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PRE-TRIAL CHAMBER I

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

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

Public Document

FINAL SUBMISSIONS OF THE LEGAL REPRESENTATIVE OF VICTIMS a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 and a/0109/08

Source: Maître Carine Bapita Buyangandu

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Court to:

The Office of the Prosecutor

M. Luis Moreno-Ocampo, Prosecutor
M. Eric MacDonald , Senior Trial Lawyer

Counsel for the Defence

Mr David Hooper
Ms Caroline Buisman
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Jean-Louis Gilissen
Mr Joseph Keta
Mr Hervé Diakiese
Mr Jean-Chrysostome Mulamba

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

FINAL SUBMISSIONS OF THE LEGAL REPRESENTATIVE OF VICTIMS

a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 and a/0109/08.

MAY IT PLEASE THE CHAMBER:

1. Considering that, in the opinion of the victims represented hereby, the instruments governing the International Criminal Court, the decision to grant their applications for participation in the proceedings and the ground-breaking and consistent jurisprudence of the Court,¹ which has not been hampered by its youth and the originality of the concept, dispense the said victims from again having to make submissions justifying their participation;
2. Considering that in the present submissions the victims will confine themselves to recalling that they hope to obtain public recognition of their suffering and, to the extent possible, judicial reparations for the harm they have suffered; that, accordingly, it is indispensable for the persons allegedly responsible for the acts which caused them such great suffering to explain their conduct and receive commensurate punishment should their responsibility be judicially established;
3. Considering that the victims are convinced, in light of the facts of the case, that the suspicion attaching to Messrs Germain Katanga and Mathieu Ngudjolo Chui is warranted and should lead to their trial, so that justice may be done at all levels;

¹ See the decisions by Pre-Trial Chamber I authorising the authors of this submission to participate in the proceedings in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

See also the 11 July 2008 decision by the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, entitled *Judgement on appeals of the Prosecutor and the Defence against Trial Chamber I's decision on victims participation*.

4. Considering that a number of these victims suffered harm, including physical injury, death of family members, loss of income in connection with medical expenses as a result of injuries sustained in the attack on Bogoro, hospitalisation expenses and costs associated with the loss of foodstuffs (children, spouses), mental harm consistent with all these violations of their rights, etc.; that, as a result, the victims consider it necessary for the Court to confirm the charges pending against the two suspects so that they may hope for reparations;

5. Considering that the victims wish through the present submissions to restate their position as given at the opening and closing of the oral proceedings at the hearing to confirm the charges brought by the Prosecutor against Messrs Germain Katanga and Mathieu Ngudjolo Chui;

6. Considering that, as regards the facts of the case, the victims maintain the oral submissions made at the hearing in respect of the historical background, strategy and conduct of the Bogoro attack; that in this respect, the victims agree with the Prosecutor's case and evidence, which is far more extensive than theirs and consistent therewith, and which was clearly set out before the Honourable Bench;

7. Considering that these final submissions will accordingly focus on a number of points of law, including the Defence challenges in respect both of issues relating to the suspects personally and of the admissibility of the Prosecution evidence, namely:

- the challenge raised on the basis of Germain Katanga's youth at the time of the events;
- the dual status of victim-witness of persons participating in the proceedings;
- the Defence challenge to the admissibility of the Prosecution evidence, in relation in particular to the contemporaneity of the photographs presented by the Prosecution, the lack of evidence that the said photographs are indeed those of injuries sustained in connection with the Bogoro attack of 24 February 2003, the alleged hearsay nature of testimony, etc.;

- the alleged lack of co-participation/co-perpetration as regards the acts of the two suspects, which is refuted by the existence and consequences of the chain of command headed by both Germain Katanga and Mathieu Ngudjolo Chui, this being a key fact establishing their individual criminal responsibility;

I. The challenge on the basis of the youth of Germain Katanga at the time of the events

8. Considering that such a challenge has absolutely no basis in law; that the age of majority in legal, criminal or civil matters in all countries ranges from 16 (in particular for free minors under Romano-Germanic law) to 21 years;

