Excerpts from the Minority Opinion of Judge Christine Van den Wyngaert in the Katanga Decision (footnotes omitted)

[…]

II. THE RECHARACTERISATION OF THE FACTS VIOLATES ARTICLES 74 AND 67 OF THE STATUTE

9. I am of the view that it was not open to the Majority to recharacterise the facts in this case for two reasons. First, it was not possible to change the mode of liability from "commission" (article 25(3)(a)) to "common purpose liability" (article 25(3)(d)) without substantially transforming the charges (see *infra*, A). Second, the recharacterisation process in this case occurred in violation of various fair trial rights under article 67 of the Statute (see *infra*, B). Before developing these points, I will briefly explain my understanding of regulation 55.

10. Regulation 55 of the Regulations of the Court[6] is said to serve two broad purposes. The first is to allow more focused trials on clearly delineated charges.[7] The second is to avoid "impunity gaps" that may be caused by technical acquittals in the "fight against impunity".

[6]

11. While the Appeals Chamber has upheld the validity of the regulation generally, it has stressed the need to ensure the rights of the accused to a fair and impartial trial are "fully" protected, and has suggested that safeguards in addition to those outlined in regulation 55(2) and (3) may be required depending on the circumstances of the case.[9] The Appeals Chamber has indeed emphasised that recharacterisation must not render

the trial unfair.[10] As such, when making a regulation 55(2) assessment, the Chamber must remain mindful of the rights of the accused. The Chamber must ensure that the accused: (i) receives prompt notice of the specific facts within the 'facts and circumstances described in the charges' which may be relied upon;[11] (ii) is given adequate time and facilities for the effective preparation of his or her defence;[12] (iii) is afforded the right to examine and have witnesses examined;[13] and (iv) that the accused's right not to be compelled to testify is not infringed.[14]

12. Through the invocation of regulation 55 at this late stage, the Majority has "mould[ed] the case against the accused"[15] in order to reach a conviction on the basis of a form of criminal responsibility that was never charged by the Prosecution. In doing so, and contrary to article 74 and regulation 55(1), the Majority has substantially exceeded the scope of the facts and circumstances as confirmed by the Pre-Trial Chamber. For this reason alone, I consider the judgment to be invalid as a matter of law (see *infra*, II.A).

13. Even if there were no concerns regarding the ambit of the confirmed charges, I still believe that a series of Germain Katanga's rights have been fundamentally violated. Although the mere fact of activating regulation 55 at this late stage may not, in itself, have given rise to an appearance of bias, I believe that the manner in which the ensuing proceedings have been handled infringe upon the accused's right to a fair and impartial hearing. I believe there has been a serious misapprehension of Germain Katanga's right to remain silent pursuant to article 67(1)(g). In addition, I consider that the Majority's determined refusal to provide the accused with clear and precise notice of the altered charges was in flagrant

violation of article 67(1)(a). This, in itself, has made the entire procedure under regulation 55 unfair and, moreover, caused unnecessary delays. Potentially the most troublesome denial of Germain Katanga's rights is the failure to afford the Defence a reasonable opportunity to conduct further investigations to respond to the new form of criminal responsibility, instead restricting the Defence to providing submissions on article 25(3)(d)(ii) on the basis of the existing record. This was hardly a meaningful alternative to fresh investigations, particularly considering that the Defence was afforded no insight into how the Majority would formulate its case under article 25(3)(d)(ii). Accordingly, the accused could do little more than proffer general denials. Given that the Defence never had any reasonable opportunity to conduct meaningful investigations under the prevailing conditions of insecurity in Eastern Democratic Republic of the Congo ("DRC"), I consider that the accused was not afforded a fair chance to defend himself against the charges under article 25(3)(d)(ii), which constitutes a clear violation of article 67(1)(b) and (e) (see *infra*, II.B).

14. Finally, I strongly believe that the length of these proceedings is incompatible with the Chamber's obligation under article 64(2) to conduct the trial expeditiously and with the accused's right to be tried without undue delay under article 67(1)(c). The delays have been severe yet almost entirely avoidable and, most importantly, attributable exclusively to the Majority. We must not lose sight of the fact that German Katanga, who has endured these delays whilst in detention awaiting verdict, has in no way contributed to them (see *infra*, II.C).

15. Any one of these infringements alone would suffice to cast serious doubts upon the validity of today's judgment. In view of their

cumulative effect, they present a case of overwhelming strength against the legality and legitimacy of this judgment.

A. The Judgment substantially transforms the facts and circumstances described in the charges

16. Regulation 55(1) stipulates that the Chamber may only change the legal characterisation of facts and circumstances described in the charges. This provision mirrors article 74(2), which provides that the judgment "shall not exceed the facts and circumstances described in the charges and any amendments to the charges". As the Appeals Chamber pointed out, the Trial Chamber is thus bound to the factual allegations in the charges and any application of regulation 55 must be confined to those facts.Crucially, the Appeals Chamber stated that the text of regulation 55 "only refers to a change in the legal characterisation of the facts, but *not to a change in the statement of the facts*."

17. The question then arises as to whether the facts upon which the Majority has relied for the conviction of Germain Katanga under article 25(3)(d)(ii), are indeed part of the facts and circumstances described in the charges. As I see it, there are two aspects to this question. First, the Majority can only rely on allegations which are specifically mentioned in the Confirmation Decision as part of the factual narrative supporting the legal elements of the crimes charged,[20] or which are part thereof by necessary implication. Accordingly, references to evidence put forward by the Prosecutor in support of the factual allegations do not constitute part of the 'facts and circumstances'. *A fortiori* it is also impermissible to introduce entirely new facts (see *infra*, II.A.1). Second, the Majority may

not change the narrative of the facts underlying the charges so fundamentally that it exceeds the facts and circumstances described in the charges (see *infra*, II.A.2) I consider the Majority erred on both points, which I will address in turn.

1. The Judgment relies on facts that clearly fall outside the 'facts and circumstances' of the Confirmation Decision

18. Whereas regulation 55 allows for a change in the legal characterisation of the factual allegations, such a change should be confined to facts already confirmed by the Pre-Trial Chamber. The factual allegations cited in support of a charge under article 25(3)(d)(ii) must thus be the same 'facts and circumstances' as were relied upon by the Pre-Trial Chamber for the confirmation of the charges under article 25(3)(a). It might, under certain conditions, be permissible to rely on fewer elements of the 'facts and circumstances', but it is strictly forbidden to introduce any new factual elements or to rely on facts that are mentioned in the Confirmation Decision, but which do not form part of the 'facts and circumstances' of the charges. The key question is thus where to draw the line between the 'facts and circumstances' on the one hand, and other factual references contained in the confirmation decision.

