

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Germain Katanga
5 and Mathieu Ngudjolo Chui - ICC-01/04-01/07
6 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra
7 and Judge Christine Van den Wyngaert
8 Closing Statements
9 Monday, 21 May 2012
10 (The hearing starts in open session at 9.01 a.m.)
11 THE COURT USHER: All rise. The International Criminal Court is now in session.
12 PRESIDING JUDGE COTTE: (Interpretation) Please be seated.
13 Good morning, everyone. Good morning to the accused. Before I give the floor to
14 the Katanga Defence team, we are going to give Mr Gilissen a few moments to reply
15 to a question that was put to him at the very end of the hearing on Wednesday.
16 Mr Gilissen, please proceed.
17 MR GILISSEN: (Interpretation) Thank you very much, your Honours. Good
18 morning. Good morning to my learned friends. Good morning to the OTP team.
19 Now, the question was, "You have argued, sir, that the Ngiti and Lendu combatants
20 were waging an ethnic war against the Hema within the framework of an
21 international conflict with a view to reconquering Ituri. In your opinion, the
22 propagation of the idea that a Hema empire - a Hema empire - was a threat to the
23 very survival of the Lendu and Ngiti peoples."
24 I did have the privilege and honour, your Honours, to say a few words last week
25 about the international nature of the conflict in question. Regarding this empire, I

1 thought it would be useful to point out that historically speaking there is this myth of
2 a Hema-Tutsi empire, but in actual fact we know that the events, the actual realities in
3 the field, that would support this notion of a Hema-Tutsi empire, are based on a
4 certain idea, an identity rather, within several groups that are found in Rwanda,
5 Uganda, Burundi and also in the Congo in the Ituri territory and in the part of the
6 Ituri region that is of interest to us; namely, the area between Bunia and Lake Albert.
7 Now, myths are very strong things, your Honours, myths have great strength, and it
8 would be foolish to ignore them. That is a reality in the western world and is
9 certainly a reality in Africa.

10 At the time that is of interest to the Chamber, this myth certainly was present and it
11 was being fostered by a number of appearances, very strong appearances, because
12 during this very, very troubled time, 1990 to 2001, we do know that there were a
13 number of very sensitive issues at play within the area and there was the influence of
14 Rwanda on a part of Congo, particularly on the Kivu province, which is now two
15 provinces.

16 Uganda was also involved in the Ituri region.

17 Now, the fact -- and I think we have to be courageous when we make arguments
18 before Court. We have to say -- call a spade a spade. Now, the president of -- is of
19 Hema origin, and this certainly did foster this ethnocentric viewpoint and this is part
20 of a certain view-point within Africa.

21 Now, the fact of the occupation, the fact that certain roles were allocated in the Kivus,
22 both north and south, to people who were called the Banyamulengue, whether
23 rightly or wrongly. This is a reality of the Ituri region in the minds of certain Hema
24 people, so there was this ethnic colouration of the UPC, whether we accept it or not,
25 and we must have to consider the ethnic origin of Mr Thomas Lubanga himself.

1 And for all of these -- well, this is the background, your Honours, that I have to
2 explain to you. And this background gave a certain appearance. I want to be
3 prudent with my words here, but it did give the impression for people in the area,
4 people involved in these events, that the Lendu and Ngiti warriors -- well, this
5 appearance had to have had an impact, had to have had an influence, and this was
6 truly a part of the political culture of the area.

7 And I think this led a number of international observers to come to some conclusions,
8 and I think really these considerations definitely had an impact on what happened
9 because, you see, the people in this area experienced these realities on a daily basis.

10 Now, I am Belgian, so I think I can explain to you what has happened and I will
11 explain to you as a Belgian person, in my own country we have a French community,
12 a Dutch speaking community and a German speaking community. That is a daily
13 reality in Belgium and it is a reality that we have to deal with in a prudent way.

14 So it's not unreasonable to make a comparison here. Those ideas, whether we want
15 it or not, we have to be very careful because some people play with these ideas, or bet
16 on these ideas rather.

17 Your Honours, I think that in the various statements that were made by both
18 witnesses and accused you will find traces of these ideas that I have just provided to
19 you.

20 Now, in the case of Chief Manu and his statement, transcript 327, page 32, in
21 particular -- I won't read out the actual lines. I merely make reference to this
22 transcript, lines 1 to 28, and in particular lines 5 and 10 and line 27.

23 In the case of Mr Ngudjolo and transcript 327, page 48, line 7 and on, that is to say all
24 the way to line 28, page 49, line 18, of that same transcript, transcript 329, page 33,
25 line 6 to 25, we also find remarks to this end. Then we have transcript 321, page 9,

1 lines 19 and on.

2 And finally we saw with Mr Luvengika, because we do share the same feelings in this
3 regard and I do hope you will allow Mr Luvengika to confirm a number of points,
4 because the legal representatives of victims, although our clients do some have
5 diverging interests at times -- in any event, transcript 316, page 16, lines 25 to 64, and
6 then 321, page 64, line 4, then 325, page 9, lines 13 to page -- the following page, line 4.
7 So that is all I have. There you have it, your Honours.

8 One final element of information for you. We believe that the international nature of
9 the conflict, and in light of your question, is within a certain framework, and these
10 two conflicts must be seen within this framework and really these conflicts are merely
11 one. This is a conflict -- this was a complex one, but really was just a single one.
12 There were a number of stakeholders with varying interests and divergent interests in
13 the same framework, in the same area, and this explains why it is so difficult to
14 follow all the various alliances that were formed, that were dissolved, that were
15 renewed.

16 And so we would put it to you, your Honours, that on 24 February 2003 in Bogoro
17 little mention was made of the Ugandans, even though the role of those people was
18 crucial.

19 The fact that they did not intervene, that they did not leave the camp a few kilometres
20 away from Dele, was such that the Ugandans were stakeholders that day. They did
21 play a role. It can be seen as an abstention. It is not that they did not exist. It
22 was the first time that the Ugandans did not support their allies. So they abstained,
23 so to speak, and that has a certain meaning. We mustn't forget this point. This
24 really was a form of abstaining, an abstention, and this must be considered.

25 If you wish me to provide additional information, I would be kind -- I would be glad

1 to do so. We realise that this is a very complex situation, but a real one. The
2 Chamber must have that information. The Chamber may wish to dismiss that
3 information, or may choose to include these considerations in their ruling.

4 PRESIDING JUDGE COTTE: (Interpretation) Thank you, sir, for your
5 contribution.

6 Mr Luvengika, did you wish to take the floor briefly before the Katanga team begins
7 their arguments? You might have additional information, or perhaps you will
8 merely tell us that you share Mr Gilissen's view-point?

9 MR NSITA: (Interpretation) Thank you, your Honours, yes, indeed, we did have
10 some discussions with Mr Gilissen on this matter and I just wanted to share one point:
11 Indeed, there are a number of theories about the creation of this Hema-Tutsi empire
12 and as well, in the eastern part of the Congo, there are peoples that everyone
13 recognise that these are to be found in the North and South Kivu provinces that are
14 often referred to as Banyamulengue and in the Ituri region, and these are victims I am
15 representing, they are Hema people, and these two ethnic groups are to be found in
16 three countries; in the Congo, in Uganda and Burundi. And given that context,
17 generally speaking, the interventions by Uganda and Burundi and Rwanda, in the
18 eastern part of the Congo, have been seen from that view-point. In light of what
19 Mr Katanga said in transcript 325, this entirely corroborates what we see in the field,
20 what people say in the field, in the area.

21 As Mr Gilissen put it, we are not experts in this area. That would be going beyond
22 our mandate, but we can state that the conflict within Ituri must be analysed against
23 this backdrop. That is why we supported the argument of an international armed
24 conflict and we would encourage the Chamber to see these matters within the greater
25 context, the broader context. So this is really what I wanted to say. I thank you, sir.

1 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much. Thank you.
2 Thanks to both of you for raising these concerns. Mr Katanga, your Defence team
3 will now take the floor and present final arguments. Mr Hooper, on 18 May as
4 scheduled, you did provide us with the order of speakers and the various issues you
5 would be dealing with, so I believe that you will now begin. You may now proceed.
6 And for the entire team, you have three-and-a-half hours. We will have a break at
7 11 o'clock. Now, Mr Hooper, please proceed.

8 MR HOOPER: Good morning your Honours, Mr President. Every story has two
9 sides, but in a criminal court to some extent and in one sense only one side matters
10 and that is the Prosecution's story because they have to prove it, and if they do not
11 prove it then of course they do not succeed in proving their case and the overarching
12 submission that we make is that in this case the Prosecution has not proved its story,
13 has not proved its case.

14 As you can see from our schedule, proposed schedule of oral submissions, I kick off
15 as it were and I will be subsequently succeeded by Mr O'Shea who will deal with
16 some particular aspects of law. Dr Buisman, who will be dealing with Article 25,
17 and in particular the notion of common plan; Sophie Menegon, who will be
18 addressing you on specific issues relating to the sexual crimes and cumulative
19 convictions and, finally, Nathalie Wagner who will be dealing with some aspects
20 of -- on the subject of charges of pillage and destruction and murder and wilful killing.
21 And may I take this opportunity, because though she has been with us now since
22 December, in fact this is the first time I think Julie Fabreguettes, our intern, has been
23 in this Court. Can I introduce you to her. She is the last, I perceive, of a line of
24 interns, some of whom I see have rejoined us in the public gallery this morning, who
25 have come our way all, I must say, talented young lawyers furnished by the Barreau

1 de Paris, from the Paris Bar.

2 PRESIDING JUDGE COTTE: (Interpretation) Welcome for this final stage of the
3 proceedings.

4 MR HOOPER: I furnished, as you've seen, and I think this has been distributed in
5 hard copy to everybody, and I hope to the booths as well for their assistance, an
6 extract really, a table that merely shows Prosecution Katanga and Ngudjolo witnesses.
7 In the third column, for example, of the Prosecution witnesses' table you'll see the
8 pseudonym of the witness in consecutive order, and in the first column of the
9 Defence witness tables the same thing; we look at the last series of numbers.

10 And if you're like me, then with all the facility of modern science, sometimes hard
11 copy in fact does the trick and it does it sometimes a lot quicker, so I hope that is of
12 assistance.

13 On 24 February 2003 there was an attack on a significant and well-defended UPC
14 military camp that had been established right in the centre of the village or township
15 of Bogoro, and what happened in that one attack and subsequent to it forms of course
16 the subject matter of these charges and our concern.

17 There were at the time upwards of 300 or more UPC soldiers stationed in that camp.

18 The UPC were a well-trained militia. Their corps had been APC, 4,500 APC soldiers
19 mutinied and defected from the APC in early 2002. They joined the UPC or, more
20 specifically, the FPLC, the Patriotic Forces for the Liberation of Congo. Many of its
21 officers had been trained in Rwanda. They were, and the Defence emphasise this, a
22 formidable force. They were well-armed with light and heavy guns, mortars and
23 heavy mortars, chain machine-guns, rocket propelled grenades and they were skilled
24 in their use.

25 They had seen off other attacks, notably just in August of 2002 where you will recall

1 they had been attacked by more or less a battalion of APC in August and they had
2 seen them off. And they had prepared positions. You've been to Bogoro, you've
3 seen some of what's left of those positions encircling their camp; foxholes all around,
4 lines of fire laid down, and the camp itself in a relatively dominant position, vis-à-vis,
5 the rest of the local terrain.

6 So you might think, and anyone as a matter of common sense would conclude, that a
7 frontal attack against such a well-defended and prepared defensive position should,
8 by any normal rules of military engagement, be doomed to failure, would be suicidal.

9 The attack on 24 February 2003 was successful. And though we've heard of
10 substantial losses on the side of those defending UPC troops upwards of 100, we've
11 heard very little of any losses on the part of the attacking forces. This was a
12 surprising victory indeed.

13 Now, the Prosecution, and indeed it's accepted, were -- say, and it's accepted, that
14 most of the attackers, of course, the predominant number of attackers were local
15 people. They claim that they were led by Katanga, then age 24, and Mathieu
16 Ngudjolo who was, whatever else, a trained nurse.

17 The local combatants were local men and young men who had had to defend
18 themselves by force of circumstance. They were not trained soldiers, for the most
19 part, they were farmers and the children of subsistence farmers, and they had had
20 war thrust upon them by the extensive attacks inflicted on that impoverished
21 community by the UPDF, the Ugandan army, who had committed atrocities over a
22 substantial area of Walendu-Bindi killing, destroying villages, destroying facilities,
23 committing atrocities. They even buried the secretary of the commune, they buried
24 him, killed him by burying him alive, and those depredations went on, as we know,
25 for several years.

1 The men of Walendu-Bindi, in our submission, were clearly a defending force and not
2 an attacking force; they were classic autodéfense. They were defending themselves
3 village-by-village, in a traditional manner. They were fighting, as we've heard,
4 originally with bows and arrows and spears; this in the second millennium. And
5 sometimes they got guns from confrontations with the UPDF, or perhaps from selling
6 a cow up in Beni and bribing someone to give them a gun, but this was, in our
7 submission, on pretty small scale and they had limited if any training at all.
8 They had limited experience of fighting. In fact, it seems to have been largely
9 against Ugandans hit and run. I mean, what other attacks, laying aside Nyankunde,
10 which is a matter we'll come to in due course, what other attacks have the
11 Prosecution suggested did the Walendu-Bindi-ites, the Ngiti, engage in before the
12 attack in Bogoro in February of 2000, 2003?

13 And when the Prosecution speak of witnesses, their witnesses, saying, "Oh, we had a
14 system, this is what we usually did," well, when and where did they usually do it
15 because we haven't had a jot of evidence about that, with the exception of Nyankunde
16 which we bear in mind was an attack not against Hema but an attack against UPC
17 and Bira.

18 So by the time of Bogoro in February, this essentially ragtail force had only just
19 recently been provided with a significant amount of weaponry. In fact, that delivery
20 appears to have taken place just a week or a few weeks before, at the very most.

21 And most of them you might think would have had very little, limited experience of
22 the use of even a Kalashnikov, SMG, let alone any of the other weaponry.

23 So how was it - and it's a fair question that we pose - how was it that this -- these
24 really -- this group of recently armed subsistence farmers, with a sprinkling of men
25 perhaps with other skills, how was it that they were able to attack successfully and

1 defeat in such an extravagant manner the defending UPC at Bogoro?

2 We submit that they were defeated because, of course, it was a well-planned attack

3 and they had the facility and use of heavier and heavy weapons, heavier

4 machine-guns, heavy mortars, 60mm mortars, RPGs, and these were not weapons

5 that the local men had the necessary skill, in our submission. The local militia

6 lacked those kinds of skills.

7 We submit that the reason why the success -- that this attack was a success was that

8 they were -- the local people were backed by people who were in the know, by APC

9 advisers and fighters who had those skills.

10 This was not either a plan that had been hatched by a 24-year-old young man still at

11 school, Germain Katanga, with some skills in hunting, and Mathieu Ngudjolo who

12 was essentially, whatever else, a maternity nurse.

13 The plan clearly came from some other source, from people who know about these

14 things, and it came in our submission quite plainly from the desire of Kinshasa and

15 the government there, 2,000 kilometres away from Bogoro, who wanted to take back

16 the eastern territories for which the attack on Bogoro was an essential step.

17 And for that reason, the background to this case, the context as it were, is of course of

18 importance, and yet it's a context that's been largely overlooked, overstepped and

19 ignored by the Prosecution, largely in our submission because it doesn't quite fit their

20 story of an ethnic attack.