9. Considering that, furthermore, in the Congo, Germain Katanga's country of origin, the age of majority for civil and criminal matters is 18 years; that Mr Germain Katanga was aged 24 at the time of the events;

10. Considering, finally, that the jurisdiction of the International Criminal Court covers defendants who have reached the age of 18 years at the time of the alleged crimes;²

11. Considering that it would be inappropriate at this juncture to dwell on doctrinal arguments, or to review the customs in various regions with regard to the various types of majority; that, furthermore, the instruments of the Court have primacy over any national or regional custom once the facts charged or the person being prosecuted fall within the sovereign powers of a State Party to the Rome Statute,³ and that this applies in the instant case;

12. Considering that not only can the defence of youth not constitute a valid challenge on the ground of minority, but also that such a defence is nugatory in the instant case and therefore fallacious; that the Defence will be at liberty to raise it at

² Article 26 of the Rome Statute.

³ Article 12 *et seq.* of the Rome Statute.

trial if appropriate as a mitigating circumstance; and that, at the confirmation of charges stage, it is appropriate to dismiss it without further consideration;

II. The dual status of victim-witness

13. Considering that only three types of people experienced the events in Bogoro and can therefore bear witness thereto: the victims, the perpetrators and persons who were neither victims nor perpetrators but bystanders;

a) Victims:

14. Considering that all the parties and participants agree that today there is just one ethnicity in Ituri: that of victims; that this is so evident a truth that even the suspects portray themselves as victims, both direct and indirect; that it is therefore obvious that the persons capable of giving an account of the events that occurred in Bogoro are primarily those who were present at the *locus in quo*;

15. Considering that the instruments of the *ad hoc* international criminal tribunals make no provision for the participation of victims in proceedings; that it is in this notion that the originality of the International Criminal Court lies; that, however, in not expressly prohibiting victims from appearing as witnesses, the *ad hoc* tribunals thus allow for this eventuality, as their established jurisprudence shows;

16. Considering that, first, the International Criminal Court allows victims to participate on the basis of the provisions contained in the legal instruments governing its functioning; that, furthermore, the continually evolving jurisprudence of the Court in the matter is defining and improving the procedures for the participation of victims;

17. Considering that the Court has produced abundant jurisprudence on the subject; that in so doing it has made provision for the participation of victims, including

Prosecution witnesses, even though it had previously denied such participation in relation to the confirmation hearings;⁴

18. Considering that, subsequently, participation at this stage of the proceedings was authorised by this Chamber, which, in the same decision, determined the issue of the dual status of “victim-witness”;⁵ that the Chamber thus recalled that neither the Statute nor the Rules expressly prohibit a victim from also being a witness, while noting *a contrario* that there is, moreover, nothing in the texts that expressly prohibits the admission of evidence (including testimony) from individuals who have been granted the procedural status of victim⁶

19. Considering that, on 5 June 2008, the Court also rendered a decision in connection with the practical modalities for the participation of individuals who have the status of victim and witness; that we would also recall the Appeal Chamber’s decision of 11 July 2008 in the Lubanga case, whereby it granted victims the right to submit evidence, thus implying that they can therefore be admitted as witnesses;⁷

20. Considering that, in light of the foregoing, the debate over the issue of the dual status of victim-witness has been virtually closed as far as the Court’s current jurisprudence is concerned, notably through the appeal decision of 11 July 2008 in the Lubanga case;

21. Considering, furthermore, that it is impossible to find witnesses capable of giving a better account of what actually happened than those who experienced such events, whether as perpetrators or as victims; that we strongly doubt that there were

⁴ Decision on the application for participation in the proceedings of Victims a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06, rendered on 20 October 2006 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

⁵ Decision of 23 June entitled *Decision on the application for participation of Witness 166*, paragraphs 18 and 19.

⁶ Article 69(4) of the Rome Statute can be read in this light.

