

THE PROSECUTOR V. GERMAIN KATANGA

Case No. ICC-01/04-01/07
International Criminal Court
Trial Chamber II Judgment
March 7, 2014

Judges:

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

Prosecution:

Fatou Bensouda
Éric MacDonald

Defense:

David Hooper
Andreas O'Shea

Gender keyword(s): Coercion, Consent, Credibility or Character of the Victim, Forced Marriage, Forceful Abduction, Rape, Sexual Slavery

Procedural background:

On July 2, 2007, Pre-Trial Chamber I of the International Criminal Court (ICC) issued a warrant of arrest against Germain Katanga based on acts allegedly committed on February 24, 2003, during an attack against the Bogoro village in the Democratic Republic of Congo (¶¶ 7, 16). On October 17, 2007, the Congolese authorities surrendered Katanga to the ICC and transferred him to The Hague the following day (*id.*). On October 22, 2007, Katanga made his first appearance (*id.*). On March 10, 2008, the Pre-Trial Chamber joined the cases against Germain Katanga and Mathieu Ngudjolo, who had been arrested in the Democratic Republic of Congo (DRC) on February 6, 2008 (¶ 17). The Appeals Chamber confirmed this decision (*id.*). On September 26, 2008, the Pre-Trial Chamber unanimously confirmed there was sufficient evidence to believe that Katanga and Ngudjolo were responsible: 1) under Article 25(3)(a) of the Rome Statute (joint commission through other persons) for the crime against humanity of murder and the war crimes of willful killing, directing an attack against a civilian population, destruction of property, and pillaging, and 2) under Article 25(3)(a) (joint commission) for the war crime of using children under the age of fifteen years to participate actively in hostilities (¶¶ 7-9). The Pre-Trial Chamber also found, by majority, that there were substantial grounds to believe that Katanga and Ngudjolo jointly committed through other persons, within the meaning of Article 25(3)(a), the war crimes and crimes against humanity of rape and sexual slavery (¶ 10). On November 24, 2009, the trial commenced (¶ 20). On November 21, 2012, the Trial Chamber rendered a

decision severing the case of Katanga from the case of Ngudjolo.¹ In that same decision, the Chamber stated its intention to re-characterize the mode of liability against Katanga under Article 25(3)(d) of the Statute (contributing in any other way to the commission of the crimes by a group of persons acting with a common purpose).² The decision was upheld by the Appeals Chamber.³ On March 7, 2014, the Trial Chamber released its judgment in the case which is digested here with a focus on the charges relating to sexual and gender based violence.

Disposition: The Trial Chamber finds Katanga guilty, as an accessory within the meaning of Article 25(3)(d), of the crime against humanity of murder and the war crimes of murder, attack against a civilian population, destruction of enemy property, and pillaging, and acquits him of the war crimes and crimes against humanity of rape and sexual slavery (pp. 658-659). The Trial Chamber acquits Katanga of using children under the age of 15 years to participate actively in hostilities as a war crime (p. 659).⁴

Gender keywords based holdings:

COERCION

- The Prosecution charged Katanga with rape as both a war crime and a crime against humanity (¶ 10). As discussed under “Rape” below, the Chamber defined rape as requiring the following elements:
 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent (¶ 962).

¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Nov. 21, 2012. On December 18, 2013, the Trial Chamber issued its Judgment pursuant to article 74 of the Statute in the case of Mathieu Ngudjolo. *Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, Dec. 18, 2012.

² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Nov. 21, 2012, ¶¶ 6-7.

³ *Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons,” Mar. 27, 2013.

⁴ In a subsequent decision, the Trial Chamber, by majority, sentences Katanga to a total of 12 years of imprisonment *Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to article 76 of the Statute, May 23, 2014, ¶ 147.