19. The Majority has, since the Notice Decision, still not engaged with the crucial legal question of how to interpret the concept of 'facts and circumstances'. Indeed, it makes no effort to explain on what basis it considers that the passages from the Confirmation Decision it now relies on were actually part of the 'facts and circumstances' or whether they merely contained part of the Pre-Trial Chamber's reasoning about the evidence. Instead, my colleagues seem to maintain the belief that every single sentence of the Confirmation Decision, including footnotes

containing references to evidence, qualifies for recharacterisation. Yet, it seems unassailable that not every word, sentence or phrase that may be contained in the Confirmation Decision qualifies as 'facts and circumstances'. More importantly, the Majority has introduced totally new factual elements into the charges under article 25(3)(d)(ii). A prominent example is the Majority's crucial allegation that members of the Ngiti fighters of Walendu-Bindi were filled with a desire for revenge towards the Hema population and motivated by a so-called "anti-Hema ideology". However, this allegation is nowhere stated as such in the Confirmation Decision. Indeed, apart from a reference to the hate-filled lyrics, neither the Confirmation Decision, nor the Prosecutor's Document Containing the Charges for that matter, made any explicit reference to ethnic hatred or a desire for vengeance on the part of the Ngiti fighters of Walendu-Bindi. In fact, the words "hatred", "vengeance" or "revenge" simply do not appear in the Confirmation Decision. The same is true for the Prosecutor's Document Containing the Charges.

20. In an effort to read this new allegation into the Confirmation Decision, the Majority mentions, first, that the Pre-Trial Chamber confirmed that the physical perpetrators committed their alleged crimes with the requisite *mens rea* (see *infra*, II.A.1.(a)) and, second, that the Confirmation Decision mentioned that both FRPI and FNI fighters sung hate-filled lyrics prior to the attack (see *infra*, II.A.1.(b)).[24] Another "new fact", in my assessment, is the Majority's allegation that Germain Katanga had knowledge of the group's common purpose (see *infra*, II.A.1.(b)). In the following paragraphs, I will explain why I am not persuaded by these arguments.

a) The *mens rea* of the physical perpetrators

21. In paragraph 1462 of the Majority Opinion, it is argued that the "intention" of the Ngiti fighters of Walendu-Bindi was – implicitly – confirmed by the Pre-Trial Chamber, because the latter found that the physical perpetrators of the crimes in Bogoro acted with the requisite *mens rea*.

22. First, I observe that the Majority does not demonstrate that the Pre-Trial Chamber actually made any findings regarding the individual *mens rea* of the different physical perpetrators. Although the Confirmation Decision mentions the Pre-Trial Chamber's intention in this respect, I have not been able to identify any paragraph where such findings are actually made. It is worth noting, in this regard, that according to the 'indirect co-perpetration' doctrine of the Pre-Trial Chamber (article 25(3)(a)), the individual motives or intent of the physical perpetrators were entirely irrelevant, because they were – so it was claimed – under the total control of the two co-accused. Moreover, article 25(3)(a) allows someone to commit a crime through another person "regardless of whether that other person is criminally responsible". Accordingly, it cannot be assumed that the Pre-Trial Chamber somehow took it for granted that the physical perpetrators acted with the requisite *mens rea*. On the contrary, given the Pre-Trial Chamber's strong emphasis on the complete control which the co-accused allegedly exercised over the members of their respective "organisations", it is difficult, in my view, to assume that the Pre-Trial Chamber somehow implicitly confirmed that the individual physical perpetrators acted with the requisite *mens rea*.

23. Even if the Pre-Trial Chamber had entered a finding about the *mens rea* of the physical perpetrators, I consider the Majority's argument to be wrong as a matter of law, because it confuses a finding that a number of

individuals acted with intent and knowledge with finding that a *group* had a common plan to commit crimes, which is a requirement under the newly charged mode of criminal responsibility (article 25(3)(d)). This is not to say that, in certain circumstances, it may not be possible to *infer* the existence of a group acting with a common purpose from the fact that a number of people simultaneously committed crimes at a certain time and location. However, it does not follow from the *possibility* of making such an inference that the Pre-Trial Chamber actually did so. I certainly do not believe that the Majority is allowed to make any assumptions in this regard. Moreover, even if it were possible in this case to infer from the fact that a number of Ngiti fighters intentionally committed crimes in Bogoro on 24 February 2003 that they constituted a group acting with a common purpose, such an inference could only result in a finding that those specific individuals formed a group acting with a common purpose. However, it would not be possible to infer anything about the criminal purpose (or otherwise) of other members of the Ngiti fighters of Walendu-Bindi, who were not present at the scene(s) of the crime(s). More importantly, such an inference could only warrant a finding that there was a common purpose among the perpetrators of the crimes in question *at the time* when the crimes were committed. It is not possible to infer from the mere fact that physical perpetrators acted with *mens rea* on the day the crimes were committed that they shared a common purpose to commit these crimes *beforehand*.

24. As it is required by article 25(3)(d)(ii) that it must be established that the accused's contribution was "made in the knowledge of the intention of the group to commit the crime", this can only mean that the common purpose of the group must exist *prior* to the accused's contribution. From my reading of the Confirmation Decision, there is nothing that would permit

one to infer from the alleged *mens rea* of the physical perpetrators that there already existed a criminal common purpose at the time when Germain Katanga made his alleged contribution to the group, much less that he knew about it.

b) Germain Katanga's alleged knowledge of the group's common purpose

25. With regard to the crucial question as to whether the Confirmation Decision contained any allegations regarding Germain Katanga's knowledge of the group's common purpose (a question which is indeed relevant under the newly charged mode of liability (article 25(3)(d)), my colleagues refer in general to their earlier decisions, which contain a number of references to the Confirmation Decision. However, I do not believe that these paragraphs of the Confirmation Decision contain any reference that specifically relates to Germain Katanga's knowledge of the criminal common purpose of the Ngiti fighters of Walendu-Bindi as a group acting on its own volition. This should come as no surprise, since the Pre-Trial Chamber held that the three 'subjective elements' for 'indirect co-perpetration' under the initial charge (article 25(3)(a)) are: (a) "the suspect must carry out the subjective elements of the crimes"; (b) "the suspects must be mutually aware and mutually accept that implementing their [i.e. Germain Katanga's and Mathieu Ngudjolo's] common plan will result in the realisation of the objective elements of the crimes"; and (c) "the suspects must be aware of the factual circumstances enabling them to control crimes jointly". There is no mention of the mental state of the physical perpetrators, let alone of the accused's knowledge thereof. Significantly, even in relation to the charges of pillaging, rape and sexual slavery, which the Pre-Trial Chamber found to have been foreseeable consequences (*dolus directus* 2nd degree) of the

execution of the common plan under article 25(3)(a), the Confirmation Decision makes no mention whatsoever of an alleged common purpose of the physical perpetrators.