⁷ See footnote 1. See also the Pre-Trial Chamber I’s decision entitled *Decision on certain practicalities regarding individuals who have the dual status of witness and victim*.

bystanders present during the Bogoro attack who were not involved in the events - indifferent to them and safe from attack; and that this is self-evident;

b) Perpetrators:

22. Considering that, as the Defence points out, some of the Prosecution witnesses were previously interviewed as suspects; that whatever the outcome of such interviews, this does not adversely affect their ability to testify to what occurred in Bogoro on 24 February 2003 ;

23. Considering that the established jurisprudence of the *ad hoc* international criminal tribunals accepts testimony from perpetrators, both for the Prosecution and for the Defence,⁸ be they penitent or not, prosecuted or not, convicted or not; that it is therefore for the judges to weigh the credibility of their testimony in order not to allow themselves to be influenced by fabrication or covert settling of scores;

24. Considering that, on this issue, even the suspects, Germain Katanga and Mathieu Ngudjolo Chui, may testify as witnesses; that the victims, sole ethnicity accepted by the Prosecution, the Defence and the Legal Representatives of the Victims, could also be rechristened the “witness ethnicity”, all of them being survivors, whether assailants or assailed; that, in this regard, the dual status of victim-witness could have as its perfect mirror image the dual status of witness-perpetrator;

c) Bystanders:

25. Considering our submission that it would be difficult, if not impossible, to find any mere bystander during the tragedy of 24 February 2003 at Bogoro, unless he or

⁸ ICTR: In the “Media” Trial, witnesses included George Ruggiu and Omar Serushago (convicted persons who pleaded guilty before the ICTR). In the case of *The Prosecutor v. Father Athanase Seromba*, the driver of the bulldozer that destroyed Nyange church, who was sentenced to life imprisonment in Rwanda, was however allowed to give testimony in the trial of the priest prosecuted for the same events. Both the Prosecution and the Defence called him to testify, and he finally testified for the Defence, although the Prosecutor had originally tendered his written statement as Prosecution evidence.

she were not human (a tree or a bird, for example); that it is wishful thinking to believe that, on that fateful day of 24 February 2003, there were in Bogoro persons sufficiently deranged or fortunate – unless they were invisible – to have witnessed all of the killings without having participated therein or been in danger;

26. Considering that it follows from all of the foregoing that it would be futile for anyone to seek to reject a witness on the ground that such witness is also a victim of the events, or that a victim should be rejected on the ground that such victim is also a witness, whether for the Prosecution or for the Defence;

27. Considering further that this same Chamber has indeed granted the dual status of victim-witness, notably to the person whose pseudonym is “Witness 166”;⁹ that it cannot revise its opinion under the influence of a factitious argument completely devoid of logic;

28. Considering that it is therefore appropriate to disregard the challenge by the Defence to the participation in the proceedings of individuals having the dual status of victim and witness;

29. Considering that there is, however, a fourth category of individuals who can give testimony, not on the Bogoro attack *stricto sensu*, as they did not experience it, but on the damage it caused, as subsequently observed at the *locus in quo*; that this category is challenged by the Defence, particularly as concerns the person of Witness 166; that this point will be discussed in the submissions on the admissibility or otherwise of the Prosecutor’s evidence;

III. Admissibility and probative value of the Prosecution evidence

30. Considering that the Defence challenges the Prosecutor’s evidence under a number of heads, namely:

⁹ See the ICC decision of 5 June 2008 referred to in footnote 5.

- the probative value of the summaries of testimony presented by the Prosecutor;
- hearsay, allegedly the basis of certain of the prosecution testimony presented in the case;
- the contemporaneity of the photographs of scars of victims' injuries, which leads the Defence to cast doubt on the link between the said injuries and the attack on Bogoro of 24 February 2003 ;

a) Summaries of Prosecution witness statements (including those of witness-victims)

31. Considering that, without depriving the Prosecutor of the opportunity to defend the relevance of his submissions, the victims wish to reaffirm here that these statements are corroborated by their own statements, which form part of the foundation on which their participation in these proceedings rests;

32. Considering that, on 11 July 2008,¹⁰ the Court decided that henceforth evidence from victims may be admitted to the case-record even prior to the phase of reparations hearings;

33. Considering further that the victims recall article 68(5) of the Rome Statute, which provides that *"where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial [such as the current proceedings], withhold such evidence or information and instead present a summary thereof"*; that the protection of the Prosecutor's witnesses is in itself sufficient justification for the Prosecutor to confine himself for the time being to presenting their testimony only in the form of summaries;

