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Date: **22 July 2008**

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo***

Public Document

**Written Submissions from the Legal Representative of Victims a/0009/08,
a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 on the Issues Raised at
the Confirmation Hearing**

Source: Mr Hervé DIAKIESE, Legal Representative of the Victims

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

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I. PROCEDURAL BACKGROUND

1. Having regard to the Decision of 13 June 2008, whereby Pre-Trial Chamber I set the schedule for the confirmation hearing.¹
2. Considering that in the said decision Pre-Trial Chamber I required the Legal Representatives of anonymous and non-anonymous victims to file their submissions on the issues discussed at the confirmation hearing by 22 July 2008.
3. That, throughout the confirmation hearing, the two Defence teams (for Mr Germain Katanga and Mr Mathieu Ngudjolo) developed arguments seeking to persuade the Chamber that there are no substantial grounds to believe that their clients are responsible for the acts ascribed to them.
4. That four issues have attracted the attention of the Legal Representative of Victims a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08, namely:
 - The rejection of the concept of co-perpetration in relation to Mr Germain Katanga in view of the ICTY jurisprudence in the *Stakic* case.²
 - The challenge to the probative value of the evidence produced by the Prosecutor and to the concept of dual victim-witness status.
 - Mr Germain Katanga's youth, namely 24 at the time of the events, and the large number and heterogeneous nature of the troops, regarded as a factor obviating or diminishing his criminal responsibility.
 - The challenge to the probative value of the record of Mr Germain Katanga's interview of 20 January 2006 referenced DRC-OTP-1016-0150.

¹ ICC-01/04-01/07-587.

² Judgment rendered on 31 July 2003 by Trial Chamber II, reversed by the judgment rendered by the Appeals Chamber on 22 March 2006 (International Criminal Tribunal for the Former Yugoslavia).

5. That, in response to these issues and in the interest of the said victims, whose anonymity has already been lifted, their Legal Representative respectfully submits the following observations to the Chamber:

II. OBSERVATIONS

A. The rejection of the concept of co-perpetration in relation to Mr Germain Katanga

6. On the basis of the ICTY jurisprudence in the *Stakic* case, Mr Germain Katanga's Defence requests the Chamber to disregard the International Criminal Court jurisprudence (*Decision on the confirmation of charges* No. ICC-01/04-01/06 rendered by Pre-Trial Chamber I in the Lubanga case).

According to the Defence, that decision erred:

- in conflating the concept of co-perpetration with that of indirect perpetration;
- in defining the common plan vaguely and too broadly;
- in including *dolus eventualis* as a form of "*mens rea*", whereas there is no provision for this in the Statute.

7. Before examining this decision, it is appropriate to recall that the applicable law before the International Criminal Court is set out in article 21 of the Rome Statute: the Court first applies the Statute, the *Elements of Crimes* and the *Rules of Procedure and Evidence*. Paragraph 2 then authorizes the Court to apply the general principles and rules of law as interpreted in **its previous decisions**.

8. Contrary to what Mr Germain Katanga's Defence contends, an examination of the decision discloses the following:

At para. 326: "The Chamber is of the view that the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime".

At para. 327: "In this regard, the definitional criterion of the concept of co-perpetration is linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons."

At para. 329: "The subjective approach – which is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine – moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission."

At para. 330: "The concept of control over the crime constitutes a third approach for distinguishing between principals and accessories which, **contrary to the Defence claim, is applied in numerous legal systems.** The notion underpinning this third approach is that principals to a crime are not

limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.”

At para. 338: “Not having accepted the objective and subjective approaches for distinguishing between principals and accessories to a crime, the Chamber considers, as does the Prosecution and, unlike the jurisprudence of the *ad hoc* tribunals, that the Statute embraces the third approach, which is based on the concept of control over the crime.”

At para. 339: “In this regard, the Chamber notes that the most typical manifestation of the concept of control over the crime, which **is the commission of a crime through another person, is expressly provided for in article 25(3)(a) of the Statute.** In addition, the use of the phrase “regardless of whether that other person is criminally responsible” in article 25(3)(a) of the Statute militates in favour of the conclusion that this provision extends to the commission of a crime not only through an innocent agent (that is, through another person who is not criminally responsible), but also through another person who is fully criminally responsible.”