26. Accordingly, I think it is perfectly clear that the introduction of Germain Katanga's alleged knowledge of the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi is a completely new fact. This is so, even if it were based on an inference from 'facts and circumstances' that were contained in the Confirmation Decision. Indeed, it is probably possible to propose quite a number of different inferences on the basis of the raw facts of the Confirmation Decision. However, the purpose of formulating charges is precisely to make clear which inferences are being alleged, so that the accused knows against what he has to defend himself. It cannot reasonably be argued that an accused is put on notice of every possible inference that can be made from the raw facts of the Confirmation Decision. Such a position would render trials entirely unfocused and the charges would be nothing more than a moving target for the accused. It follows that the allegation about Germain Katanga's alleged knowledge of the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi is new and falls squarely outside the scope of the 'facts and circumstances' of the charges as confirmed by the Pre-Trial Chamber. At the very least it fundamentally changes the narrative of the charges, which is also impermissible under regulation 55, as will be discussed next.

2. The Judgment changes the narrative of the charges so fundamentally that it exceeds the facts and circumstances described in the charges

27. Even assuming that the Majority Opinion had not formally exceeded the 'facts and circumstances' of the Confirmation Decision, I strongly believe

that the charges under article 25(3)(d)(ii) involve such a fundamental change in the narrative that this violates the requirements of article 74 and regulation 55.

28. Whether or not the narrative has changed impermissibly can be ascertained on the basis of two considerations. First, when the defendant would have (had) to significantly adjust his or her line of defence to address the changed narrative. Second, when certain factual elements that were part of the original narrative play a significantly different role in the new narrative.

a) Prohibition to change the narrative to such an extent that the accused has to adjust his or her line of defence

29. As the Majority rightly observes, it is not prohibited for there to be *any* change in the narrative. Whether or not there is a violation of article 74 is, as Judge Fulford has observed, a question of fact and degree.Nevertheless, it is beyond dispute that it is impermissible to fundamentally change the narrative of the charges in order to reach a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the prosecution.

30. Understandably, the Majority tries to minimise the significance of the change in narrative by claiming that:

> *[TRANSLATION] Instead it is a matter of bringing to the fore the commission of crimes by some of the physical perpetrators identified in the Decision on the confirmation of charges (such as the FRPI members and Ngiti combatants) and to undertake only an analysis of the contribution of the Accused, and his contribution alone, to their commission of the crimes,*
>
> *such contribution no longer being essential but significant.*

31. However, a closer look at the way in which the Majority proceeds with this ''bringing to the fore" exercise shows that the narrative has been changed to such an extent that the narrative of the charges is substantially altered, in violation of article 74 of the Statute, as I believe the following examples demonstrate:

a. The single common plan between Germain Katanga (FRPI) and Mathieu Ngudjolo (FNI – situated in Bedu Ezekere), which encompassed a combination of goals (i.e. to take control over Bogoro, to re-open the Bunia-Kasenyi route, to exact reprisal, etc.) no longer exists. Instead, there are now two separate plans: (a) a coalition between the Ngiti fighters of Walendu-Bindi and the Integrated Operational Military Staff (Etat-Major Opérationnel Intégré, or "EMOI") (situated in Beni and comprising APC, the DRC central government and other groups, including the Ngiti fighters of Walendu-Bindi) to reconquer Ituri and (b) a common purpose of the Ngiti fighters of Walendu-Bindi alone to commit crimes against the Hema civilian population. The two new plans are said to be separate and independent of each other.

b. The Ngiti fighters of Walendu-Bindi – formerly members of the hierarchically structured FRPI – are promoted from being Germain Katanga's blindly obedient subordinates to independent and autonomous actors.

c. Whereas the Ngiti fighters of Walendu-Bindi were originally said to have been mere gears in a giant machine and, as such, to have been merely fungible individuals,[40] they are now said to

have collectively decided, of their own volition, to attack Bogoro for the sole purpose of committing crimes against the Hema civilians present there.

d. Germain Katanga is no longer the ultimate authority who commanded blind obedience over the FRPI. Instead, he is now the "autorité de référence" of the militia of WalenduBindi and the person other commanders would refer to in order to settle important matters. Rather than focusing on Germain Katanga's alleged exercise of effective control over the commanders and combatants of Walendu-Bindi, the 25(3)(d)(ii) charges now focus on Germain Katanga's alleged "authority in matters relating to the distribution of weapons and ammunition".[42]

e. Germain Katanga is no longer alleged to be the (co-)architect of the attack on Bogoro. To the contrary, he is now said to have merely known about the criminal common purpose of the Ngiti fighters of Walendu-Bindi and to have made a contribution (article 25(3)(d)).

32. As already indicated, charges are more than a list of atomic facts and a corresponding list of legal elements. Instead, charges allege the existence of specific relations between different facts and construct a particular narrative on this basis which, if true, would cover all the legal elements of the charges with which it corresponds. Like with a Tangram or a Lego set, it would, in theory, be possible to combine the individual pieces that are contained in the narrative in many different ways so that different shapes appear. However, I am of the view that it is not permissible under

regulation 55(1) to rearrange the pieces of the charges to construct a different shape or to take away certain pieces when this results in the original shape becoming unrecognisable. In other words, charges are not merely a loose collection of names, places and events which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to, and were influenced by, a particular context. Charges therefore constitute a narrative in which each fact belonging to the 'facts and circumstances' has a particular place. Indeed, the reason why facts are included in the 'facts and circumstances' is precisely because of how they are relevant to the narrative in a particular way. Taking an isolated fact

and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a "change in the statement of facts", something the Appeals Chamber has found to be clearly prohibited by regulation 55(1).

33. It is crucial to note that it is insufficient to simply compare 'stories' in order to see to what extent they contain some of the same elements. It is equally important to analyse the legal significance of each fact within the framework of each narrative, because this determines how an accused would defend him or herself against the charges as formulated. It matters a great deal, in this respect, how important certain parts of the story are within each narrative. A similar fact may be a mere detail in one narrative, but constitute the linchpin of another. Accordingly, a defendant may have chosen not to devote scarce resources to such a fact because it could not be expected to have any tangible effect on the outcome of the case, whereas he or she would in all likelihood

concentrate all his or her investigative efforts on that same fact if that fact were to perform a different function in an alternative narrative. The same is true for trial time spent on such issues, the number and type of questions posed during cross-examination, the evidence called to rebut the allegation, or indeed the facts admitted or agreed to. Crucially, it may affect the accused's decision whether or not to testify, as I address later in this Opinion.

