

Confirmation of Charges Hearing – Open Session  
Ruling

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1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/07

4 Confirmation of Charges Hearing - Open Session

5 Tuesday, 15 July 2008

6 The hearing starts at 9.00 a.m.

7 COURT USHER: All rise. Please be seated.

8 PRESIDING JUDGE KUENYEHIA: Can the security please bring in the  
9 suspect.

10 Good morning, everyone. Court Officer, could you please call the  
11 case.

12 COURT OFFICER (interpretation): Situation in the Democratic  
13 Republic of the Congo, case of the Prosecutor versus Germain Katanga and  
14 Mathieu Ngudjolo Chui, case number ICC-01/04-01/07.

15 PRESIDING JUDGE KUENYEHIA: Thank you. I would like to say that  
16 as provided for in the decision implementing the Appeals Chamber  
17 judgement on -- concerning languages, even though Mr. Germain Katanga is  
18 not here, Lingala interpretation is still being provided in accordance  
19 with Regulation 61(1)(d) of the Regulations of the Registry. The audio  
20 recording shall be made available to Mr. Katanga. The interpretation is  
21 also available, of course, to Mr. Mathieu Ngudjolo Chui if he so wishes.

22 This is a continuation of the confirmation hearing that began on  
23 the 27th of June, and I note that the same parties and participants are  
24 present in court today.

25 Before moving ahead with this morning's agenda, which is the

1 closing statement by the Prosecution and the Legal Representatives for  
2 victims, the Chamber notes that yesterday, on the 14th of July, the  
3 Office of Public Counsel for Victims filed an urgent request for leave to  
4 present its closing statement on behalf of the victims originally  
5 represented by Mr. Jean Chrysostome Mulamba Nsokoloni on Wednesday 16th  
6 of July, 2008, and not today as currently scheduled in order to  
7 appropriately represent them. The Chamber notes that the Office of  
8 Public Counsel for Victims received all the documents on the 3rd of July  
9 which is about two weeks ago. The Office of Public Counsel for Victims  
10 made its presentation on the evidence of the Prosecution on the 7th of  
11 July. Additionally, the hearings have lasted for about three or four  
12 hours per day and therefore the Chamber sees no reason why the Office of  
13 Public Counsel for Victims is not prepared to present its closing  
14 statements today.

15 Therefore, the Chamber rejects the request of the Office of  
16 Public Counsel for Victims to make its closing statement tomorrow. All  
17 Legal Representatives of Anonymous and Non-Anonymous Victims shall make  
18 their closing statements today within the two hours allocated to them in  
19 their schedule for the confirmation hearing.

20 I now give the floor to the Prosecution for its closing  
21 statements.

22 MR. MacDONALD: Good morning, Madam President, your Honours, dear  
23 colleagues of the Defence and Legal Representatives of the victims.

24 The Prosecution will now make its closing statement or  
25 submissions.

1           Madam President, your Honours, the Prosecution's evidence filed  
2     at this confirmation hearing establishes substantial grounds to believe  
3     that Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible  
4     of the crimes as charged in the Document Containing the Charges.

5           During my closing statement I will address the following topics:  
6     First, the contextual elements of the crimes such as the existence of an  
7     armed conflict and its widespread or systematic nature. Second, the  
8     implementation of the common plan and the crimes committed during the  
9     attack on the village of Bogoro. And finally, I will address the  
10    criminal responsibility of Germain Katanga and Mathieu Ngudjolo Chui.

11           Let me first start with the contextual elements of the crimes.

12           The Prosecution has demonstrated that from at least July 2002 to  
13    August 2003 a protracted armed conflict took place in Ituri. This armed  
14    conflict involved a number of militia groups, including, but not limited  
15    to, the FNI/FRPI and the UPC/FPLC.

16           The Prosecution's evidence shows that the FNI/FRPI had an  
17    internal structure that allowed both groups to act under responsible  
18    command with operational and disciplinary powers. In other words, the  
19    FNI/FRPI were both organised armed groups.

20           Your Honours, the Prosecution's evidence also demonstrates that  
21    both the FNI and the FRPI resorted to armed violence and this violence  
22    was exercised throughout the relevant time period of the Document  
23    Containing the Charges. The evidence also demonstrates that the  
24    FNI/FRPI, as did the UPC, controlled part of the territory of Ituri,  
25    which enabled them to plan and carry out concerted attacks.

1           The Prosecution's evidence established that Germain Katanga and  
2   Mathieu Ngudjolo were aware of the existence of the armed conflict as the  
3   evidence demonstrates they both took part in this conflict. Your  
4   Honours, as an example of this awareness, I refer to the 18th of March,  
5   2003, peace agreement called in French "Accord de Cessation des  
6   Hostilities en Ituri," which can be found at DRC-OTP-0043-0201. Germain  
7   Katanga and Mathieu Ngudjolo both signed this peace agreement, and I  
8   quote in French: (Interpretation) "The parties agree to a complete  
9   ceasing of hostilities all over Ituri District."

10           (In English) Madam President, your Honours, the Prosecution's  
11   evidence demonstrates that the plan, the orders, and the execution of the  
12   common plan to attack the village of Bogoro was itself part of the  
13   strategy of the FNI and the FRPI to gain ground in this larger, prolonged  
14   conflict. As the evidence clearly shows, one of the objectives, one of  
15   the reasons to wipe out Bogoro was to dislodge the UPC from Bogoro and to  
16   open up the road between Bunia and Aveba. As referred to in French, it  
17   was to (interpretation) to open up (in English) the FNI forces based in  
18   Zumbe and the FRPI forces based in the Walendu-Bindi collectivite.

19           Your Honours, the Prosecution's evidence also demonstrates that  
20   the crimes committed at Bogoro were closely related to the ongoing  
21   conflict.

22           Let me now address the characterisation of this prolonged armed  
23   conflict. The Prosecution has presented evidence of the involvement of  
24   the governments of Uganda and Rwanda in the conflict in Ituri. The  
25   Prosecution reiterates that for the purpose of this case, it is

1 immaterial whether the conflict is characterised as non-international or  
2 international. The war crimes alleged in the Document Containing the  
3 Charges describe conduct equally prescribed under the Statute, whether of  
4 an international or non-international character.

5 Now, regarding the widespread or systematic nature of the  
6 attacks, the Prosecution's evidence also demonstrate that the conflict  
7 was widespread. No localities or collectivites of the Ituri District  
8 were spared. Civilians everywhere were the victims of crimes. Now, the  
9 attacks that took place in Ituri were not random or isolated attacks.  
10 The attacks were also systematic. They were planned and executed  
11 according to the wishes of the respective leaders of the militia groups  
12 involved. The following attacks are examples of the widespread or  
13 systematic nature of the attacks that took place during the conflict in  
14 Ituri and which involve the FNI or FRPI or either groups separately. The  
15 Nyakunde attack of September 2002. The attack on Bogoro of February  
16 2003, the object of this case. The attacks on Mandro and Bunia of March  
17 2003. The attack on Drodoro of April. And after the fall of Bunia in May  
18 2003, the attacks on Tchomia, Kisangani, and Katoto are also other  
19 examples of the large scale nature of the attacks and the number of  
20 civilians that were the targets of these attacks.

21 Your Honours, again as indicated earlier, Germain Katanga and  
22 Mathieu Ngudjolo were both aware that the crimes committed during the  
23 joint FNI/FRPI attack on Bogoro were part of a widespread or systematic  
24 attack on the Hema population. The Prosecution presented evidence of the  
25 awareness of both of them. One of the purposes of this evidence was to

1 demonstrate that both suspects were aware of the existence of the ongoing  
2 conflict and that the underlying attacks of this conflict were widespread  
3 or systematic.

4 I will now address the implementation of the common plan and the  
5 crimes committed during the attack on Bogoro.

6 Madam President, your Honours, the Prosecution's evidence  
7 establishes substantial grounds to believe that Mathieu Ngudjolo and  
8 Germain Katanga planned and ordered FNI and FRPI soldiers under their  
9 command to launch a joint attack against the village of Bogoro. The  
10 common plan consisted of attacking indiscriminately both civilians not  
11 taking part in the hostilities and the UPC soldiers located in a camp  
12 inside Bogoro.

13 The totality of the evidence tendered by the Prosecution  
14 demonstrates that the joint FNI/FRPI attack on Bogoro was perpetrated  
15 pursuant to a well-conceived plan, the authors of which were Germain  
16 Katanga and Mathieu Ngudjolo.

17 In late 2002 and early 2003, as you have heard during the  
18 Prosecution's presentation, Germain Katanga travelled to Beni to obtain  
19 weapons and ammunition. During that same time period, commanders of the  
20 FNI and FRPI met at Katanga's residence in Aveba. Mathieu Ngudjolo  
21 designated Commander Boba Boba to lead an FNI delegation from Zumbe to  
22 Aveba to attend these meetings with Germain Katanga and other FN -- FRPI,  
23 sorry, commanders.

24 The plan of Katanga and Ngudjolo, as well as the other commander  
25 was clear and unequivocal. The plan was to erase or wipe out the village

1 of Bogoro.

2 Once the Aveba meetings were concluded, the evidence also  
3 demonstrates that the FNI delegation, informed of the plan to attack  
4 Bogoro, returned to their bases in the Ezekere groupement. They also  
5 brought with them ammunition provided by Katanga.

6 The FRPI commanders who had attended, who had participated in the  
7 Aveba meetings, also returned to their respective camps. Commander  
8 Bahati, Ngudjolo's proxy at the planning meetings, returned a few days  
9 before the attack to Zumbe, Zumbe being Ngudjolo's camp, with the written  
10 plan of the attack.

11 Shortly before the attack, FRPI commanders were also summoned  
12 back to Katanga's residence to prepare for the attack. Katanga informed  
13 the commanders again of the details of the Bogoro attack, and the FRPI  
14 commanders were also provided with ammunition in preparation for the  
15 attack, and then returned to their bases.

16 I do not intend to describe again all the evidence of the  
17 movements of the FNI and FRPI forces prior to the attack because you have  
18 heard our presentations, and you have seen and can appreciate our visual  
19 animation in support of this presentation. But I do want to draw your  
20 Honours' attention to the following key points: First, the day before  
21 the attack, FNI and FRPI soldiers travelled to different meeting points.  
22 At these meeting points, the details of the plan of attack on the orders  
23 of Katanga and Ngudjolo were conveyed to the FNI and FRPI soldiers.

24 Second, after being informed of the details of the plan of  
25 attack, the FNI and FRPI soldiers were then divided in different groups,

1 and they walked to take up position on the outskirts of Bogoro. At this  
2 stage Bogoro was completely surrounded.

3 And third, the FNI and FRPI soldiers entered Bogoro. They came  
4 from all four points of the compass and encircled Bogoro. This fact  
5 alone is the best indicator of the level of preparation and coordination  
6 that went into the planning of the attack. This fact alone, your  
7 Honours, indicates the necessary level of preparation that went into the  
8 organisation of the movement of over 1.000 FNI and FRPI soldiers. It had  
9 to be a carefully thought-out plan, because the Lendu and Ngiti had twice  
10 before tried to overtake Bogoro without any success. This time, they  
11 took all the necessary measures to be successful.

12 I will now summarise the evidence presented regarding the attack  
13 itself.

14 Your Honours, at the beginning of the confirmation hearing the  
15 Prosecution clearly indicated that it was relying on the core evidence  
16 for the purpose of its oral presentations. The Prosecution would like to  
17 recall that any document or statement of a witness cannot and should not  
18 be analysed in isolation. Documents or statements have to be analysed  
19 against the entirety of the Prosecution's list of evidence.

20 Now, I do not intend to revisit the evidence presented by the  
21 Prosecution during this confirmation hearing in minute detail, but it  
22 suffices to mention in our closing statement that the evidence of both  
23 former FNI and FRPI soldiers and the victims' accounts confirm or  
24 otherwise corroborate each other on a number of key facts regarding the  
25 execution and the crimes committed during the attack.

1           The Prosecution's evidence establishes substantial grounds to  
2     believe that in the early morning hours of 24 February 2003, Mathieu  
3     Ngudjolo and Germain Katanga and their respective soldiers launched a  
4     joint, indiscriminate attack against the village of Bogoro.