At para. 340: “The Chamber considers that the concept of co-perpetration embodied in article 25(3)(a) of the Statute by the reference to the commission of a crime “jointly with [...] another person” must cohere with the choice of the concept of control over the crime as a criterion for distinguishing between principals and accessories.”

At para. 341: “Hence, as stated in its *Decision to Issue a Warrant of Arrest*, the Chamber considers that the concept of co-perpetration embodied in article 25(3)(a) of the Statute coincides with that of joint control over the crime by reason of the essential nature of the various contributions to the commission of the crime.”

9. It is appropriate therefore to observe that, contrary to what Mr Germain Katanga’s Defence contends, Pre-Trial Chamber I correctly interpreted the Statute at the confirmation hearing in the Lubanga case, and is entitled to rely on that interpretation.

10. It is nevertheless helpful to consider the *Stakic* decision, in order to draw from it an interpretation which differs from that put forward by Mr Katanga’s Defence.

It should be noted that the decision of Trial Chamber II of the ICTY was reversed on the grounds that:

- Trial Chamber II erred in analysing the Appellant’s responsibility in terms of “co-perpetratorship”. According to the Appeals Chamber, this mode of liability does not have support in customary international law or in the ICTY’s settled jurisprudence;
- The appellant was charged in the indictment with having participated in a joint criminal enterprise and it was to this charge that he responded at trial (see para. 62 of the *Stakic* Judgment).

11. However, having decided to address the Appellant’s liability under the head of joint criminal enterprise – a mode consistent with the Tribunal’s jurisprudence (paragraph 59, p. 23 of the decision) - the Appeals Chamber recalled in para. 87 of its judgment that “for the application of third category joint criminal enterprise liability,

it is necessary that: (a) crimes outside the Common Purpose have occurred; (b) these crimes were a natural and foreseeable consequence of effecting the Common Purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose.”

12. In paragraphs 97 and 98, the Chamber went on to decide that “[i]n finding that the Appellant acted at least with *dolus eventualis* to commit extermination, the Trial Chamber concluded that the commission of extermination was likely, the Appellant was aware of this, and he had reconciled himself to that likelihood. [...]” “In light of these findings, the Appeals Chamber concludes [...] that the Appellant had the requisite *mens rea* to be found responsible under the third category of joint criminal enterprise for the crimes of murder (as a war crime and as a crime against humanity) and extermination.”

13. In response to the contention that *dolus eventualis* is a concept unknown to the law, the Chamber stated that there is a basis for it in customary international law.³

14. From the foregoing, it may be concluded that not only is the mode of liability applied to Messrs Katanga and Ngudjolo consistent with the *Rome Statute of the International Criminal Court*, but also that its manner of application finds jurisprudential support both in the *Decision on the confirmation of charges* in the Lubanga case and in the *Stakic* case.

³ Para. 101 and 102. “A basis in customary law having been established, the Appeals Chamber in that case came to the conclusion that the notion of joint criminal enterprise did not violate the principle *nullem crimen sine lege*. As the concept of *dolus eventualis* (or “advertent recklessness”) is clearly “required for the third form of joint criminal enterprise”, the same conclusion is applicable in the instant case. As joint criminal enterprise does not violate the principle of legality, its individual component parts do not violate the principle either.” and “The Appeals Chamber therefore concludes that, in the instant case, the use of *dolus eventualis* within the context of the third category of joint criminal enterprise does not violate the principles of **nullum crimen sine lege and in dubio pro reo**”

B. The challenge to the probative value of the evidence produced by the Prosecutor and to the concept of dual victim-witness status

B.1 The challenge to the probative value of the evidence produced by the Prosecutor

15. The challenge to the probative value of the evidence of the Prosecutor raised by Mr Ngudjolo's Defence relies on doubts as to authenticity and the reliability of testimony from minors.

16. With respect to this point, paragraph 9 of the *Decision on the confirmation of charges* in the Lubanga case states: "Under the framework established by the Statute and the Rules, the Chamber notes that, at the stage of the confirmation hearing, the scope of which is limited to determining whether or not a person should be committed for trial, it is necessary to assume that the material included in the parties' Lists of Evidence is authentic. Thus, unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing."