34. If the accused could reasonably believe that he was mounting a full and meaningful defence against the charges as a whole by challenging a particular allegation or set of allegations from the original charges, it requires little explanation as to why a recharacterisation that no longer takes into consideration these allegations radically alters the 'facts and circumstances' as viewed from the position of the accused. I stress this last point because it would be grossly unfair to ignore the standpoint of the accused in this regard. Moreover, doing so would have as an unfair and undesirable consequence that all accused before this Court would henceforth have to defend themselves against all possible narratives that could be construed on the basis of the raw factual allegations contained in the charges.

35. In sum, the key factor in evaluating whether the narrative has changed fundamentally is the question of whether a reasonably diligent accused would have conducted substantially the same line of defence against both the old and the new charge. If this is not the case, then this constitutes a clear indication that the narrative of the recharacterised charges has changed so much that it goes beyond the 'facts and circumstances' as confirmed.

36. The Majority seems to recognise that, in this case, the Defence for Germain Katanga focused its efforts during the trial on challenging the central element of the charges under article 25(3)(a) but which is irrelevant for the charges under 25(3)(d)(ii), namely, the alleged common plan between Mathieu Ngudjolo and himself. However, the Majority brushes off any concerns in relation to the change in narrative this has had by stating that the original charges *also* included the question of the alleged essential contribution to the common plan, in particular Germain Katanga's role in obtaining weapons and ammunition from Beni and his *de facto* control over the commanders and combatants of Walendu-Bindi.[46] Indeed, as already indicated, the Majority believes that all it did was to "bring to the fore" ("mettre en relief") the commission of crimes by *some* physical perpetrators and to analyse only the contribution which the accused made to the commission of those crimes. However, what the Majority fails to acknowledge is that the facts "brought to the fore" were never the subject of much attention during the trial and that this was perfectly normal, because they were relatively insignificant under article 25(3)(a).

37. By concentrating its efforts on disproving the common plan to 'wipe out' Bogoro (in the sense of article 25(3)(a)), the Katanga Defence sought primarily to refute the Prosecution's allegation that Germain Katanga had organisational control over the FRPI and that he made essential contributions to the implementation of a common plan between himself and Mathieu Ngudjolo that would result in the commission of crimes.The Defence only summarily addressed whether the commission of the charged crime was foreseeable, and did so only in relation to an alternative common plan that it advanced, namely that of EMOI's

objective of retaking control over Ituri, of which the attack on the UPC military base at Bogoro was an important part. Had the Katanga Defence been able to reasonably foresee the possibility that the charges would be recharacterised under article 25(3)(d)(ii), it may well have adopted a different strategy.

38. This brings me to a crucial point for the determination of whether or not the Majority has fundamentally changed the narrative of the original charges. Under the Pre-Trial Chamber theory, article 25(3)(a) requires a contribution to the common plan, whereas article 25(3)(d)(ii) requires a contribution to a specific crime. The Majority brushes over this problem by making the obvious point that if essential contributions are proven, less-than-essential contributions are proven as well. However, what the Majority fails to recognise is that proof of an essential contribution *to a plan* (article 25(3)(a)) does not necessarily mean proof of a non-essential contribution *to a specific crime* (article 25(3)(d)(ii)). Accordingly, article 25(3)(a) liability can be proven without proving article 25(3)(d)(ii) liability; the latter provision is therefore not a "lesser included" form of criminal responsibility.

39. I note, in this regard, that the Majority misconstrues what Pre-Trial Chamber I said in paragraphs 524 and 525 of the Confirmation Decision.[53] Read in context, these paragraphs explain that under the PreTrial Chamber's interpretation of 'indirect co-perpetration', the coaccused must exercise control over the crime by making coordinated essential contributions to the implementation *of a common plan,* which they know will *result in* the realisation of the objective elements of the crime. It can hardly be disputed that there is a fundamental difference between making a contribution (essential or otherwise) to a common plan, which

may have broader goals than just the commission of crimes (such as defeating the UPC and opening the road between Bunia and Kasenyi), and contributing directly to the commission of a specific crime.

In fact, under the Pre-Trial Chamber's interpretation of article 25(3)(a), Germain Katanga was considered responsible for the crimes allegedly committed by the troops of Mathieu Ngudjolo (and *vice versa*, as indirect co-perpetrators), which clearly demonstrates that his 'essential contribution' under the original charges did not have to be made directly to the commission of specific crimes by the Ngiti fighters of WalenduBindi.

40. In any event, even if the charges under article 25(3)(d)(ii) could be considered as lesser included offences under article 25(3)(a), the fairness in convicting someone of a lesser included offence fundamentally depends on the defence having had sufficient certainty of this possibility. The defence only needs to respond to the elements of the offences charged to secure an acquittal. Unless the defence is put on clear notice that the lesser included offence is in play, it cannot be blamed for concentrating its efforts on rebutting the allegations actually charged. As such, by springing article 25(3)(d)(ii) at the end of the trial, the Katanga Defence may have conceded, or less vigorously contested, certain points of fact that it might have contested differently had it been properly informed. There is nothing "lesser" about any of this; it is nothing short of the Chamber co-opting a valid defence and turning it against the accused.

b) Prohibition to take facts out of context

41. Furthermore, I submit that the concept of 'facts and circumstances' refers to the allegations as formulated in a coherent narrative. The 'facts and circumstances' present a structured evidentiary argument, not just a

collection of unrelated facts. All references to particular dates, places or persons must be seen in the context of the narrative that is put forward in the narrative of the 'facts and circumstances'. Accordingly, it is not permissible, in my view, to simply lift out a particular factual proposition and use this as part of a significantly different factual claim. […]

B. The application of regulation 55 violates Germain Katanga's right to a fair trial

50. Amending the legal characterisation of facts can only be done insofar as it does not render the trial unfair. It is for that reason that paragraphs (2) and (3) of regulation 55 provide procedural safeguards for the accused. Nowhere has the Appeals Chamber stated that the 'fight against impunity' provides a justification for infringing upon the rights of the accused. The Appeals Chamber has made it very clear that "[h]ow these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented [...] will depend on the circumstances of the case". This means that the mere formal application of the guarantees in paragraphs (2) and (3) of regulation 55 is not, in and of itself, a sufficient guarantee that the rights of the accused are respected.

1. Right not to be compelled to testify (article 67(1)(g))

51. It bears repeating that, on 24 November 2009, the specific charges of "indirect co-perpetration" under article 25(3)(a) were read out to Germain Katanga and he pleaded not guilty thereto.

52. It seems a fairly basic and uncontroversial requirement that when an accused waives his right to remain silent, he must do so with full understanding of what this waiver implies. If the accused reasonably misapprehends the consequences of his waiver of the right to remain

silent, the evidence thus obtained cannot be used against him.