- The Chamber notes that the definition does not include lack of consent as an element of rape and clearly seeks to punish any act of penetration committed under threat of force or of coercion (¶ 965). The Chamber notes further that Rule 70 of the Rules of Procedure and Evidence provides that “consent cannot be inferred by reason of any words or conduct of a victim where force or coercion was used or advantage was taken of a coercive environment” (¶ 966). Assessing the evidence regarding Witness P-132 – including that “she was flushed out by a group of six combatants armed with knives, guns and spears” and “was aware of the risks which non-compliance [with her assailants] entailed” – the Chamber finds “she had no choice but to suffer in silence,” adding the “acts of a sexual nature committed by attackers during an armed offensive against civilians are necessarily coercive” (¶¶ 989-990). Similarly, the Chamber finds the circumstances to which Witness P-249 was subject – including being “dragged through the bush by six combatants” and threatened with death – put her in a situation of extreme vulnerability, satisfying the objective elements of rape (¶ 993-995). The Chamber likewise finds that Witness P-353 – who was forced to go to a camp by combatants who she had witnessed kill others – “was forced to engage in sexual intercourse with them by dint of threat and coercion” (¶¶ 997).

CONSENT

- As detailed above under “Coercion,” the Chamber notes that the elements of crimes do not include lack of consent as an element of rape and notes further that Rule 70 of the Rules of Procedure and Evidence provides that “consent cannot be inferred by reason of any words or conduct of a victim where force or coercion was used or advantage was taken of a coercive environment” (¶¶ 965-66).

CREDIBILITY OR CHARACTER OF THE VICTIM

- The Chamber assesses the credibility of Witnesses P-132 and P-249 who testified that they were raped in Bogoro. Regarding Witness P-132, the Chamber finds “that it can rely on those parts of Witness P-132’s testimony concerning the sexual violence which she claimed to have suffered in Bogoro, despite apparent contradictions identified in her previous statements and discrepancies discerned between her statements and certain aspects of P-353’s account[,]” because the inconsistencies can be “explained by her difficulty in describing such intimate scenes to the Chamber” (¶ 988). The Chamber then highlights “the detailed nature of the information provided by P-132 about what she allegedly saw and heard from her hiding-place in the Waka plain” and notes that “several details she provided were corroborated by testimonies of various other witnesses” (*id.*). Regarding Witness P-249, the Trial Chamber notes that “the Defense identified certain discrepancies between P-249’s statement to the Office of the Prosecutor and her testimony in court” (¶ 994). The Chamber notes, however, that P-249 “met with the

investigators twice and that although her second account does differ from the first, it is to a great extent identical to her in-court testimony” (*id.*). The Chamber finds that the witness explained these inconsistencies and that “the contradictions were due to her initial reluctance to reveal personal information and the place where she lived, to recount her ordeal and to provide details about the number, names and conduct of her attackers” (*id.*). The Chamber finds that “these inconsistencies – essentially arising from the witness’s sense of shame at having to reveal what she had endured and her security concerns – do not therefore undermine her credibility” (*id.*).

FORCED MARRIAGE

- As noted below under “Rape” and “Sexual Slavery,” witnesses P-132, P-249, and P-353 all testified that they were forced to marry combatants who held them captive, forced them to do household chores, and forced them to have sexual intercourse (¶¶ 202, 959, 990, 997, 1003-06, 1009, 1014-18). These acts were not charged as forced marriage but these allegations supported the charges of rape and sexual slavery as war crimes and crimes against humanity (¶¶ 992, 999, 1008, 1013, 1019).

FORCEFUL ABDUCTION

- The Trial Chamber heard evidence from witnesses that they were abducted from Bogoro and taken to the combatants’ camps where they were raped and sexually enslaved (¶¶ 958-59). The Chamber considered this evidence in support of the charges of rape and sexual slavery as war crimes and crimes against humanity, finding that Witnesses P-132, P-249 and P-353 were abducted by Ngiti combatants who had attacked Bogoro or by men living in military camps, raped, imprisoned and forced to become the “wives” of the combatants. (¶¶ 991, 993, 997, 1002-1004, 1009).