17. Furthermore, paragraph 100 reinforces the point, stating: "Under article 69(4) of the Statute, the Chamber has the discretion to rule on the admissibility of any evidence, 'taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.' "

18. Paragraph 101 further adds: "The Chamber also notes that there is nothing in the Statute or the Rules which expressly provides that evidence which can be considered hearsay from anonymous sources is inadmissible *per se*. In addition, the Appeals Chamber has accepted that, for the purpose of the confirmation hearing, it is

possible to use certain items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements.”

19. The Chamber adds in paragraph 102 that the jurisprudence of the European Court of Human Rights is also to the same effect.⁴

20. With respect to interviews with unassisted minors, the decision states in paragraph 118: “Relying on several grounds, the Defence challenged the credibility and reliability of the statements made by children and Kristine Peduto’s entire testimony, on which the Prosecution relied to substantiate the charges against Thomas Lubanga Dyilo.” In paragraph 120, the Chamber recalls that, in a previous decision, it had held that, under article 69(4) of the Statute, “the Chamber may rule on the relevance and admissibility of any evidence ... in accordance with the *Rules of Procedure and Evidence*.”

21. And in paragraph 121 it held: “In exercising its discretion and in accordance with the jurisprudence of the ICTR,⁵ the Chamber declares that it will attach a higher probative value to those parts of the **children’s and Kristine Peduto’s** evidence which have been corroborated, as is apparent from several sections of this decision”, while in paragraph 122 it was concerned “to emphasise that, according to the jurisprudence of the ICTY, less probative value is not necessarily attached to parts of a witness statement that have not been specifically corroborated, and which do not

⁴ “Furthermore, ECHR jurisprudence evinces that the European Convention does not preclude reliance at the investigation stage of criminal proceedings on sources such as anonymous informants. Nevertheless, the ECHR specifies that the subsequent use of anonymous statements as sufficient evidence to found a conviction is a different matter in that it can be irreconcilable with Article 6 of the European Convention, particularly if the conviction is based to a decisive extent on anonymous statements (*Kostovski v. The Netherlands*, Judgement of 20 November 1989, Application No. 11454/85, para. 44 quoted in the decision)”; and in paragraph 103: “Accordingly, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.”

⁵ In *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1, Trial Judgement, 21 May 1999, it is stated in para. 80 that “[d]oubts about a testimony can be removed with the corroboration of other testimonies. However, corroboration of evidence is not a legal requirement to accept a testimony.”

vary from the statement as a whole (*The Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Judgement, 16 November 1998, paras. 594 – 597, quoted in the decision).⁶

B.2 The challenge to the concept of dual victim-witness status

22. With respect to the contention that a person cannot have the status of both victim and witness, there are no provisions in the Statute or in the *Rules of Procedure and Evidence* prohibiting victims from appearing as witnesses, inasmuch as they experienced the events in question.

23. Thus Article 68(3) of the Statute provides: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

24. Article 69(1) of the Statute further provides: “Before testifying, each witness shall, in accordance with the *Rules of Procedure and Evidence*, give an undertaking as to the truthfulness of the evidence to be given by that witness.”

25. From a joint reading of these two provisions, it cannot be concluded *prima facie* that there is legal incompatibility between the status of victim and that of witness, since the purpose of the trial is the determination of legal truth and the Chamber’s

⁶ As a general principle, the Trial Chamber has attached probative value to the testimony of each witness and exhibit according to its relevance and credibility. The Trial Chamber notes that, pursuant to Rule 89 of the Rules, it is not bound by any national rules of evidence and as such, has been guided by the foregoing principles with a view to a fair determination of the issues before it. In particular, the Trial Chamber notes the finding in the Tadic Judgment that corroboration of evidence is not a customary rule of international law, and as such should not be ordinarily required by the International Tribunal (...). Accordingly, inconsistencies or inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, are relevant factors in judging weight but need not be, of themselves, a basis to find the whole of a witness’ testimony unreliable.”

powers in weighing testimony and evidence remain intact (article 69(4) of the Statute).

26. Moreover, it follows from paragraphs 97 and 99 of the *Judgement on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on victims' participation* that if victims can tender evidence at trial and discuss evidence adduced by the parties, then, *a fortiori*, they have the right to appear as witnesses, the interest being the determination of truth. Testimony constitutes evidence just as much as other materials and evidence.⁷

28. We respectfully submit that the main eyewitnesses in series of crimes presented to the Chamber are most often the victims and the perpetrators.

C. Mr Germain Katanga's youth, namely 24 at the time of the events, and the large number and heterogeneous nature of the troops as a factor that could obviate his criminal responsibility.