53. It is therefore important to assess the scope of Germain Katanga's waiver of his right to remain silent in this case. It is noteworthy, in this regard, that the Chamber reminded Germain Katanga before he started testifying of the terms of the Chamber's Decision of 13 September 2011.According to this Decision, "once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating." However, this reminder was clearly qualified, in that the permissible scope of questioning to which Germain Katanga could be exposed was limited to "the present case". The Chamber emphasised this point by stating, unambiguously, that "[q]uestions relevant to the case for the crossexamining party must be *strictly related to the charges*" and that such questions "should not merely be aimed at incriminating the accused in relation to facts and circumstances falling outside the *scope of the current case*." To avoid any confusion in this regard, the Chamber required

that, if the Prosecutor intended to ask questions that were relevant to the contextual circumstances of the case, he should "state the purpose

behind the question and explain how the evidence sought is relevant to the *confirmed charges*."

54. To my mind, the terms of this Decision indicated unambiguously that German Katanga waived his right to remain silent *only* in relation to the confirmed charges under article 25(3)(a) and that questions that went beyond the scope of these charges were strictly prohibited. At the very least, the decision did *not* clearly indicate that, by choosing to testify, the accused exposed himself to the risk of self-incrimination under a

different form of criminal responsibility. Under these circumstances, at least I was under the impression that Germain Katanga's testimony could only ever be used against him as an alleged 'indirect co-perpetrator'. And if I was under this impression, I think it is reasonable to assume that the accused and his Defence Team also misapprehended the situation and did not contemplate the possibility that Germain Katanga's testimony could ever be used to convict him under article 25(3)(d)(ii). Accordingly, I believe that Germain Katanga did not knowingly and freely waive his right to remain silent in relation to article 25(3)(d)(ii).

55. It is worth noting, in this regard, that the Chamber had made it quite clear, in its decision of 13 September 2011, that it expected Germain Katanga to answer all "permissible questions" and that it would draw "adverse inferences" if he declined to answer.[73] In other words, Germain Katanga was compelled to answer all of the Chamber's questions, as long as they were "permissible". It seems that there was a fundamental misunderstanding between the Majority and Germain Katanga's Defence as to which questions the Majority deemed "permissible". It is worth emphasising, in this regard, that the Chamber, far from putting the accused on notice that his testimony could be used to convict him under different forms of criminal responsibility, took pains to stress that the only role it saw for itself was to determine whether or not Germain Katanga was guilty of "the charges", which can only be interpreted as referring to his alleged criminal responsibility under article 25(3)(a).Had Germain Katanga known that the Majority deemed it "permissible" to force him to answer questions that could incriminate him under a different form of criminal responsibility, he might well have decided to remain silent.

56. The argument that Germain Katanga must have been aware of the existence of regulation 55 cannot be used against him in this context. Indeed, if it is argued that Germain Katanga should have taken the possibility of a recharacterisation into consideration when deciding to give testimony under oath, this begs the question why the Chamber did not think of this possibility itself at the time and, if it did so, why it did not find it necessary to inform the accused of the fact that the Chamber would consider Germain Katanga's evidence for a possible recharacterisation. Again, I did not for a moment contemplate this was a possibility when the Chamber questioned Germain Katanga at such great length. Otherwise, I would certainly not have agreed to a number of questions the bench put to the accused and would have insisted that he was given the option to invoke his right to remain silent in relation to questions that might lead to self-incrimination under a different form of criminal responsibility. In my view, this is the only way in which the Chamber could have proceeded as it did without running afoul of its obligation under article 64(2) to ensure that the trial is fair and conducted with *full* respect for the rights of the accused.

57. For example, the Chamber questioned Germain Katanga extensively on his role as coordinator between the APC and the fighters of WalenduBindi. It should come as no surprise that Germain Katanga enthusiastically answered the many questions about his role as a coordinator. Undoubtedly, he was under the impression that the Chamber was interested in his *defence* against the Prosecutor's allegation that he was the top commander of the Ngiti fighters of Walendu-Bindi and that he had total control over their actions. This allegation was crucial for him to be considered an indirect perpetrator under the control theory interpretation of article 25(3)(a). The facts concerning his role as coordinator, about

which Germain Katanga testified, were, viewed in this context, purely exculpatory as they undermined the Prosecutor's thesis that he had 'control over the crimes' committed by his subordinates.

58. However, now the Majority relies heavily on Germain Katanga's role as a coordinator for its finding that he made a 'significant contribution' in the sense of article 25(3)(d). In other words, the Majority has turned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility.

59. To the extent that the accused was – unintentionally - misled in this regard by the Chamber's decisions and utterances, I consider that any answers Germain Katanga gave that incriminated him under article 25(3)(d)(ii) were given in violation of his free will. Using this evidence against him therefore violates article 67(1)(g).

2. Right to be informed of the charges and to have adequate time and facilities for the preparation of the defence (article 67(1)(a) and (b))

60. I turn now to two inter-related further Defence rights that I consider have been infringed: article 67(1)(a) and (b)**.** Article 67(1)(a) provides for the accused's right to be informed promptly and in detail of the nature, cause and content of the charge. Accordingly, there must be a minimum amount of detail in the 'facts and circumstances' described in the charges in order for Germain Katanga's right under article 67(1)(a) to be fully respected. As acknowledged by the Majority in the Notice Decision, both the European and Inter-American Courts of Human Rights hold that this right

incorporates being informed of the legal qualification of the charges. In addition, the accused must be given adequate time and facilities for the preparation of the defence, a right so prominent that it is guaranteed both by the Statute (article 67(1)(b)) and the Regulations (Regulation 55(2)(b)).

61. I consider there to be a host of problems in this respect. First, the timing of the notice was anything but "prompt" in the sense of article 67(1)(a) (*infra*, II.B.2.(a)). Second, I believe that the Majority failed to give sufficiently detailed information (*infra*, II.B.2.(b)). Third, I think that the notice was grossly inadequate (article 67(1)(a)), all of which impacted on the accused's right to adequately prepare his defence (article 67(1)(b) (*infra*, II.B.2.(c)).

a) Timing of notice under regulation 55

62. I fail to see how the Majority's Notice Decision could be consistent with Germain Katanga being "promptly" informed of the charges in accordance with article 67(l)(a). Notice under regulation 55(2) "*shall*" be given "[i]f, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change". In my view, this language means that, although the Chamber's decision to give notice under regulation 55(2) is discretionary, the Chamber is under an ongoing obligation to remain vigilant in considering whether to trigger regulation 55.