RAPE

- The Prosecution charged Katanga with rape as both a crime against humanity and a war crime (¶ 10). The Pre-Trial Chamber confirmed the charges, which were supported by allegations that during an attack on the village of Bogoro that took place on February 24, 2003, women were raped by members of two armed groups, the *Front des nationalistes et intégrationnistes* (“the FNI”), and the *Force de résistance patriotique en Ituri* (“the FRPI”) (¶¶ 433, 958, 985). At trial, the Trial Chamber heard evidence from Witnesses P-132, P-249 and P-353 in support of these charges and applied the legal elements of the crime of rape as a war crime and as a crime against humanity (¶¶ 961-72, 988-99).
- The Trial Chamber recalls that the ICC’s Elements of Crimes defines rape, whether charged as a war crime or as a crime against humanity, as requiring the following elements:
 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent (¶ 962).

- The Chamber considers that “the first constituent element is established where the perpetrator invaded the body of a person by conduct resulting in penetration” (¶ 962). The conduct “must comprise penetration, however slight, of any part of the body with a sexual organ, or penetration of the anal or genital opening with any object or any other part of the body” (*id.*). “The second constituent element enumerates the circumstances and conditions of invasion of the body of the victim” that give the act its criminal character (¶ 964). “The establishment of at least one of the coercive circumstances or conditions set out in [that] second element is therefore sufficient alone for penetration to amount to rape within the meaning of articles 7(1)(g) and 8(2)(e)(vi) of the Statute” (¶ 965).
- The Trial Chamber cites evidence of the following three witnesses in support of the rape charges:
 - Witness P-132: Witness P-132 testified that she was hiding in the bush for part of the day of the attack, but was flushed out by a group of six combatants armed with knives, guns and spears (¶ 989). Given that she had heard that other people who had tried to escape were killed, the court found that she was in a state of complete submission at that moment (*id.*) She testified that three of her attackers took turns sexually abusing her by vaginal penetration (*id.*). The Trial Chamber finds that P-132 “had no choice but to suffer in silence” due to the “risks of non-compliance” with the combatants, and thus concludes that “such penetrations could only have taken place with violence and coercion,” (¶¶ 989-90). The Trial Chamber notes that the perpetrators said to P-132 that she had become “their wife” (¶ 990). The Trial Chamber finds that the evidence established that “the three persons who attacked her in Bogoro intentionally committed the crime of rape” and that the subjective elements of rape were established, “as the men had the intention of engaging in sexual intercourse with the woman and were fully aware of the coercive environment in which she found herself” (¶ 992).
 - Witness P-249: The Chamber notes that during the attack on Bogoro village, Witness P-249 was pursued and dragged through the bush by six combatants who then forced her to have sexual intercourse with them (¶ 993). The Trial Chamber recalls that “[t]he six armed men undressed her, assaulted her, threatened her with death and then twice forcibly penetrated her vagina as she begged them to leave her alone” (*id.*). The same combatants took her to a place against her will and

again hit and raped her while P-249 begged that they kill her instead (*id.*). The Chamber notes that P-249 was vulnerable and “had good reason to fear for her life” (*id.*). The Chamber therefore finds that combatants forced P-249 to engage in sexual intercourse during the attack on Bogoro on 24 February 2003 and that “the body of evidence suffices to establish the first two objective elements of rape” (¶ 995). The Chamber finds further that the mental elements of rape are established, noting that the perpetrators themselves committed the acts of violence against the victim and “could not have been unaware of her verbal objections” (¶ 996). The Chamber thus finds that “in Bogoro on 24 February 2003, six combatants intentionally invaded P-249’s body in the knowledge of the force, threats and duress they were exerting on their victim as well of the prevailing coercive environment” (¶ 996).