21 The RCD-K/ML, that is the group that had controlled this part of eastern Congo for

22 several years, albeit under the watchful gaze of the Ugandans, and the central

23 government of what is now President Kabila in Kinshasa, had clearly come to an

24 agreement. We don't dispute that. In fact, any suggestion to the contrary -- and it

25 was referred to by my friend last week, where there was a reference - and I recognise

1 this in the Defence brief - to a theory that in fact the RCD-K/ML were attacking Bunia
2 as a last shot chance of getting their hands on Bunia. That is clearly not what the
3 history and the context reveals. That was in fact the view of one witness, Pichou
4 I think, but that doesn't actually reflect the réalité.

5 The reality was that by November/December of 2002 Kinshasa and Mbusa Nyamwisi
6 of the RCD-K/ML had come to an agreement, so much so that afterwards, as we know,
7 Mbusa becomes a minister in the government - then the new and elected
8 government - of Kabila and, as far as I know, is still a minister in that government.
9 Bogoro was an essential stepping-stone to the objective of displacing the UPC and
10 regaining possession of the eastern provinces, and we must not in our submission
11 forget that the background of the few months or even weeks that we're dealing with,
12 really December and January and February of 2002/2003, a very narrow window of
13 time, what the context was and what the situation was.

14 It's difficult to see, because there's no established history. There's no history books,
15 as we pointed out - and it's obvious - in our closing brief, and we've not been assisted
16 here by a Prosecutor who has thought it necessary, for example, to bring contextual
17 witness or expert to assist us and to give us all a foothold in the surrounding history
18 of events.

19 But we do know, from evidence we've heard and from other material and documents
20 in the case, that only at Christmas, Christmas 2002, some eight weeks in other words
21 before the Bogoro attack, Jean-Pierre Bemba, the MRC, the RCD-Goma backed of
22 course by Rwanda, and the RCD national, all these fragmented parties, had united
23 and in the closing stages of 2002 were attacking the RCD-K/ML at Beni with the
24 objective of taking over Beni in northern Kivu.

25 So all that was very much against Kinshasa's interests, and one can understand it, and

1 Kinshasa was clearly not going to sit back, not with an increasing Rwandan support
2 of the UPC, because towards the end of 2002 -- and none of these things of course
3 were broadcast, very difficult for any locals or anyone, any observer, to know exactly
4 what was going on. No one had a finger on the pulse all the time, but it's quite plain
5 towards the end of 2002 that the UPC and Uganda were falling out and Rwanda was
6 coming in as a supporter of the UPC.

7 Now, let's not forget that Bosco Ntaganda, wanted by this Court on warrant,
8 appearing just over on our televisions just this weekend with more activities in Kivu
9 as we all saw, or may have seen, that he at the time was deputy commander of the
10 UPC, of the LLPC; a Rwandan-Tutsi still doing Rwanda's dirty work in Kivu, of
11 which Beni is part.

12 Can I refer to paragraph 636 by way of reference of our closing brief, where there's
13 reference there to an EMOI document dated 2 January 2003 where we have the
14 commander of EMOI writing to the chef d'état major interarmées, the chief of the staff
15 of Kinshasa and DRC army, CEPIA as its acronym in fact is known, in that letter it
16 notes what appears to be the general view that Uganda does not, despite its promises
17 and its treaties, intend to leave. There's a suspicion its going to go back on its word.
18 So there were clearly justifiable suspicions, even with the agreements that ostensibly
19 were being made with both Rwanda and Uganda at that time, that they weren't going
20 to keep their word. There was no certainty in December/January looking forward
21 exactly what was going to happen and how the future was going to pan out.

22 And on top of all that, setting aside all these theories of Tutsi empires and things, it
23 was a simple problem that the UPC were declaring themselves in favour of cessation
24 from DRC; a cessation that at the time may have appeared quite attractive to a
25 number of international players and actors given the appalling performance of the

1 central government of the DRC in managing and looking after the people in its
2 eastern provinces.

3 So it's against that context that the Defence submit this.

4 The attack on Bogoro was bound to happen. It didn't take Germain Katanga to
5 make it happen. If Germain Katanga had been hit by a bus in Beni when he was
6 there in early January 2003, do you think the Bogoro attack would not have taken
7 place? Of course it would have taken place. Whatever effect that might have on
8 reflections as to essential role and the like, the attack was going to happen.

9 Bogoro and the road to the east had to be secured, and the western route to Bunia, as
10 we've heard in evidence, was just too difficult a military exercise to penetrate. The
11 route - the only route - led via Aveba, via Bogoro, slicing the Kasenyi road,
12 weakening the Ugandan position in doing so, holding them a bit to ransom in doing
13 so and ousting the UPC and weakening them, because the last thing Kinshasa wanted,
14 or could abide, was the Ugandans to keep their promises and go and then the UPC
15 seize control, which is exactly what the UPC tried to do, as we know. In effect that's
16 what they tried to do and, if they had had more support from Rwanda, who knows
17 where things may be today in 2012.

18 So all this, this attack on Bogoro, was primarily in fact in Kinshasa's interest, albeit
19 removed a particular thorn in the flesh of the Ngiti of Walendu-Bindi for all the good
20 reasons we know. The attack on 24 February, therefore, was not the picture painted
21 by the Prosecution of a powerful warlord, Germain Katanga, falling on the village of
22 Bogoro like the wolf on the fold to slake his thirst for ethnic revenge. There were far
23 more powerful interests being served and at work and essentially in control than he.

24 We come to EMOI, because the means for the plan to put into effect the liaison, the
25 interface, between Kinshasa and its interests and troops in the east was plainly the

1 État-Major Operational Intégré, acronym EMOI, working together with the
2 RCD-K/ML and its APC forces, and we have much documents and evidence that
3 relates to that, paragraph 602 to 639 of the Defence brief.

4 Did EMOI plan? Did they order? Did they direct? Did they have effective control,
5 to the extent that they were able to control the militia in whole or part sufficiently to
6 do the job? And we say they did. And it's not a fanciful submission, because
7 there's attendant and good evidence in support of it.

8 It's an important evidential issue, because the more that EMOI, Kinshasa, the
9 RCD-K/ML are involved, then clearly there's less a role to be put on the shoulders of
10 Germain Katanga, then aged just 24.

11 Irrespective of his position, of his titles, irrespective of whether he was -- had been
12 nominated king even of Walendu-Bindi, the less control he has over events then
13 clearly affects the whole Prosecution story, which didn't or barely touched on these
14 powerful outside forces, but ignored them.

15 The Prosecution say, quote, "The credible evidence does not establish that the APC or
16 EMOI had effective control over the Ngiti and Lendu combatants, or that they
17 planned, ordered or even directed the attack on Bogoro." That's their words in their
18 closing brief.

19 Well, this is an issue that has been raised in the case by the Defence not in a
20 speculative way, but in a supported way with clear evidence and material in support
21 of it, and it's surely not for the Defence to prove -- to prove that EMOI was involved
22 and the extent. It's now for the Prosecution to negate the issue that has been raised.

23 And for the Prosecution to put that in this way, "The credible evidence does not
24 establish that the APC or EMOI had effective control," is reversing the whole issue to
25 the prejudice of the Defence and it doesn't reflect the obligations of the case where the

1 burden of proof of course rests with the Prosecution.

2 It's interesting that the Prosecution concede at paragraph 585 of their brief that

3 expelling the UPC from Ituri was, quote, "... in the interests of the APC and EMOI."

4 It undoubtedly was.

5 In fact, you may recall one of the Defence witnesses, Floribert Ndjabu, telling you

6 how he attended a meeting on 10 to 11 February 2002. So this is ten days, two weeks,

7 two weeks before the attack on Bogoro where President Kabila tells him, man-to-man,

8 to act quickly and to go back, to go back so that Ituri could be recovered from the

9 hands of the UPC.

10 And we know who EMOI is constituted by, Colonel Aguru, Lieutenant-Colonel

11 Kibelebele, Ekuba, and Duku. These are significant officers of the General Staff of

12 the DRC. And there's also, as we've heard from our witnesses, the activities of the

13 head of the Maison Militaire, particular office directly associated with the President

14 of -- with Kabila, that's General Kisempia, who reported directly to Kabila. Our

15 paragraph 620 refers.

16 And you've seen the documents that have been produced, the EMOI documents. I

17 refer to the brief, paragraph 631 to 639. You'll note the difficulties the Defence had

18 in obtaining them. And see, for example, paragraph 638. This is a document

19 produced in fact by Mr Kilenda, and I hope he doesn't mind if I borrow his close for a

20 moment by referring to it. It's referred to paragraph 638. As I say, it's a letter dated

21 23 November 2002. It refers to the President's office security meeting where, quote,

22 "He orders the CEMIA, that's the chef d'état major," et cetera, "to reinforce the FAC,

23 Forces Armées Congolaise, Congolese army, and the APC on the sites 'targeted and

24 planned,'" and there's four sites mentioned and two of them are Bogoro and Mandro.

25 It can't be more specific, can it? Isn't that game, set and match on this issue?

1 So Bogoro, planned, armed, supported and to the extent possible ordered by the
2 President's office at Kinshasa. And it's the 24-year-old, Germain Katanga, who sits
3 behind me today. Where were the arms that were flown into Aveba, two or three
4 tonnes at a time? Where were they flown from? They came, we've heard, from
5 Kinshasa via Beni. They were kept in a EMOI lock-up in Beni. They were
6 distributed by EMOI. Who chartered the planes? The Ngiti, well, you've been to
7 Walendu-Bindi, they didn't have a sou. Ndjabu sat on a whole load of three tonnes
8 going to Kpandroma, and he gave evidence of rather similar logistical support in the
9 west of the province.

10 Pichou spoke of a meeting. He was an intelligence officer where Bogoro figured,
11 paragraph 614 of our brief, and they were exhorted by EMOI not to follow the policy
12 of hit and run, but to occupy territory, to occupy, to take over. Sharif was told to
13 "cover areas and the President will give you work."

14 Well, the Prosecution has not chosen to investigate any of that, either before they
15 sought the arrest warrant for Germain Katanga or since. It's been a highly selective
16 investigation. The APC specialists, Blaise Koka, et cetera, are plainly there to ensure
17 success in the attack and the use, of course, of sophisticated heavy weapons. And
18 there was a consequent supply of arms. You're obviously not going to train local
19 people of perhaps uncertain loyalties how to use sophisticated weaponry if you're a
20 government with any sense at all. And those arms were ferried into Aveba and
21 through Aveba.

22 Could Katanga have reasonably prevented the supply of those arms? And in any
23 event, why should he have done so because those arms didn't come in with a label on
24 them saying "For the use of killing civilians."

25 As to the APC presence, the Prosecution were uncharacteristically coy as to whether

1 the APC were at Bogoro. You may remember Mr MacDonald's rather Delphic
2 answer last week, and the Defence say on the evidence they clearly were
3 present -- presence. As Mr MacDonald said, witnesses do speak of them. And the
4 evidence of Blaise Koka, his existence and his visit, that's not disputed by the
5 Prosecution and he, you might think, was not sent merely to observe things.
6 On 10 February there is, under Blaise Koka, a reconnaissance in strength of Bogoro
7 with Germain Katanga present. The Prosecution say that's not true, but why
8 shouldn't it be true? It's difficult to see why Germain Katanga would say he was
9 present at an earlier attack unless it was true.
10 You say, well, it's to furnish him with this explanation of not being able to go back
11 because people had been killed. He doesn't need that story. He could simply say
12 "Kasaki said I couldn't go to Bogoro," and we know that there's evidence that Kasaki
13 had the strength to say that, the power to say that. We know it even happened in
14 Bedu-Ezekere, with Nyunye or Kute, one of them, and there's ample evidence, in our
15 submission, in support of that attack. And let's be frank, that the Defence haven't
16 ambushed the Prosecution on that, we've made it plain from the outset that that was
17 our case; paragraph 687 refers. See witness 268, who spoke of a brutal attack a week
18 or so before and D-176 who says that ten were killed and then Adirodu arrives on the
19 15th with the plan from EMOI, according to Germain Katanga, and they have, as
20 we've heard, according to Kabila, to act quickly and the attack takes place on the 24th.
21 And it does seem from the background material that we know that things were
22 moving at pace. Uganda was beginning to get involved, and it may be that that was
23 why the attack on 6 March by the UPC on Ugandan forces failed. It was premature.
24 They didn't get the support that they were expecting and probably been promised by
25 Rwanda. Things are moving very quickly.

1 The Prosecution don't accept the numbers of APC that are suggested by Katanga.
2 Katanga speaks of a company coming in, some staying in Aveba, the rest passing on
3 down to Kagaba. And there are other, of course, other aspects of evidence relating
4 to this, and you will bear in mind undoubtedly the APC forces that had, as it were,
5 washed up in and around Walendu-Bindi as a consequence of the events just in
6 August.
7 So the Defence submits that plainly on the evidence there were other parties.
8 Kinshasa and the RCD-K/ML were deeply involved through EMOI and the APC and
9 that that has, in our submission, a significant effect, not just a question of other parties
10 involved in the planning in the attack who were also having control over the
11 participants and affecting the Prosecution theory of common plan. Talking of which,
12 one may have thought starting this trial that this was going to be a straightforward
13 case but, of course, it isn't. And here we are, we are now on filing I think 3,300, more
14 or less, 20,000 at least pages of transcripts. You've had to wade through 1,300 pages
15 of submissions from the parties, and we're burdening you again with more
16 submissions, and we apologise. And there's novel areas of law to address, and
17 every step of this trial has been new, new law, because the ICC is new. Such is the
18 nature of a trial. It's inevitable. But - and I'm not addressing you on this -
19 Dr Buisman and Andreas O'Shea will, but on top of what appear to be the simple
20 words of Article 25 of the Statute carefully, scrupulously, economically honed in
21 Rome, we have established on top of that this Baroque edifice that's come from
22 nowhere but various Pre-Trial Chambers, Baroque edifice has been established of
23 common plan and the rest of it. And just at a time when international law needs to
24 be clear, because it's addressing so many different people in so many different
25 systems, we have a system instead imposed, or trying to be imposed which

1 obfuscates and makes things oh so difficult, but there we are.

2 Germain Katanga is Ngiti, and it's sometimes seemed in this trial as if the Ngiti

3 themselves have been on trial. May I say, and I think I can speak to all those in the

4 team, it's been a privilege to have come into contact with these people, the Ngiti.

5 We've witnessed their friendliness, their resourcefulness, their concern for their

6 young. They weren't offering up their children to a UPC-type system. Their

7 emphasis on education and their struggles in poverty, because it is a poor area, you

8 visited it and seen it, and a particular feature of them which others have noticed,

9 including P-12, is their honesty.

10 It's been a very strange consequence of the notion of victim-hood at the ICC that

11 there's no Ngiti victims here. There's no voice for the Ngiti victims, and yet in this

12 history they were the most put upon, the ones who suffered the most of any group in

13 this area. And in 2000 and 2003 these decent people were put under pressures that

14 we cannot even begin to imagine. But let's go back to the attack.

15 The Prosecution case is that Germain Katanga planned, led and directed that attack

16 with Mathieu Ngudjolo. So the question is this, a question: Was Germain Katanga

17 present at Bogoro on 24 February?

18 Now, the Defence don't have to prove that he wasn't. It's a good example of the

19 nature of our system. We say he wasn't. We don't have to prove he wasn't, the

20 Prosecution have to prove that he was.

21 We weren't there, and I've got no video I can play and show and say, "Oh, look, you

22 don't see him in this video," whatever. Was he there? Was he at Bogoro? He

23 could have been, and he was a commander. Because he was a commander some

24 people might say, well, he probably would be there, wouldn't he? But "probably"

25 isn't enough. You have to be sure that he was. That, as we know, is the test in

1 Article 66. And he says he wasn't at Bogoro for a number of reasons. Our
2 paragraph 679 to 696 refer, to protect his base because of Kisoro, and there's good
3 evidence in respect of that, and a very reasonable motive given that his family, his
4 kith, his kin, his community, are in Aveba.