63. The Majority had two and a half years of trial during which they could have provided Germain Katanga with reasonable notice that the charges 'may' be subject to change. I therefore do not believe that the timing of the Notice Decision can be reconciled with the duty of diligence which rests upon the Chamber. This is particularly so in light of the fact that the

Defence on several occasions requested – without success - additional clarifications of the Document Containing the Charges, in particular regarding the alleged co-perpetrators of Germain Katanga, challenged the mode of liability, but also made the Defence position clear through statements, submissions and questions. On no occasion was any issue raised by the Prosecutor, the co-accused, the OPCV, or the Chamber relating to an alternative form of personal liability.

64. Despite limited precedent before this Court, notice of possible recharacterisation has consistently been provided at a far earlier stage of the trial proceedings, permitting the accused to appropriately adjust their defence to the charge. For example, the Trial Chamber V(A) decision in *Prosecutor v. Ruto and Sang* was rendered three months after the trial hearings started on 10 September 2013. Even at this relatively early stage, the Chamber felt it prudent to justify why notice was not given earlier still, stating:

> *The Chamber acknowledges that Regulation 55(2) Notice could have been given at an even earlier point during the trial proceedings than now. However, this is the first extended break in the proceedings since the Prosecution Additional Submission was filed and the Chamber required additional time to deliberate on the legal and factual complexity raised by the relief sought.*[85]

65. Trial Chamber V(A) emphasised that, despite any additional preparation time which comes from giving regulation 55(2) Notice, waiting to provide such notice increases the chances of prejudice to the Defence. It further stated that:

> *[t]he remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of*
>
> *respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.*

66. Contrary to all other Chambers of the Court, the Majority in this case appears to be unconcerned by any of these considerations and deems that the accused should have anticipated the possibility of a requalification. My firm view remains that a recharacterisation from article 25(3)(a) to article 25(3)(d)(ii) was, to the contrary, entirely unforeseeable to the Defence and rendered at a point in the proceedings when the Defence was unable to effectively respond to it. As observed above, if the Majority can argue that the Defence should have been able to foresee an article 25(3)(d)(ii) recharacterisation, then it seems equally reasonable that the Majority should have been able to foresee this possibility as well and given notice at a point that would have respected the rights to have adequate time and facilities for the preparation of the defence pursuant to article 67(1)(b) and regulation 55(3)(a), and to have witnesses examined pursuant to article 67(1)(d) and regulation 55(3)(b).

67. Considering how late the notification was given, it was therefore of the utmost importance that, when it came, it would be as complete and

detailed as possible. In this case, however, the Majority failed to do so. Indeed, it was only after being admonished by the Appeals Chamberthat the Majority acknowledged the need to provide considerable further clarifications in order to permit the Defence to defend itself effectively.[89] However, as I will argue in what follows, the Majority's Further Notice Decision still fell far short in this regard.

b) Need to provide detailed information

68. It is beyond dispute that article 67(1)(a) and (b) require that the Defence is given detailed information about the charges. The importance of providing detail of the relevant charges has also been recognised by this Chamber. On 13 March 2009, more than eight months before the start of the trial, the Trial Chamber required the Prosecutor to submit an indepth analysis chart ("IDAC") to the Defence prior to the start of trial detailing how each piece of the Prosecution evidence related to each of the charges levelled against the accused. The reason behind this instruction was that such information was necessary to give meaning to the right of the accused to prepare a defence. The Chamber referred to the need to ensure that "there is no ambiguity whatsoever in the alleged facts underpinning the charges confirmed by the Pre-Trial Chamber" and that such a table was "necessary for a fair and effective presentation of the evidence on which the Prosecution intends to rely at trial".[90] It is worth citing in full what the Chamber saw the table would achieve:

> *[It would] ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1)(b) of the Statute, by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them. [….] The Chamber further agrees with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution*

[89]

case. Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of trial.

69. In light of this high standard applied to the initial charges under article 25(3)(a), one can only wonder why the Majority has made no serious effort to inform Germain Katanga of the precise nature of the charges against him under article 25(3)(d)(ii). Indeed, I think it is fair to say that the Majority's negative attitude with regard to the accused's repeated requests for more detailed information violates the letter and the spirit of the very principles which the Chamber pronounced before the start of the trial.

70. This situation stands in sharp contrast with how regulation 55 has been applied by other Trial Chambers. For example, Trial Chamber V(A) in *Prosecutor v. Ruto and Sang* alluded to the importance of detailed notice in its decision of 12 December 2013 providing notice that, with respect to Mr Ruto, there is a possibility that the legal characterisation of the facts may be subject to change to accord with article 25(3)(b), (c) or (d). On 9 July 2012, the Chamber had already directed the Prosecution to file a pre-trial brief "explaining its case with reference to the evidence it intends to rely on at trial". In their Notice Decision, Trial Chamber V(A) directed the Prosecution to file an addendum to this brief wherein the Prosecution was to explain its case, with accompanying evidence, under each of the proposed legal characterisations.

71. It would of course have been difficult for the Majority to ask the Prosecutor to submit a new document containing the charges under

article 25(3)(d)(ii) at the end of the trial. Doing so would have given the Prosecutor an unfair advantage. I therefore submit that, at the end of the trial, it is only appropriate to apply regulation 55 in relation to purely technical matters, such as the nature of the armed conflict, for which it is not necessary to provide any additional notice concerning the underlying factual basis of the recharacterisation.

72. I stress, in this regard, that it is not appropriate to argue that, because the accused is aware of everything that was presented at trial, he or she therefore has notice of everything. As already noted, charges are more than a list of isolated facts and a list of legal elements. Instead, charges are *allegations* about the existence of specific relations between evidence and factual propositions on the one hand, and between those several factual propositions on the other. Together, they are *claimed* to demonstrate a particular narrative which, if true, would cover all the legal elements of the charges with which it corresponds.

73. Having a general idea about how the Majority might argue the case is simply inadequate. As any lawyer knows, the devil is always in the detail and this is why the Defence is entitled to know the charges in as much detail as possible. Whereas it may be difficult to give very detailed information about how the charges will be proved at the commencement of a trial, once the trial has run its course, there is no excuse for not giving the accused exhaustively detailed information about the intended recharacterisation so that he or she may defend him or herself as effectively as possible.

c) Inadequate notice

74. The Majority Opinion states that, because the facts relied upon for the recharacterisation under article 25(3)(d)(ii) are the same as those initially

relied upon by the Prosecutor under article 25(3)(a), the only questions that need to be asked in relation to article 67(1)(a) are whether the charges under article 25(3)(a) were sufficiently notified and whether the Defence received adequate notice about those facts that have taken a "different significance" under article 25(3)(d)(ii).[96] As I do not agree with my colleagues that the facts underlying the article 25(3)(d)(ii) charges are

the same as those that were initially charged under article 25(3)(a), I am also not in agreement with this suggestion.