29. With respect to the youth of Mr Katanga at the time of the events, it should be noted from the outset that, pursuant to article 26 of the Rome Statute, the Court has jurisdiction over any person who is 18 years of age or more at the time of commission of a crime.

⁷ Paragraph 97: "To give effect to the spirit and intention of article 68(3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual"; and paragraph 99: "In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation. For example, should a victim demonstrate that his or her personal interests would be negatively affected if a particular witness (who could attest to the harm suffered by the victim) was not called to testify or if a piece of evidence (which would have ramifications on the safety and security of the victim) were to be declared admissible, then the victim would be able to move the Chamber to exercise its powers under article 69 (3) to present the evidence or challenge the admissibility of the evidence respectively."

30. The Defence of Mr Katanga does not deny that at the time of commission of the crimes he was 6 years older than the minimum age required for the Court to have jurisdiction over him.

31. In light of the foregoing, no relevant argument has been put forward with respect to Mr Germain Katanga's age of 24 offering substantial grounds to believe that he cannot be held responsible for the crimes with which he is charged.

32. With respect to the second aspect of the above point, namely that, in light of the heterogeneous nature of the militias and their large membership of 1000 to 1300, he cannot be held criminally responsible:

33. Reference should be made to the abovementioned jurisprudence from the LUBANGA case with respect to the considerations pertaining to responsibility set out above.

D. The challenge to the probative value of the record of Mr Germain Katanga's interview of 20 January 2006 referenced DRC-OTP-1016-0150.

34. Mr Germain Katanga's Defence has challenged the probative value of the abovementioned document on the ground that he was interviewed in the absence of his lawyer.

Given that the Prosecution refrained from citing it for that reason, we hereby respectfully submit our observations in case they may be helpful.

35. In this regard, paragraph 67 of the Lubanga decision states that: "unless it had expressly ruled an item inadmissible upon a challenge by any of the participants at the hearing, and provided that item was included in the Prosecution Amended List

of Evidence, the Chamber may rely on it whether or not the Prosecution decides to present it at the confirmation hearing.”

36. Furthermore, Mr Germain Katanga’s interview before an officer from the Public Prosecutor’s Office constitutes what is called a pre-trial examination under Congolese law and, contrary to the common law system, the drafters of Congolese law intended this to be an inquisitorial phase, which means a non-public and non-adversarial phase, notwithstanding the optional presence of a lawyer pursuant to article 18 of the Transitional Constitution, who moreover plays a non-active role, and whose absence has no impact on the validity of the proceedings.

37. In any event, the Court has already stated in paragraphs 69 and 82 of the Lubanga decision that “[it] is not bound by the decisions of national courts on evidentiary matters [...]. When deciding on the [...] admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law [...]; all violations of procedural rules do not necessarily result in a violation of internationally recognised human rights.”

38. In light of the foregoing:

- considering the evidence tendered by the Prosecutor;
- considering that the two Defence teams have waived their right to present exculpatory material or to call defence witnesses;
- considering the admissions contained in certain of the Prosecutor’s evidence, particularly the document referenced DRC-OTP-1016-0150 (record of Mr Germain Katanga’s interview of 20 January 2006), in which he admits to the attack on Bogoro;
- considering the document referenced DRC-OTP-0039-0058 (record of Mr Mathieu Ngudjolo’s interview, Question 6/Answer 6), in which he

testifies that Germain Katanga's group were active in the attack on Kasenyi;

39. Considering all the submissions on the said materials at the confirmation hearing, there are substantial grounds to believe that the suspects are fully and completely responsible for the crimes with which they are charged in respect of the attack on Bogoro of 24 February 2003.

40. That those events are source of the harm caused to the victims whom we represent.

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER:

- to admit all of the evidence tendered by the Prosecution;
- to rule that there is sufficient evidence establishing substantial grounds to believe that Mr Germain Katanga and Mr Mathieu Ngudjolo each committed the crimes with which they are charged;
- to confirm the charges against Mr Germain Katanga and Mr Mathieu Ngudjolo;
- to commit Mr Germain Katanga and Mr Mathieu Ngudjolo to the Trial Chamber for trial.

And justice shall be done.

[signed]

Maître Hervé DIAKIESE

Legal Representative

for

Victims a/009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08

Done this 22 July 2008 at The Hague.

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Official Court Translation