- Witness P-353: The Chamber heard testimony that Witness P-353 witnessed the very violent murders in Bogoro of those with whom she had been hiding and was then forced to help the perpetrators transport property they had just stolen back to their camp (¶ 997). The combatants declared that P-353 was “their wife” (*id.*). Witness P-353 testified that she was physically abused and deprived of her liberty in the combatants’ camp, several hours’ walk from her village, and was forced by two of the combatants to engage in sexual intercourse on the evening of her arrival (*id.*). Based on this in-court testimony, the Chamber finds that both men forced P-353 to engage in sexual intercourse (*id.*). The Chamber finds that P-353 “feared for her life and that she had no other choice than to obey;” that she was verbally and physically assaulted during the attack on Bogoro and that she “was forced to engage in sexual intercourse with them by dint of threat and coercion” (*id.*). The Chamber therefore finds that P-353, who was under 18 years of age at the material time, was forced by two combatants in the camp in Walendu-Bindi collectivité to engage in sexual intercourse with them on 24 February 2003 (*id.*) The Chamber finds that these two combatants intentionally raped P-353 and that “they were aware of the circumstances in which she found herself but nevertheless deliberately engaged in sexual intercourse with her” (¶ 998).
- Based on the evidence above and the Chamber’s findings on the contextual elements of crimes against humanity and war crimes, the Chamber finds that the evidence establishes beyond reasonable doubt that during the attack on Bogoro on 24 February 2003, combatants from the military camps of the Ngiti militia of Walendu-Bindi intentionally committed against P-132, P-249 and P-353 the crime of rape constituting crimes against humanity and war crimes (¶ 999).

SEXUAL SLAVERY

- The Prosecution charged Katanga with sexual slavery as both a crime against humanity and a war crime (¶ 10). The Pre-Trial Chamber confirmed the charges, which were

supported by allegations that during and after the attack on the village of Bogoro on February 24, 2003, “some of the women who had been subjected to [rape] were also abducted, imprisoned and forced to become the wives of the combatants, to engage in acts of a sexual nature, to carry out household chores for them and, generally, to obey them” (¶ 958). The Trial Chamber heard evidence that Witnesses P-132, P-249 and P-353 and other young women were sexually enslaved at the combatants’ camp and assesses this evidence using the definition of sexual slavery as both a war crime and a crime against humanity (¶¶ 959, 973-84, 1000-1021).

- The Trial Chamber recalls the definition of the crime of sexual slavery as a crime against humanity in the ICC’s Elements of Crimes as including two common material elements:
 1. The perpetrator exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty.
 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature (¶ 974).
- The Chamber notes that the various examples enumerated in the the ICC’s Elements of Crimes are not exhaustive, because “the ‘right of ownership’ and the powers attaching to it may take many forms” (¶ 975). “Powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy” (*id.*). Factors that may prove such powers attaching to the right of ownership include: “detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape” (¶ 976). Furthermore, “the use of threats, force or other forms of physical or mental coercion, the exaction of forced labor, the exertion of psychological pressure, the victim’s vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account” (*id.*). The Trial Chamber notes that the Elements of Crimes’ definition of sexual slavery defines the elements “such that the exercise of the right of ownership over someone need not entail a commercial transaction” (*id.*). The Chamber notes further that it “considers that the notion of servitude relates first and foremost to the impossibility of the victim’s changing his or her condition” (*id.*). The Chamber also finds that it will consider the subjective nature of the victim’s deprivation of liberty, taking into account “the person’s perception of his or her situation as well as his or her reasonable fear” (¶ 977). The Chamber interprets the second element to refer the “victim’s ability to decide the conditions in which he or she engages in sexual activity” (¶ 978).
- The Trial Chamber considers the evidence of sexual slavery heard at trial, and notes the use of the term “wife” by the attackers of three of the witnesses (¶ 1000). The Chamber finds that “in the specific context of the immediate aftermath of the attack on Bogoro, the

statement that someone was ‘taken as a wife’ by a combatant or that she was to ‘become his wife’ is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature” (*id.*). The Chamber cites as an example testimony by Witness P-132, who testified that “[y]ou know full well that when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse” (*id.*). The Chamber finds that “the fact that the combatants declared that the civilians captured in Bogoro and brought to their camps were ‘their wives’ does show they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them” (¶ 1001).