75. Moreover, the Majority's argument that it did not have to provide detailed notice of the new charges under article 25(3)(d)(ii) because they are based on the same 'facts and circumstances' as the charges under article 25(3)(a) fails. This is because *any* legitimate application of regulation 55 must, by definition, be limited to the same 'facts and circumstances' as contained in the Confirmation Decision. Accordingly, if the Majority's reasoning were accepted, it would never be necessary to provide further notice.

76. Be that as it may, even if it were true, as the Majority Opinion states, that this is just an instance of the same facts taking on a particular importance, then it would still be incumbent upon the Majority to explain exactly how the significance of those particular facts has changed and how those changes have altered the narrative of the charges. However, I cannot fail to note that even when the Majority purported to provide the Defence with further information, it remained exceedingly vague. For example, on 15 May 2013, the Majority gave the Defence more information about the charge that Ngiti combatants committed crimes in Bogoro on 24

February 2003. However, rather than indicating a number of specific incidents of crimes committed by particular Ngiti combatants, the Majority stated:

> *[t]he Defence is invited to refer to the existing evidence in the record of the case, which shows that certain crimes were committed by Ngiti combatants from Walendu-Bindi collectivité, sometimes identified by the name FRPI.*

With all due respect, I struggle to think of a formula that would have been any vaguer than this.

77. In relation to the Defence request to have more specific notice about when and where the common purpose to attack the civilian population of Bogoro was supposedly formed, the Majority states that:

> *the Defence should not have confined 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 promulgation of a decision which it may have formally taken.*

78. However, other than stating the general principle that it is *possible* to infer the existence of a common purpose from circumstantial evidence,the Majority never explained with any level of precision which particular circumstantial evidence it had in mind, let alone how it thought this specific evidence proved the existence of the criminal common purpose.

79. After this unhelpful comment, the Majority Opinion goes on by stating that, "even assuming" evidence of specific meetings was essential to prove the common purpose, it was incumbent upon the Defence to refer to those meetings that had already been discussed during the trial and

gives *as an example* a meeting mentioned in the Confirmation Decision at paragraph 548(vi). First, it is entirely inappropriate to be so ambivalent about the importance of certain specific meetings. Second, it is totally inappropriate to formulate charges on such a central issue by way of examples. Third, it is hard to see how the Defence should have guessed that this particular meeting was relevant to the new charges. The Majority had only made reference to paragraph 548 twice before; once in relation to the *objective* elements of article 25(3)(d), i.e. Germain Katanga's alleged contribution and particularly his "overall coordinating role"and once in relation to the allegation that "on the eve of the attack, several commanders took up positions with their troops in Medhu or Kagaba in order to launch the Bogoro operation", which is unrelated to the question of the genesis of the alleged criminal common purpose.

80. Last but not least, I simply cannot see the relevance of this particular reference, as it relates to a meeting which allegedly took place the day before the attack on Bogoro, between Germain Katanga, Mathieu Ngudjolo and other commanders in the camp of Cobra Matata (i.e. Bavi). Not only is there no evidence for this meeting (as is evident from the fact that the Majority makes no reference to this meeting in its reasoning under article 25(3)(d)(ii)), it also allegedly involved Mathieu Ngudjolo and Cobra Matata, two persons of whom it has not been shown that they took part in the attack on Bogoro. In other words, the Majority seems to be arguing that the Defence had received sufficient notice because the Confirmation Decision mentioned a meeting that never took place and which, even if it did, would have been irrelevant to the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi.

81. Be that as it may, the most fundamental problem with regard to the lack of notice is, in my view, that the Majority has never informed the Defence

of the precise evidentiary basis of the charges under article 25(3)(d)(ii). In response to repeated requests by the Defence in this regard, the Majority laconically states:

> *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.*

82. The Majority also rejected the Defence's request to be informed of how it evaluated the credibility of the evidence by stating that the Defence had no right to know what the Chamber thought about the evidence before the judgment was pronounced.

83. Whether or not one agrees with this from a formal point of view, I cannot help but notice how artificial these arguments sound in this particular context. Of course, the Defence was aware of the evidence in the case. However, the Defence was also aware of the fact that the Majority clearly did not believe a considerable portion of this evidence, otherwise it would not have taken the step to recharacterise the charges to begin with. Accordingly, as the Defence was not informed about which parts of the Prosecutor's evidence the Majority was still considering relying upon, the Defence was left guessing about which evidence it had to challenge in order to defeat the article 25(3)(d)(ii) charges. More importantly, the Defence could not possibly have foreseen how the Majority would use its own evidence, as well as that of the co-accused – which was presented to *disprove* the charges under article 25(3)(a) – in order to *prove* the charges under article 25(3)(d)(ii). The significance of this point can be seen from the fact that the Majority relied heavily on several Defence witnesses and exhibits, such as D02-148, D03-88, the "Lettre de doléances", as well as

Germain Katanga's own testimony.Had the accused been given adequate notice of how the Majority planned on using this evidence against him, the Defence may well have
decided to recall some of these witnesses to clarify a number of points.

84. The issue of notice perfectly illustrates, in my view, how problematic it is when chambers (re)formulate charges, especially when this happens at the end of a trial. By doing so, the entire balance and structure of the proceedings was upset. For example, the whole purpose of having closing arguments is to give the Prosecutor an opportunity to state, one last time and in great detail, how she believes the evidence proves her allegations. The reason why the Defence is never required to submit its final observations at the same time as the Prosecutor is because it has a fundamental right to *respond* to the latter's claims. What the Majority has done here, however, is similar to compelling the accused to defend himself *before* he learns about the precise nature of the allegations against him.

85. Based on these considerations, it is my firm view that the Majority has completely failed to live up to the most basic requirements in terms of notice to the Defence and has violated the accused's right to be informed in detail about the charges.