5 The Kasaki had effectively not given him permission to go because of the processes
6 that were still ongoing following the attack on the 10th, and there's clear evidence of
7 that attack. As I say, we don't have to prove he wasn't there.

8 Why should he go? Why -- is it necessary for him to have gone? After all, he
9 wasn't directing the attack. The evidence here that we've had is that Yuda was the
10 director of the attack, leading the most substantial of the forces, the garnison based at
11 Kagaba, on the front-line where you'd expect the bigger forces to be. So all Germain
12 Katanga would have been, if he had gone, was another man with a gun. It wasn't
13 necessary, in our submission, for him to be there.

14 But the Prosecution say he was and we ask this: On what evidence? Who are the
15 eyewitnesses? Who are the eye-witnesses that Germain Katanga was at Bogoro that
16 you've heard from?

17 Well, the first eye-witness who saw him, et cetera, et cetera, was Witness 159. When
18 you look at the list, you'll recall that 159 was abandoned by the Prosecution. Having
19 given evidence and sat in that witness box for five or six days, he's later abandoned
20 and his evidence as we know, because of your decision, does not in fact count as
21 incriminating evidence. The Defence say, "Well, he was plainly caught out lying,"
22 and the victims' counsel put that information the way of the Prosecutor.

23 He's interesting 159, because he does illustrate the obvious and that is that people can
24 come before these courts - and unfortunately do all too regularly - and lie for all
25 manner of reasons and sometimes for no reason.

1 161 is another eye-witness. You may remember him, I'm sure you do, and you may
2 remember on your judicial visit that we went down and looked at his house and his
3 view-point -- well, limited view-point and even no view-point when we looked at his
4 hiding place in the stream or ditch essentially.

5 This is the man you might recall who said he knew Germain Katanga, hence
6 recognition, and then admitted he'd only heard about him after the war; a man who'd
7 made no mention of Germain Katanga in any of his lengthy interviews with the
8 Prosecution, even when he was asked specifically in interview who he thought had
9 been responsible. So this is an ex post facto identifier, an eye-witness in a way.

10 He's a man, we bear in mind, who undoubtedly lost family in that attack and may
11 very well have been motivated, to some extent almost understandably, to go much
12 further in his evidence than he should.

13 But aside from those, there are four Prosecution witnesses who place Germain
14 Katanga in Bogoro, and those are 279 -- well, let me put them in proper batting order,
15 as it were: 28, 219, 250 and 279. Those are the Prosecution key witnesses.

16 There's another key witness generally, and that's 280 who you may recall comes from
17 the same place as 279, but he doesn't say very much about, or really nothing about,
18 Germain Katanga.

19 So we've got four witness eye-witnesses, and there's also of course witnesses 12 and
20 160 that are relevant. They are reviewed extensively in the brief. I'm not going to
21 repeat it. They refer to a conversation that take -- a year later, which they claim
22 occurred, which is disputed both in terms of the event and of course content, and
23 they - even though it's a short conversation that they relate - contradict one another
24 significantly, and we submit paragraphs 296 to 363 really their evidence can and
25 should be given no weight.

1 So here we come to the heart of the case, the main battle-field between the
2 Defence and the Prosecution, and that is the reliability, the credibility, of the
3 Prosecution's key witnesses, those four.

4 And when I say "key," and I even tried this over the weekend, I have a lonely life, but
5 if you open the Prosecution brief at any of the parts of their case that deal with
6 Germain Katanga and close your eyes and you stab your finger to the bottom where
7 you know the footnote should be, a pound to a penny your finger will land on either
8 28, 219, 279, 250. They are all over this brief like a rash. They are all over their
9 submissions last week. Hardly one page of the transcript relating -- no page of the
10 transcript relating to Germain Katanga lacked reference to one of those four.

11 I say "key witnesses," because obviously some of the witnesses deal with generalities.
12 These are the witnesses that the Prosecution have to sustain as credible, or they lose
13 their case. They are the building blocks. There are four of them. They are, to use
14 the word of Mr MacDonald's last week, corner-stones.

15 It's not surprising then that a significant part of our brief deals with their credibility,
16 and that's paragraphs 17 to 401 of our brief. I'm tempted to apologise to you, the
17 Judges, that we've written all that, but it's essential and it's to be seen as a whole. It's
18 not a question of taking one particular point. It's the whole of each witness's
19 testimony read A to Z. As objectively as a Defence advocate can be, our submissions
20 are looked at objectively those witnesses crumble through their own words.

21 Well, the burden of proving this case is obviously on the Prosecution and to a high
22 standard, and that's fair enough. After all, they brought Germain Katanga here four
23 years ago. He's been in the detention centre, or here. It's only fair that they have to
24 prove the case against him.

25 And in reviewing these witnesses I emphasise, as one said in the brief and perhaps

1 before, it's no role of Defence counsel to instruct you, the Judges, how you view the
2 evidence. How you view the evidence is obviously a matter for you. We make
3 submissions, submissions that we hope advance the Defence case, and whether they
4 do advance the Defence case or not, that's a matter for you.

5 But the Prosecution chose the evidence to adduce in this case in support of their case.
6 That's the system. The Judges didn't choose it, they chose it, and in our submission
7 there can be very few cases brought before a national court, let alone a High Court
8 such as this, the International Criminal Court, with Prosecution witnesses of this base
9 quality, of this low currency, these devalued witnesses.

10 And our crucial submission, as I said at the outset, is that the Prosecution hasn't
11 proved its case because it has to prove it through these witnesses, these four, and it
12 cannot surely substantiate its case on any one of them.

13 It's interesting that, despite the obvious inevitable attention that was paid by the
14 Defence in both briefs as to the credibility of these witnesses, how very little the
15 Prosecution themselves have said about it. There's about ten pages tethered to the
16 end of their brief, and last week we heard just the generalities reflecting the comment
17 or assertion at paragraph 762 of their brief that these witnesses are -- witnesses are,
18 quote, "... straightforward, reliable and credible," unquote.

19 Well, the Defence say they are lying. Those witnesses are lying. It's not a question
20 of mistake, an error. It's not a word, I know, we use when the witnesses are here.

21 We're polite, but as a submission that's where we are. They are lying.

22 And we're not dealing here with minor discrepancies. We hope we're not
23 taking -- removing ourselves completely from a degree of objectivity in this case.

24 We're not talking white hat/black hat inconsistency here. We're talking about
25 inconsistencies that go to the very root of their evidence and which illustrate lies.

1 Witness 279 - and I will just alight on them I hope very briefly - is to be seen in
2 conjunction with Witness 280. They came from the same farm, you may remember.
3 A very poor background; an undoubted influence we say on what they have done.
4 Both claim to have been in the militia at Zumbe. Both claim to have been at Bogoro.
5 Oddly enough, despite living next door to one another's farm, neither acknowledged
6 the other. 280 didn't even recognise 279 in that photograph. The Defence is
7 criticised for not showing the photograph to the other member, 279, but of course our
8 view was that they were in cahoots, that they're working together.
9 The Defence have called both (Redacted) of those witnesses, who have said in the
10 nicest possible way, but quite clearly, their (Redacted) have been lying. Neither one
11 was in a militia. It takes something for (Redacted) to do that, does it not?
12 And both of these witnesses lied by their ages. We spent ages in this Court going
13 through the various documents. It's only in the closing brief that the Prosecution
14 suddenly concede, "We accept the Defence evidence. We accept the birth certificates,
15 detailing weights at birth and everything else. We accept it". All that time spent on
16 that.
17 And it was the Defence who went out and found that material, not the Prosecution.
18 The Defence found the documents proving their true ages. So what does the
19 Prosecution say? They say, "We accept now that they were wrong about their ages.
20 They were mistaken," but how would you get mistaken when you're claiming to be
21 12-years-old when you're 18? How do you lose six years, and each of those
22 witnesses lost six years each? That's not a mistake. That's a purposeful lie by each
23 one in order to make each one look more attractive in the gaze of the Prosecution
24 investigator, who was looking for and thought he'd found on the strength of those
25 lies boy soldiers, child soldiers.

1 280, he says little about Germain Katanga, but his account in the battle, which was
2 referred to I think by Ms Bensouda in her opening comments, of course was the
3 dramatic and bloody tale of quietly killing, going around from house-to-house, ten
4 houses at a time with our machetes, cutting the throats of the toddlers, picking up the
5 babies and smashing their heads against the wall. And all that he says occurred in
6 his participation at the battle of Bogoro, which he says in his earlier account, detailed
7 and over many hours, started at 1 in the morning and ended at 5, just as light was
8 starting.

9 A battle fought entirely at night, when our evidence is Bogoro was fought from first
10 light onwards.

11 But he's still heavily relied upon by the Prosecution. Doesn't that suggest what we
12 say is the basic flaw here in the Prosecution case, their -- this is a desperate measure
13 to sustain a case. 279 lied about his age by six years, as we know. He said he saw
14 Germain Katanga on three occasions, including when he came to Zumbe to prepare
15 the attack on Bogoro. And the Prosecution now say in their brief, confirmed last
16 week, "Well, we don't rely on that; he's confused." He was confused about being six
17 years younger than he was, he's confused about seeing Germain Katanga before
18 Bogoro. Why? Well, the Prosecution suggest it's because he was mixing it up with
19 seeing Katanga before Mandro. Well, the only problem with that is he doesn't make
20 any mention of Mandro in his evidence. Witness 279 doesn't speak of the Mandro
21 attack at all.

22 279 and 280, in the Defence submission, it's another point, a smaller one perhaps but
23 it's insignificant, is that they both mark a map that shows the UPC camp to be at the
24 Kavali school, which we know, you know the geography and relevance of that; I
25 don't go into it.

1 Interestingly enough, so did one other witness as we will see, but both these
2 witnesses, 179 and 180, each had the same intermediary. Both came from great
3 poverty. Indeed, the very first witness who was in fact the witness called by the
4 Court, the head of investigations said, quote, "I can easily see how individuals in the
5 operational areas could think that it might be beneficial to be a witness." Indeed.
6 Now, I will just pause there for one moment.
7 (Pause in proceedings)
8 250, he's the other Zumbe witness. He's dealt with paragraph 950 to 150 in the
9 Defence brief. His significance is that he speaks of being part of a delegation from
10 Zumbe which the Prosecution rely on for obvious reasons, and have declared a
11 corner-stone of their case. He misled the Chamber too as to his name, his family, his
12 age. Gave a false date of birth. He even claimed his family were dead when they
13 weren't.
14 His (Redacted) also gave evidence and said again, and again in the nicest possible
15 way, his (Redacted) was lying and that his (Redacted) had never been a member of
16 any militia and was in fact in school, in Kagaba Gety during the relevant period.
17 That is supported by a number of Defence witnesses, I'm not going to trawl through
18 them, and in our submission it's of great interest, the Prosecution have brought no or
19 sought to bring no rebuttal evidence at all. They have got to prove the reliability of
20 their witness, not for the Defence to prove his unreliability.
21 Of particular interest, as we point in our brief, paragraph 149 and thereabouts, is that
22 he provided an earlier account also of Germain Katanga coming to Zumbe prior to
23 the attack on Bogoro. And though their witness claimed, well, that was a mistake,
24 the circumstances in which he gave that account at length, at great length in fact,
25 doesn't really lend itself to a notion of confusion.

1 As to the delegation, we deal with that significant issue when we deal with this
2 witness, and you will see it at paragraph 166 to 130. May I correct something there?
3 I state that but -- sorry, that D-366 was a member of the delegation, and he wasn't.
4 Now, this delegation is only mentioned by Witness 215 and 28. Witness 219, who
5 seems to know so much, knew nothing about the delegation at all.
6 Interestingly, according to 250, part of the delegation returns a few days before the
7 rest because Zumbe was being attacked; that is Nyunye returned, and they hear
8 explosions coming from Zumbe, but there's no mention of an attack on Zumbe after
9 December of 2002.
10 250 claimed, T-101, page 66, to have left on this delegation a week after the APC left
11 to go up towards Nyankunde. That is in September. And to my friend Mr Fofé, he
12 actually put the date of 24 August as his start date. And we bear in mind, this was
13 not a child at the time, he was 19 at the time. There's a lot in his evidence that we
14 dispute and question and raise against him. I'm not going to go through it all. But
15 interestingly, he embraced the letter, EVD-OTP-00025, the soap letter, as does my
16 friend last week, Mr MacDonald, a corner-stone again, a corner-stone of the case, he
17 says, but how can that letter fit in with what we know of the delegation described by
18 that witness? Because when he looked at the letter the witness saw the date, 4
19 January 2003, and tried to put his delegation in to January, but if we look at the letter
20 it states they have already been there for three weeks; I.e., they must have left in
21 mid-December Zumbe to have been where they are on 4 January or what that letter
22 purports.
23 The Witness 250, as we know, goes for a month, a week and four days. There is a
24 mantra that came on through his evidence, and then they attack Bogoro within three
25 days or week of his return. How does that fit in? It can't, can it?

1 And why, if we have that stamp, FRPI Zumbe, where does that come from when on
2 his evidence they learnt when they -- immediately they entered Walendu-Bindi
3 territory at Lakpa that they were FNI? And why is Martin Banga, the president of
4 the delegation, when he said that Boba Boba or Bahati had led it?
5 And the stamp, you may remember that stamp on the letter, when he was asked who
6 had made it, he said Edward. When? At 1 in the afternoon. 1 o'clock in the
7 afternoon. That's T-104. But why the FRPI stamp?
8 But what is of interest, the Defence submit, is that his evidence, and don't forget we
9 say that he was living in the area, he could -- could be correct in the extent that it
10 could be easy to get a stamp made up, as he said, not a difficult thing, everyone
11 seems to have had stamps, and it could be that perhaps there were Zumbe-ite
12 refugees - we've heard that there were Zumbe-ite refugees - but there may have been
13 such refugees who would have been minded to create a representative stamp once
14 they'd heard about the existence of the FRPI. But what's interesting is the way he
15 weaves that letter into his story in front of us.
16 And finally, 28, a witness central to the Prosecution case according to the Prosecution
17 brief, and of course he is, he appears on nearly every page, he was interviewed for
18 50 hours by the Prosecution. There were no background checks, it appears, and he
19 achieved international relocation, which is a huge prize, and he was in contact with
20 intermediary 143, who was also the intermediary with 279 and 280 that we've dealt
21 with, and 316, who was the intermediary with 250 and with the abandoned witness
22 159, and also with intermediary 183 who was associated with the last witness I
23 touched on, 250.
24 Twenty-eight lied about his age. He gave false name. He made up the name of a
25 whole family of siblings. He produced forged school reports and he admitted he'd

1 lied about abduction and that he'd been told to by the intermediary.

2 The Prosecution haven't called any of the intermediaries, and it really is for the

3 Prosecution to prove the reliability of their system and their witnesses.

4 Twenty-eight lied about those who participated at the Nyankunde attack, he listed

5 names, and then he changed it. He had to because he realised the Defence had

6 investigated his account, and very significant is his account in 2006, much earlier than

7 his account in Court when events were presumably much fresher in his memory, an

8 elaborate story told not in a brief interview, in 20 hours of interview, and what

9 emerged there is a clear account of immediately prior to the battle of Bogoro

10 accompanying Germain Katanga to Bavi, meeting commanders there to plan the final

11 attack on Bogoro, and then accompanying Katanga to Kagaba. That's a completely

12 different account, even as to the times of arrival in Kagaba. And again, he's one of

13 these who claims it was a mistake. He confused it with another meeting at Bavi.