¹⁰ See footnote 1.

b) Hearsay challenge to the testimony of Witness 166

34. Considering that, with regard to the aforementioned Witness 166, the Defence submits that his testimony must be disregarded on the ground that, although he was absent at the time of the events, he drew up a list of deceased persons and multifarious harm to individuals and damage to property in Bogoro as a result of the attack of February 2003;

35. Considering that, without endangering his security, we submit that his testimony is perfectly admissible in light of the capacity in which the witness performed this work, and that this witness is not a random individual, recounting events of which he has little knowledge;

36. Considering that the Chamber has at its disposal materials that will enable it to determine that this was a factual report such as is conducted in the wake of a disaster, whether natural or not;

37. Considering that it is for the Chamber if it so wishes - and it is therefore under no obligation in this regard - to satisfy itself that the Prosecutor has complied with the provisions of article 15(2) of the Rome Statute, which provides that “[t]he Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from...other reliable sources that he or she deems appropriate...”;

38. Considering that, for their part, the victims consider Witness 166 to be a reliable source, and that the Chamber has at its disposal materials that will allow it to take the same view; that, since Witness 166 is under cover of anonymity at this stage in the proceedings, the Defence, through no fault of its own, is not in a position fully to assess the probative value of the witness, because it is not privy to the position held by this witness;

39. Considering that the Defence challenge should simply be viewed as a foreseeable consequence – not prejudicial to the suspects – of the anonymity enjoyed by Witness 166 at this stage in the proceedings; that, if considered necessary, the position of the said witness will be made known at the trial stage, as a result of which it will become clear to the Defence that there is no foundation for its challenge to the admissibility of this testimony, which is certainly not hearsay; and that it is accordingly appropriate to disregard this challenge;

40. Considering, moreover, as stated before, that the Chamber has accepted that Witness 166 may participate in the proceedings;¹¹

41. Considering that the victims recall that the Defence has stated that it has not yet been able to visit Bogoro; and that the destruction that occurred in this village as a consequence of the attack of February 2003 is, however, indisputable;

c) The contemporary nature of the photographs presented by the Prosecution

42. Considering that the challenge to the contemporary nature of the photographs produced by the Prosecution is not logical, in that the date of the investigations cannot coincide with that of the events; and that the said photographs were taken after the event;

43. Considering that it is inconceivable that, in the heat of the fray on 24 February 2003 in Bogoro, anybody would have paused to take photographs to be used as evidence in a future trial before the Court;

44. Considering that the victims further presume that the Prosecutor is in possession of material that establishes a nexus between the impugned photographs and the events of Bogoro; that at the trial stage he will be able to produce that material,

¹¹ See footnote 6.

putting the Trial Chamber judges in a position to form a more definite view; that a debate of this kind is not warranted at the current stage of the proceedings;

45. Considering that the victims would further recall that the harm exists, that the facts that caused such harm have been proven; that they are not presenting hearsay but what they experienced in the flesh and in their hearts; and that they cannot accept that the dates on which the Prosecutor took the photographs during his investigation be used to construct a specious argument that seeks to reject any causal link between the alleged conduct of the suspects and its consequences;

46. Considering that this objection should be dismissed as inappropriate at this stage of the proceedings;

47. Considering that, in principle, we are at one with the Legal Representative of Victims a/0333/07 and a/0110/08, who has sufficiently argued that, in relation to evidence, there is a considerable difference between such established legal notions as “admissibility”, “credibility”. “relevance”, “probative value”, “validity”, etc.; and that we shall therefore not revisit this debate, but will rather note that the point at issue here is linked to the relevant provisions governing these proceedings;

48. Considering that, with regard to the current stage of the proceedings, the Rome Statute is clear and precise, stating in article 61(5): “...*the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged*”; that what is involved here is a “first sight” (*prima facie*) analysis, which enables the Chamber to determine whether there are grounds for initiating trial proceedings, or whether it should be concluded that the Prosecutor does not have sufficient evidence to charge the suspects in question;