- The Trial Chamber cites evidence of the following three witnesses in support of the sexual slavery charges:
 - (i) Witness P-132: Witness P-132 testified that after the attack on Bogoro, armed men found her hiding in the bush and raped her, then kept her in a hole in the ground at the military camp for several days (¶ 1002). She testified further that the camp commander forced P-132 to live behind his house and “she was forced to carry out household chores, including assisting the combatants’ wives in their daily activities” (*id.*). P-132 “considered herself a hostage and wanted to escape the camp but was afraid to disobey her commander’s orders” (*id.*). P-132 testified that “she was compelled to marry a militia member living at the camp, live with him and follow him when he was reassigned to other Ngiti camps” (¶ 1004). The Chamber considers arguments by the Defense that the marriage was consensual, but notes that P-132 was visibly upset by suggestions that the relationship was consensual and that she fled the camp and left the man when she had the opportunity (¶ 1005). With regard to the second element of sexual slavery, the Chamber “notes that P-132 was raped several times by combatants during the attack on Bogoro, at the military camp and, more generally, in captivity” (¶ 1006). P-132 was also “regularly raped by the man who had taken her as his wife and, on occasion, by another combatant” and the Chamber notes further that after her escape, P-132 “gave birth to a child who can only have been conceived whilst she was in captivity” (*id.*).
The Chamber finds that this evidence “establishes that combatants from the camp where P-132 was kept wielded powers over her attaching to the right of ownership: the witness, who was held at the camp, was extremely vulnerable” (¶ 1007). P-132 “did not have freedom of movement, nor was she able to decide where she lived, and she in fact belonged to the camp combatants” (*id.*). The Chamber finds further the man who became P-132’s “‘husband’ was given P-132 and exercised powers over her attaching to the right of ownership” (*id.*). The Chamber is satisfied that P-132 was held in enslavement for more than a year and a half during which she was “constantly compelled to performed sexual acts” (*id.*). The Chamber finds also that the combatants who raped P-132, both when

she was incarcerated and when she was living with the man who made her his wife, “deliberately forced her to have sexual intercourse with them” and “were aware that the witness, who had lived in captivity in their camp for a long period, had no freedom of movement” (¶ 1008). The man who made P-132 his wife “could not have been unaware that he wielded power over her such that she was in reality entirely under his control,” citing the fact that he told her he would make her his wife when she resisted his advances, which the camp commander eventually did (*id.*). The Chamber therefore concludes that the evidence proves that “these combatants intentionally committed the crime of sexual slavery” (*id.*).

(ii) Witness P-249: Witness P-249 testified that after she was physically assaulted and raped by six Ngiti combatants during the February 24th attack, she “was captured and immediately taken to a military camp, where her attackers raped her again” (¶ 1009). P-249 testified that she was held at the camp by force for about a month (*id.*). At the camp, “the commander told her that because of her refusal to tell him where the Hema were, she would be killed or become their wife,” and he then “consigned” her to one of his bodyguards (*id.*). P-249 “was compelled to live with the combatants from this group, serve them and, more specifically, remain available to the man referred to immediately above” (*id.*). She was threatened with death and “under the control of the group’s combatants, who deprived her of all freedom of movement by keeping her under constant surveillance” and “compelled her to perform various household chores for them” (*id.*). At night, the combatants came to her for “the sole purpose of having sexual intercourse with her, without even speaking to her” (¶ 1011). The Chamber finds that “this evidence establishes that the commander’s bodyguard as well as several other combatants collectively exerted powers over P-249 attaching to the right of ownership. It is also established that she was regarded as a woman available for the sexual gratification of those who went to her and that she was thus compelled to engage in acts of a sexual nature with numerous men, including the aforementioned bodyguard” (¶ 1012). The Chamber finds further that the combatants were aware that P-249 was “deprived of all freedom of movement and autonomy” while they “collectively enjoyed prerogatives attaching to the right of ownership” (¶ 1013). Thus, the Chamber “finds that the combatants at the Bogoro camp intentionally sexually enslaved Witness P-249” (*id.*).