14 But what meeting could that have been? And how is that his account clearly meshes,

15 is connected, in detail with Kagaba and Bogoro? That's not a mistake; that's a

16 purposeful account. There's much more in the brief, and I don't go into it.

17 And finally on the witnesses, Witness 219, you will recall him, paragraph 243 to 293

18 in the Defence brief, he provides a lot of details, and why not we say because he had

19 been living in Aveba. Interestingly, despite appearing to know so much, he neither

20 knew of any delegation nor did he know of arrival of Blaise Koka, and he said that

21 Chef Manu arrived just two weeks before the attack on Bogoro. We know it was the

22 previous year, we can see that document. The Defence pay particular interest to his

23 account of the planning meeting on the Sunday, and his story is reviewed critically of

24 course in the Defence brief.

25 Now, an important part, I'm not going to go through it all and pressure of time does

1 not allow, an important part of his evidence is his opportunity to see all the
2 commanders at Bogoro the day after the attack. He says he goes to Bogoro on the
3 24th, the Tuesday. And of course that's quite important, that detail, because it gives
4 authority to what otherwise would just be hearsay. He says "I went there and I saw
5 commanders," and he names about 20 that he saw, and in Court about a dozen that he
6 saw, including of course the accused.

7 But what's extraordinary is the basis of that evidence, and his claiming that he'd
8 walked of course from Aveba to Bogoro and back in light, in the same day, 100
9 kilometres, and he's got a bad knee. Just, just extraordinary. And it's not the kind
10 of element of evidence that can just be stepped over, that one can ignore or get
11 around, and the Prosecution, the Prosecution haven't addressed this at all, and it's for
12 them to prove the credibility of such a witness.

13 He, too, seems to place the school, the camp, at the Kavali institute. And look what
14 he says about Mandro and Germain Katanga; our reference paragraph 285. And
15 then there's the telephone transcript. You know the background to that and how he
16 said how he was phoned, and Germain Katanga is crying on the phone in his account
17 and then we compare it to the transcript that fortunately the prison here were
18 recording telephone messages, and we had it intercepted and we had it and you have
19 it. Where does that leave that witness?

20 And it's quite clear in the course of that telephone call Katanga didn't go to him.

21 You know the history from Jean Logo, how through his cousin he'd heard of someone
22 and the rest of it, so it's not Katanga reaching out for him. And in that conversation
23 on the telephone it's quite clear that Katanga saw him, you might think, very much as
24 someone who could, I suppose, act as an intermediary with others.

25 Well, there we are. Those are the four pillars of the Prosecution case. I've dealt

1 with them briefly. They are dealt with at greater length of course in the brief.

2 Would any one of us wish to be convicted of any crime, let alone a crime of this

3 seriousness, on the say-so of any one of those witnesses? Why hasn't the

4 Prosecution addressed the flaws in their evidence? The Prosecution just hoping you,

5 the Judges, will make some leap of faith in respect to them, on the basis that the

6 Prosecution say that they are reliable, when they've shown themselves to be frankly

7 as contradictory, as self-contradictory, as illogical as any witness that possibly comes

8 before a Court.

9 And how on earth did that happen? The chief of investigations was called and gave

10 evidence. Well, it's evident, in our submission, that it was the way in which the

11 Prosecution investigation was structured and conducted that problems like that were

12 bound, bound to occur. The system was inadequate largely because of course of the

13 reliance on intermediaries. The head of investigations unit was asked how she

14 assessed the objectivity and credibility of these intermediaries. Really, she said,

15 "Well, the information could be sometimes very limited." Indeed, indeed.

16 She also claimed, quote, "For the most part we found the witnesses and not the

17 intermediaries." T-81, page 61. That's not correct, that's incorrect. The opposite is

18 true. In this case, the use of intermediaries has been prolific. I refer to the

19 Defence brief, paragraphs 560 to 504. Indeed, of 24 Prosecution witnesses, let's

20 discount those journalists, photographers, the medical evidence, et cetera, linguists.

21 Three intermediaries of concern for us, they are there on our list in front of you, 143,

22 316 and 183. 143 introduced both 279 and 280 who lied about their ages by six

23 years and all the rest of it, and his (Redacted) claim are liars.

24 He also had contact with 28, as did 316 and 183. Twenty-eight says he was told to lie

25 by 143 about his abduction. 316 also had contact with 250, who's the other Zumbe

1 witness, as did 143. 316 also introduced 159, that's the witness who was withdrawn.
2 We know that there's a system of payment of intermediaries, there's reference in our
3 brief in respect to that. It seems to have been payments that were, if not
4 unsupervised, right hand did not know what left hand was doing, as we heard.
5 We're aware of the Lubanga case, as you are, and the view there that was taken that
6 the Prosecution should not have delegated its investigative responsibilities. We
7 okay that. It's happened here. And I'm not intruding into the facts of that case, but
8 I'm certainly permitted to resort to principle. And we know that as a matter of
9 principle that Court rejected a series of witnesses as a result of the essentially
10 unsupervised actions of the principal intermediaries.
11 We are surprised, this Defence is surprised, at the attitude that the Prosecution have
12 taken towards the intermediaries and their witnesses, particularly in the light of the
13 Lubanga decision. We are surprised that a Prosecutor, in a Court of this level,
14 should seek to sustain convictions when there is, as we submit, a sufficiency of
15 evidence of contamination and of gross unreliability of the witnesses.
16 We do not say, as the Prosecution seem to think, "Oh, because they've been in contact
17 with intermediaries you can't take account of them." We're saying those witnesses
18 are lying, their evidence reflects that and, really, the fact that there's also this apparent
19 pattern with intermediaries is really an icing on the cake, a cherry on the cake.
20 There is a discernible pattern of intermediaries and lying witnesses. But it's an
21 important element for all that.
22 And we emphasise, it's for the Prosecution to demonstrate the integrity of the
23 progress, of the process, and that it's not been affected or corrupted, and the
24 Prosecutor has chosen policy decision clearly not to call those intermediaries.
25 It would be better, in our submission, if the Prosecutor had, as he did with 159, taken

1 a more appropriate view of certain witnesses in this case, particularly in the light of
2 events in another Court.

3 It would have been the proper thing to have done to demonstrate that this Prosecutor,
4 ICC Prosecutor, is not going to permit his institution to be seen or suspected of being
5 tainted in that way. One's surprised that particular view was not adopted. Not a
6 view for the Court, it's a view for the Prosecution.

7 Relocation. Again, our paragraphs 512 to 513, all the principal witnesses were
8 relocated in this case, and we say against the background of poverty and the rest of it,
9 that is a colossal inducement, particularly when it involves, and we believe it does in
10 three of the witnesses, international relocation, that is outside Africa.

11 There were other flaws in investigation. There was no general exhumation in
12 Bogoro. They go and exhume 8,000 corpses at Srebrenica and here we have Bogoro
13 with a very limited crime scene, with people apparently capable of pointing out
14 where the graves are, there's no general exhumation. Thank you.

15 Féticheur, the féticheurs. The head of investigations was asked by you, the Chamber,
16 about the féticheurs. She said this: "We did not see it as essential to seek out these
17 persons." And at that time both Kilongo and Kasaki, Kakado and Kasaki were of
18 course alive, they are no longer alive, but isn't that clearly a misstep because fetish,
19 and that background as we've learnt, is absolutely essential to the culture and they
20 plainly had real power. 219 said Kakado was the most powerful after God. And
21 may I say, there is nothing adverse, perverse, in my quoting 219 even though I say
22 he's not a credible witness, because on some aspects of things, background and some
23 aspects of things, there's no reason why one couldn't see that he could know
24 something like that, and indeed with other witnesses as well.

25 Well, Pichou has said, as far as the féticheurs were concerned, "If they said this or that

1 should happen or should be done, no one else could do anything about it." Can I
2 just see how much more time I've got, because I'm limited within our team.
3 (Pause in proceedings)
4 Well, there was some dramatic cuts in our written brief. I think there's going to be
5 some -- a dramatic cut now in terms of my oral submissions. As I don't sit in front of
6 a mirror and time myself it becomes difficult to judge sometimes, but I was going to
7 move on, and I do, towards Katanga's position and authority, and I'm not going to
8 refer to the context which is in paragraphs 548 to 744.
9 Nobody suggests Katanga had any position in the militia before September 2002.
10 The Prosecution assertion that he became leader of the Ngiti after the death of Kandro
11 has no reliable basis. The suggested sources last week by the Prosecution, we invite
12 you to go to, we submit they don't -- aren't sustained. Kandro was not himself
13 leader of the Walendu-Bindi/Ngiti. His power base was one part of it, very much to
14 the west. There's no evidence of association between him and Katanga.
15 The militia was not a unified group in September or in the months following. We
16 only have to see the history: Cobra against Kandro, Ndekote against Cobra, Cobra
17 against Ndekote, Ndekote against Yuda, et cetera. Kisoro. The behaviour of Cobra.
18 We've plainly got very independent people in this area. So there's clear -- no clear,
19 certainly no clear succession on the evidence, and difficult men around.
20 And moving on from September, the visit to Beni, that document, no sign of the FRPI
21 on that document. The history of the FRPI and its development, the issue of when
22 Germain Katanga was president, one of the difficulties is that very few people seem
23 to really know then and even now exactly how the FRPI was structured at the time.
24 You know that we say that Germain Katanga did not formally, formally become
25 president of the FRPI until early 2004, but there was a continuum of, as it were,

1 progressive use by him up until that point of the title. We rely and refer
2 significantly to the manifesto and to the use of co-ordinator that appears - that's the
3 word used in the manifesto - and we refer to our paragraphs 598 to 600, and we say
4 that it's not unreasonable, not something that should be scoffed at or disregarded as
5 the Prosecution do, when Germain Katanga says on his return to Aveba he
6 considered himself co-ordinator. It's a function, it's not a rank or a post, and it
7 provided no military authority.

8 Germain Katanga has said many people called him many things, and that he held no
9 title or rank before Bogoro. In a way, I suppose whatever title or rank he may have
10 had doesn't -- isn't the issue, the issue is whether he had control and authority. And
11 the evidence produced by the Prosecution doesn't reach that far.

12 The first time -- there's no letter pre-Bogoro where he uses the title of "president,"
13 others might, but he says, "No, the first time that I became" -- or the use of "president"
14 was adopted was rather confusingly in a parallel kind of structure with Kakado, who
15 himself was president, as we know, of Codeco, "nominating me as president of
16 combatants on 3 March when Kakado said, 'The day of changes which I've been
17 waiting for, the time had come when the combatants should not kill each other
18 because of titles. Cobra, you're stay as colonel, Katanga will become president',"

19 which interestingly is not a rank of course, and you may think that the problems of
20 Kandro and Kisoro may have prompted that.

21 From March onwards under very much the influence of Kisempia, head of the
22 Maison Militaire, the FRPI tried to structure itself unifying itself with, uniting itself
23 with the FNI as we know, and from then on and throughout the next year or so it
24 really is a question, is it not, of various groups trying to put on the make-up and the
25 face of responsible, hierarchical structured organisations in order to benefit, to be

1 seen as viable, in order to receive the benefits of pacification of a seat at the table of
2 perhaps what eventually led, in Katanga's case, to his appointment as
3 brigadier-general in the army.

4 So there's a lot of manoeuvring and overstatement, and perhaps exaggeration that
5 goes on in order to achieve that. So titles and ranks, in our submission, need to be
6 carefully, carefully weighed and not given undue weight as a reliable indicator of
7 effective control and authority.

8 Coming to the letters, and I have little time to deal with them, the letter from the
9 Église du Christ, well, there's no mention of president there. I will just deal with the
10 last -- with the -- I won't give the full EVD definition, it's just the 238 letter.

11 The 278 letter, charges de front, sent by Kasaki, very interesting in one respect
12 because it's plain from the wording of that letter that Kasaki appears to be exercising
13 a superior authority. He's not saying, "Do you mind if they don't carry arms saying
14 "It is strictly forbidden." And in respect to that, Germain Katanga says he's not seen
15 that letter. And this is the problem with these letters. We don't know their
16 provenance. It's all very well for the Prosecution to say they came from Medhu, but
17 if you look at the transcripts there's been no evidence of that and, as Mr MacDonald
18 said just last week, it's not just sufficient for counsel to make assertions; there has to
19 be evidence. And there is no evidence that these particular items came from Medhu,
20 and he can't get it through the back door now unless he's put it up through the front.

21 Mentioning on transcripts is not enough. And that's a significant matter, because we
22 can't cross-examine a letter.

23 And those letters are no more than documentary hearsay, and they should be
24 approached with very great care indeed.

25 And what's interesting about the cabinet du front, charges de front letter, is that

1 there's a copy there sent to le commandant at Aveba-Mukubwa. Who is that on that
2 letter? And even if, even if you were to accept that Kasaki is in fact meaning to
3 address Germain Katanga as president of the movement, it doesn't mean at that time
4 he was because it's quite plain names are being bandied around right, left and centre,
5 and maybe it was all part of a continuing process which eventually ended up with his
6 appointment as president in competence on 3 March.

7 Letter 239, the Cobra letter, very briefly dealing with that, look at it. It's quite plain
8 that that letter is dated 3 March. It says it comes from Olongba. Whether it does or
9 not, we don't know. I'm sending letters from The Hague with my London address
10 in an envelope with a Dutch stamp. It doesn't mean you are where you are. But
11 more importantly with that letter, look at it, because doesn't it shout out that here
12 is -- here is perhaps a somewhat disgruntled Cobra Matata, emphasising his own
13 position? Look at the way he emphasises l'état -- le chef d'état major supreme le
14 colonel. Very grandiose, and at the same time saying "And I've got the gold. I've
15 got the gold."

16 This is not a letter accepting command. And where does the letter of 17 February,
17 just a week before Bogoro, that we saw, to Oudo, sent by Cobra and headed
18 "Mouvement de libération Lendu," where does that come into the picture? It merely
19 confuses, and it was a confusing situation.

20 And finally on letters, because I want to mention this, because I think it became a
21 victim of some cutting of the written brief, and that's EVD-D02-00231, and it's a very
22 interesting document, not least because of the people it's sent to as well as its content.
23 And this is a letter sent apparently, or purports to be sent by Oudo on 6 March, and it
24 is sent to Kakado or purports to be, and this letter where Oudo boastfully claims
25 responsibility for all the successes incidentally, and also talks about the terrible

1 depredations imposed by Ndekote on the local people, which again goes to his
2 control or lack of control, but if you look at the list of people it's sent to, it's sent to
3 Mbusa, it's sent to the Director of Communication of RCD-K/ML, who we know to be
4 Mike-4, it's sent to the person in charge of war, His Excellency, at Bolo, who might be
5 Kasaki, it's sent to Members of the Committee of the FRPI at Beni. It's sent to the
6 Committee of Management at Codeco. It's sent to the Supreme Commander of FRPI
7 of Walendu-Bindi at Olongba, which is Cobra. No mention of President of the FRPI,
8 no mention even of president of combatants, but there is a figure here, monsieur le
9 commandant auditeur of the FRPI at Bolo, and those are essentially my submissions.
10 Now, whatever his title, the Defence submits the real focus is not the names that were
11 bandied about, often not the same ones, but whether the Prosecution approved
12 personal liability of Katanga and we say they have not. And the letters won't get
13 them there; it's the witnesses, the four key witnesses, and the view you, the Judges,
14 take of them.