49. Considering that the current stage in the proceedings is similar to the investigation stage in the Romano-Germanic system, at the end of which the proceedings may be terminated, but without, however, fully discharging the person

prosecuted, as would an acquittal vested with *res judicata* authority; that, moreover, when a person is committed for trial by a criminal Chamber, this does not automatically make such person guilty;

50. Considering that the task now before this Chamber, a repository of the confidence of that part of the international community which has agreed to accept the jurisdiction of the Court, is to:

- analyse the evidence submitted to it and the submissions made thereon;
- form its intimate conviction; and
- determine whether, notwithstanding the presumption of the innocence of any person before the Court until finally convicted, it appears possible in the Chamber's view that the suspects may have been guilty of the acts imputed to them by the Prosecution;

IV. The criminal responsibility, both individual and joint, of the two suspects

51. Considering that article 25(3) of the Rome Statute contains very precise provisions regarding individual responsibility arising from criminal co-perpetration; that this was the basis for the joinder of the proceedings against Germain Katanga and Mathieu Ngudjolo Chui;¹² that the victims seek to show here that there are substantial grounds to believe that the two suspects may be held criminally responsible, and to set out the basis for the legitimacy of their suspicions in the following paragraphs;

52. Considering that it is futile for the suspects to attempt to deny the conspiracy between them, and the conspiracies between the troops under their command, to commit the deadly attack on Bogoro of 24 February 2003;

¹² Decision to join the cases of Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, rendered by Pre-Trial Chamber I.

53. Considering that, regarding the issue of the alleged lack of co-participation/co-perpetration between the acts of the two suspects, we fully subscribe to the argument made by the Legal Representative of victims a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08 and a/0016/08; that the jurisprudence in the *Stakic* case,¹³ inappropriately cited by the defence of Germain Katanga, on the contrary buttresses our position on this point, as was abundantly demonstrated at the hearing;

54. Considering that we submit in support of the criminal responsibility of the suspects that they had established a chain of command that enabled them to control their troops and that this chain of command was never broken; that the said troops acted not only with their knowledge but also on their express orders; that, furthermore, they did not punish the troops for their acts of violence, but instead expressed their satisfaction in this regard; that, furthermore, in this instance they displayed neither remorse nor the slightest compassion for their victims;

a) *The chain of command within the FRPI-FNI coalition*

55. Considering that the FRPI-FNI coalition acted in Bogoro as a modern armed group, having at its disposal weapons, ammunition and modern means of communication (Motorola two-way radios and long-distance “phonies”), distributed to them by their leaders;

56. Considering that it has been shown that, from Zumbe, using a Motorola-brand two-way radio, Mathieu Ngudjolo contacted his various camp commanders in camps located some 15 kilometres from one other;

57. Considering that it has also been shown that, from his base, the BCA in Aveba, Germain Katanga likewise contacted by Motorola two-way radio both his various troop commanders along the various lines of assault during the Bogoro attack and his allies led by Mathieu Ngudjolo;

¹³ Decisions rendered in the *Stakic* case by the International Criminal Tribunal for the former Yugoslavia on 31 July 2003 by the Trial Chamber and on 22 March 2006 on appeal.

58. Considering that, thanks to these modern means of communication, both Germain Katanga and Mathieu Ngudjolo Chui thus had the means to control the execution of the common plan of their coalition;

59. Considering that, on the basis of article 25(3)(a) of the Statute and the warrant for the arrest of Germain Katanga, the Prosecutor maintains that two modes of liability can be applied to this case, namely co-perpetration and indirect perpetration; that the Prosecutor alleges perpetration as his main charge and indirect perpetration in the alternative;¹⁴

60. Considering that it should first be noted that article 25(3)(a) refers to three forms of perpetration: direct perpetration, co-perpetration and indirect perpetration; that article 25(3)(b) goes on to explain the relevant modes of direct and indirect perpetration, namely “orders, solicits or induces”, which fall under the head of co-perpetration;