5           As the villagers of Bogoro awakened to gunfire at around 5.00  
6     p.m., over 1.000 soldiers of the FRPI and the FNI under the command of  
7     Katanga and Ngudjolo entered the village with one clearly communicated  
8     and agreed goal, to erase the village.

9           As the attackers flowed, and as demonstrated by the evidence, as  
10    the attackers flowed to the centre of the village, houses were burned,  
11    sometimes with civilian occupants still inside. Property was pillaged.  
12    The civilians who tried to flee found the escape routes from the village  
13    to be effectively blocked by the attackers. FNI and FRPI forces were  
14    simply everywhere. Many civilians were killed either by bullet or knife.  
15    Some were captured, others suffered injuries such as bullet wounds. Some  
16    were abused sexually or otherwise.

17          The Prosecution's evidence demonstrates from different sources  
18    that at least 200 children, women, elderly, and civilian men were killed  
19    in the attack. The Prosecution's evidence demonstrates that women were  
20    captured at Bogoro. They were sexually enslaved, after which they were  
21    repeatedly raped, threatened with death by the combatants. Some women  
22    were forcibly taken to military camps, and once there they were sometimes  
23    given as a wife to their captors or kept in camp's prison, prisons that  
24    were a simple hole dug in the ground. The women detained in these  
25    prisons were repeatedly raped by soldiers and commanders alike, and also

1 by soldiers who were sometimes punished and sent to prison.

2 Your Honours, the evidence demonstrates how civilians were  
3 detained in a room filled with dead bodies at the Institut de Bogoro  
4 located at the centre of the UPC camp, which was to be a safe haven for  
5 civilians as agreed in case of an attack.

6 The next day, FNI and FRPI soldiers forced Witness 268 to lure  
7 other civilians out of their hiding place in order for the soldiers to  
8 kill them.

9 The evidence also demonstrates how soldiers violated the dignity  
10 of other victims. We provided such an example. Witness 287's children  
11 were shot in her presence. FNI/FRPI forces then took part of her clothes  
12 off, stripping them with a knife. She was then forced to walk half-naked  
13 down the main road of Bogoro at which time she walked by who she thinks  
14 was Ngudjolo, who was entering the village from the Bunia road. Remember  
15 also Witness 279 on that point. He mentions also Mr. Ngudjolo walking  
16 down the main road of Bunia.

17 After the FNI and the FRPI soldiers crushed the UPC camp at the  
18 centre of the village, Germain Katanga and Mathieu Ngudjolo celebrated  
19 their victory under the shade of the mango trees at the roundabout. The  
20 bodies of women, children, and elderly victims could be seen. They were  
21 around.

22 Evidence also demonstrates that Ngudjolo himself went to the  
23 institute -- the institute, sorry, and would have entered that room where  
24 those bodies were located or scattered.

25 Madam President, your Honours, the Prosecution would like to

1 pause here and state the following in response to some of the allegations  
2 that were presented yesterday by the Defence for of Mr. Mathieu Ngudjolo.  
3 The Defence team of Mathieu Ngudjolo contends that the list of victims  
4 prepared by Witness 166 is based on hearsay and accordingly is not  
5 reliable.

6 Madam President, your Honours, according to all the evidence, all  
7 the evidence on the Prosecution's list, is there any doubt as to whether  
8 there are substantial grounds to believe that a large number of civilians  
9 were killed? Is there any doubt that civilians were the target of the  
10 attack, that the village of Bogoro was pillaged, that houses were set on  
11 fire and destroyed?

12 UN human rights officers saw the destruction with their own eyes,  
13 while Commander Dark, a sub-commander under the orders of Katanga, was  
14 keeping the town as corroborated by insider witnesses such as Witness  
15 250, 28, 157, 279, and 280.

16 Madam President and your Honours, is there any doubt as to  
17 whether there are substantial grounds to believe that witnesses 132 or  
18 287 suffered bullet wounds during the attack as described in their  
19 statements, as evidenced by the pictures taken in the last year by the  
20 Office of the Prosecutor?

21 Like we say in French, (interpretation) to put the question and  
22 answer it.

23 (In English) In regards to the pictures of the Institut de  
24 Bogoro. They were presented for one purpose, for this Chamber to  
25 appreciate the size of the building, the nature of the landscape around

1 the institute, and to also appreciate the size of the first classroom  
2 where Witness 268 was detained with bodies of dead civilians lying around  
3 him.

4 The Defence team of Mathieu Ngudjolo also challenges the  
5 admissibility and/or probative value of the summaries of the statements  
6 of witnesses 243 and 271 in particular. They say that these summaries  
7 are inadmissible because they are not corroborated. The Prosecution  
8 would like to recall that the two summaries refer to accounts of sexual  
9 violence suffered by these two victims. The Prosecution would also like  
10 to recall Rule 63, paragraph (4) of the Statute, and I quote: "Without  
11 prejudice to Article 66(3), a Chamber shall not impose a legal  
12 requirement that corroboration is required in order to prove any crime  
13 within the jurisdiction of the court, in particular, crimes of sexual  
14 violence."

15 Consequently, corroboration is not a legal requirement for the  
16 admissibility of evidence. The Prosecution contends that the position of  
17 the Defence that predicates the admission of a summary of a witness on  
18 the condition of corroboration is legally incorrect.

19 Your Honours, the Prosecution evidence also demonstrates that  
20 both Lendu and Ngiti children under 15 years of age, trained at FNI and  
21 FRPI camps, took part in the attack on Bogoro. Child soldiers under the  
22 age of 15 were an integral part of the combatants during the attack on  
23 Bogoro.

24 Again, in response to arguments presented, the Prosecution states  
25 that it has respected Article 54(1)(b) of the Statute when taking the

1 statements of these child soldiers. And let's not forget, Ituri was and  
2 is still a conflict zone. We do not live -- and sorry, inhabitants who  
3 do not live in the comfort that we can appreciate here in Europe. The  
4 conditions prevailing in Ituri are certainly not the same. The  
5 Prosecution has interviewed these witnesses in the presence of a legal  
6 guardian or with the consent of a legal guardian when available.

7           Witness 28's parents are either dead or cannot be found, and the  
8 Prosecution still respected the conditions of Article 54(1)(b), making  
9 sure, considering the age, that also a psychologist, or at least someone  
10 with such expertise, was present during at least the first interview.

11           Now, we will supplement, Madam President and your Honours, in our  
12 written submissions and respond to the other topics and arguments  
13 addressed either on this issue or other issues.

14           Madam President, your Honours, the Prosecution would also like to  
15 recall that Germain Katanga and Mathieu Ngudjolo both admitted their  
16 responsibility in the attack on Bogoro. And I will quote Witness 160  
17 states, and I quote in French: (Interpretation) Germain Katanga said  
18 that he had given the order to attack Bogoro to his junior commander. He  
19 boasted of the success because he had planned it as the supreme  
20 commander."

21           (In English) This passage can be found at DRC-OTP-0153-0006, at  
22 paragraph 96 of the statement.

23           There is also the public UN Special Report on the events in Ituri  
24 which states, and I quote: "The Lendu FNI Chief of Staff at the time,  
25 Mathieu Ngudjolo, who admitted to having organised the attack on Bogoro

1 and Mandro, told MONUC human rights investigators that his forces carried  
2 out the military operations in order to dislocate UPC military forces  
3 which had been shelling the Lendu villages around Bogoro for several  
4 months."

5 Now, this report can be found at DRC-OTP-0129-0267, at page 0288.

6 The keywords in this passage, and again in response to arguments  
7 raised yesterday, are the following: Mathieu Ngudjolo told MONUC human  
8 rights investigators, told and the identity of the people he told to in a  
9 UN public report accessible on the web.

10 Let me now address the final topic, which is the criminal  
11 responsibility of Germain Katanga and Mathieu Ngudjolo.

12 Your Honours, the Prosecution's evidence presented during the  
13 confirmation hearing establishes substantial grounds to believe that  
14 prior to the attack on Bogoro, Germain Katanga was the highest ranking  
15 commander of the FRPI, and Mathieu Ngudjolo was the highest ranking  
16 commander of the FNI based in Zombe.

17 The evidence has demonstrated that Katanga and Ngudjolo planned  
18 to launch an indiscriminate attack on the village of Bogoro and that  
19 according to the common plan the whole village had to be wiped out or  
20 erased. Katanga and Ngudjolo directed their respective subordinates in a  
21 coordinated manner in order to jointly implement the common plan. The  
22 level of coordination in the implementation was such that in a few hours  
23 the attack was over, as the FRPI and the FNI soldiers had taken control  
24 of the village of Bogoro and were already engaging in the crimes as  
25 charged in the Document Containing the Charges.

1           The Prosecution has demonstrated that there are substantial  
2 grounds to believe that the crimes against humanity and the war crimes  
3 committed during or in the aftermath of the joint attack were either  
4 encompassed by the common plan or, at the very least, a likely  
5 consequence of the implementation of the common plan, common plan which  
6 was mutually accepted by Katanga and Ngudjolo.

7           The Prosecution has established that there are substantial  
8 grounds to believe that Katanga and Ngudjolo, as military chiefs and with  
9 the authority conveyed to each of them due to such a position, played an  
10 essential role in the implementation of the common plan which led to the  
11 commission of the underlying crimes.

12           Your Honours, the Prosecution underlines that Katanga and  
13 Ngudjolo, as the co-perpetrators, were mutually aware of their essential  
14 role and that such role gave them joint control over the implementation  
15 of the common plan.

16           The contributions of Katanga and Ngudjolo are indivisible as they  
17 both had joint control over the implementation of the common plan.  
18 Therefore, Katanga and Ngudjolo are each responsible for the crimes  
19 committed by both FRPI and FNI combatants in Bogoro regardless,  
20 regardless of whether they each had authority over the other's  
21 subordinates.

22           Now, Madam President and your Honours, in the alternative, the  
23 Prosecution's evidence has demonstrated that Katanga and Ngudjolo each  
24 vested with their power and authority as chiefs of their respective  
25 groups ordered -- they ordered the attack on the civilian population of

1 Bogoro and are criminally responsible for the crimes as charged in the  
2 Document Containing the Charges.

3 Madam President, your Honours, this concludes the Prosecution's  
4 closing statement, and I add on behalf of all members of the  
5 Prosecution's team that it has been an honour and a privilege to  
6 represent the Prosecution in this confirmation hearing. I thank you.

7 PRESIDING JUDGE KUENYEHIA: Thank you very much, Mr. MacDonald.  
8 We will now turn to the Legal Representatives of Victims, who have two  
9 hours to make their joint presentation. I do not know the order in which  
10 you have agreed to make the presentation. I presume you have an order,  
11 so please go ahead.

12 MR. KETA (interpretation): Thank you, Madam President. Your  
13 Honours, dear members of the Prosecution team, my learned colleagues of  
14 the Defence, and representatives of the victims, ladies and gentlemen, I  
15 am going to discuss the factual aspect of our final statements or closing  
16 statements for victims a/0333/07 and a/0110/08. In turn, Mr. Gilissen  
17 will discuss the legal aspects of our statements.

18 From 1999 to 2003 in Ituri, there was a conflict which harmed the  
19 civilian population. The conflict which was triggered by a land dispute  
20 between the Hema and Lendu ethnic groups does include internal and  
21 external factors. According to Andre Cuvillier, "There is conflict when  
22 there is an open struggle between two persons or groups in order to  
23 subject or annihilate the other who is considered as an attacker." This  
24 quote sufficiently proves that it is persons or groups of persons that  
25 generate conflict and therefore, accordingly, some will be considered as

1       assailants and others, of course, will be considered as the people who  
2       are being attacked. You have the people who dominate and those who are  
3       dominated. You have the lords and the slaves. You have the Christians  
4       and the pagans. You have the rich and the poor. But in fact this is  
5       the -- it is the relationship between people which includes, or which  
6       englobes conflict, and some of these people come from somewhere and live  
7       in a particular geographical situation. It is therefore important to  
8       study the phenomenon of migration with the thorny problem of the right of  
9       the first occupant.

10               This right of the first occupant also encompasses political,  
11       economic, and cultural problems linked to the land which in general  
12       Africans, and particularly Iturians, consider to be the greatest wealth a  
13       human being can possess.

14               The Hemas and Lendus live on the same land. This is Djugu  
15       territory in the Democratic Republic of the Congo, whose total surface  
16       area is 8.730 square kilometres, and they speak the same language, which  
17       is Kilendu.