15 All the witnesses enter the witness box equally, in our submission, whether you're a
16 victim, whether you're a Prosecution witness or a Defence witness or an accused as a
17 witness. You enter the witness box equally, but whether you leave the witness box
18 equally, that's a matter for you the Judges.

19 Compare the Prosecution witnesses with the Defence witnesses. I'm not going to -- I
20 can't take time up doing that. Look at Ndjabu, look at Alain Metu, look at Jonathan,
21 look at Pichou, look at Jean Logo, look at them as witnesses and the way they gave
22 their answers. These weren't rehearsed men. Just think for what -- compare them
23 to the Prosecution witnesses. It's chalk and cheese, chalk and cheese, but we
24 emphasise we don't have to prove anything; it's the Prosecution who have to. You
25 can have doubts about even significant parts of the Defence case and acquit. You

1 cannot have doubts about significant parts of the Prosecution case and convict. And
2 those four witnesses, 279, 280, 28, 250, 209, 219, are those really the stuff the ICC
3 Prosecution is going to be made of? Is that the future of this Court? We hope not,
4 and we hope it's the end of this case as far as Germain Katanga is concerned.
5 I am sorry I overran just a little - a very little marginal bit and now I give way to
6 Mr O'Shea. Do you want --
7 PRESIDING JUDGE COTTE: (Interpretation) Mr O'Shea, no doubt you'll be
8 explaining to us how you plan to make your presentation. Now, I believe that we
9 started some time between 9.15 and 9.20, because we gave the floor to legal
10 representatives for a few moments, so you will have to reduce your presentation
11 slightly so that we can finish today's hearing at 1.30.
12 I'd also like to mention that at page 18 of the French transcript, line 9, Mr Hooper
13 mentioned February 2002 but I believe you must have been speaking about 2003, and
14 I don't think that comes as a surprise to anyone but, in any event, if that could be
15 corrected.
16 MR O'SHEA: Your Honours, I will be addressing certain paramount legal issues in
17 this case. The case, of course, is filled with law, but I will focus on particular aspects
18 or highlight particular aspects which I feel are important, and in particular I shall be
19 addressing the issue raised by your Honours -- well, I say raised by your Honours,
20 raised by your Honours as an issue which ought to be addressed today, the issue of
21 Regulation 55. I will then address the issue of crimes against humanity. I will deal
22 with the chapeau elements of crimes against humanity and Ms Sophie Menegon, and
23 Ms Nathalie Wagner, will address the particular crimes in that context.
24 I will then go on to address the issue of children and then, finally, I will deal with the
25 theory of common plan followed by Dr Buisman who will go into the essential

1 ingredients.

2 So with regard to Regulation 55, our submissions are three, and the first of those

3 submissions is this: That there is not the evidential basis for your Honours to apply

4 Regulation 55. I accept that the conflict must be one or the other, international or

5 non-international. However, in this adversarial system, it is for the Prosecution to

6 prove its case, whatever that case may be. And we make no admission as to the

7 international nature of the conflict or the non-international nature of the conflict.

8 For your Honours to make a finding, your Honours have to make a finding on the

9 basis of evidence, and by virtue of Article 74 must confine yourselves to the facts and

10 circumstances in the charges and the evidence in the case.

11 In our submission, international conflict has not been proved, non-international

12 conflict has not been proved either. With regard to non-international armed conflict,

13 it is not sufficient that the Prosecution has failed to establish a confrontation between

14 two states because the fact that the Prosecution has failed does not necessarily imply

15 the reality of the situation. I will proceed after the break.

16 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much, Mr O'Shea.

17 Even though it must be terribly complicated for you to stop in the middle of an

18 argument, we will now suspend and resume at 11.30 sharp.

19 THE COURT USHER: All rise.

20 (Recess taken at 11.00 a.m.)

21 (Upon resuming in open session at 11.34 a.m.)

22 THE COURT USHER: All rise.

23 PRESIDING JUDGE COTTE: (Interpretation) Please be seated. The proceedings

24 are called to order. Mr O'Shea, you have the floor.

25 MR O'SHEA: So I will continue where I left off and pick up the torch and hope that

1 the flame is still lit, and I was discussing Regulation 55 and the fact that in my
2 submission there must be an evidential basis before your Honours can actually apply
3 Regulation 55 and I was dealing with the issue of non-international armed conflict
4 and with respect to that your Honours will note that there is some evidence, albeit
5 much of it of a hearsay nature, but there is some evidence in the dossier to suggest
6 that Rwanda on the one part and Uganda on the other have supplied arms, have
7 played a role in the creation of the UPC; in the case of Uganda have continued to
8 occupy the territory of the DRC, albeit not necessarily physically the territory of
9 Bogoro, but what this small aspects of evidence, what they point to, is the reasonable
10 possibility that the UPC was indeed under the overall control of either Rwanda or
11 Uganda, and it is for the Prosecution to prove that the relationship which was created
12 between Uganda and the UPC has effectively been severed and it is for the
13 Prosecution to prove that the relationship between Rwanda and the UPC has either
14 been severed or is insufficient to establish overall control.

15 Now, there being a reasonable possibility that the reality might be that Uganda or
16 Rwanda did in fact exercise an overall control over the UPC in the sense of strategy,
17 playing a role in strategy, or the planning of the defence of Bogoro, that reasonable
18 possibility in my submission blocks your Honours from applying Regulation 55
19 because we have not had the evidence to the contrary.

20 That brings me on to the second limb of my submissions on this particular issue
21 which is whether the Chamber is in fact authorised by the Statute and Regulations to
22 exercise Regulation 55, and it is my submission that the Chamber does have authority
23 to alter the legal qualification of the facts, but it only has such authority where this
24 would not alter the essential nature of the charges.

25 And here I refer to Article 67(1) and this is a minimum guarantee which requires that

1 the content of the -- of the charges be made plain at the beginning of the trial, and
2 Article 74(2) which limits the authority of the Chamber in terms of Regulation 55 in
3 that the Chamber may not go beyond the facts and circumstances as contained in the
4 charges.

5 Now, the Appeals Chamber in the case of Lubanga has had the opportunity to
6 address this issue of the application of Regulation 55 in circumstances different from
7 these, and the Appeals Chamber has held that any interpretation of Regulation 55
8 which cannot be reconciled with Article 74(2) cannot be reconciled with the Statute
9 and must be rejected as incorrect.

10 The Appeals Chamber has also stated at paragraph 100 that "The Chamber notes,
11 however, that the text of Regulation 55 does not stipulate beyond what is contained in
12 Regulation 1 what changes in legal characterisation may be permissible. The
13 Appeals Chamber will not consider the issue any further, but notes in any event that
14 the particular circumstances of the case will have to be taken into account." So once
15 it is determined that the Chamber does not have authority to apply Regulation 55
16 then the question of whether the Defence is prejudiced does not arise.

17 Regulation 1 is the regulation which states that the Regulations are subject to the
18 Statute and Article 52(1) defines the power of the Judges to make Regulations, make
19 Regulations which are necessary for the routine functioning of the proceedings.

20 Now, the Appeals Chamber has stated that routine functioning incorporates certain
21 important provisions, and that is a proposition which I can accept. That's contained
22 at paragraph 69 of the decision in the case of Lubanga, and that it also includes
23 changing the legal qualification of the facts.

24 However, in my respectful submission, it is not envisaged that in changing the legal
25 qualifications of the facts one can affect the central nature of the charges. It should

1 be remembered that in the ICC context that the accused must know the nature, cause
2 and content of the charges and the word "content" goes beyond international human
3 rights instruments. So that would appear to be a deliberate choice on the part of the
4 drafters.

5 So with regard to the facts and circumstances referred to in Article 74, in our
6 submission circumstances is capable of including the circumstances underlying the
7 basis or the basis of the legal qualification itself.

8 Among those circumstances, one finds in the confirmation decision the participation
9 of Uganda in the Bogoro attack. One will note that in the submissions of the
10 Prosecution on non-international armed conflict, that the Prosecution notes the
11 non-participation of Uganda in the Bogoro conflict. This is a change in
12 circumstances.

13 The Defence has been at pains throughout this trial to pursue the line that Uganda
14 did not participate in the Bogoro conflict in terms of fighting, and the question arises
15 would the Defence have exercised a different strategy had it not been faced with a
16 case of the Prosecution based on international conflict? The answer to that question
17 would be purely speculative.

18 We also say that a legal qualification itself might amount to a circumstance, so the
19 non-international or international nature of a conflict is in my submission, while a
20 legal qualification, also a form of circumstance, because it contextualises the factual
21 matrix of the case.

22 Now, looking at the Lubanga case, the Lubanga case was confined to the issue of
23 child soldiers, and so the -- when one looks at the essential character of the charges
24 the only essential difference was the reference to national army as opposed to armed
25 group, whereas in our case one can take the example of the difference between willful

1 killing on the one hand and murder on the other, two potentially different concepts,
2 and in relation to those two crimes I refer your Honours in particular to the second
3 and third elements mentioned in elements of crimes of those particular two crimes.
4 So where an application of Regulation 55 would involve a change in the essential
5 nature of the charges, in my submission it must be accompanied by an amendment to
6 the charges.

7 The final question that I will address on this issue is the question as to whether
8 Regulation 55 should apply, and in my submission if one has regard to the text and
9 the words "shall give notice" followed by the words "and having heard evidence," this
10 suggests that notice should be given before the evidence is completed. In our
11 submission the Defence is perfectly entitled to rely on the right of the accused to have
12 a trial without undue delay when it comes to the issue of decisions as to whether to
13 recall witnesses.

14 Now, I'm not in any way laying the blame at the floor of the Chamber in terms of the
15 timing of the notice. I'm laying the blame squarely at the foot of the Prosecution.
16 In Regulation 55 the Chamber has to at an appropriate stage of the proceedings invite
17 submissions from the parties. This is not in my submission an appropriate stage of
18 the proceedings.

19 The Prosecution has failed to raise this important issue until its closing arguments.
20 It has occasionally during the course of the trial pointed out as my learned friend
21 correctly stated that it makes no difference whether we are in a non-international
22 armed conflict or an international armed conflict, but in my submission that is not
23 proper notice. All the documents in this case rely upon the provisions relating to
24 international armed conflict and the Prosecution has not manifested a clear intention
25 to change its position until the end of the trial.

1 Your Honours will remember in respect of the Defence motion challenging the illegal
2 detention of Mr Katanga that in your Honours' decision in relation to that at
3 paragraph 62 your Honours pointed out that where there was an issue which a party
4 wished to raise and especially where that issue has repercussions on the proceedings
5 it is incumbent upon that party to seize the Chamber in a timely fashion, and in our
6 submission that has not been done.

7 It would not be right in our submission to apply 55 in circumstances where it would
8 allow the Prosecution to sit on the fence through a trial and leave the defendant in
9 limbo as to the legal qualification of the facts.

10 With regard to the final point which I'm going to address on this which is the
11 question of practical prejudice, as I have indicated prejudice does not rise -- does not
12 need to arise in this particular instance. However, there is an element of prejudice.
13 Firstly in terms of the Defence position with regard to the participation of Uganda, a
14 position upon which it cannot go back on, and secondly in terms of the definitions of
15 the crimes, and I've referred to the unlawful killing and murder as an example in
16 international armed conflict, whether the civilians are protected persons would
17 depend on two factors: It would depend on the factor of effective occupation by a
18 State of which they are not nationals and it would depend on whether they had any
19 active participation in hostilities.

20 So with regard to occupation by Uganda in an international armed conflict there's
21 been no evidence which would support the proposition that Mr Katanga knew of the
22 circumstances which would establish Rwanda or Uganda's overall control.

23 So it would not be necessary for the Defence to focus many resources on the other
24 issue which is active participation in hostilities, whereas in a non-international armed
25 conflict that would be the crux of the issue for the Defence. They would have to

1 focus their resources on establishing that civilians took active part in hostilities, so
2 there is a degree of prejudice.

3 Now, that leads me to the next limb of my arguments which is in relation to crimes
4 against humanity. This is contained in paragraph 761 to 828 of the Defence brief,
5 and the first issue which I will address is the question of whether an attack is directed
6 against a civilian population. It is undisputed by the Defence that an unknown
7 number of civilians were killed. It is also undisputed that there may have been
8 excesses during the course of that battle. A central feature of this case is that there
9 was an important UPC military base at Bogoro and that insofar as civilians fell as
10 victims of the attack they did so in the midst of the attack on that important military
11 base.

12 Now, it is the case of the Prosecution that civilians went to that military base and it is
13 the submission of the Defence that the UPC military base was the primary object of
14 the attack, and support can be found for that in the evidence of Germain Katanga
15 relating to EMOI, which is at paragraphs 679 to 700 of our brief; the evidence of 160
16 and Germain Katanga in relation to the involvement of the APC at paragraphs 657
17 and 662; the evidence of 148 on the direction and the strategy of the attack; the
18 evidence of the UPC soldiers 176 and 323 on their perception of the attack and in
19 particular 323's perception that there were not many civilians at that time; the
20 evidence of 159, 166 and 148 in relation to the previous attacks and the absence of
21 civilian casualties; and the evidence interestingly in relation to the attack on Mandro
22 which the Prosecution places reliance upon, because in my submission that attack
23 shows rather the military objective of the Bogoro attack because the Mandro attack
24 was itself aimed at an important military base of the UPC and there is not in this case
25 reliable evidence of great civilian casualties at that attack of Mandro.

1 And I refer your Honours to the Appeals Chamber's decision in Kunarac, and in
2 particular at paragraph 91 where it states that for the purposes of crimes against
3 humanity the civilian population must be the primary objective.

4 Now, I move on to the issue which was raised by my learned friend for the
5 Prosecution with respect to Bogoro itself being sufficient for the purposes of defining
6 "widespread" in the circumstances of this case. It's contained at paragraph 35 of the
7 Prosecution brief and T-336, 15 May, 57 to 58, of the oral arguments.

8 Under 74(2) and Regulation 55 as we've already outlined, the Chamber needs to stay
9 within the circumstances of the case and the circumstances of the charges in
10 particular.

11 Now, the Prosecution relies upon paragraph 395 and paragraph 408 of the Pre-Trial
12 Chamber decision in its submission in relation to the Bogoro attack itself being
13 sufficient to widespread, but in those paragraphs the Pre-Trial Chamber does not
14 identify the attack on Bogoro as the widespread or systematic attack in question.

15 In fact, in its findings at 407, 409 and 4011 it identifies the attack which is widespread
16 or systematic as being, I quote, "FNI/FRPI attack directed against the civilian
17 predominantly Hema ..." sorry, "... the civilian population of predominantly Hema
18 ethnicity of the region of Ituri in the DRC."

19 In my submission, the defendant must be clear as to which attack it is which is being
20 said to be widespread or systematic, and in this case it is the attack against the
21 civilian population of Ituri of predominantly Hema ethnicity, not the Bogoro attack
22 itself.