61. Considering that, in the view of the Prosecutor, which we share, co-perpetration involves:

- a material element, namely de facto or de jure control over the armed formation that carried out the crime ;
- a mental element, the intent to pursue a common goal, which is clearly demonstrated by the convergent deployment of the attacking forces on the ground, as described both by the Prosecutor and the Legal Representatives of the victims;

b) The material element

62. Considering that we submit that the entire strategy to converge on and encircle Bogoro employed by the FRPI-FNI coalition was not executed *ex nihilo*, but because it had been carefully thought out and was the result of express agreements;

¹⁴ Document containing the charges (article 61(3)(a) of the Statute)), No ICC-01/04-01/07-649-Anx 2A, 26/06/2008

63. Considering that Mathieu Ngudjolo Chui and Germain Katanga were active both **upstream** (planning, organising and giving orders) and **downstream** (supervising and monitoring results as evidenced by their **joint arrival** on the ground following the material perpetration by their troops acting in concert);

64. Considering that the said troops could not have **concerted their actions** without the supervision of their respective leaders and **could not have been joined by their leaders in concerted fashion** if there had not been a common plan and organisation (see statement by Witness 250,¹⁵ who testified to seeing them 45 minutes after the massacres, celebrating the event – and thus implicitly congratulating those who had acted on their behalf);

65. Considering further that the chain of command is a **two-way authority and accountability system** linking the superior to the lowest level of the armed group; that it is also a **hierarchy of commanders**, who take decisions within the connected functional formations and units;¹⁶

66. Considering that this can be verified by the role played by the four commanders of the various lines of assault during the Bogoro attack, who were subsequently joined by Mathieu Ngudjolo and Germain Katanga, controlling operations with their two-way radios;

67. Considering that the chain of command is a **pre-emptive instrument of command** that enables the commander to **obtain information, give directions and oversee operations**, thus demonstrating his **paramount responsibility**;¹⁷

¹⁵ Documents DRC-OTP-0177-301 and DRC-OTP-177-302, statements of witness 250.

¹⁶ Report of the Somalia Commission of Inquiry published on 02 July 1997 by the Canadian Ministry of National Defence.

¹⁷ Idem.

68. Considering that the Defence of Germain Katanga has not shown that the chain of command failed at any level whatsoever, so as to be able to claim any possible difficulty of control over the orders given;

69. Considering that in its submissions the Defence was completely unable to show that there was a break in the chain of command or improper execution of the orders given to the troops in support of its assertion that Germain Katanga was not able, or no longer able, to control the most junior of his soldiers; that the Defence was even unable to explain what might have been the origin, time and nature of this purported break in the chain of command;

70. Considering that the order was clear and unambiguous: **“WIPE OUT Bogoro!”**; that indeed, on the eve of the attack, Witness 157, a former member of the militia from one of the four lines of assault, stated that one of the leaders, Commander Kute, told them during a rally, in the presence of Mathieu Ngudjolo Chui, that Bogoro had to be wiped out;¹⁸

71. Considering that at no point was it submitted that the various commanders directing the four assault groups during the attack on Bogoro had received any instruction to the contrary; that, on the contrary, from the various commanders of the four lines of assault to the most junior participants, they were required and able fully to **coordinate and synchronise** their actions; that the four commanders could likewise be seen converging and arriving simultaneously at the scene of the attack; that the chain of command was thus fully operational within each group of troops and perfectly coordinated within the coalition;

72. Considering that the facts as reported by a number of witnesses clearly show that Germain Katanga and Mathieu Ngudjolo Chui committed the alleged crimes at three levels:

¹⁸ Document DRC-OTP-1007-1089, para. 37: statement of witness 157.

- by themselves directly (*inter alia* by recruiting the child soldiers who were the bodyguards of Germain Katanga);
- through their respective FRPI and FNI troops;
- and, additionally, through the troops of the entire military/political FRPI-FNI coalition which they led;

73. Considering that both Germain Katanga and Mathieu Ngudjolo Chui encouraged and acquiesced in the acts committed by their troops during the attack on Bogoro, in particular by meeting there 45 minutes afterwards without meting out the slightest sanction to their troops, the authors and actors in what is now sought to be portrayed as excesses evidencing a break in the chain of command;

74. Considering that the two suspects meted out no sanction whatsoever in the wake of the massacres and other crimes perpetrated by their troops: no reprimand, no rebuke, no arrest – nothing – no show of displeasure, NOTHING AT ALL!