18               Accordingly, one might well wonder why people who speak the same  
19       language can enter into conflict. It is the land which triggers conflict  
20       between the Hemas and Lendus in Ituri with political, economic, and  
21       cultural consequences.

22               The conflict started in April 1999. It was a land dispute which  
23       was inadequately settled by the Bunia judicial authorities. There was a  
24       consequent escalation of violence. There were attempts to reconcile the  
25       parties, but these attempts were unsuccessful.

1           In 1999, the two suspects, although they were one of the members  
2   of one of the belligerent ethnic groups, were not the heads of the ethnic  
3   groups. So why are they before this court today?

4           My address will be divided into two parts. The first will be on  
5   the causes of the conflict, and the second will be on their impact on the  
6   victims.

7           The causes of the conflict in Ituri, the causes are both -- the  
8   indigenous causes arise from the dichotomy established by Andre  
9   Cuvillier, that is the relationship between those who are considered to  
10  be rich, that is the animal husbandry -- those who practice animal  
11  husbandry, that is the Hemas, and those who are considered to be poor,  
12  that is the Lendu farmers. However, this dichotomy is only an illusion  
13  because you can find Lendu husbandry farmers and people who till the  
14  lands which are -- who are rich and poor as Hemas are rich and poor. So  
15  we can also draw attention to the negative work of the church which  
16  swirled the flames of conflict between the two ethnic groups.

17          Briefly, the two --

18          MR. HOOPER: Address. I'm just rather concerned as to whether  
19  these are appropriate submissions that we're hearing this morning or  
20  whether they are really and effectively a way of introducing evidence.

21          (The Pre-Trial Chamber confers)

22          PRESIDING JUDGE KUENYEHIA: I think the victims are well aware  
23  that he cannot introduce any new evidence. They're just allowed to make  
24  observations.

25          MR. HOOPER: Well, we're hearing assertions here. I don't know

1     what factual basis there is for those assertions. We're hearing of land  
2     conflicts, and we're now hearing of the position of the church, which is  
3     not a matter that I've heard of before.

4             This is a confirmation hearing. We're not in final closing  
5     stages of a case, and I would have thought essentially we need to be  
6     attentive to that material which has been placed before the Court by the  
7     Prosecution in the case. This is material, and these are assertions that  
8     are made quite independent of that, and there must be some limit, in my  
9     submission, as to what can be said by the victims, bearing in mind their  
10    responsibilities and position under Article 68(3).

11            PRESIDING JUDGE KUENYEHIA: I think that the victims must be well  
12    aware of that fact and must confine themselves to the evidence that have  
13    been discussed here throughout the confirmation hearing. Additionally,  
14    the Defence has the opportunity to respond to anything that they do not  
15    think is appropriate.

16            MR. HOOPER: Well, I am responding, and I am asking that these  
17    matters not be led before the Court.

18            (The Pre-Trial Chamber confers)

19            MR. GILISSEN (interpretation): Madam President, I'm sorry to  
20    interrupt your deliberations. I consider that if the Defence has -- if  
21    the Defence were to be a little bit more patient, they would understand  
22    the link that Mr. Keita is trying to establish between the subject of  
23    these proceedings. I do not think that Mr. Keita is exceeding his bounds  
24    when he tries to resituate the debate and the criminal responsibility and  
25    the evidence of the Prosecutor within a broader context. I mean,

1       thereby, that if we need to understand what we're discussing, there is no  
2       doubt that Mr. Keta's submissions are wholly relevant, but we need to  
3       understand what the discussion is about. Thank you.

4               (The Pre-Trial Chamber confers)

5               MR. KILENDA (interpretation): Thank you, your Honour.

6       Madam President, your Honours, thank you.

7               You will recall that speaking some time ago, Mr. Keita asked for  
8       your Chamber's leave to file a document which he claimed was going to  
9       trace the origin of the conflict. I therefore support the submissions of  
10      my colleague, Mr. Hooper, and I wonder whether what we are hearing now is  
11      not by some means a filing of the document that you refused to accept  
12      under other circumstances.

13              MR. KETA (interpretation): With your leave, Madam President, may  
14      I say something? I would like to say that I am not alluding to a new  
15      document as a piece of evidence. All I wished to do was to define the  
16      context of the conflict and demonstrate how the two suspects, when the  
17      conflict broke out in Ituri, as you know, one was trained as a nurse, I  
18      wanted to prove that from 2001 to 2002 when they created their armed  
19      groups and movements, they were instrumentalised by external forces. I  
20      wanted to address the exogenous causes and say how our victims were  
21      affected by this instrumentalisation. So there's no new element. I'm  
22      not alluding to any document. I am only defining the context of the  
23      facts as they have been presented since the beginning of this  
24      confirmation hearing.

25              (The Pre-Trial Chamber confers)

1               PRESIDING JUDGE KUENYEHIA: The Chamber would like to say that  
2     the Chamber is very much aware that the witnesses are not allowed to  
3     bring new evidence. The Chamber will not take into consideration  
4     anything that it considers to be inappropriate on the part of the Legal  
5     Representatives of Victims, and the Chamber would appreciate that we  
6     allowed them to finish their presentation without any more interruptions.  
7     Thank you very much.

8               MR. KETA (interpretation): Thank you, Madam President. So I  
9     shall continue. I was discussing the indigenous causes. I shall now  
10    move on to the exogenous causes of the conflict in Ituri, and these are  
11    most important in defining the conflict.

12              There was an internal conflict in 1999 which led to an armed  
13    conflict of an international character as from 2001, with the  
14    intervention of foreign troops, that is those of Uganda. This gave  
15    another dimension to the conflict. This was the control of the rich  
16    region of Ituri so as to better exploit it. The consequence of this  
17    foreign intervention is indeed the instrumentalisation of some  
18    individuals and, therefore, in the case in point, the causes are more  
19    economic and financial than anything else.

20              In light of the evidence presented by the Prosecution, the Court  
21    will need to establish the responsibility of each of the suspects in  
22    carrying out the common plan through the use of their respective armed  
23    groups.

24              I shall now move on to the second point, which is the impact of  
25    the armed international conflict on civilians.

1            Their recruitment and use of child soldiers is neither a  
2            tradition nor a practice in the Democratic Republic of the Congo, but  
3            history teaches us that this has happened in the east of Africa.  
4            Therefore, the intervention of Ugandan troops in the Democratic Republic  
5            of the Congo inspired the armed groups of Ituri, that is the FNI and the  
6            FRPI.

7            A child is considered to be docile and naive but capable of  
8            coldly carrying out the orders of his military leaders. This is the  
9            context in which the two suspects did not depart from the general rule.  
10          In this case children a/0333/07 and a/0110/08 were schoolchildren in  
11          Songolo. It is some kilometres away from Bogoro. They were abducted on  
12          their way to school by Commander Lobho Tshamangare, who was the FRPI  
13          commander for Katanga. They were taken to Lakpa camp. In this camp the  
14          two children underwent inhuman treatment, hence the material or the  
15          physical and mental harm this they are suffering up until today.

16          Although the facts need to be discussed before they are  
17          considered adequately, the harm remains visible. Justice should aim for  
18          punishment and reparation.

19          The current situation of children a/0333/07, and a/0110/08,  
20          particularly with regard to the delay in there studies, could be of some  
21          concern to the Court. All they're asking for, these children, is to be  
22          reintegrated into the society and for the time being in order to survive  
23          their combined studies and temporary work, I refer in particular to  
24          a/0333/07 is a student and he works part time in order to pay his school  
25          fees. This is the harm suffered by these two children.

1 I shall now give the floor to my colleague, Mr. Gilissen, who  
2 deal with the matters of law. Thank you.

3 MR. GILISSEN (interpretation): With your leave, Madam President,  
4 your Honours.

5 Madam President, your Honours -- could I borrow your microphone,  
6 please.

7 Madam President, your Honours, learned members of the Prosecution  
8 and Defence teams, and my colleagues of the victims' representation, we  
9 represent child soldiers, between must say that we represent -- we intend  
10 to limit ourselves in our closing statements to the representation of the  
11 children, the interests of these child soldiers. So whatever our real  
12 needs, we shall try to limit ourselves to responding to the arguments  
13 that have been put forward by the Defence lawyers, so I shall be brief,  
14 and I shall develop four observations leading to a conclusion which will  
15 be as brief. I shall try to be brief, and I shall try to be clear,  
16 although it will not be easy.

17 First, Madam President, your Honours, I'm afraid that there may  
18 be, on the part of the Defence, a deliberate intent to sow confusion  
19 regarding the contents of the arguments that have been submitted. I  
20 think in particular, and I think this will suffice as an observation,  
21 that admissibility do not -- does not -- is not equivalent to relevance,  
22 reliability, credibility, and probative value. There is no synonymy, and  
23 the court is aware that each of these problems is -- addresses a  
24 particular issue.

25 Apart from this contradiction which probably quite clever on the

1 part of the Defence, it seems to us without doubt that the Court has  
2 recalled the purpose of this stage of the proceedings of confirmation of  
3 charges, that is the meaning and object of this stage of the proceedings  
4 in all its aspects. Although the Defence has raised some questions, it  
5 does not mean that they must necessarily be addressed at this stage of  
6 the proceedings. Obviously some of the questions raised will require  
7 discussion at the level of the trial, when, at last, the evidence will be  
8 presented and make matters clearer and when discussions will be more  
9 profound.

10 That was my first observation. My second observation aims to  
11 respond to a question that was put by the Defence of Mr. Ngudjolo. The  
12 documentary analysis of the Prosecution's list of evidence reveals  
13 another reality. That was the worth used. That -- apart from that is  
14 the general presentation that the Prosecutor might have made.

15 Madam President, your Honours, I think that the Prosecutor  
16 responded to this argument a while ago. I would like to say here that it  
17 is indeed true that the evidence presented by the Prosecution only comes  
18 to confirm the generality of the various explanations that each of the  
19 pieces of evidence has provided through experience, the -- through the  
20 individual and fragmented experience of people. Thus, even if there was  
21 a possibility of one of the pieces of evidence submitted by the  
22 Prosecution, even if one of these were to be excluded, the general list  
23 of evidence has, first, undeniably provided further support to each of  
24 the pieces of evidence to support each of the charges. It has also and  
25 obviously strengthened the charges, that is grounds to believe that the

1 suspect committed each of the crimes charged. I shall return to this  
2 idea in my conclusion.

3 My third observation, Madam President, your Honours, is that some  
4 of the Defence arguments require more attention while bearing in mind  
5 that we are the representatives of the victims or two child soldier  
6 victims.

7 The Defence talked about the number of victims and their status  
8 as civilians or combatants. I think here we should salute the care that  
9 characterised the Prosecution's presentation.

10 It is true that there is an inconsistency between the number of  
11 victims and the number of civilian victims that came out of the attack of  
12 the 24th of February, 2003, in Bogoro. The Prosecutor was right, and I  
13 salute him, not criticise him for this. He was right to be prudent in  
14 adopting a minimalist evaluation. I had access to no document limiting  
15 the number of victims to such a low number. I do not understand why the  
16 Defence complains about this honest evaluation.

17 In a country where no census has been done for a long time, since  
18 the beginning of the '80s, to be precise, in a country where there is no  
19 civil status or no reliable Registry office, in a country where, as we  
20 know, the movement of populations was so widespread that it was difficult  
21 to have the least control whatsoever, so is it reasonable in this context  
22 for the Prosecution and the Defence to put forward figures that are not  
23 supported by anything? I think that the minimalist evaluation was  
24 relevant. It would therefore be unjust to use an advantage of the  
25 Prosecution's presentation and change it into a disadvantage.

1           The second observation with regard to the application forms of  
2     the victims. You have been very clear on this, Madam President, your  
3     Honours. There should not be any problem in this regard. These forms  
4     cannot in any way be used as evidence. And the presentation by Mr. Keita  
5     a while ago is a clear example because these forms and their content were  
6     disclosed to the Defence. So the information contained therein is only  
7     for the purpose of information, which obviously can be discussed in an  
8     inter partes debate in a hearing. However, this information is not given  
9     any probative value.

10           Madam President, your Honours, this is my fourth and last  
11     observation. I promised to be brief, and so I shall be.