23 My learned friend refers to the case of Jelusic. This was a Trial Chamber decision
24 and it was based on a guilty plea, so one might imagine that there would not have
25 been extensive argument around the issue. The Defence does not say that a single

1 location can never form the basis. One has to look at the facts in question. In the
2 case of Jelusic, it was the municipality of Bruco which was described as a sizeable
3 town and this is in the European context don't forget. It doesn't say in the decision
4 the population of that town, but the offences committed were of such a prolific nature
5 that it was thought appropriate by the Prosecution in that case to charge the crime of
6 genocide individuals taken to collection centres and to camps, and there was in that
7 case not like in this case a mix of an attack on a military target and deaths of civilians.
8 I accept that at paragraph 94 of the Kunarac decision in the Appeals Chamber not
9 cited by my learned friends for the Prosecution, but cited by myself, but I do accept
10 that there the term "widespread" is said to involve a large-scale attack with a high
11 number of victims. However, I caution the Chamber that in relation to the ICTY and
12 the definition of "widespread" or "systematic," one must remember that in that
13 context there's no element of plan or policy incorporated. In fact in Kunarac the
14 Appeals Chamber says there is no requirement of plan or policy.
15 So the legal framework within which the question is being decided is different and in
16 my submission the natural meaning of the word "widespread" and the practice prior
17 to the International Criminal Tribunal for the Former Yugoslavia would tend to
18 suggest that there is indeed a geographical element to the use of that word and
19 particularly when you put it in the context of a court where one is also asking the
20 question "Was there a plan or organisational policy?"
21 With respect to the other attacks, the Prosecution refers to Nyankunde, Mandro,
22 Bunia, Tchomia, Kasenyi, transcript 336 of 15 May, page 57, lines 15 to 18. With
23 regard to Bunia, Tchomia and Kasenyi, the Prosecution includes those when it says
24 "implicates the accused," but of course with regard to Germain Katanga there is no
25 reliable evidence of his implication in those three locations, in my submission. With

1 respect to Nyankunde, the evidence of 219, 28 and 12 are essentially contradictory,
2 inherently contradictory and in my submission cannot be relied upon. As I have
3 said, there was no reliable evidence of civilian casualties at Mandro.

4 Now, with respect to the attack on Nyankunde, which is a significant attack I accept
5 in the context of this case if one is going to look at other attacks, this was an attack
6 which was predominantly directed at the Bira, not the Hema, and it involved a
7 different set of commanders. On the evidence of this case it involved Commander
8 Faustin, Cobra and Kandro. At the time of the Bogoro attack Kandro was no longer
9 there, Cobra in our submission did not take part in the attack and there's no evidence
10 that Faustin took part in the attack either, but indeed there is evidence that he was
11 arrested subsequent to the Nyankunde attack although the link is not entirely clear.

12 One has to look at the circumstances of the Nyankunde attack. The Nyankunde
13 attack was in the circumstances of a retreating force from Bunia, and an attack on
14 Songolo -- it was clearly a reaction to the attack on Songolo of 31 August. Several
15 days later Nyankunde is attacked on 5 September. Those are the circumstances in
16 which that attack took place. The attack on Bogoro on the other hand was the first
17 step in a plan to retake Ituri, so the context of those two attacks is in my submission
18 quite different such that one cannot say that one was part of the other.

19 Finally on this I would state that with regard to Germain Katanga and mens rea, one
20 can only in fact look at the attack on Nyankunde and not the attack subsequent to
21 Bogoro.

22 Now, let me come to the issue of children. This is contained at paragraphs 1012 and
23 1010 of the Defence brief. We have extensively argued around the meaning of
24 "active" and "direct" and suggested that they involve the same quality and degree of
25 participation and that this is reflected in International Humanitarian Law and the

1 way it's viewed by the international committee of the Red Cross. I will just focus on
2 one aspect here, because we have said that it's not permissible to go back to the
3 travaux préparatoires, but everyone has gone back to the travaux préparatoires. We
4 have said it's not permissible because of the ordinary meaning and the context, the
5 context provided by existing humanitarian law, but if one goes to the travaux
6 préparatoires there is reliance on a footnote, a footnote in the preparatory committee's
7 work; and with respect to that footnote, that footnote has been somewhat
8 misunderstood in my submission because it does not say "direct part in hostilities,"
9 no, active part in hostilities is the correct test. What it says is that direct active
10 participation in hostilities would include, one, direct participation in combat and, two,
11 active participation in military activities.

12 In our submission, the important point is pointed out by the International Committee
13 of the Red Cross with regard to direct or active participation in hostilities is what is
14 the effect on the enemy? In my submission, the definition which one must adopt
15 with regard to hostilities is that adopted by the International Committee of the Red
16 Cross, and the International -- the legal adviser to the International Committee of the
17 Red Cross in advice on direct participation states at paragraph 43 of the interpretive
18 guide-lines "While the concept of hostilities refers to the collective resort by the
19 parties to the conflict, to the means and methods of injuring the enemy, participation
20 in hostilities refers to the individual involvement of a person in these hostilities."

21 I've drawn to your Honours' attention the legal dictionaries, word and phrases, and
22 Stroud's Judicial Dictionary, and your Honours will be able to find definitions which
23 are alternative and which perhaps militate against what I've just said, but in my
24 submission in the particular context of this case the definition provided by the
25 International Committee of the Red Cross is the proper one.

1 In my submission, it would be wrong and incoherent to have one test of direct or
2 active participation in hostilities when dealing with the question of the activities of
3 civilians and then another test for the same phraseology when dealing with the
4 question of children. It would be wrong, because it would create an incoherent body
5 of law and it would be inconsistent with the practice of International Humanitarian
6 Law.

7 Again in the same footnote reference has been made by the Pre-Trial Chamber in
8 Lubanga to the fact that activities are clearly unrelated. In my submission what the
9 preparatory committee is doing there is its saying that it does not include activities
10 which are clearly unrelated. That does not mean that it only includes those activities
11 which are not clearly unrelated. The preparatory committee was providing
12 examples and in my submission the appropriate test is whether the activities are
13 potentially capable of causing harm to the enemy.

14 Lubanga has referred to the test of real danger. I accept that danger is an element in
15 the equation. Certainly children have to be to the extent possible preserved from
16 danger and this is of course part of the reasoning behind the provisions not only in
17 the ICC, but also in International Humanitarian Law itself, but danger is not the
18 decisive factor because necessarily any contribution to war effort places a person in
19 greater danger and it's only a matter of degree, so the real question is harm.

20 And with regard to the question of age, in my respectful submission it would be
21 useful to adopt the position which pertains in French law with regard to an accused
22 and his perception of a person's age, and that is that if it can be established that it was,
23 and I quote in French, "suffisamment plausible (phon)," that the accused made an error
24 as to the age of the person, then that would be sufficient for the purposes of acquittal.

25 I move now on to the last theme which is the question of common plan in this case.

1 Now, in my submission the Pre-Trial Chamber, the Trial Chamber in Lubanga and
2 the Prosecution have distorted the plain meaning of the words. The -- 25(3)(a) falls
3 under individual criminal responsibility, and individual criminal responsibility
4 means not only not state responsibility; it also means not collective responsibility, and
5 this must be taken into account. Article 22(2) provides for a strict interpretation of
6 the words.

7 The theory is based upon first of all a Trial Chamber decision in the case of Stakic on
8 31 July 2003 which itself relies on writings of one Claus Roxin, *Täterschaft und*
9 *Tatherrschaft*, 1994. The Appeals Chamber in Stakic noted at paragraph 62 that
10 there was no basis for this theory in customary international law or in the
11 jurisprudence of the International Criminal Tribunal for the Former Yugoslavia.

12 The Pre-Trial Chamber may have said that customary international law is not
13 relevant, but in my submission it is relevant; it is relevant to the issue of legality. To
14 what extent was 25(3)(a) accessible to Germain Katanga, the interpretation of
15 common plan theory as it has been expounded accessible to Germain Katanga at the
16 time of the relevant events?

17 The theory remains highly controversial and your Honours will see that there are
18 articles even of this year and last year criticising the theory.

19 With regard to the words "jointly with another" and "through another" person, the
20 Pre-Trial Chamber basically said that there were two possible interpretations of the
21 word "or," one which would be inclusive and one which would be exclusive. In my
22 respectful submission, there is a third possible interpretation of the word "or," and
23 that is jointly with another or through another person or both, but not one by virtue
24 of the other, and that in my submission is a possible natural interpretation of the use
25 of the word "or" and applying 22(2) is the one which should be applied.

1 In my submission, Article 30 has been distorted to give meat to the desire to create
2 this new theory. Article 30 refers to the material elements of the crime, must be
3 committed with intent and knowledge, and 30(2) for the purposes of this
4 Article refers back to the first subsection. So when one is talking about conduct,
5 consequences and circumstances, one is talking about the elements of the crimes.
6 That is clear on the wording of Article 30 in my respectful submission.
7 The theory rests upon boxing into the word "consequence" the crime, not looking at
8 the elements, boxing into the word "consequence" the crime and that in my
9 submission is a distorted interpretation. If one looks at the context of 30(1), 30(2)(a)
10 and 33, consequence like conduct and circumstances are clearly set out in the
11 elements of crimes.
12 If one looks at the general introduction to elements of crimes, one sees that it is stated
13 where no reference is made in the elements of crimes to a mental element for any
14 particular conduct, consequence or circumstance listed. In my submission it is
15 clearly set out that those words "conduct," "consequence" and "circumstance" relate to
16 the elements of the crimes.
17 I provide one example, 8(2)(b)(vii)(i), improper use of a flag of truce. Using the flag
18 improperly is the conduct. The fact that the conduct resulted in death or personal
19 injury, that is the consequence.
20 Now, it would be submitted that this would undermine the ability to close the
21 accountability gaps. That is an impermissible argument in my respectful submission
22 under 22(2). If one looks at Tadic, the first case involving joint criminal enterprise, it
23 is clear from the case of Tadic at paragraph 222 that the common purpose must be a
24 criminal purpose for the purposes of joint criminal enterprise. So, therefore, for the
25 purposes of joint criminal enterprise it must be the aim of the accused to commit the

1 crime, so there is nothing unusual about following the same line consistently with
2 customary international law in this case.

3 Finally, I will address the issue of the definition of "intention." There's no magic or
4 enigma in the words. Means to engage in conduct means it's the aim of the person
5 to engage in that conduct. With regard to "in the normal course of events," this does
6 not mean as would be submitted normally. It means that it would happen save for
7 intervening circumstances.

8 I provide by way of illustration, not by way of a binding authority, but by way of
9 illustration only an authority from the United Kingdom and it is the case of the
10 Crown against Woollin decided in the House of Lords as it then was, and it is
11 reported in the first volume of the Appeals Chamber cases -- sorry, the first volume of
12 Appeal Cases 1999 and at page 82, and at page 85, at paragraph (e), it is stated by the
13 learned Lords in that case that "The use of the words 'substantial risk' can never be
14 appropriate direction on intent. It fails to make clear that it's not open to the jury to
15 make an evidential connection between foresight of the natural consequence and
16 intent unless the consequence is little short of overwhelming and serves to confuse
17 the necessary intent for murder with foresight required in cases where recklessness is
18 sufficient to found a conviction. The use of the word 'risk' however qualified should
19 be restricted to directions on recklessness."

20 This is an illustration because it shows how in serious cases, and after all we are
21 dealing with the most serious cases to humanity in this court, in cases of the utmost
22 seriousness it is important that one interprets intention as intention and not as an
23 analysis of risk.

24 Your Honours, those are my submissions and I now hand the floor to Dr Caroline
25 Buisman.

1 PRESIDING JUDGE COTTE: (Interpretation) Please take the floor.

2 MS BUISMAN: Good afternoon, your Honours. As Maître O'Shea has just pointed
3 out we still challenge the mode of liability, which is the indirect co-perpetration as we
4 have referred to it, but if you are of the view that this is a legitimate mode of liability
5 that we submit that you have to give a very narrow interpretation to all the
6 requirements as they were set out by the Pre-Trial Chamber.

7 I do not think I have the time to go through all the details, but they're all set out in my
8 brief, but I'll focus on the four issues that I think are the most important ones. There
9 is the common plan; there is the essential contributions that also must be co-ordinated
10 between the various co-perpetrators, in this case Mr Katanga and Mr Ngudjolo; there
11 is the requirement of control over the organisation; and the organisation must be
12 organised and hierarchical apparatus for power, and this must be such that there is a
13 securance of almost automatic compliance with the orders issued by the accused.

14 Common plan: I will leave out some of the evidentiary submissions as
15 David Hooper has already addressed them. We submit that the common plan itself
16 must be criminal. If it's not criminal it would be really hard to comply with the
17 requirements under Article 30; namely intent and knowledge. At the very least the
18 accused must know that in the ordinary course of events the crimes charged will
19 occur. That's a really high standard, your Honours.

20 The Prosecution is conflating a legitimate plan with a criminal plan. We submit
21 there's only evidence that there was a legitimate plan. This legitimate plan was not a
22 plan of these two accused here; this was a plan that was orchestrated and formulated
23 by Kinshasa, together with Beni, RCD-K/ML. You've heard Hooper on this, so I will
24 not go into the evidence, but this is important because the people from Bedu-Ezekere
25 are not part of this plan. We submit that this is further evidenced by their late

1 arrival in Bogoro and this is further detailed in our brief at paragraphs 1149 to 1156.
2 So we have Germain Katanga, who we accept made a contribution to this legitimate
3 plan, coming from Beni and this legitimate plan was only to get rid of a UPC base, a
4 very strong military base, based in Bogoro. We've heard the Prosecution
5 submissions about civilians being there, and it gave the impression that we were
6 denying the civilian presence. We are not, and I think it's very clear in our brief we
7 accept there were civilian casualties. We just do not accept that this is necessarily
8 known to the accused before participating in a plan. There was a general perception
9 that most of the civilians were gone, and this general perception corroborates
10 Katanga's submission that he was unaware that there were civilians.
11 Now, you've heard him testify about 10 February and he says he did not see any
12 civilians in Bogoro. We are not saying that there were not, but you cannot -- you
13 cannot infer his intent and knowledge on the basis of what occurred later. You have
14 to go back in time and we have to -- we have to pose the question whether or not he
15 could -- he knew that these crimes would be committed in the ordinary course of
16 events at least unless you accept of course our previous submissions.
17 So we say that the common plan as it's charged by the Prosecution there is very little
18 evidence to support that. In fact, there's only one not credible witness, 250, and a
19 letter, and this letter was not even -- he did not even recognise this letter, so we
20 submit it doesn't corroborate his evidence.
21 We have a visit from Chef Manu, and the Prosecution made a pretty big deal out of
22 the fact that Manu was staying at Germain Katanga's house. We submit there's
23 nothing strange about that. There were lots of visitors at his house and we also have
24 never denied that he was someone significant in Aveba, but that doesn't give him
25 control over all these Ngiti combatants as is claimed by the Prosecution.

1 Also I would like to correct one thing, because Manu, although he did stay with
2 Germain Katanga, he did initially not come to Aveba but to Olongba where he stayed
3 three nights and he stayed with Oudo and this is actually in his evidence, this is
4 Manu's evidence, 6 September 2011, pages 36 and 37.

5 The Prosecution submits that what binds us, the two groups, is the ethnic hatred.
6 However, there's very little evidence of this. They rely on these two documents, I've
7 got them here, there is DO3-0098, this is 15 November 2002 document that we have
8 already discussed. If you look at this document, there's nothing about hatred or
9 anything that you can interpret that way. We're talking about UPC attacks. There's
10 Uganda, Rwanda, UPC and there is like one reference to Hema militia, but this is
11 clearly not evidence of ethnic hatred. These are legitimate complaints of attacks in
12 the region.

13 The other document, which is EVD-OTP-00275, is dated 5 June 2002 and this is signed
14 by Lompondo. This is before he is even chased out. We don't see any relevance of
15 this to demonstrate there's ethnic hatred that orchestrated in fact by these two
16 accused.