75. Considering, moreover, that they even celebrated “their victory”!¹⁹ that this abundantly demonstrates their original criminal intent;

c) The mental element of the crimes (mens rea)

76. Considering that Germain Katanga shared a common goal with the commanders directing the the four lines of assault on the ground and with Mathieu Ngudjolo, his counterpart in the FNI; that he made this goal clear through preparatory meetings held at his residence, which served as his command headquarters in Aveba ;

77. Considering that the individual responsibility of Germain Katanga in respect of these crimes, just as with that of Mathieu Ngudjolo Chui **cannot be denied**, for, in effect, neither of them prevented or halted the offences, still less punished the perpetrators, who were under their authority and to whom they had given the clear instruction to “WIPE OUT BOGORO”;

¹⁹ See previous footnote.

78. Considering that, on the contrary, they encouraged them by providing them with weapons and communication equipment, by attending meetings to prepare for the attack, by encouraging them to utter slogans hostile to the Hemas of Bogoro, and to sing war-chants proclaiming that they should be driven from their homes and pillaged;

79. Considering that, all through these preparatory meetings, they did not ask their troops not to touch civilians; that at no point was such an instruction issued to the members of the armed forces on the basis of their responsibilities at a given level of the hierarchy;

80. Considering that both suspects knew the date of the attack; that, moreover, they had chosen it, jointly with the other warlords involved; that, *a fortiori*, they had made no provision for sparing and/or protecting civilians;

81. Considering that, in our submission, *Germain Katanga and Mathieu Ngudjolo Chui were thus the instigators and, ipso facto, co-perpetrators of the crimes charged; that they therefore bear criminal responsibility equal to, if not greater than, that borne by those who physically committed the crimes, over whom they had unquestioned authority*;

82. Considering that, on this issue, we challenge the argument put forward by Germain Katanga's Defence in respect of his youth; that to plead the youth of the suspect at the time of the events is no defence, as his young age was **no impediment at all to his leading** an armed militia, a fact that he moreover **does not dispute**; that this is evident in the transcript of the interview of 20 January 2006, which has been entered into the record of the instant case,²⁰ wherein, furthermore, he refers to Bogoro as having been one of his theatres of operation;

²⁰ Document No DRC-OTP-1016-0150, transcript of interview of Germain Katanga, 20 January 2006.

83. Considering that it is irrelevant and absolutely illogical to cite the numbers of the FNI force at the time of the events, namely 1400 individuals, including 300 FRPI troops, as Germain Katanga's Defence sought to do, in order to suggest that, at the age of 24, he could not control the acts of his men or those of the FNI troops which were part of the coalition;

84. Considering that the victims have described to the Chamber the circumstances under which Germain Katanga was vested with the power of command over the FRPI, in the wake of the death of his predecessor, Kandro, who was killed during the attack on Nyakunde;

85. Considering that one witness²¹ stated that Germain Katanga had been chosen by the elders of the community; that the advice of the elders was highly valued by the Lendu militia members, who therefore owed him fealty because he had been appointed to take over the leadership of the Lendu resistance against the traditional Hema enemy, the UPC;

86. Considering that other warlords were similarly designated within their respective communities to lead their militias; that this was the case for the Ngiti commanders known as Yuda, Darc, Matata alias Cobra, etc.;²²

87. Considering that the persons mentioned by the victims are still alive and accessible, in particular the *great Lendu fetish priest Bernard Bayongo Kakado*, who is being held in an FARDC detention facility; that it is therefore easy to ascertain the veracity of their assertions;

88. Considering that nowhere is it indicated that Germain Katanga, or anyone else who could have exercised authority over him, complained that he was too young to hold this position; that not even his Defence risked making such a submission in support of its fallacious defence of youth;

²¹ See document DRC-OTP-0173-0592.

²² Idem.