12           We were -- we listened with close interest to the argument of  
13     Mr. Katanga's Defence reviewing the elements of crimes charged to the two  
14     suspects, that is the mens rea and the actus reus, and discussing,  
15     analysing in great detail the modes of participation, and by this means  
16     introducing the concept of complicity.

17           At this point we are now dealing with a substantive debate which  
18     is more appropriate at trial. However, we shall refer to the  
19     International Criminal Court or ad hoc courts and their jurisprudence  
20     with regards to the commission of crimes. They have jurisdiction -- or  
21     jurisprudence referring to joint criminal enterprise, JCE. This is what  
22     we are referring to here. This jurisprudence led to the drafting of  
23     Articles 25(3)(a) and (d) and enabled a debate -- the debate on the  
24     definition and the definition of limits to be clearly defined. Beyond  
25     the perpetrator, the actual perpetrator of a crime, other individuals are

1 responsible for this very crime. We should add that persons under this  
2 institution of joint criminal enterprise, this is my translation, and  
3 it's a fairly free one, of the English expression "joint criminal  
4 enterprise," are each responsible for acts committed by other people who  
5 were part of this joint criminal enterprise.

6 This form of commission of crimes therefore makes each person,  
7 each participant the JCE, individually responsible for all the crimes  
8 committed and, therefore, prevents the individual difficulties arising  
9 from the assignment of roles to each of the participation -- each of the  
10 participants in the common plan from arising.

11 If the Defence were to have any doubt in this regard,  
12 Madam President, your Honours, the Chamber should refer to -- refer them  
13 to an excellent piece of work that I have here, that is, "International  
14 Criminal Law" jointly authored by Mr. Goran Sluiter and Mr. Alexander  
15 Zahar. Chapter 7, page 219 will show what I say. For those who need to,  
16 they will find the definition of joint criminal enterprise therein.

17 Madam President, your Honours, we strongly submit, because we do  
18 not wish to proceed in secret, we do not wish to use the masks of figures  
19 and bodies. That is for the victims. This is an inter partes debate.  
20 We shall proceed differently.

21 Joint criminal enterprise in the attack on Bogoro and to call  
22 things by the -- the right name in Bogoro in which the two suspects  
23 participate is joint criminal enterprise, which included the use of child  
24 soldiers. The troops massed -- amassed to attack Bogoro on the 24th of  
25 February, 2008, were considered as including child soldiers. The Chamber

1 will bear in mind that during these attacks more numerous child soldiers  
2 than ever were brought together and used. A -- an unprecedented large  
3 number of child soldiers used better -- were given better preparation for  
4 this important attack, that younger child soldiers than usual were  
5 recruited forcibly, it might be added, because the intent was to make  
6 them take part in the pillaging.

7 The use under such conditions of child soldiers is clear  
8 manifestation of joint criminal enterprise because the property of  
9 civilians and civilians themselves -- or people themselves were attacked.  
10 And from the very first moment, there was a manhunt targeting civilians  
11 present in Bogoro.

12 For these two crimes, the organisers of the Bogoro attack were  
13 aware that the child soldiers would be stupefyingly effective.

14 Madam President, your Honours, although an adult may hesitate to  
15 kill, a child of 15, 13, 12 years, a child of 12 does not hesitate to  
16 kill an older person. And when you're 12 years old, there are a lot of  
17 people who are older than you are.

18 This is the terrible efficiencies and the particularity, the  
19 horrible particularity of children used as child soldiers in war.  
20 Madam President, your Honours, this is why we think that those who  
21 organised this assault on Bogoro wished to include child soldiers. This  
22 is the reason why. So in light of the particular characteristics of the  
23 joint criminal enterprise that these child soldiers were used, and the  
24 Chamber will take due note, I am sure. Unfortunately, they were horribly  
25 successful.

1           For all these reasons, Madam President, your Honours, we  
2   consider -- we consider that the Chamber will consider that during the --  
3   that the use of child soldiers during the events before this court has  
4   been sufficiently supported to establish substantial grounds to believe  
5   that the two suspects before this Chamber committed the crimes charged.

6           Mr. Prosecutor mentioned this a while, and I shall add, perhaps  
7   needlessly, that the two suspects agreed during the peace agreement of  
8   the 18th of March, 2003, they -- they acknowledged this fact. They  
9   acknowledged the use of child soldiers in the conflict, the enlistment of  
10  child soldiers. And this agreement mentioned that they knew that this  
11  enlistment and use was carried out in violation of international  
12  instruments.

13           How shall we prove this otherwise? Surely this is an important  
14  corroborative element to support substantial grounds to believe that the  
15  two suspects committed the crimes charged, that is, count 5, the use of  
16  child soldiers within the framework of the Bogoro attack, which is the  
17  subject of the counts as a whole.

18           I stated as such, Madam President, your Honours, during my  
19  opening statement. We are here because those we represent demand  
20  justice. We consider that you will commit the suspects for trial. They  
21  should explain their actions. For better or for worse they should  
22  explain their actions. The human community needs explanations as to what  
23  happened in Bogoro. So let them provide such explanation. It is time  
24  for them. The time is now. They should be tried fairly and justly,  
25  especially fairly and justly, Madam President, your Honours, because in

1 Ituri the people who suffered need justice.

2 Thank you.

3 PRESIDING JUDGE KUENYEHIA: We have until 11.00, and I think that  
4 the next legal representative can make their presentation between.

5 MR. DIAKIESE (interpretation): President, your Honours, members  
6 of the Chamber, the Defence, the Prosecution, and learned colleagues from  
7 the legal representation of victims. On behalf of the victims I  
8 represent and which were identified on numerous occasions during this  
9 hearing and during the various sessions for the confirmation hearing, we  
10 would like to make the following statement: President, your Honours,  
11 honourable members of the Chamber, during the whole of the confirmation  
12 hearing the victims whom I am represented -- representing, noted the  
13 evidence tendered by the Prosecution and discussed some of the evidence  
14 to put it in the context and to see what the real prejudice is they  
15 suffered, and we believe at this stage of the discussions there are  
16 substantial grounds to believe that the facts entail the responsibility,  
17 criminal liability, of those accused, and I would like to submit to you  
18 some legal considerations based on the arguments submitted by the Defence  
19 teams. Co-perpetration in the case of Mr. Katanga, and this in light of  
20 the Stakic case of the ICTY case law.

21 The Appeals Chamber corrected the decision of the Trial  
22 Chamber II on 2 July -- 31 July 2003. The probative value of the  
23 evidence produced by the Prosecutor at the confirmation of charges and  
24 the status of victims and witnesses. Three, the young age of  
25 Mr. Katanga, \*24 years of age at the time of the events, and the number of

1 troops and heterogenous nature, which in our understanding, it was  
2 submitted that this meant that he, due to his young age, was unable to  
3 control, effectively control the troops, and that therefore could not be  
4 held responsible.

5 Four, urging Mr. Mathieu Ngudjolo's Defence to -- urging the  
6 Chamber to limit itself strictly to the law outside of any sentimental  
7 consideration.

8 And five, the concept that there is only one ethnic group in  
9 Ituri, the victims.

10 Your Honours, Mr. Katanga's Defence, basing himself on the case  
11 law of the ICTY in the Stakic case, requests the Chamber not to take the  
12 decision on the confirmation of the charges into account, decision  
13 ICC-01/04-01/06 of Pre-Trial Chamber I in the Lubanga case. According to  
14 that Chamber, this decision erred by combining co-perpetration with  
15 direct perpetration by defining the common goal in a very broad way and  
16 loose way, by combining mens rea with actus reus which was not  
17 appropriate in this context without going into these considerations  
18 raised by Mr. Katanga's Defence, which could be the object of several  
19 doctoral theses. We would like to submit the following arguments:  
20 Article 21 of the Rome Statute provides for the applicable law before the  
21 ICC. First, the Court applies a Statute, elements of crimes and Rules of  
22 Procedure and Evidence, and paragraph 2 authorises the court to apply  
23 general principles and rules of law as interpreted in their prior  
24 decision.

25 In this case, Mr. Germain Katanga would -- Defence would like to

1 ask you not to refer to the position of the court, because the court  
2 apparently took a position which is not that of the ICTY.

3 If one looks at the decision of the Pre-Trial Chamber in the  
4 Lubanga case, paragraph 323, the Prosecution recognises that the motion  
5 of co-perpetration under Article 25(3) of the Statute differs from that  
6 of co-perpetration based on a joint criminal enterprise with a common  
7 goal, which was, however, adopted in the case law of the ICTY, and in  
8 view of this the Prosecution believes that it is important to take into  
9 consideration the fundamental of differences between the ad hoc tribunals  
10 and the court as the latter is governed by a Statute which not only sets  
11 out in great detail the different modes of criminal liability but also  
12 deliberately disregards of the broader definitions which are given, for  
13 instance, under Article 7(1) of the Statute of the ICTY.

14 Under paragraph 326 of the same decision, the Chamber opines that  
15 originally the notion of co-perpetration springs from the idea that when  
16 the totality of individual contributions and coordinated contributions of  
17 several persons leads to the realisation of all the objective elements of  
18 a crime, any person that contributes may be accused of the contributions  
19 of others and accordingly may be considered as a principal perpetrator of  
20 the crime as a whole.

21 Under paragraph 327, and there is a distinction between main  
22 perpetrators and accomplices when there is co-action.

23 Under paragraph 328, the subjective paragraph -- approach, which  
24 was adopted in the case law of the ICTY through the notion of joint  
25 criminal enterprise or the theory of a common goal, disregard the

1 importance of the contribution to the commission of an offence as a  
2 criteria allowing to distinguish between the principle perpetrators of a  
3 crime and their accomplices.

4 So I repeat. I'm sorry. The -- I repeat. Paragraph 328. The  
5 subjective approach, which was adopted in the case law of the ICTY  
6 through the notion of joint criminal enterprise or the theory of common  
7 goal, disregards the importance of the contribution to the commission of  
8 the offence as a criteria enabling to distinguish between the principal  
9 perpetrators of a crime and the accomplices to accentuate the state of  
10 mind in which the crime was -- the contribution to the crime was made.

11 So aside from the importance of the contribution to the shared  
12 intent to commit an offence, could be considered -- those who committed  
13 the offence could be considered as principal authors of the crime.

14 The notion of control exercised over a crime is a third approach  
15 in making a decision between the various or the main perpetrators of a  
16 crime and their accomplices, and contrary to what the Defence claims it  
17 is applied in many legal systems. It is based on the idea that principal  
18 perpetrators of a crime, not limit -- are not limited strictly to those  
19 who physically execute the objective elements of the crime, but also  
20 amongst those who in spite of the distance that separate from the locus  
21 in quo monitor or direct the commission of this crime because they decide  
22 whether the crime will be -- can be committed and how.

23 Paragraph 338.

24 PRESIDING JUDGE KUENYEHIA: You're really racing and the  
25 interpreters are having difficulty keeping up with you.

1 MR. DIAKIESE (interpretation): Thank you. At the same time, I'm  
2 trying to save time and to develop the argument, but this is delicate  
3 balancing act. I apologise.

4 I was saying paragraph 338, the court decided having set aside  
5 the objective and subjective approaches of the distinction to operate  
6 between the main perpetrators of the crime and their accomplices, the  
7 Chamber is of the opinion, similar to the Prosecution and differently to  
8 the case law of the ad hoc tribunals, that the Statute has enshrined the  
9 third approach, which is based on -- based on the notion of exercising  
10 control over the crime.

11 Paragraph 339. In this regard, the Chamber notes that the most  
12 typical example of the notion of control over the crime, which is the  
13 commission of a crime through one or more people, is expressly provided  
14 for in Article 25(3)(a) of the Statute.

15 Furthermore, the use of this expression that this other person is  
16 criminally responsible in Article 25(3)(a) of the Statute, that is, leads  
17 to the conclusion that this provision provides for the commission of a  
18 crime through not only an innocent agent, that is -- but also another  
19 fully responsible person, that is, criminally responsible person.

20 Paragraph 440. The Chamber considers that the notion of  
21 co-action which is set out in Article 25(3)(a) of the Statute, in wording  
22 that refers to the commission of a crime jointly with another person,  
23 should be consistent with the choice of the notion of control exercised  
24 over the crime as a criterion that will enable the distinction between  
25 made between the main perpetrators of the crime and their accomplices.