17 The Prosecution, because that's the main thing, they have no evidence that
18 Germain Katanga had any - any - hatred towards the Hema community. In fact, we
19 have actually presented you with evidence that showed the contrary. This is a man
20 who wasn't even aware of his Ngiti community until much later. He actually grew
21 up with a Hema family and later on after 12 May when everyone is chased out of
22 Bunia there are lots of Hema refugees in Aveba. This is not a man who hated
23 anyone.

24 There is reliance on I think it's P-160. Allegedly Germain would have said that
25 Bogoro was an act of vengeance, but what vengeance against the Hema community?

1 What vengeance, your Honours? We are talking about someone from Aveba.
2 Aveba has never been attacked by any Hema militia. We know his history. He was
3 fighting the Ugandans. There is a real distinction between that.
4 We were happy to hear on this issue that the victim representatives agreed with us
5 that without this broader plan from RCD-K/ML and EMOI there would not have been
6 an attack on Bogoro. This is we submit a stronger - a stronger - and more reasonable
7 interpretation of the facts. And as David Hooper said, even if it's not the more
8 reasonable, as long as it's reasonable that's what matters because we don't have any
9 burden of proof.
10 One mistake that I would like to rectify and the Prosecution rightly point it out that
11 the Sun City reference was an error. The Sun City indeed did not yet refer to the
12 RCD-K/ML and EMOI's position towards Bogoro and Bunia, but it doesn't change the
13 facts. We're happy to accept that this was an error. It wasn't -- it wasn't deliberate,
14 but it doesn't change what we have heard this morning. There is a very strong
15 evidentiary basis that we provided that this is a legitimate attack that was planned
16 not by these two accused, but by bigger powers.
17 Essential contribution: The essential contribution must be co-ordinated between the
18 perpetrators or the co-perpetrators and they have to go towards the commission of
19 the crime, not just towards the plan itself. So the fact that we accept as you are very
20 well aware that Germain Katanga played a role in supporting this plan from Beni to
21 attack Bogoro, however this role was very limited because it was all under the
22 directions of Koka; and we say as David already pointed out that Germain Katanga
23 could not have stopped this. This plan would have been carried out without his
24 contribution, so it's not an essential contribution; it is a contribution to a legitimate
25 plan and it's certainly not co-ordinated with Mr Ngudjolo. At least we have seen no

1 evidence of it.

2 His control: Well, this control, your Honours, has to be a very tight control. It has
3 to be an effective control and it should be interpreted in light of Article 28, which is
4 command responsibility. We submit you cannot rely on this new mode, new and
5 controversial mode of liability thereby circumventing the rigid requirements of
6 effective control. Germain Katanga's position itself makes no difference, in our
7 submission. Call him president, call him supreme commander. Call him whatever
8 you like. It's not the issue. The issue is whether or not he actually had control over
9 these people, and on this issue there are two things I would like to say.

10 First of all, as is sort of accepted by the Prosecution that there might have been APC
11 soldiers present at Bogoro, it's a little more accepted by the victim representatives and
12 there's also Bira. We have heard evidence that there were Bira involved in this
13 attack.

14 Well, this itself, according to the Prosecution, makes no difference in liability. We
15 submit that's not the case. Of course it doesn't -- of course if there is another
16 perpetrator that itself does not exempt him from liability, the problem is that you
17 have to identify that these crimes were committed by someone under his commands,
18 and the moment we have all these other armed groups it has to be very clear that the
19 crimes were committed not by APC, not by Bira, not by civilians who (indiscernible)
20 up. Is there evidence of that? I submit no. There has been -- people have been
21 identified on the basis of language. I think even if we accept that Mr Katanga was
22 the president of the FRPI, which just to be clear we don't accept, but even if that's the
23 case that doesn't mean that anyone who is speaking Ngiti would be under his
24 command. You still have to establish that these people actually were part of that
25 structure and ironically, as we know, Germain Katanga doesn't even speak Ngiti.

1 Yes, there has been some dispute about the numbers of the APC soldiers present.
2 The Prosecution is of the view that 150 APC soldiers, as was pointed out by
3 Germain Katanga, is an exaggeration. It might be. It might not be. I can see that
4 there is maybe for you, you are Judges, not enough evidence to come up with a very
5 exact number, but it doesn't matter. The fact is there is between 25 and 150, but they
6 clearly played a leading role in this attack. That's what matters, and we have
7 been -- the Prosecution says we are speculating on why they're not there after Bogoro,
8 the APC, if they led the attack. Well, first of all, we are allowed to speculate because
9 we don't have this burden that they have, but second of all I think we have given a
10 very reasonable explanation. It's not speculation. We have actually evidence, we
11 have presented you with evidence, most notably Sharif Ndadza, which shows that
12 indeed the people in Beni were not very keen on having APC on the forefront which
13 is also quite understandable in the circumstances.
14 And I also would like to say about the organisation. The organisation must consist
15 of an organised and hierarchical apparatus of power. Here we have a problem,
16 because we are dealing with two structures, and I know that the name has changed
17 for the people on my left, our co-perpetrator allegedly. The people from
18 Bedu-Ezekere call them FNI or something else, but they have their clear independent
19 alleged structure, and then you have our structure, the allegedly, the FRPI.
20 Already, when we are dealing with this indirect co-perpetration, this makes it all the
21 more controversial because the whole origin of this, and inspiration of this mode of
22 liability, is clearly based on this bureaucratic dictatorships, like in the Second World
23 War, or the junta regime in Argentina, although there the mode of liability was
24 rejected by the supreme court anyway.
25 So we submit in order to accept this controversial theory, it is very important that

1 there is a very tight coalition between the two groups, because if not you undermine
2 the whole philosophy behind this mode of liability, which is control. You have to
3 control the crime and if there is not this tight coalition between the two groups, how
4 can anyone argue that Mr Katanga should be held liable for crimes committed by
5 people under Ngudjolo's commands? We submit that would be unfair indeed.
6 Well, on this issue we submit the joint structure is very, very thin, very thin indeed.
7 There is no history, no joint history, there has been no joint attacks we submit before
8 Bogoro, and also so after Bogoro. There is evidence about Mandro, but Bunia is
9 UPDF and there is no coalition between the Ngiti and the Lendu. There is Tchomia
10 and there is Kasenyi, no Ngiti involvement. There is previous attacks on Bogoro,
11 and it's either the one or the other, but never together. And of course in -- there's
12 been attempts to merge the two, as we have heard evidence of, and particularly
13 during the CEPIA, the commission de paix en Ituri, the negotiations taking place in
14 April, there has been definitely attempts to structure, to give a structure to these Ngiti
15 and Lendu combatants. This has not been easy and it's been a very short-lived joint
16 coalition. 12 May, when everyone is chased out of Bunia, after that everyone
17 disperses again and there's nothing left of this joint -- this attempt to have a joint
18 coalition. So we submit that the criteria of this very organised and hierarchical
19 apparatus of power has not been established. Even if you don't accept that it has to
20 be joint, well, our structure is also very loose. You have to think, because this
21 is -- also goes together with the compliance with orders, we have heard evidence of
22 someone like 148. His commander is clearly Yuda; it's not Germain Katanga. Do
23 you really think that if Yuda and Germain Katanga are in a disagreement he would
24 actually follow the orders of Germain Katanga over Yuda? We submit not.
25 We have seen people like Dark. Dark has been in videos. Does he show -- is he

1 someone who could be like a mere cog in the wheel? Is it someone who could be
2 easily replaceable and who is just saying "yes" and "Amen" to Germain Katanga?
3 We submit not.
4 So overall, we say that these requirements, no matter how you look at them, have not
5 been established and on the knowledge and intent I just refer actually to the brief,
6 paragraphs 1309 and 1320, as I said, I just want to highlight it one more time. We
7 cannot read history backward. We cannot look at what happened and say therefore,
8 he had knowledge and intent. You have to look at before.
9 And we submit the Prosecution failed to establish beyond a reasonable doubt all
10 these criteria. I thank you very much.
11 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much, Counsel,
12 Ms Buisman.
13 Ms Menegon, please proceed.
14 MS MENEGON: (Interpretation) Good morning, your Honours. First of all I'd
15 like to deal with the charges relating to sexual crimes and then cumulative
16 convictions for these same crimes. Regarding sexual crimes only two witnesses,
17 P-132 and P-249, testified that they were raped in Bogoro during the attack or
18 immediately thereafter. These witnesses, as well as P-353, said that they were taken
19 to camps where allegedly they were forced to be the wives of soldiers. Their
20 reliability and credibility were seriously undermined. These witnesses were
21 inconsistent on several points that also speak to the very heart of their testimony.
22 What's more just because a witness is consistent on an essential point within his
23 account, but not credible about the rest, that the witness should be considered
24 credible.
25 132 was particularly inconsistent. For example, the Defence saw that during

1 cross-examination, when she was interviewed from 8 to 14 January 2008, she gave
2 one particular version of her account only mentioning one very unpleasant incident
3 that she was subjected to by a commander when she was in a camp and which
4 apparently was her first -- the first time she had sexual relations.
5 Then, during the evening of the fifth day of her second interviewing, her husband
6 became involved and she gave a different story that was more complete, mentioning
7 other unpleasant incidents, before being taken to the camp, and I am making
8 reference to transcript T-143, pages 20 to 26.

9 Another example: The Defence wishes to reiterate that P-249 was not able to justify
10 these inconsistencies regarding the fact that apparently she lived with her family in
11 Kasenyi during the attack on Bogoro, according to what she said here in the
12 courtroom, whereas in 2006 she said that she was living in Bogoro at the time with
13 her family, and that she had fled Bogoro at the same time as her mother during the
14 attack when they heard gun-shots. She said that the house had been burnt down.
15 Even if the house had been burnt down in the town close to the lake and not in
16 Bogoro as she then said, this doesn't explain the gun-shots that apparently made her
17 family flee. 249 said that she was not in Kasenyi when the town was attacked. I
18 make reference to transcript T-137, pages 34 to 35.

19 The Defence dismisses the argument with relating to a possible interpretation error to
20 justify discrepancies found in earlier statements made by witnesses, because these
21 witnesses were interviewed over several days, and they were interviewed by
22 experienced investigators and experienced interpreters. The statements were read
23 back, or read over, and then they were signed. In fact, one wonders if P-249 might
24 have been the victim of attack -- the attack on Kasenyi, not Bogoro.

25 P-353 made a major mistake regarding the geography of Bogoro and the most

1 important location or site, namely, the Bogoro institute, which she mistook for the
2 Buzora (phon) institute.

3 The Defence is not taking a position whether 3 -- correction 132, 249 and 353 were
4 victims of rape or sexual enslavement. We are merely saying that all these
5 inconsistencies, when taken together, really undermined their credibility.

6 Their memory should be more accurate when they make statements closer to the
7 events. We could acknowledge that, yes, they were the victims -- they were victims
8 of traumatic events that could justify some inconsistencies, but this doesn't justify
9 everything. For example, the inconsistencies, incomplete information, incorrect
10 information, hostility towards the Defence, the fact that 132 and 249 were introduced
11 by intermediaries, 143 and 316. Taken together these truly -- these elements truly
12 undermine the reliability of these witnesses.

13 Their testimony should be dismissed or given only minor probative value and their
14 testimony certainly isn't enough to prove beyond reasonable doubt that the crimes of
15 rape and sexual enslavement occurred in Bogoro.

16 I would also like to refer you to paragraphs 960, 961, 990 and 992 of our brief with
17 regard to talk about such crimes. Generally speaking, information was incomplete
18 regarding the victim or the soldier or the camp and so one cannot necessarily deduce
19 any link between these allegations and the accused. For the most part, this
20 testimony is hearsay and only a very slight amount of probative value can be
21 accorded to such testimony.

22 Regarding criminal responsibility of the accused for sexual crimes, the Defence
23 argues that the evidence shows that the -- that rapes and sexual enslavement were not
24 a predictable consequence of the attack occurring in the ordinary course of events and
25 I make reference to the criteria set by the Pre-Trial Chamber in Bemba.

1 On the contrary, several witnesses said that in actual fact those practices were
2 prohibited, in particular by the fetish priests. I refer you to paragraphs 962 and 1005
3 of our brief. So there was no green light. The Prosecution is extrapolating and
4 twisting the remarks made by Mr Katanga.

5 What's more, none of the witnesses who mentioned attacks on Bogoro earlier
6 mentioned the commission of sexual crimes. The Prosecution mentions only one
7 attack during which such crimes were allegedly committed in Mandro, relying only
8 on 280. The Defence challenges his credibility, saying that he is the only person to
9 have mentioned such events in Mandro before Bogoro and he may actually have
10 made a mistake confusing this attack with the attack on Mandro of 4 March 2003.

11 What's more, according to this witness, these attackers were not Ngiti. The only
12 significant attack that was mentioned during the case was the Nyankunde attack, but
13 there is no evidence that sexual crimes were committed there. I refer you to
14 paragraphs 964 and 996 of our brief.

15 Then the Prosecution mentioned attacks on Tchomia and Kasenyi where such crimes
16 were allegedly committed by Ngudjolo's men, but that has nothing to do with
17 Mr Katanga and in no way proves Katanga's knowledge of such crimes during the
18 attack on Bogoro.

19 Regarding the documentary proof and the final report from the Ituri Pacification
20 Committee, EVD-OTP-00195 and MONUC report EVD-OTP-00206, which mentioned
21 the commission of sexual crimes in general, no specific information is actually
22 provided. On the contrary, the reports from MONUC, EVD-OTP-00205, 00206,
23 00218, which deal with different attacks on Mandro, Bunia, Tchomia, Kasenyi that
24 happened, well-documented, do not mention rape or sexual enslavement during
25 those attacks.

1 So there is no prior -- there were no prior cases of such crimes and it cannot be proven
2 beyond all reasonable doubt that it was a foreseeable consequence. Even if the
3 Chamber were to conclude that those crimes were a foreseeable consequence of the
4 attack, the Defence argues that it has not been established beyond all reasonable
5 doubt that Mr Katanga was personally aware of such crimes, or that they would
6 occur during the ordinary course of events.

7 That personal knowledge is required as Judge Ušacka reported -- pointed out in her
8 dissenting opinion on the decision confirming the charges. I refer you to our brief,
9 paragraph 1008. According to evidence heard, if sexual crimes were committed,
10 those events must have been very discrete, unreported because they were taboo.

11 What's more, if we look at one group of witnesses, 249, 132 and 353, only 132 said that
12 he saw Katanga, but his testimony is so inconsistent that he can't be deemed credible.
13 Those three -- the three testimonies would rather confirm that Katanga did not often
14 visit the commanders in other camps and so was not necessarily aware of what was
15 going on there.

16 Now, let us turn to D-161 who explicitly denied the existence of any practice of sexual
17 enslavement in Aveba, transcript 268, page 23, lines 15 to 20. Finally, one cannot
18 deduce because of supposed hate between the Lendu and the Ngiti that it was certain
19 that in the case of a conflict women would be raped or forced to be sex slaves. To
20 conclude, we maintain that the commission of the crimes of rape and sexual
21 enslavement in Bogoro have not been proved beyond all reasonable doubt.

22 Your Honours, I would now like to say a few words about cumulative convictions
23 relating to the crimes of rape and sexual enslavement. First of all, the Defence
24 submits that the rapes that may have been committed after the attack upon victims of
25 sexual enslavement must be taken into account only for the charge of sexual

1 enslavement, because those acts of rape are subsumed within or come under the act
2 of sexual enslavement and a cumulative conviction is not possible under such
3 circumstances.

4 This was confirmed by the Trial Chamber of the Special Court for Sierra Leone in the
5 Issa Hassan Sesay ruling. As for the matter of cumulative convictions for sexual
6 crimes as a war crime or crime against humanity as set out in paragraphs 1321, 1332
7 of our brief I think it should be recalled that the Celebici threshold was a
8 jurisprudential fabrication from the ICTY Appellate Chamber inspired initially by an
9 American precedent. It does not apply automatically to the ICC.