(iii) Witness P-353: The Chamber notes that combatants ordered P-353 and two other women to leave the house where they had been hiding with other occupants who had just been massacred (¶ 1014). Two of the combatants said they would share P-353 “as their wife” (*id.*). After being beaten and held captive in Bogoro, P-353 was forced to follow the combatants and transport the property they had just stolen to their camp (*id.*). On arrival at the camp, she was forced to have sexual intercourse with two combatants (*id.*). P-353 was subsequently confined to a

house at the camp for about three months, during which time one of the men who forced her to be his wife “wanted the only activity she performed to be sexual intercourse with him” (¶ 1015). The Chamber finds that P-353 was held as the wife of two men, which meant she had to have sexual intercourse with them (¶ 1016). The Chamber finds that these two men who made her their wife “exerted over her powers attaching to the right of ownership” (¶ 1017). The Chamber finds also that the two men compelled P-353 to have sexual intercourse with them and finds that the men “could not have been oblivious to the fact that whilst at the camp P-353...was deprived of all freedom of movement” and yet they “deliberately forced her to perform acts of a sexual nature” (¶¶ 1017-18). The Chamber finds that the two combatants committed the crime of the sexual enslavement of Witness P-353 for a period of about three months (¶ 1019).

- Finally, the Chamber notes that Witnesses P-353, P-132, and P-268 also testified that other women were sexually enslaved following the attack on Bogoro (¶¶ 1020-21).

Other issues:

MODE OF LIABILITY

- The Prosecution charged Katanga under Article 25(3)(a) of the Rome Statute, which provides for criminal liability if an individual “commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible” (¶¶ 7-10).⁵ As mentioned above, the Chamber recharacterized the mode of liability, changing it from Article 25(3)(a) to Article 25(3)(d), which provides for criminal liability when an accused contributes “in any other way to the commission of a crime by a group of persons acting with a common purpose” (p. 658). “Such contribution shall be intentional and shall either
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime.”⁶
- The Chamber notes Article 25(3)(a) provides “a residual form of accessoryship, included in the Statute to vest the Court with jurisdiction over accessories whose conduct does not constitute aiding or abetting the commission of a crime within the meaning of article 25(3)(c)” (¶ 1618). The Chamber distinguishes this form of liability from joint criminal enterprise (JCE) as defined by the *ad hoc* international criminal tribunals by finding that “the accused will not be considered responsible for all of the crimes which form part of the common purpose, but only for those to whose commission he or she contributed” (¶

⁵ Rome Statute, Art. 25(3)(a).

⁶ Rome Statute, Art. 25(3)(d).

1619). The Chamber finds that to establish liability under Article 25(3)(d), the elements that must be established are:

- a crime within the jurisdiction of the Court was committed;
- the persons who committed the crime belonged to a group acting with a common purpose;
- the accused made a significant contribution to the commission of the crime;
- the contribution was intentional; and
- the accused's contribution was made in the knowledge of the intention of the group to commit the crime (¶¶ 1620-21).