1           To conclude with this part of the decision, paragraph 341. The  
2   Chamber says: "Accordingly, as previously indicated in the decision  
3   issuing a warrant of arrest the Chamber considers that the notion of  
4   co-action, which is enshrined in Article 25(3)(a) of the Statute, is  
5   consistent with the notion of joint control over the crime due to the  
6   essential nature of various contributions to the commission of the  
7   crime."

8           At this stage in the proceedings, we note that contrary to what  
9   the Defence of Mr. Germain Katanga's Defence has said, the correct  
10   interpretation of the Statute was set out in the jurisprudence of  
11   Pre-Trial Chamber I in the Lubanga case during the confirmation hearing.  
12   It would therefore be appropriate for this Chamber to refer to it in  
13   connection with the current proceedings.

14           Madam President, your Honours, however, it is important equally  
15   in order to regard, to consider a different approach, to refer to the  
16   case law of the ICTY in the Stakic case. It should be noted that the  
17   decision by Pre-Trial Chamber II of the International Criminal Tribunal  
18   for the former Yugoslavia was set aside by the Appeals Chamber on two  
19   grounds with regard to responsibility. The Appeals Chamber firstly  
20   considered that the Pre-Trial Chamber erred in analysing responsibility  
21   under the -- under co-action because this analysis was not based in the  
22   case law of this Tribunal and under customary law.

23           Secondly, since the appellant was charged on the basis of a  
24   notion separate from joint criminal enterprise, it -- it could only  
25   respond to this notion as decided by the Chamber. However, analysing the

1 modes of responsibility contextualised with that arising from joint  
2 criminal enterprise, which was consistent with the jurisprudence of the  
3 tribunal, the Appeals Chamber noted in paragraph 87 -- or 67, as counsel  
4 says, that the responsibility in participation in a third category, joint  
5 criminal enterprise, presupposes that there are crimes that were not  
6 considered during the common objectives which were committed; (b), that  
7 these crimes were are a natural consequence -- a foreseeable consequence  
8 of the realisation of this objective; and (c), that the participation  
9 knew -- or the participant in the criminal enterprise knew that these  
10 crimes were the consequence, or the possible consequence, of the  
11 attainment of this objective and that he took part in it nonetheless.

12 Accordingly, in paragraph 97, the Chamber decided as follows:  
13 Considering in the case of extermination that there had been at least the  
14 case of *dolus eventualis* on the part of the appellant, the Pre-Trial  
15 Chamber -- or the Trial Chamber concluded that: "The massacres were to  
16 be expected and that the appellant, who knew about this risk, took it  
17 into consideration."

18 This conclusion meets the conditions required for the appellant  
19 to be held responsible for participation in a criminal enterprise of the  
20 third category.

21 In paragraph 98 this Chamber said: "In light of the foregoing,  
22 the Appeals Chamber concludes that the findings of the Trial Chamber show  
23 that the appellant had the *mens rea* required for being held responsible  
24 for murder and -- but due to his participation in a joint criminal  
25 enterprise of the third category."

1                Responding to the supposedly unlawful concept of *dolus*  
2        *eventualis*, the same decision says: The concept of joint criminal  
3        enterprise is based on -- in customary law. Accordingly in this case the  
4        Appeals Chamber has concluded that this notion does not violate the  
5        principle of legality, because *dolus eventualis* or advertent  
6        recklessness, is clearly a necessary element of joint criminal  
7        enterprise, and therefore this conclusion or this finding is equally  
8        valid in this case, because joint criminal enterprise does not violate  
9        the principle of legality. The same applies to each its constituent  
10       elements.

11              Lastly, paragraph 102, the Appeals Chamber concludes that in the  
12       case in point, the use of *dolus eventualis* in the -- within the framework  
13       of the third category, joint criminal enterprise, is not a violation of  
14       the principle of *nullum crimen sine lege* and *in dubio pro reo*.

15              We therefore conclude that the mode of responsibility which is  
16       adopted against Mr. Katanga and Mr. Ngudjolo is consistent with the  
17       Statute. We also conclude that furthermore the jurisprudential  
18       modalities of their application have been buttressed by the decision on  
19       the confirmation of charges in the Lubanga case and in the Stakic case  
20       law which was used by Mr. Katanga's Defence. We regret that this is not  
21       the opinion of the Defence or any other dissenting opinion put forward by  
22       the Defence. This is this position of the Statute and the jurisprudence  
23       of the International Criminal Court.

24              As regards the challenge to the probative value of the evidence  
25       produced by the Prosecutor and as regards the incoherence of the status

1 of victim and witness or the non-co-existence of the status of victim and  
2 witness, we base ourselves on the case law of Pre-Trial Chamber I in the  
3 Lubanga case.

4 Paragraph 98 of this case law states that in the framework  
5 established by the Statute and Regulations, the Chamber notes that at the  
6 stage of the confirmation of charges hearing, which aims at establishing  
7 whether or not a person should be tried, sent to trial or not, it is  
8 necessary to presume that the evidence contained in the list of evidence  
9 of both parties are authentic. So unless a party provides information  
10 that could reasonably call the authenticity of the documents of some  
11 evidence into doubt, the evidence must in the hearing -- confirmation  
12 hearing be considered authentic. This prejudice of the probative value  
13 could be given in the framework of the global analysis of the evidence  
14 submitted for this hearing. And moreover, Article 69(4) of the Statute  
15 gives the Chamber a discretionary power to assess the admissibility of  
16 the evidence by taking into -- into account the probative value of the  
17 evidence and by taking into account the possibility that it may do harm  
18 to the fairness of the trial or to a fair assessment of a witness's  
19 statement.

20 And in paragraph 101 the Chamber notes that no provision of the  
21 Statute of the Regulation expressly states that evidence that could be  
22 considered as indirect evidence from anonymous sources is inadmissible as  
23 such. Moreover, the Appeals Chamber has admitted for the confirmation of  
24 charges hearing to use evidence that could contain indirect evidence from  
25 anonymous sources and redacted versions of witness statements.

1           Concerning the interviewing of minors without the assistance of a  
2   guardian, the same adds paragraph 18 that the Defence has called into  
3   question for several reasons the credibility and reliability of  
4   statements made by children, and under paragraph 120 the Chamber recalls  
5   that -- moreover the Chamber recalls that pursuant to Article 69(4) of  
6   the Statute that the Court may rule on the relevance and admissibility of  
7   any evidence in accordance with the Rules of Procedure and Evidence by  
8   taking into account the probative value of the evidence and the  
9   possibility of it harming the fairness of the trial or the fair  
10   assessment of the witness's statement.

11           And then I refer to a decision of the ICTR in the case of the  
12   Prosecutor versus Clement Kayishema and Obed Ruzindana. The Chamber  
13   states that the doubt arising from a statement can be confirmed by  
14   another statement if there is a concordance between the two. However, it  
15   is not legally necessary for a statement to be corroborated by another  
16   one to be considered relevant. And the Trial Chamber concludes that it  
17   will give a more important probative value to the evidence from children  
18   and produced by Christian Peduto which were corroborated as is shown by  
19   several parties in this decision and under paragraph 122. The Chamber  
20   states that it is not necessary to give a lesser value to the statements  
21   of witnesses that haven't been corroborated but that do not stray from  
22   the statement as a whole.

23           PRESIDING JUDGE KUENYEHIA: Mr. Kilenda, please try and slow  
24   down.

25           MR. DIAKIESE (interpretation): Mr. Diakiese, madam.

1               PRESIDING JUDGE KUENYEHIA: I'm sorry. Mr. Diakiese, can you  
2     please slow down because you're really going fast. Those doing the  
3     transcript are having difficulty keeping up with you.

4               MR. DIAKIESE (interpretation): Thank you. Thank you, madam.  
5     I'm also trying to stick to the time I have, but I know your Chamber will  
6     take this into account. Thank you.

7               As regards the fact that the Statute does not allow for the  
8     co-status of victim and witness in the same proceedings, on this matter  
9     the victims which I represent respectfully submit that unless we are  
10    mistaken, there aren't any provisions in the Statute or in the Rules of  
11    Procedure and Evidence which do not allow for a victim to be a witness if  
12    they were a witness to the events. So what is the question of law that  
13    we must ask ourselves at this stage in the proceedings?

14              The victims participate to voice their concerns and to give their  
15    points of view in light of their interests. Witnesses come and tell what  
16    they have seen, heard, and know. The Court sits in order to establish  
17    the truth. Hence how, concerning a person who experienced the events,  
18    how would it be detrimental to a trial for a person who having witnessed  
19    the events to come and be a witness at the trial? And we refer to the  
20    Appeals Chamber's judgement of the 11th of July, 2008, entitled, and I  
21    am -- I apologise in advance for my bad pronunciation of English because  
22    I did hope that I would be given the French version of the judgement, and  
23    I know that the Court has two working languages, both English and French,  
24    but sometimes I feel that the first language is English and the second  
25    English too, so I will try to read but I ask you to be patient. So this

1 decision is entitled (in English) "Judgement on Appeals of the Prosecutor  
2 at the Defence against Trial Chamber Decision on Victim Participation.

3 (Interpretation) in paragraph 97 it is written: (In English) To  
4 give effect to the spirit and intention of the Article 68(3) of the  
5 Statute in the context of the trial proceeding, it must be interpreted so  
6 as to make participation by victim meaningful."

7 (Interpretation) I'm sorry, I will not torture your listening my  
8 massacring of the English language, but from what I understand, this  
9 decision states that if the victims can produce evidence at the trial and  
10 challenge the victims producing a fortiori anything, they should be able  
11 to be witnesses if the aim is to establish a truth, because their  
12 statements are evidence as any other material and evidence in the  
13 proceedings are. Moreover, at this stage of the confirmation hearing,  
14 the victims whom I represent know that legally speaking it is not  
15 appropriate to produce evidence, but they would like to reassure  
16 Mr. Ngudjolo's Defence that at the trial stage they will have all the  
17 photos they require, contemporaneous photos, as well as medical reports  
18 established in tempore, and all contemporaneous to the events because the  
19 photos will be as close as possible to the events. However,  
20 unfortunately during the events the victims did not have time to satisfy  
21 Mr. Ngudjolo's Defence to call a photographer to come immediately and  
22 take photos to produce the evidence that would be needed. We didn't --  
23 they didn't have the possibility to do so. At that moment their only  
24 concern was surviving.

25 And finally on the young age of Mr. Germain Katanga. From the

1        outset under Article 26 of the Rome Statute, we would like to observe  
2        that the Court has jurisdiction for a person age at least 18 years old at  
3        the time of the events. So at the time of the events Mr. Katanga had  
4        more than six years more than the age required for the Court to have  
5        jurisdiction, and having not stated the legal consequences they wanted to  
6        draw from this, we would like to respond for whatever purpose it may  
7        serve that at age 24 one can be held responsible for one's actions and  
8        that at the age of 24 Alexander the Grande had already conquered the  
9        world and Neron -- Alexander the Great had conquered the world, and Neron  
10       was around the same age when he was the emperor of Rome. And after the  
11       events Mr. Ngudjolo and Mr. Katanga were celebrating, and Bogoro was  
12       wiped out, there were bodies all over the place, of bodies, decapitated  
13       bodies of victims.

14                We would like to refer to what was developed by the Prosecution.  
15       According to the Lubanga case, if we were to follow this reasoning, Adolf  
16       Hitler wouldn't be responsible for, or Herman Goering, for the action --  
17       for their acts, and even less Napoleon. But why do the chiefs of staff,  
18       supreme commanders of their troops, claim victory of their troops when  
19       they manage to do so in far -- far away parts of the world?

20                Now, we would like to conclude for -- concerning Mr. Mathieu  
21       Ngudjolo's Defence and outside of any sentimental considerations that,  
22       Madam President, members of the Chamber, your Honours, to judge, to try,  
23       is not only to apply an arithmetical equation to the fact of being guilty  
24       or not guilty and apply this to establish the sanctions. To try is to  
25       understand, hold to account, justify. That is a justice with a human

1 face. To draw lessons from the past, draw the consequences of the  
2 actions committed and as much as possible avoid any repeat offence.

3 Mr. Ngudjolo's Defence mentioned that he had previously been a  
4 nurse and that he had taken care of Hema and Lendu without distinguishing  
5 between the two, and Mr. -- Mr. Katanga's Defence has said that  
6 Mr. Katanga is not a monster, that he is a gentleman who has adopted  
7 three children from his community and that he took up arms to defend his  
8 community and that any -- every war wasn't always illegal.