89. Considering that Germain Katanga was moreover not overwhelmed when faced with a *fait accompli* in the aftermath of the Bogoro attack, having exercised unfettered command over his troops *from the time of his designation until the massacre of 24 February 2003*;

90. Considering that, if Germain Katanga *decided to negotiate and form an alliance with the FNI, it is because he knew that he had authority over troops, the FRPI, which gave him standing in talks with the FNI militia commanded by Mathieu Ngudjolo Chui*;

91. Considering that it follows that Germain Katanga and Mathieu Ngudjolo Chui must answer both for their individual responsibility and for their command responsibility for failing to take the necessary and reasonable measures, at least after the fact, to sanction the conduct of their militias after the killings in Bogoro;

92. Considering that, with regard to the causal link between the damage in respect of which evidence has been submitted by the Prosecutor and the events of February 2003 for which the suspects are charged, the Chamber has at its disposal sufficient material to make a determination, and in particular the suspect Germain Katanga's own words, whose confidentiality it has lifted, denying the Defence application of 7 July 2008 and reclassifying them as public;²³

93. Considering that, in light of the foregoing, the victims consider that they are entitled to summarise the issue at stake at this confirmation hearing by inviting the Chamber to ascertain whether there are in this case *sufficient substantial grounds to believe that*:

- *in February 2003, in the Congo, Germain Katanga was the leader of an armed militia called the FRPI*;
- *in February 2003, in the Congo, Mathieu Ngudjolo Chui was the leader of an armed militia called the FNI*;

²³ Decision by Pre-Trial Chamber I of 11 July 2008, rendered in public session.

- *on 24 February 2003 these two militias attacked the village of Bogoro, concurrently, without fighting one other, and in fact jointly;*
- *Messrs Germain Katanga and Mathieu Ngudjolo Chui went to the locus in quo on that same day and expressed their agreement, indeed their satisfaction;*
- *at the very least, Messrs Germain Katanga and Mathieu Ngudjolo Chui did nothing to prevent or punish these acts;*
- *Messrs Germain Katanga and Mathieu Ngudjolo Chui had the means to prevent these acts and/ or to punish them;*
- *this attack is punishable and falls as such within the jurisdiction of the Chamber;*

94. Considering that there are undoubtedly a number of other similar issues that the Chamber might wish to address in the wake of this confirmation hearing;

95. Considering that, for their part, in the interests of justice, in response to all the questions posed above, the victims offer but one clear word in answer, vibrant with the experience of their suffering: YES!

96. Considering that the victims making these written submissions recall – not that they need to do so - the unspeakable harm suffered by them:

- 7 suffered physical, bodily harm (bodily injury): a/0043/08, a/0051/08, a/0056/08, a/0066/08, a/0073/08, a/0076/08, a/0088/08;
- 16 physically lost close relatives: a/0327/01, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, a/0056/08, a/0066/08, a/0073/08, a/0076/08, a/0078/08, a/0109/08, a/0100/08;
- 36 suffered material loss as a result of the burning and destruction of their houses, fields, livestock and other physical property: a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0039/08, a/0043/08, a/0044/08, a/0046/08; a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08,

a/0073/08, a/0076/08, a/0077/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08;

- Thus, all 40 victims making their views known through these written submissions have suffered mental harm as a result of physical, financial, material and/or family injury as submitted;

97. Considering that one of the fundamental functions of justice is to respond to the needs of the victim and to protect his or her interests; that, in order to establish the needs of the victims, account must be taken of the physical, psychological, material and social harm suffered by them, and appropriate procedures for meeting their needs in these areas must be envisaged;

98. Considering that the needs and interests of the victims must be further taken into consideration at all stages of criminal justice proceedings; and that it is for this reason that, throughout the confirmation hearing and in these written submissions, the victims have endeavoured to present their concerns to the Court;

99. Considering that the victims expect of this Chamber:

FOR THESE REASONS:

- that it will confirm the charges against Messrs Germain Katanga and Mathieu Ngudjolo Chui;
- and that it will commit them for trial so that they may legitimately defend themselves before the whole world so that justice may be done.

AND JUSTICE SHALL BE DONE.

Maître Carine Bapita Buyangandu

[signed]

Maître Carine Bapita Buyangandu
on behalf of

Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08,
a/0044/08, a/0046/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08,
a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08,
a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08,
a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 and
a/0109/08.

Dated this 22 July 2008

At The Hague, the Netherlands