10 It should also be stressed that this ruling by the Appellate Chamber was also the
11 subject of a dissident opinion by two of the Judges Hunt and Bennouna. I would
12 refer you in particular to paragraph 26 of their dissident opinion. This shows the
13 controversial nature of this threshold or criteria.

14 Several authors, including Bogdan Atilla, Guénaél Mettraux, Ildikó Erdei in articles
15 found on our list of doctrine show the suggestion that these two Judges found the
16 criterion to be unsatisfactory. I also make reference to the Kunarac case, paragraphs
17 175 to 178, as Mr Erdei pointed out. Such a view would suggest that the
18 courts -- although stating that the accused person did not suffer any harm because of
19 cumulative convictions, all the same this should be taken to be an aggravated form of
20 punishment.

21 Mr Erdei also has offered some useful guide-lines saying that the Celebici criterion is
22 incorrect because it is based on elements of crimes that cannot be attributed to the
23 accused. He suggests focusing on actus reus and mens rea of the accused. If there
24 is no distinct element or something distinguishing between the two crimes, he would
25 suggest relying upon a hierarchy of crimes to determine which characterisation

1 should be used; namely the more serious one.

2 To conclude, we would urge the Chamber with all due respect to take an
3 independent approach, independent of the independent tribunals and show fairness
4 towards the accused. I thank you.

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you. Ms Wagner will now
6 address the Court. Please proceed.

7 MS WAGNER: Your Honours, colleagues, my presentation is divided in two parts:
8 I deal first with the charges of murder and wilful killing and examine next contextual
9 issues of the crimes of murder and wilful killing and the notion of allegiance as well
10 as pillage and destruction of property.

11 First of all, it is important to recall with regard to the crimes generally that the armed
12 group that remained in control of Bogoro after its fall was a non-state actor. Clearly
13 then it cannot be considered an occupying power for the purposes of International
14 Humanitarian Law and so cannot be held responsible for acts committed by civilians.
15 Naturally, an occupying power per se can only be in a situation of international
16 armed conflict. If the Chamber were to requalify the conflict to non-international,
17 the laws of occupation are not applicable at all.

18 In turning next to the crimes of murder and wilful killing, the Prosecution and the
19 victim representatives both argue that more than 200 civilians were murdered and
20 wilfully killed. They do so on the basis of two lists of victims, but only one of which
21 has actually been admitted into evidence. The Prosecution does so also on the basis
22 of evidence of P-219 whose evidence cannot safely be relied upon as detailed in
23 paragraphs 275 to 285 and 895 of the Defence final brief.

24 And with regard to the list of victims actually admitted into evidence, the Prosecution
25 at its own initiative at trial and in its final brief placed the number at 150. I refer in

1 this regard to paragraph 64 of the Prosecution final brief, and I quote, "In the view of
2 the Prosecution, an examination of the list shows that 150 people were killed during
3 the attack in 2003," end quote. Even when taking this number as a point of
4 departure, it is simply not net-based on the facts to which I now turn.
5 Firstly, this number does not include the UPC fighters that died whilst defending
6 Bogoro. The Defence recalls that these deaths are not charged and that they may be
7 included on the list of victims but to an unknown extent. I also bring to the attention
8 of the Chamber the evidence of P-323 who testified that 120UPC fighters were killed
9 at the relevant time, and this is at transcript 117, page 48.
10 Contrary to the oral submissions made by the victim representatives at transcript 337,
11 page 68, not all UPC members were in uniform at the relevant time. I refer in this
12 regard to paragraph 87 of the Defence final brief. The difficulty in distinguishing to
13 which these written submissions refer are made within the context of witnesses
14 having identified the dead as those afforded protective status at the relevant time on
15 the basis of their clothing.
16 Any such distinction becomes all the more difficult given that the list of victims does
17 not include any indication of those that directly participated in hostilities. Also, it
18 cannot reasonably be excluded that the list of victims includes those that died as a
19 result of collateral damage from the attack directed against the Bogoro institute,
20 which undoubtedly was a military objective. Liability for murder and wilful killing,
21 if any, cannot be attributed on the basis of collateral damage resulting from an attack
22 directed against a lawful target. Again, the list of victims does not differentiate
23 between on the one hand these deaths, which although regrettable are not violations
24 of international law, and on the other hand those for which, according to the
25 Prosecution, there is no justification under international law.

1 Furthermore, not only were mistakes made in the list of victims, but also the numbers
2 may have been exaggerated. In addition, it does not include any indication of those
3 killed by civilians for which I mentioned at the outset Mr Katanga cannot be held
4 liable.

5 Also to be taken into account is the lack of effective investigations into the number of
6 those killed and that no exhumation was conducted, as mentioned by Mr Hooper this
7 morning.

8 For its part, the list of victims compiled by P-317, Sonia Bakar, also does not
9 differentiate between UPC fighters, those having directly participated in hostilities,
10 and deaths resulting from collateral damage from the other victims. Furthermore,
11 Bakar conceded at trial that the names on the list may have been invented and that it
12 includes those that had disappeared but were not necessarily killed. The Defence set
13 out all of these submissions in detail in its final brief at paragraphs 863 to 897.

14 Too many reasonable uncertainties remain with regard to the list of victims not
15 admitted into evidence for it to safely be relied upon. The Defence has never seen
16 the list, so it has not been able to conduct any investigations into the information that
17 it contains. As such, only the list of victims actually admitted into evidence can form
18 the basis of liability, if any, for murder and wilful killing.

19 Even so, however, Mr Katanga cannot be held responsible for the extent of the
20 killings even in reduced figure as conceded to by the Prosecution for the reasons that
21 I've explained and as detailed further in our written submissions.

22 I will now address the other relevant arguments made by the victims' representatives.
23 I must stress first and foremost in response to the oral submissions made by the
24 victim representatives at transcript 337, pages 66 to 67, that the Defence does not
25 dispute the presence of civilians at Bogoro. This was also pointed out by

1 Dr Buisman.

2 The Defence therefore does not submit that all victims were legitimate military
3 targets. Instead, and as submitted in our file brief at paragraphs 879 to 891, the crux
4 of our argument is that the Prosecution has failed to prove beyond reasonable doubt
5 the protective status of at least some of the victims. Civilians that directly
6 participated in hostilities are those meeting the three cumulative criteria of direct
7 participation: Threshold of harm, direct causation and belligerent nexus as outlined
8 at paragraph 1091 of the Defence final brief.

9 Their killing during their armed resistance does not constitute murder or wilful
10 killing regardless of the qualification of the conflict. Regretfully, the victims'
11 representatives confused the notion of direct participation and misconstrue the
12 submissions of the Defence. Civilians that directly participate at all times retain
13 their civilian status but lose their protection against attack. They do not become, and
14 I quote "combatants" unquote, but remain civilians and are liable to be attacked for
15 the duration of their participation in hostilities.

16 I would also like to clarify what appears to be a misunderstanding of the concept of
17 self-defence by the victim representatives in their oral submissions at transcript 337,
18 page 67.

19 The Defence maintains the distinction that it makes between personal self-defence
20 and direct participation in hostilities as detailed in paragraph 1107 of its final brief.

21 Civilians meeting the three cumulative criteria to which I have just referred, and
22 having defended military targets at the time of the attack, including the Bogoro
23 institute, directly participated in hostilities.

24 I turn next to the second part of my presentation with regard to the crimes of murder
25 and wilful killing, pillage and destruction of property. Earlier, Mr O'Shea addressed

1 the issue of prejudice with regard to requalification of the armed conflict. This issue
2 is relevant also when looking at the detailed regulations of the crimes that I turn to
3 now.

4 Although related to child soldiers, it is still illustrative that two months ago the Trial
5 Chamber in Lubanga held that participation of children based on the relevant
6 non-international prohibition is broader than the prohibition for international armed
7 conflict. I refer here to the Lubanga judgment at paragraph 627.

8 The Prosecution in the current case therefore erroneously submits that, and I quote,
9 "For the purposes of a criminal case it is immaterial whether the conflict is
10 characterised as international or as non-international," unquote, and I refer here to the
11 Prosecution final brief at paragraph 24, and in its filing 3264, paragraph 5.

12 Whilst the Lubanga judgment dealt only with the issue of children in active hostilities,
13 I will show in the remaining minutes that the issue of the crimes of being broader in
14 scope also applies to murder, wilful killing, pillage and destruction of property.

15 Illustrative of the difficulties applying rules pertaining to international armed conflict,
16 to non-international armed conflict, is the following quote by the ICTY Appeals
17 Chamber in Tadic, in its decision on jurisdiction of 2 October 1995. This was
18 rendered of course during the drafting of the Rome Statute and shortly before its
19 adoption, and I quote at paragraph 126: "The emergence of general rules on internal
20 armed conflicts does not imply that internal strife is regulated by general law in all
21 respects. Two limitations may be noted: (1) only a number of rules and principles
22 governing international armed conflicts have gradually been extended to apply to
23 internal conflicts; and (2) this extension has not taken place in the form of a full and
24 mechanical transplant of those rules to internal conflicts. Rather, the general essence
25 of those rules and not the detailed regulation they may contain has become applicable

1 to internal conflicts," unquote.

2 In relation to this first limitation, one need only refer to the Rome Statute itself which
3 contains separate provisions under Articles 8(2)(a) and 8(2)(b) and Articles 8(2)(c) and
4 8(2)(e). Consider also that a number of offences under Article 8(2)(b) simply do not
5 exist under the Rome Statute in non-international armed conflict.

6 Discussed next is the second limitation that the relevant regulations of international
7 armed conflict have not been transplanted wholesale to non-international armed
8 conflict. I believe I said "international." I don't have the transcript. Let me just
9 check. Okay, okay.

10 PRESIDING JUDGE COTTE: (Interpretation) Although we don't have much more
11 time, please kindly slow down for the benefit of our interpreters and our court
12 reporters who are suffering. We have up until 1.30 and it will be best if the
13 interpreters and the court reporters were able to do their work properly, and we
14 know that Mr Hooper has the last word. Thank you.

15 MS WAGNER: Thank you. Thank you, Mr President.

16 As noted by Mr O'Shea this morning with regards to the crime of murder and wilful
17 killing, wilful killing under Article 8(2)(a) limits the crime committed against those,
18 and I quote, "adverse to the party to the conflict," end quote.

19 No such restriction is placed with respect to the same crime being committed in
20 non-international armed conflict. Under Article 8(2)(a)(i) then, Mr Katanga could
21 only be held liable for the deaths of those at Bogoro who had an allegiance to the
22 adverse party. I refer here to the evidence of P-12 at transcript 196, page 10, where
23 the notion of allegiance based on ethnicity is discussed.

24 By contrast, Article 8(2)(c)(i) applies without limitation absent the belonging to an
25 adverse party to the conflict requirement. Should recharacterisation of the armed

1 conflict occur, Mr Katanga would be facing a charge more broad in scope. Also the
2 notion of protected persons is defined based on the relevant regulations in
3 international armed conflict and in non-international armed conflict respectively.
4 The Pre-Trial Chamber in the confirmation decision held, at paragraphs 288 to 294,
5 that Article 4 of Geneva Convention IV governs protected persons in international
6 armed conflict. It was only this clarification that was provided by the Pre-Trial
7 Chamber as to the protective status applicable. In non-international armed conflict,
8 however, protective status should be based on different articles, because the
9 provisions of Geneva Convention IV, save common Article 3, do not apply.
10 To date in the jurisprudence of the ICC, no definition by Pre-Trial, Trial or by an
11 Appeals Chamber has been provided with respect to persons taking no active part in
12 hostilities for the purposes of common Article 3 in conflicts not of an international
13 character.
14 The point is that the Defence has not been in a position to make submissions in case
15 of dispute as to the given definition as it has in its final brief with respect to protected
16 persons for the purposes of international armed conflict, and I refer here to paragraph
17 879 of the Defence final brief.
18 And turning next to the issue of protected property, it is governed in international
19 armed conflict by Article 33 of Geneva Convention IV. Again, however, this article
20 cannot apply directly to non-international armed conflict, and with regard to
21 protected property for the purposes of destruction of property, it was defined strictly
22 by the Pre-Trial Chamber in international armed conflict, and that is that the
23 confirmation decision, paragraphs 309, 310 and 329. No definition was provided for
24 the corresponding offence in non-international armed conflict.
25 And with regard to the war crime of pillage, a similar issue arises. The Pre-Trial

1 Chamber defined protected property for the purposes of pillage as property
2 belonging to the hostile party to the conflict. That is in the confirmation decision at
3 paragraph 329.
4 Also in the same paragraph it is held that pillage in international armed conflict
5 requires an intention to destroy Bogoro and to displace the persons that lived there.
6 Knut Dörmann, who is the head of the ICRC legal division of course, and in his
7 authoritative commentary on the ICC elements of war crimes cautions, and I quote,
8 "There are no specific rules of International Humanitarian Law allowing acquisitions,
9 contributions, seizure or taking of war booty in non-international armed conflict," end
10 quote.
11 A finding -- a finding and ensuing conviction, if any, for the crimes that I have dealt
12 with under non-international armed conflict, would amount to prejudice. They are
13 broader in application than the crimes with which the Pre-Trial Chamber confirmed
14 Mr Katanga for trial.
15 Thank you, Mr President, your Honours.
16 PRESIDING JUDGE COTTE: (Interpretation) We thank you, Ms Wagner.
17 Mr Hooper, this is the time for you to now conclude.
18 MR HOOPER: Well, all I'd say is those are our submissions. I've nothing to add.
19 A passing thought, perhaps, and that is it must be very rare - indeed unique - for
20 Judges to go to crime scenes before the Prosecutor, before the investigators. It may
21 have been just a short time before, but that's what happened in this case, and we are
22 very grateful that you, the Judges, did go, did go to Walendu-Bindi, and I can assure
23 you, the Judges, it had and has had a deep effect on people there, but the fact that
24 such a thing could happen is really a reflection of the point I was making earlier of
25 the system that was adopted in this case that led or may lead, because it's a matter for

1 you, the Judges, to a disaster for the Prosecution, because it generated - produced - a
2 case that is founded, as far as Germain Katanga is concerned, on those four
3 corner-stone witnesses whose credibility, we have submitted, is so clearly in doubt.
4 Those are our submissions. We are of course forever thankful for the obvious
5 diligence and your unfailing courtesy in receiving them. Thank you.

6 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr David Hooper. We
7 thank your team for respecting the agreed time-frames. We want also to thank our
8 interpreters and court reporters for the special efforts made today.

9 Mr Kilenda, Professor Fofé, will be taking the floor tomorrow on behalf of
10 Mr Mathieu Ngudjolo, and you will have three-and-a-half hours to talk on behalf of
11 Mr Ngudjolo, and then on Wednesday morning we will see whether there are any
12 clarifications to be sought from the Defence, and then the Prosecutor will also speak
13 and we will determine, according to circumstances, how much time to ascribe to
14 these subsequent exchanges, and I think we also need to remember that
15 Mr Mathieu Ngudjolo intends to speak for about 30 minutes and maybe Mr Katanga
16 for about 15 minutes as well.

17 Mr Hooper, and all those who were part of our field trip to the DRC, particularly to
18 the Ituri, I think we all agree that it was a very beneficial trip to all. We now adjourn
19 and resume tomorrow at 9 a.m. The accused, see you tomorrow at 9 a.m.
20 (The hearing ends in open session at 1.18 p.m.)