9 So I would like to submit some thoughts on this. The victims  
10 whom I represent do admit that Mr. Ngudjolo, it is true, took care of  
11 some people as a nurse and therefore he knows the pain of inflicted by  
12 injecting someone with something and to be cut with a razor blade, and  
13 what we are saying that -- is that during the attacks that took place,  
14 the victims I represent were cut up by machete blows. There is a proverb  
15 in aphri (as interpreted), President, that says when a dog bites a  
16 person, take this man to the healer, but when the man bites the dog, take  
17 this man to the family council.

18 Mr. Katanga adopted three children who were orphans in this  
19 community. This means that he's aware of the vulnerability of childhood  
20 and the innocence of children. He acknowledges that a village can be  
21 attacked and massacre children of the same age group of those that he's  
22 protecting.

23 Mr. Katanga's Defence says that he's a gentleman. We say that  
24 Mr. Katanga was also called Simba. Simba means lion. When you immediate  
25 a lion in captivity, you may admire its beauty and its mane, but when you

1 meet him in the jungle you might just change your opinion.

2 The victims I represent, the day they met Simba their village was  
3 wiped out. The members of their families were chopped up with machetes,  
4 and they were left without a past and without a future, so they have a  
5 slightly divergent view of Mr. Katanga as a gentleman.

6 To close, Madam President, the aphorism we quoted during our  
7 opening statements to the effect that there is one tribe in Ituri or  
8 ethnic group which is victims, we confirm now. In fact there is only one  
9 ethnic group in Ituri, the ethnic group of victims, but these are victims  
10 who were taken as hostages by warlords from all sides who were themselves  
11 manipulated by foreign powers in search of property to pillage.

12 Madam President, a locksmith protects people by giving them safe  
13 doors. When the locksmith begins to break down the doors, then he should  
14 be caught and punished.

15 The Defence of the suspects alleges that it is in their interests  
16 to protect their community that led them to take up arms, but since  
17 Germain Katanga and Mathieu Ngudjolo have been protecting their  
18 community, how many schools and hospitals have they built? How many  
19 families in their community have they taken care of? How many orphanages  
20 are there in Ituri? How many widows do they support?

21 Today Hemas and Lendus live in desolation. There are deaths in  
22 each family. There are widows and orphans. This is the story of the  
23 warlords who claimed to defend their communities, to bleed their own  
24 people white.

25 I will close with this quote: In his opening statement in the

1 Nuremberg trial, Prosecutor Robert Jackson said and I quote: "The real  
2 plaintiff in this court is civilisation. In all our countries  
3 civilisation is imperfect and it must struggle. Civilisation asks  
4 whether the law is so slow as to be inefficient when it is faced with  
5 crimes of such scope committed by such criminals."

6 We do not expect you to make war impossible. We expect that your  
7 decision will place the strength of the international law, its defences,  
8 and its punishment, in the service of people so that men and women of  
9 goodwill in all countries will be allowed to live without asking for  
10 authorisation from anyone under the protection of the law.

11 The victims I represent would like to have the permission to live  
12 without asking for permission from any liberator or protector of the  
13 community.

14 In light of the foregoing, Madam President, your Honours, relying  
15 on the body of evidence developed by the Prosecution, relying on the  
16 evidence discussed during this confirmation hearing, particularly --  
17 particularly with regard to the transcripts collected from non-suspects  
18 or suspects such as -- or transcripts in which suspects such as Germain  
19 Katanga acknowledged the attack on Bogoro, describing it as an act of  
20 resistance, relying on all this evidence and the statements of the  
21 victims I represent, it is our humble hope that you will confirm the  
22 charges against the two suspects and that you will commit them for trial  
23 by the relevant Chamber.

24 I crave your infinite indulgence for the long time that I took,  
25 and I am aware of the infinite patience with which this Chamber has heard

1 me. I'm also aware of the inconveniences I have caused in trying to read  
2 in English. Thank you.

3 PRESIDING JUDGE KUENYEHIA: Thank you very much. I see that it's  
4 a few minutes to 11.00, so we will adjourn the proceedings, take a break  
5 for half an hour and resume at 11.30 for the legal -- the rest of the  
6 Legal Representatives to make their observations.

7 Mr. Diakiese, the Chamber accepts your apology for crucifying  
8 English as some of us crucify French.

9 COURT USHER: All rise.

10 Recess taken at 10.56 a.m.

11 On resuming at 11.31 a.m.

12 COURT USHER: All rise. Please be seated.

13 PRESIDING JUDGE KUENYEHIA: Security, can you please bring.

14 The session is resume. We will continue with the presentation of  
15 the Legal Representatives for Victims.

16 MS. BAPITA (interpretation): Thank you, your Honour, for the  
17 floor.

18 Your Honours, members of the Chamber, I would now like to make my  
19 closing declarations. I have followed the statement made by the  
20 Prosecution with all the elements supporting the evidence and also the  
21 statements made by my learned colleagues of Legal Representatives of  
22 Anonymous and Non-Anonymous Victims, and I find myself in a lot of what  
23 has been said, so I don't need to repeat what has already been said.  
24 However, I would like to focus my submission on three main points, the  
25 points raised by Ms. Buisman in Mr. Katanga's Defence, and I will also

1 talk about the young age of Mr. Katanga, and the process by which he was  
2 brought to the head of the FNI, and I will close with the probative value  
3 of the evidence presented at this stage of the confirmation hearing.

4 President, your Honours, I listened very careful to the arguments  
5 raised by Mr. Katanga's Defence mainly on two points when Maitre Buisman  
6 said that it was difficult or almost impossible to accuse Mr. Germain of  
7 controlling an armed group of 1.400 men and an allied group of 300 more  
8 men, that he couldn't control the actions of these men right down to the  
9 rank and file.

10 President, your Honours, as I have said, I will focus on the  
11 individual liability of Mr. Katanga, not Lubanga, I am sorry, by  
12 insisting on the fact that the FRPI/FNI coalition acted in Bogoro under  
13 the -- the -- with the powers of any modern armed group. They had  
14 sufficient ammunition, arms, and means of communication.

15 The Prosecution talked about talkie-walkies of the Motorola make  
16 and long-distance telecommunication means. This was distributed to  
17 everyone, including commanders, whether in the FNI or the FRPI. The  
18 Prosecution demonstrated that Mathieu Ngudjolo communicated with a  
19 Motorola talkie-walkie from Zumbe, his headquarter, with the different  
20 camp commanders, approximately 15 kilometres distance from each other.  
21 It was also demonstrated that Germain Katanga entered into contact from  
22 his base at the BCA in Aveba with a Motorola talkie-walkie and through  
23 this talkie-walkie he contacted his commanders on the different roads  
24 leading to Bogoro, as well as entered into contact with his allies, and  
25 therefore Mr. Germain Katanga had ways of controlling the execution of

1 the common plan through these modern means of communication.

2 According to 25(4)(a) of the Statute and in Mr. Germain Katanga's  
3 arrest warrant, the Prosecutor claims that two forms of liability can be  
4 applied in this case, co-perpetration or indirect perpetration. The  
5 Prosecution alleges first perpetration because the indirect perpetration  
6 is only used in the alternative. 25(4)(a) mentions three -- 25(3)(a)  
7 mentions three forms of perpetration, direct perpetration,  
8 co-perpetration, and indirect perpetration. The same texts, Article  
9 55(3)(b) establishes -- Article 25(3)(b) establishes indirect forms of  
10 perpetration. Orders, solicit or induces which all fall in the  
11 definition of co-perpetration. So the co-perpetration, according to the  
12 Prosecutor, involves an actus reus which is a control in law of -- in  
13 fact, of the armed structure which is at the origin of the crime and the  
14 mens rea, the intention to pursue a common goal, which proves the  
15 converging positioning of the assaulting forces in the field as was  
16 explained to you both by the Prosecutor and by the Legal Representatives  
17 of Victims.

18 Your Honours, President, as regards the actus reus, we would like  
19 to draw your attention to the fact that the strategy to converge in  
20 Bogoro and encircle Bogoro by the FRPI and FNI troops did not happen  
21 ex nihilo but was the object of a lot of thinking and agreements.  
22 Mathieu Ngudjolo Chui and Germain Katanga were the plan -- planified,  
23 organised, and gave the orders upstream and downstream, supervised, and  
24 controlled the results after their joint arrival in the field following  
25 the actual perpetration by the troops of the acting together. This was

1 mentioned by the Prosecution. So said troops would not have been able to  
2 consult each other outside the supervision of their respective leaders,  
3 and they would not have been able to act together if there hadn't been  
4 joint planification and organisation.

5 President, your Honours, Mr. Germain Katanga's Defence was unable  
6 to demonstrate during these -- his submissions that there was a rupture  
7 in the chain of command or that the orders given to the troops weren't  
8 properly executed to claim that he didn't manage to control the lesser  
9 rank and file.

10 Mr. Katanga's Defence didn't even manage to explain what the  
11 object, moment, and form of this so-called rupture was of the chain of  
12 command.

13 To plead that the suspect was very young at the time of the  
14 events is not an excuse, because this young age didn't prevent him from  
15 leading an armed militia, which he doesn't deny, by the way. Indeed, the  
16 chain of command is a two-way process of authority and reporting which  
17 links the commander, a high-ranking commander, to the lowest levels of  
18 the rank and file within the armed group. It's also a hierarchy of  
19 commanders which take decisions within formations and units that are part  
20 of the chain.

21 This is the role that the four commanders of the different roads  
22 played during the attacks on Bogoro on -- in February 2003. They were  
23 then joined by Mathieu Ngudjolo and Mr. Germain Katanga. They controlled  
24 the operations through their talkie-walkies.

25 The chain of command is meant to be the main tool of command

1       which enables one to abstain -- to obtain information, to give guidance,  
2       and it calls for a -- the high responsibility of the command.

3       Mr. Katanga's Defence hasn't shown that the chain of command was  
4       defective at any level, and they can't claim that there was a difficulty  
5       in understanding the orders given, because the orders were clear: To  
6       wipe out Bogoro.

7               The day before the attacks a witness that was member -- a member  
8       of the militia of the four roads said that Mr. Bahati, during the meeting  
9       in Bogoro, had been given the orders that they had to attack Bogoro. At  
10      no stage was it claimed that the four commanders that were directing the  
11      attacks from the four roads in Bogoro received orders to the contrary.  
12      However, they had to coordinate and synchronise their actions from the  
13      highest ranking commanders to the lowest level rank and file.

14             These commands had to converge, because they had to arrive at the  
15      place of the attack at the same time. So the chain of command was very  
16      functional within each troop and well coordinated within the coalition.

17             The facts show clearly that Mr. Germain Katanga committed the  
18      acts at three levels. He committed them him himself. He committed them  
19      through his troops in the FRPI, and moreover, through the troops of the  
20      whole political-military structure of the FNI/FRPI coalition. Germain  
21      Katanga encouraged and agreed to the act -- to the action committed  
22      during the Bogoro attack, committed by his troops, and he arrived there  
23      14 -- 45 minutes after without taking any measures against his troops,  
24      which were authors or actors of what one is trying to present us today as  
25      excesses that demonstrate that the chain of command was ruptured.

1           There was no sanction, no reprimands, blames. Nobody was  
2       accused, nothing. The commanders actually drunk and claimed -- or  
3       expressed their joy following the attack. So there is clearly an intent.

4           Mr. Katanga shared a common goal with the commanders leading the  
5       four troops in the four roads, and Mathieu Ngudjolo, in the FNI. They  
6       gave clearly what their aims were through the preparatory meetings that  
7       they held at their domicile which was used as headquarters in Aveba.

8           The individual responsibility of Mr. Germain Katanga and these  
9       crimes cannot be disputed, because he did not prevent or stop the  
10      offences being committed or punish the authors of those who committed the  
11      crime. He had given them clear orders to wipe out Bogoro. However, he  
12      encouraged them by providing them with arms and equipment, communication  
13      equipment, during the preparatory meetings, before the attacks, and  
14      giving them hostile slogans and bellicose chanting saying that people had  
15      to be evicted from their houses and their goods pillaged. So it was  
16      foreseeable what would happen.