3. Failure to afford a reasonable opportunity to investigate (article 67(1) (b) and (e))

86. The Majority's arguments concerning the Defence's right to investigate the new charges can be summarised as follows: first, the Majority argues that the Defence did not prove that conducting an investigation was an absolute necessity in this case and that there were other means by which the accused could defend himself (*infra*, II.B.3.(a)); second, the Majority

seems to suggest that it offered the Defence a number of meaningful alternatives, short of fresh investigations, to defend itself, but that the latter failed to seize them (*infra,* II.B.3.(b));[110] and third, the Majority clearly accuses the Defence of not having been sufficiently diligent and for having squandered the opportunity to investigate when it presented itself (*infra,* II.B.3.(c)). Below I will traverse only some of the reasons why I distance myself completely from the Majority on each of these points.

a) Serious investigation was necessary

87. Contrary to what my colleagues assert, an additional investigation into a number of key factual issues was more than necessary. It suffices to point to the example of Nyankunde and what is alleged to have happened there on 5 September 2002 to illustrate the point. Seeing that very little reliable evidence was presented on this point during the trial which can be explained by the fact that this allegation was all but immaterial under the initial article 25(3)(a) charges - and noticing also how extremely weak the evidential basis is on which the Majority relies for its findings in this regard, I think it is difficult to maintain that further investigations were anything other than a bare necessity. The Chamber accepted as much on 26 June 2013:

> *17. As previously stated in the 15 May 2013 Decision, the Chamber acceptsthat, 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 investigationsby the Defence for the purposes of a final list of those witnesses whom it intends to recall or call for the first time […].

88. After this the Majority had what can only be described as a complete change of heart on this matter:

[the Majority] 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

89. While I agree with the Majority that regulation 55 does not give the Defence an unfettered right to conduct unlimited investigations, I think that in this particular case it was absolutely clear that, in order to maintain some level of fairness and balance in the proceedings, the Defence had to be able to conduct a meaningful investigation. It is noteworthy, in this regard, that prior to the new charges under article 25(3)(d)(ii), there was no need for the Defence to invest its limited resources in the investigation of questions such as what happened in Nyankunde or who inflicted most harm upon the civilian population of Bogoro. As previously noted, the Defence was perfectly entitled to limit itself to challenging other aspects of the Prosecutor's case under article 25(3)(a), and it therefore had no need to investigate these facts.

90. The mere existence of regulation 55 cannot impose a burden upon the Defence to investigate all possible facts and circumstances contained in

the Confirmation Decision, just in order to be prepared for the eventuality that the Chamber might at some point decide to recharacterise the charges. Such a suggestion would run counter to the avowed purpose of why we have regulation 55, i.e. to allow for shorter, more focused, trials. Accordingly, I am of the view that if the Defence can identify particular factual issues which it did not previously investigate – without having been negligent in this regard – and it is clear that these issues have a particular significance in the context of the recharacterised charges, then the Defence should, as a matter of principle, be given a meaningful and realistic opportunity to investigate these issues.

91. I therefore fundamentally disagree with my colleagues when they argue that it was somehow incumbent upon the Defence to demonstrate why further investigations were absolutely necessary. To the extent that the Defence had to demonstrate a need for further investigations, it amply did so by identifying those areas which it had not previously investigated through no fault of its own. The requirement that the Defence should somehow have proved that additional investigations would have yielded new information that would have been favourable to its case is plainly incongruous. It amounts to demanding that the Defence predict – prove, even – what the results of the investigation will be. However, common-sense dictates that it is simply impossible to foresee what the evidence one may or may not discover will reveal. One therefore wonders what more the Defence could have done, other than stating that it *hoped* that the witnesses it would interview would contradict the allegations contained in the new charges.

92. The fundamental flaw in the Majority's reasoning lies in the fact that they seem to argue that further investigations are only "necessary" under

regulation 55(3) when they will result in new information that may have an impact on the outcome of the proceedings. However, this is a crucial misconception of what this provision means. The necessity in question is not to be measured on the basis of what impact further investigations may have on the outcome of the case. Rather, necessity here refers to the fairness of the proceedings. Accordingly, even if the investigations yield no useful new evidence whatsoever, this does not mean – even with hindsight - that they were not necessary. Arguing otherwise would imply that Defence investigations are always a waste of time when the accused is convicted in the end.[116] The point of defence investigations is to give the accused a fair opportunity to challenge the charges and the evidence against him or her. Even if in the end the accused is convicted, the defence's investigatory efforts will still have made a very important contribution to the trial process, namely by showing that the incriminating evidence was so strong that it could not be defeated by whatever evidence the defendant could – or, crucially, could not – find to contradict the charges. In other words, defence investigations that yield no significant result play a very important role in confirming the validity of the conviction. However, if no investigation takes place at all, there always remains the reasonable possibility that evidence might have been found that could contradict the available incriminating evidence.

93. As I noted in my initial dissent, appended to the November 2012 Notice Decision, the Majority's application of regulation 55 can only be understood as a consequence of a fundamental misconstruction of the adversarial process. While article 64(8)(b) of the Statute gives Trial Chambers considerable flexibility in how to conduct trial proceedings, it has been a deliberate choice of this Trial Chamber to conduct the

proceedings in an adversarial manner. Although the Chamber reserved the right to order the production of all evidence that it considered necessary for the determination of the truth (a *discretionary* power as stipulated in article 69(3)), the trial was essentially organised in an adversarial manner.

94. In inquisitorial systems, the main responsibility for fact-finding is centralised in the hands of a neutral magistrate and the evidence is largely collected before the start of the actual trial. Thus, applying the different legal recharacterisation in that kind of system is not likely to give rise to the same concerns as the ones voiced in this Opinion. Indeed, in such a procedural model, the entire evidence of the case is centralised in a shared *dossier*, the contents of which are known to the parties and participants right from the start of the proceedings. The Chamber trying the case can freely decide which evidence to call and rely upon, independently of the parties.

95. By contrast, in adversarial proceedings, the spectrum of available evidence is more limited and, crucially, determined by what the parties actually proffer. What evidence the Defence will present is determined entirely in function of what the charges are and how the Prosecutor has substantiated them.

96. Any analysis of whether a given invocation of regulation 55 is fair must thus be carried out on a case-by-case basis in light of the Court's procedural structure and must be mindful of how the trial has actually been conducted. The Majority's reference to cases from the European Court of Human Rights, concerning late recharacterisations in particular domestic procedural contexts that are different from how this case has

been conducted, is therefore of limited interest. In the end, all that matters is whether *this* proposed recharacterisation is fair in light of the way in which *this* trial has been conducted.

97. Moreover, even if none of these procedural considerations were relevant, it would still be strange for an inquisitorially-minded Majority to close its eyes to additional evidence. Indeed, the only way in which the Majority can consistently claim to be interested in the truth, and deny the Defence's request to conduct further investigations at the same time, is if it made a finding that no new evidence that might be found during an additional investigation could make a difference to its existing opinion. However, considering the dearth of reliable evidence on so many of the points in question, I believe such a claim would be entirely unjustifiable. On the contrary, I submit that if, for example, the Defence had found a single credible witness who would have testified that Cobra Matata's troops were responsible for the large majority of civilian deaths in Nyankunde, this would have undermined the entire edifice of the Majority's theory about this case.

98. In short, I believe that the Majority's arguments in relation to the need for additional Defence investigation are wrong both as a matter of law and as a matter of fact.

[…]