- The Chamber finds that the group of persons acting with a common purpose does not require the existence of an organization “incorporated into a military, political or administrative structure” (¶ 1626). It is also not necessary to show that the common purpose was previously arranged or formulated; rather, the plan may “materialise extemporaneously and be inferred from the subsequent concerted action of the group of persons” (*id.*). The common purpose “must be to commit the crime or must encompass its execution” (¶ 1627). The group does not have to pursue a “purely criminal purpose” nor “must its ultimate purpose be criminal” (*id.*). Thus, a group with “a political and strategic goal which also entails criminality or the execution of a crime” may constitute a group acting with a common purpose within the meaning of article 25(3)(d) (*id.*). The participants of the group must share the same intent: “they must mean to cause that consequence which constitutes the crime or be aware that the crime will occur in the ordinary course of events” (*id.*). This shared intent may be established by the group's collective decisions and action, or its omissions (*id.*). The Prosecution must prove that physical perpetrators and/or the indirect perpetrators shared the common purpose (¶ 1628). The Chamber finds that in order to show that the perpetrator's acts “were encompassed by the common purpose, it will also be necessary to show that the crime at hand formed part of the common purpose” (¶ 1630). The Chamber thus finds that opportunistic acts committed by members of the group which fall outside the common purpose of the group cannot be attributed to the group's action (*id.*). “Only those crimes which the group harboured the intention to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events, can therefore be attributed to the said group and incur the accused's liability under article 25(3)(d)” (*id.*). The Chamber finds further that the accused's contribution to the crime must be significant; “[c]onduct inconsequential and immaterial to the commission of the crime cannot, therefore, be considered sufficient and constitute a contribution within the meaning of article 25(3)(d) of the Statute” (¶ 1632). Significant contribution means that the contribution “had a bearing on the occurrence of the crime and/or the manner of its commission” (¶ 1633). It is not required to establish “a direct nexus between the conduct of the accessory and that of the physical perpetrator” (¶

1635). The focus is on the effect of the conduct on the realization of the crime, and it may involve “the material elements of the crimes (it may then, for instance, take the form of provision of resources such as weapons) or to their subjective elements (it may involve encouragement)” (*id.*). With regard to intent, “the accused must intend to engage in the conduct – otherwise put, his or her actions must have been deliberate and made with awareness. It need not be proven, therefore, that the accused shared the group’s intention to commit the crime” (¶ 1638). Additionally, the Chamber finds that “it must be shown that the accused intended to engage in the conduct which constitutes a contribution and also that he or she was aware that such conduct contributed to the activities of the group of persons acting with a common purpose” (¶ 1639). The contribution must “be made with the aim of furthering the criminal activity or criminal purpose of the group” or “be made in the knowledge of the intention of the group to commit the crime” (¶ 1640). The Chamber notes that it has “decided to rely on the second alternative provided for by article 25(3)(d)(ii),” that is the accused’s contribution must “[b]e made in the knowledge of the intention of the group to commit the crime” (¶ 1640). The Chamber finds that this means that the group must “mea[n] to cause that consequence” or know that the crime “will occur in the ordinary course of events” (¶ 1641). Further, “the accused must be aware that the intention existed when engaging in the conduct which constituted his or her contribution” (*id.*). “The accused’s knowledge must be inferred from the relevant facts and circumstances” and be connected to the group’s intention to commit the specific crimes (¶ 1642). “Knowledge of such circumstance must be established for each specific crime and knowledge of a general criminal intention will not suffice to prove...that the accused knew of the group’s intention to commit each of the crimes forming part of the common purpose” (*id.*).

- The Chamber applies the elements above to the allegations of rape and sexual slavery. The Chamber finds that “no evidence is laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003,” nor to find that the attack on Bogoro “perforce entailed the commission of such acts” (¶ 1663). The Chamber finds further that these crimes did not form part of the group’s common purpose because prior to the battle of Bogoro, these combatants had not committed crimes of rape or sexual slavery (*id.*). Finally, the Chamber notes that the “lives of those women who were raped, abducted and enslaved were specifically ‘spared’ and they evaded certain death by claiming to be other than of Hema ethnicity” (*id.*). The Chamber concludes that “although the acts of rape and enslavement formed an integral part of the militia’s design to attack the predominantly Hema civilian population of Bogoro, the Chamber cannot, however, find, on the basis of the evidence put before it, that the criminal purpose pursued on 24 February 2003 necessarily encompassed the commission of the[se] specific crimes... Accordingly, and for all of these reasons, the Chamber cannot find that rape and sexual slavery fell within the common purpose” (¶ 1664).