17          And during all the preparatory meetings, Katanga did never say do  
18      not touch civilians. No such instructions were given to the armed forces  
19      according to their level of responsibility at all different levels of the  
20      hierarchy. Katanga had decided on the attacks and decided jointly with  
21      Mathieu Ngudjolo and the other warlords involved. He took no measures  
22      to -- to save the civilians. So the consequences of the excesses were  
23      foreseeable. So in our mind he instigated and therefore was  
24      automatically a co-perpetrator of the facts of the action and has an  
25      equal responsibility if not superior responsibility than others for the

1 acts committed, and he had undeniable authority over his troops.

2 President, your Honours, the second point which was raised by  
3 Mr. Katanga's Defence was to say that he was a young man, age 24 at the  
4 time of the events, and therefore that he could not control 1.400 men  
5 within his armed group and 300 more that were part of the FRPI group led  
6 by Mathieu Ngudjolo. It is not logical at the time he has to be held to  
7 account for his acts to plead that he was very young. This cannot be  
8 used as an excuse. This does not prevent him from leading an armed  
9 militia, which he does not deny for that matter.

10 As regards the fact that Mr. Germain Katanga was made head of the  
11 FRPI. President, your Honours, here I would like to refer you to a  
12 document that was tendered to the record that is part of the Prosecutor's  
13 document DRC-OTP-0173-0592 -- 0589, I mean. And they go from 89 to 596.

14 One witness has given a statement and described how the different  
15 commanders, Ngiti commanders, were designated by the old wise men, and he  
16 gave several names including that of Commander Yuda, which led a group,  
17 and the name Dark which stayed in Bogoro -- who stayed in Bogoro after  
18 the pillaging and massacres. Kakado, the first commander who led the FNI  
19 and the coalition of the Lendu-Ngiti group which, at the time of one  
20 assassination at the Nyakunde attack left -- lost his life. And in --  
21 was with the agreement of the Lendu or wise men was replaced.

22 These documents from 589 to 596 describe the different -- who the  
23 different commanders were. These commanders started the movement with a  
24 Bernard Kakado who was the chief of the Ngiti resistance, and he, in his  
25 Maki (phoen), had five main commanders: Germain Katanga, Eric Muno Alya

1 Sugana (phoen), Mutu Akombi (phoen), Matata (phoen) alias Cobra, and  
2 during the Nyakunde attack on the list of events on the Prosecutor's  
3 list, Mr. Kandro, and he was a commander, left his -- deceased on the  
4 attacks of the 17th of September 2002, and was replaced by Germain  
5 Katanga with the agreement of the old wise men, and they are the ones who  
6 designate Lendu commanders to defend their cause and therefore the person  
7 designating incarnates the power and earns the respect of all the members  
8 of the militia. And that's why a lot of people wonder why Germain was  
9 selected so young, but the evidence I will -- the elements I have given  
10 will give you more information.

11 But Mr. Bayungo (phoen) is now held in prison after the  
12 hostilities in Aveba. You can draw links here with everything that is  
13 written, with the documents I will give you, to understand the importance  
14 of Katanga's designation despite his young age.

15 Your Honours, would I now like to make observations on the  
16 probative value of the evidence produced by the Prosecution. My learned  
17 colleague, Mr. Diakiese, covered this at great length, so I will not  
18 repeat what has been said. However, I would like to underline one thing  
19 in particular.

20 Witness 166 was considered to be a problem by Mr. Ngudjolo's  
21 Defence. He -- they said he's stating things about facts he did not  
22 experience, but from the outset the Defence said that he did not arrive  
23 in Bunia or in Bogoro. That's what they explained, and that's how I  
24 believe they have difficulty in accepting the fact that a statement by a  
25 person who wasn't present at the events is taken into account. I think

1       that if they had arrived in Bogoro, they wouldn't have challenged the  
2       credibility of Witness 166, because all that is said about the -- the  
3       village of Bogoro being erased up until today has been confirmed. You  
4       just need to go in the field to see it. And we hope that at the right  
5       time we will hear a lot more from this witness, but due to his anonymity,  
6       we can't say any more now, but we would like to invite you to go to  
7       Bogoro and compare the content of what Witness 166 says to what is  
8       visible in the field. And Mr. Ngudjolo's Defence has also said that  
9       apparently he drew up a list of deceased persons, but normally when a  
10      massacre takes place in a village, all the persons concerned,  
11      international organisations, NGOs, and interested parties can draft  
12      reports in the interests of the public, and that's why Witness 166 drew  
13      up a list which isn't challenged by -- which isn't challenged, and some  
14      of the victims of the list are going to come to you to participate in the  
15      proceedings, and so you can verify the information. And the Rome Statute  
16      leaves a lot of possibilities to verify the evidence claimed by the  
17      Prosecutor, reports of the United Nations and NGO's, to check whether or  
18      not it is corroborated by other evidence submitted by the Prosecution.  
19      And I think if you do so, your Honours, President, that you will agree  
20      with us that the content of what Witness 166 says is a reflection of the  
21      truth.

22             President, your Honours, I said that I do not want to repeat  
23      myself and I agree with the submissions of my learned colleagues, but I  
24      would like to draw your attention to the fact that sufficient evidence  
25      was presented for you now to be able to confirm the charges Mr. Germain

1 Katanga and Mr. Mathieu Ngudjolo are accused of and send them to trial to  
2 be accountable for their actions.

3 I would like to underline that for five years the population of  
4 Bogoro has been waiting impatiently for this hearing to enable them not  
5 only to present their views and concerns but also to make the world  
6 know -- to make it known to the world what has happened to them, because  
7 this massacre in Bogoro is far worse than what was seen in Rwanda or far  
8 worse than the events in tsunami as was presented by my learned colleague  
9 in the opening statements and is way greater than the events of the 11th  
10 of September as raised by Mr. Herve. And the victims also not only want  
11 to be able to have the possibility of participating in the proceedings,  
12 but they want to see what has led to these acts and want those  
13 responsible to be held accountable before these court for their acts.

14 If Mr. Jean-Pierre Bemba has to be held accountable for the acts  
15 committed in the Central African Republic, we know of other Ugandans who  
16 have done the same thing, but the best way to hold someone accountable is  
17 to come before Judges.

18 The multinational enterprises that furnished the weapons and  
19 advisors are also involved, but it is only by putting these suspects  
20 before the court that we will hold all the different protagonists to  
21 account, because yesterday all the bishops of my town have come together  
22 for a meeting and have asked that the riches, the resources of my country  
23 aren't used at the detriment of my population.

24 Thank you.

25 MS. MASSIDDA (interpretation): Madam President, your Honours, as

1     you know, I was appointed legal representative of the victims in this  
2     case on the 2nd of July, 2008. I received notification of the relevant  
3     documents on the same day. I therefore consider that I did not have  
4     enough time to clearly understand the record of the case. However, I  
5     shall respect your decision this morning. I am submitting, therefore, my  
6     observations for the victims I represent.

7             We would like to recall first of all the factual matters already  
8     dealt with during discussions on the evidence presented by the Office of  
9     the Prosecutor. The submissions made today will therefore focus on the  
10    questions of law which underpin the factual elements that have already  
11    been mentioned and will therefore follow more or less the same structure  
12    as our previous presentation. My submissions will therefore dwell on the  
13    five following points: The joint nature of the attack, the attack itself  
14    and the murders carried out in Bogoro, the pillaging and destruction of  
15    property in the village of Bogoro, the responsibility of Mr. Germain  
16    Katanga and Mathieu Ngudjolo Chui and the modes of responsibility, and  
17    the harm suffered by the victims I represent.

18            Madam President, your Honours, I am aware that the first point  
19    has already been dealt with by Ms. Bapita and Mr. Diakiese. I shall  
20    therefore shorten my presentation by merely presenting further thoughts  
21    with regard to co-perpetration.

22            The joint nature of the attack, which is my first point, the  
23    constituent element of a crime committed under co-perpetration can be  
24    gathered around two criteria. First, its commission must involve more  
25    than one person; and second, these persons must work together. That is,

1 to have a common plan or objective which involves the commission of a  
2 crime provided for in the Rome Statute. This means that the  
3 co-perpetrator must participate in drawing up the plan, and his  
4 participation will be in several forms, assistance, contribution to the  
5 furtherance of this plan. Each of the co-perpetrators therefore  
6 contributes to the commission of the crime, and without their respective  
7 participation the commission of the said crime would not be possible.

8 In this vein, co-perpetration might be understood as a functional  
9 division of criminal tasks between at least two perpetrators who are  
10 bound by a common plan or agreement. Another consequence is that each of  
11 these co-perpetrators must be considered as being liable for the crime as  
12 a whole if and to the extent which all the elements of the crimes are  
13 present for each of them.

14 With regard to the psychological element of the crime, Article 30  
15 of the Statute indicates that for the responsibility of a crime within  
16 the jurisdiction of the court to be charged to an individual, the  
17 material element of the crime should be committed within intent and  
18 knowledge. This means that the person intended to adopt the conduct at  
19 issue and that he intended or she intended to cause the consequence that  
20 occurred or was aware that this consequence would occur in the normal  
21 course of events.

22 As Mr. Katanga's team emphasised and Mr. Diakiese said, there is  
23 a precedent in the Court's jurisprudence in this regard, and this is the  
24 decision on the confirmation of the charges in the case of the Prosecutor  
25 versus Mr. Thomas Lubanga Dyilo.

1           Pre-Trial Chamber I, which was constituted fairly differently  
2    from what it is today, interpreted the constituent elements of a  
3    co-perpetrated crime as arising from the notion of control over the  
4    crime. I quote: "This approach includes an objective element which is  
5    constituted by the factual circumstances which enable the control to be  
6    exercised over the crime and a subjective element which is the subject of  
7    said circumstances."

8           In this regard, the Chamber had analysed the objective elements  
9    of the crime as being -- as including the existence of the common plan or  
10   agreement between two or more people and the contribution of each  
11   co-perpetrator.

12           In looking at the decision on the confirmation of charges in the  
13   Lubanga case and in applying the first -- the same test as set forth in  
14   Pre-Trial Chamber I in the decision we have referred to, we submit that  
15   there's sufficient evidence providing substantial grounds to believe that  
16   Mr. Ngudjolo Chui and Mr. Katanga are criminal -- criminally responsible  
17   as co-perpetrators under Article 25(3)(a) of the Statute for the crimes  
18   with which they are charged, in particular, with regard the objective  
19   element, the existence of a common plan or agreement is borne out by the  
20   many witness statements which talked of cooperation between the FNI and  
21   the FRPI in order to attack the village of Bogoro. This agreement, in  
22   particular the meetings Aveba, took place in the presence of the suspects  
23   or members of their respective movements who are their subordinates.

24           The plan consisted, as the Office of the Prosecutor has  
25   maintained and proven, in attacking civilians who were not taking part in

1 the hostilities and the UPC soldiers who were at the camp inside Bogoro.  
2 The facts that each co-perpetrator provided an essential contribution and  
3 a coordinated contribution leading to the attainment of the objective  
4 elements of the crime is demonstrated by the role played by the two  
5 suspects before and during the attack in Bogoro. This is also borne out  
6 by many witness statements. These witnesses were members of the FNI or  
7 the FRPI.

8 We refer to the fact that the suspects provided weapons to FRPI  
9 and FNI commanders. They supervised the movements of troops, making sure  
10 that the common plan was carried out. They gave instructions for the  
11 implementation of the common plan, and they ordered their subordinates to  
12 carry out the common plan.

13 With regard to the subjective elements, it is also obvious from  
14 the Prosecution evidence that the suspects had knowledge and intent  
15 necessary to commit the crimes as identified in the document -- Document  
16 Containing the Charges.

17 We shall now move on to the second point, that is the attack  
18 itself and the murders committed in Bogoro.

19 With regard to the intentional nature of the attack against the  
20 civilian population of Bogoro, there is, Madam President, your Honours,  
21 as you know, abundant jurisprudence from the International Court of  
22 Justice and the ad hoc tribunals with regard to the intentional attack  
23 against a civilian population. The Appeals Chamber of the International  
24 Criminal Tribunal for the former Yugoslavia has also recalled the  
25 prohibition in international through to -- from attacking civilians,

1 indicating that this cannot be justified by military necessity. The ICTY  
2 also recalled that the principle of the protection of civilians in  
3 international humanitarian law has changed over time and is now  
4 applicable to all armed conflicts whether they're international or not  
5 international.

6 As defined in the Rome Statute and the elements of crimes, the  
7 crime consisting in the international attack against a civilian  
8 population has no requirement as to a specific result such as death or  
9 serious physical wounds.

10 With regard to the question of whether such an attack was in fact  
11 directed against civilians, the jurisprudence of the International  
12 Criminal Tribunal for the former Yugoslavia indicates that the following  
13 factors may be taken into account: The method or means used during the  
14 attack, the status and number of victims, the resistance to assailants,  
15 and the scale of precautions taken by the assailants to respect or to  
16 secure the respect of the laws of war.

17 The evidence presented by the Prosecutor shows that the attack on  
18 Bogoro was an intentional attack against a civilian population. This may  
19 be inferred from the statements of Witness 280 who describes the method  
20 of the attack, as well as from the statements of witnesses 258 and 169.

21 Mr. Ngudjolo Chui's team said yesterday on the 14th of July,  
22 2008, something with regard to the number of victims, civilian victims,  
23 of the attack on Bogoro, and it maintained that it is impossible to know  
24 how many civilians lived in Bogoro during the attack in 2003, especially  
25 taking into account the facts that there were prior attacks in 2001 and

1       2002.

2               We recall that victim 166 estimates the number of inhabitants of  
3       Bogoro at about 6.320 persons. Furthermore, in light of the existing  
4       relevant jurisprudence, it appears that the population concerned must be  
5       mostly civilian.

6               There is no doubt, Madam President, your Honours, that during the  
7       attack on Bogoro the civilian population was targeted as such and that  
8       there was a large number of deaths amongst the civilian population.

9               Now, the constitutive or constituent elements of murder. Article  
10       8(2)(c) of the Rome Statute contains four specific acts which constitute  
11       war crimes and for which -- from which individuals are protected in light  
12       of the provisions of the four conventions of Geneva and the Common  
13       Article 3 which includes murder in all its forms.

14              The murders in Bogoro are subject of the charges as crimes of war  
15       and crimes against humanity. These two categories of crimes have the  
16       same constituent elements except the fact that a crime against humanity  
17       is -- must bear this characteristic. The conduct must be part of a  
18       general or widespread or systematic attack against a civilian population.

19              We consider that the Office of the Prosecutor has presented  
20       evidence which support the commission of murder during the attack on  
21       Bogoro on the 24th of February, 2003. During this attack, large number  
22       of civilians sought refuge in the Institut de Bogoro where they were  
23       surrounded, detained, threatened with weapons, and a large number of them  
24       were killed there. The murders in the institute or the Bogoro Institute  
25       and in the village of Bogoro were widespread, so much so that some of the

1 combatants were shocked by them. But the Institut de Bogoro was not only  
2 the location where murder was perpetrated. Civilians were killed in the  
3 bush, in their burnt houses, when they were fleeing or when they were in  
4 hiding, with bullet wounds, with machetes or knives. This is borne out  
5 in the statements of Witnesses 159, 161, 166, 250, 279, 280, and 287.

6 Particularly with regard to the constituent elements of a crime,  
7 the jurisprudence of the ad hoc tribunals has been unanimous in saying  
8 that the actus reus, that is the material element of the murder, consists  
9 in the death of the victims as a result of the action perpetrated by the  
10 perpetrator. The jurisprudence further sets out that murders can be  
11 carried out by action or omission. With regard to the specific element  
12 of murder as a crime against humanity, we consider that the evidence  
13 submitted during the confirmation hearing leave no doubt of the fact that  
14 a systematic and widespread attack against the civilian population of the  
15 village of Bogoro was indeed carried out on the 24th of February, 2003.

16 The evidence prevented -- presented by the Prosecutor shows that  
17 the murders in Bogoro were widespread. It also shows that Mr. Ngudjolo  
18 Chui and Mr. Katanga were aware of the murders that were perpetrated.

19 My third point is pillaging and the destruction of property.

20 The Geneva Conventions and the Hague Conventions prohibit taking  
21 possession of property of the enemy in the course of an armed conflict.  
22 The ad hoc tribunals established a precedent in terms of pillaging when  
23 they indicated that in its traditional meaning it involves an element of  
24 violence. In our view, this element has been well proven in this case by  
25 the Prosecution's evidence.

1           The international criminal Tribunal for the former Yugoslavia  
2   also set out that for the crime of pillaging to be established, the  
3   appropriation should neither be extensive nor correspond to a high  
4   economic value.

5           The evidence presented by the Prosecutor shows that the civilians  
6   in Bogoro lost their -- lost their livelihood which consisted mainly of  
7   cattle, goats, property, materials attached or linked to their houses and  
8   their harvests from their fields. The destruction of the village and  
9   pillaging are also described in the reports of the United Nations special  
10   investigation team dated 26th of March, 2003, which confirms that after  
11   the attack the attackers continued their pillaging.

12           We shall now move on to our fourth point, the responsibility of  
13   Mr. Katanga and Mr. Ngudjolo Chui and the modes of liability.

14           The role of each of the suspects in each of these crimes charged  
15   will cause me to refer to the first point of my presentation.

16           With regard to the second form of individual responsibility  
17   alleged by the Office of the Prosecutor as provided for in Article  
18   25(3)(b) of the Rome Statute, in particular with regard to order,  
19   solicit, or induce the commission of crime -- of a crime, with regard to  
20   this, the Prosecution evidence shows that Mr. Ngudjolo Chui and  
21   Mr. Katanga give orders and instructions which were clear to the  
22   combatants. These orders were that Bogoro was to be wiped out or  
23   crushed.

24           Mr. Katanga was in Bogoro at the beginning of the attack and  
25   stayed there until the attack ended. Mr. Ngudjolo Chui was in constant

1 contact with his commanders through radio, and in the afternoon of the  
2 day of the attack he was in the centre of Bogoro.

3 With regard to the modes of liability, we shall only deal with  
4 the issue of *dolus eventualis* as raised by the Defence of Mr. Katanga.

5 During the hearing of the 11th of July, 2008, Mr. Katanga's  
6 Defence team dealt with the inclusion of *dolus eventualis* in the  
7 interpretation by the Pre-Trial Chamber of Article 30 of the Rome  
8 Statute. The Defence alleges in particular that the fact that this  
9 question was dealt with during the travaux préparatoires and that it was  
10 finally not included in the Rome Statute, would not be the result of a  
11 coincidence and the Defence concluded with a quote from author who  
12 supports the same view. However, when you read the travaux  
13 préparatoires, it appears that the inclusion of specific provisions for  
14 *dolus eventualis* was suggested on several occasions due to the  
15 seriousness of the crimes being considered, and in particular with regard  
16 to the considerations in connection with the punishment which might arise  
17 therefrom.

18 The delegations which made the proposal were considering either  
19 defining intent, knowledge, and culpable negligence, that is *dolus*  
20 *eventualis*, at three levels or including under the same chapter the  
21 corresponding elements of these three constituent elements of the *mens*  
22 *rea* of a crime. It is therefore possible to deduce from this  
23 observation, your Honours, the common intent of the drafters of the Rome  
24 Statute not to exclude *dolus eventualis* but to cover all possible  
25 scenarios with regard to the psychological element.

1           In this light, isolating the definition of *dolus eventualis* or  
2     including it in the definition of the intent and knowledge does not  
3     appear to have been considered as being decisive, and the realities  
4     described in the intent and knowledge due to the vocabulary used seem to  
5     include also those described under the umbrella of culpable negligence.

6           Article 30 of the Rome Statute, that is the final version,  
7     finally used the terms "intent" and "knowledge," however, adopting an  
8     open formulation which gives the Chamber the leeway to interpret this  
9     provision in light of the circumstances with which it is presented. This  
10    reading of the intention of the drafters of the Rome Statute is also  
11    confirmed by Piragoff in his commentary on Article 30 on the  
12    Rome Statute. This commentary assimilates the reference to the normal  
13    course of events as part and parcel of the definitions of the intent and  
14    the knowledge which are set out in Article 30 with regard to *dolus*  
15    *eventualis*.

16           Finally, in its decision on the confirmation of charges in the  
17    Lubanga case, Pre-Trial Chamber I considered that it was its prerogative  
18    to interpret the terms employed in Article 30, and in this regard decided  
19    that *dolus eventualis* was included in the intent and knowledge as set out  
20    in the Rome Statute.

21           Lastly, Madam President, your Honours, I shall move on to our  
22    fifth and last point which is the harm suffered by the victims that I  
23    represent.

24           All the victims that we represent today have suffered mental and  
25    material harm due to the loss of their dead ones, due to witnessing the

1 attacks and the massacres, losing their livelihood and their resources.  
2 The Office of the Prosecutor also presented evidence with regard to the  
3 crimes referred to in counts 3 of -- and 4 of the Document Containing the  
4 Charges with reference to inhuman acts committed in the village of Bogoro  
5 as a crime against humanity and also with reference to cruel or inhuman  
6 treatment in Bogoro as a war crime.

7 These elements were supported by photographs showing physical  
8 harm. You will not, however, find photographs that can show the mental  
9 harm and the psychological suffering which are necessarily linked to this  
10 physical suffering and the massacre of loved ones. These -- this harm  
11 was suffered and mentioned by all the victims I represent today in their  
12 applications.

13 The elements of crimes mentioned in Article 7(1)(k) and Article  
14 8(2)(a)(ii) and with regard to the corresponding articles in the Rome  
15 Statute are set out in counts 3 and 4 of the documents containing the  
16 charges also include the fact of inflicting mental suffering. This  
17 suffering was surely experienced by the victims I represent, and they are  
18 still suffering as a result of the attack that they witnessed.

19 The Prosecution evidence shows that during the attack the  
20 civilian population was subject to cruel and inhuman treatment as well as  
21 inhuman acts.

22 The Office of the Prosecutor has shown we submit,  
23 Madam President, your Honours, that there is sufficient evidence to  
24 establish the existence of substantial grounds to believe that the  
25 suspects committed the crimes charged which have reached the threshold of

1 probative value which is required by the legal instruments at this stage  
2 of the proceedings in accordance with Article 61(5) of the Rome Statute.

3 We submit that there is sufficient evidence to believe that  
4 Mr. Germain Katanga was the military chief of the FRPI and exercised his  
5 authority within this movement. That Mr. Ngudjolo Chui was the military  
6 leader of the FNI and exercised his authority within this group. That  
7 they were aware of the existence of an armed conflict in Ituri during the  
8 period referred to in the document containing these charges, that they  
9 were co-perpetrators of the crimes which consisted in attacking the  
10 Bogoro village targeting the civilians who were not participating in the  
11 hostilities and UPC soldiers who were based in the camp inside the  
12 village; furthermore, we submit that they had knowledge of the systematic  
13 and widespread nature of the attack.

14 All these facts have been shown by the Prosecution buttressed  
15 with evidence that is sufficient at this stage, at the confirmation  
16 stage, in order to enable the Pre-Trial Chamber to rule that the charges  
17 brought against Mr. Katanga and Mr. Ngudjolo Chui should be confirmed and  
18 that these two should be committed for trial.

19 Most of the victims I represent today, Madam President, your  
20 Honours, mentioned that the harm they suffered -- that they still suffer  
21 has not been dealt with. However, the expression of their wishes through  
22 their participation in these proceedings is, I hope, a way of dealing  
23 with this harm.

24 This concludes, Madam President, your Honours, my closing  
25 statement for the victims I represent. Thank you.

1               PRESIDING JUDGE KUENYEHIA: Thank you very much everybody. This  
2 concludes the schedule for today. Tomorrow morning at 9.00 we will hear  
3 from the Defence lawyers, and therefore we will adjourn the hearing now  
4 to resume tomorrow morning at 9.00 when the -- both Defences will have  
5 the opportunity to make their final statements. Thank you very much.

6               COURT USHER: All rise.

7               The hearing ends at 12.26 p.m.

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1 CORRECTION REPORT

2 After review by STIC and approval of the Pre-Trial Chamber I, the following  
3 proposition of correction has been brought in the transcript:

4

5 page 30 lines 24-25:

6 "Three, the young age of Mr. Katanga, \*24 years of age at the time of the  
7 events,"

8 replaces

9 "Three, the young age of Mr. Katanga, 20 years of age at the time of the  
10 events,"