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Date: **21 July 2008**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR  
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

**Public Document**

**Observations of the Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08,  
a/0025/08, a/0027/08, a/0028/08, a/0029/08 a/0032/08, a/0033/08, a/0034/08 and  
a/0035/08 on the evidence adduced by the Prosecutor**

**Source:** Mr Jean-Chrysostome MULAMBA NSOKOLONI, Legal  
Representative of Victims

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

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**REGISTRY**

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

## **INTRODUCTION**

1. Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08, on whose behalf we act, are civilians of Hema ethnicity who lived in the village of Bogoro, 25 km from Bunia, where they were surprised on 24 February 2003 by the attack organised jointly by suspects Katanga and Ngudjolo, who stand before your Chamber.
2. The evidence brought by the Office of the Prosecutor is of patent relevance to the interests of the victims we represent, as also is the evidence relating to how the attack took place.
3. The victims represented by us have suffered bodily injury and material and mental damage resulting from the joint attack on their village of Bogoro on 24 February 2003 due to the loss of their loved ones and also the loss of property acquired through years of work.
4. Accordingly, our observations relate to counts 1, 2, 3, 4, 11, 12 and 13 of the Prosecutor's Document Containing the Charges.
5. In light of the evidence brought by the Prosecutor, the victims consider that, under article 61(7) of the Rome Statute, there are substantial grounds to believe that the suspects committed each of the crimes with which they are charged.
6. The sole objective of the victims in regard to the relevant provisions of the Rome Statute is to confirm the charges presented by the Prosecutor relating to the suspects and thereby to open the way for reparations for the harm suffered.
7. Accordingly, the abovementioned legal representative of victims respectfully submits the following observations on the evidence submitted by the Prosecutor, placing particular emphasis on the following: the direction from which the attackers came and the joint nature of the attack, and clarifying from the outset one of the legal

issues, namely the characterisation of the conflict. We will also address the counts relating to murders, pillaging, destruction and bodily harm which are of concern to them, and finally we will conduct an analysis of the criminal responsibility of Mr Germain Katanga and Mr Mathieu Ngudjolo, replying to Katanga's Defence on the issue of the proper age at which to assume military command.

## **2. The direction from which the attackers came and the joint nature of the attack**

### **(a) The direction from which the attackers came**

8. In his statement of the facts, and according to the reconstruction given by a number of witnesses, the Office of the Prosecutor describes the attack on Bogoro by specifying the various directions from which the attackers arrived.

Mathieu Ngudjolo's group entered Bogoro via Zumbe, according to the transcript of the hearing of 3 July 2008, page 53, line 3 et seq, in which the Prosecutor tenders document DRC-OTP 1007-0087.

9. The statement of witness 28 tendered by the Prosecutor indicates that Germain Katanga entered the village of Bogoro from the south, and the references are given in the transcript of the hearing of 3 July 2008, page 54. Prosecution witness 157 is more clear and specific, stating that they arrived at Bogoro around 5 a.m. The Prosecutor states that Gety's group arrived prior to this.

10. Thus the attackers arrived from Medhu – to the west of Bogoro – and from Kagaba, to the south of Bogoro, to the south of Waka Mountain and Zumbe. Document reference DRC-UTE1006-0073. The scene having been set, all that remained was the order to attack.

***(b) The joint nature of the attack***

11. The Chamber will note that the Defence seeks to put the case that the suspects only attacked the UPC camp, where there were 150 soldiers, and that the figures cited by the Prosecutor of 200 civilian fatalities find no basis in any reliable document.

12. The Chamber will nevertheless rely on the testimony of witness 280 cited by the Prosecutor, which states: “My group was provided with knives and machetes. [...] NGUDJOLO’s order [...] was as follows: ‘You take your knives and machetes, you break the doors of the houses and you kill everyone.’ [...] My companion and I entered about six houses. I do not know how many civilians I killed”. Witness 268 states that he could also hear the group of combatants approaching from the small path near his hiding place, shouting “catch them with your hands”. Reference DRC-OTP-1007-0102, paragraphs 54 and 58. Witness 159 also stated that the combatants killed with knives and machetes. Document reference, DRC-OTP-0164-0479 and 480. This FNI/FRPI coalition had the civilian population of Bogoro in a stranglehold, and among them were the victims on whose behalf we act.

***(c) Characterisation of the armed conflict***

13. With regard to the characterisation of the armed conflict, it should be noted that there are two types of armed conflict: international armed conflict and non-international armed conflict. The distinction has lost some of its meaning in the sense that article 3 common to the Geneva conventions, which covers the second type of conflict and which has come to be part of customary law, is sufficiently general in nature to encompass specific offences incorporated in various treaty provisions relating to international armed conflicts. In the particular case of the nine crimes with which Ngudjolo and Katanga are charged, the distinction retains, however, a certain interest in an international armed conflict, in which national armed forces are implicated, as opposed to the case of a non-international armed conflict, where the

involvement of a structured or semi-structured armed group suffices. In the instant case the Prosecutor characterises the armed conflict as non-international. Whatever the type of armed conflict (international or non-international), we consider that the Statute provides exactly the same protection (articles 8(2)(c)1/1 and 8(2)(c)(1/3), 8(2)(c), 82(e)(v) and that, accordingly, the relevance of the nature of the armed conflict is diminished. In the instant case, we contend that the two suspects put in place a structure which allowed the applicable provisions of the Statute to be breached, and the protection provided by articles 7(2) and 8(2) of the Statute must continue to be applied.

### **3. Murders and killings**

14. As stated by the Office of the Prosecutor, at the start of the attack many of the civilians sought refuge inside the Bogoro Institute. The members of the victims I represent were among these civilians. Witness 280 in the evidence presented by the Prosecutor demonstrates that a number of civilians took refuge in the Bogoro Institute, where they were surrounded, captured and threatened with weapons, and a large number were killed.

This version of events is corroborated by, *inter alia*, witness 159 and 161, Reference Document, DRC-OTP-0164-07-0472 and DRC-OTP-0164-0488.

15. I have been called upon to assist and defend the interests of eleven of the victims: a/0015/08, who lost his wife, three daughters and a son; victim a/0022/08, her husband and her three daughters, killed by machete; victim a/0024/08, who lost two sons and a daughter; victim a/0025/08, who lost 13 family members; victim a/0027/08, who lost a brother killed by machete; victim a/0028/08 lost a sister and niece; victim a/0032/08 lost 5 people including his wife; victim a/0033/08 lost 10 people; victim a/0034/08 lost 3 people; victim a/0035/08 lost a brother.

16. The murders at the Bogoro Institute were perpetrated on such a massive scale that the combatants themselves were shocked. See witness 250, ref. Document DRC-OTP 101-0002 (DRC-OTP-1013-0019).

With regard to this testimony it should be pointed out that the victims share the same recollection of events.

#### **4. Bodily harm**

17. Various statements and evidence in the record corroborate that the suspects' troops used machetes and knives to inflict bodily harm on the civilian population. Applicants a/0015/08 and a/0032/08 were victims of the barbaric acts carried out by the suspects' troops.

#### **5. Attack on the civilian population of Bogoro**

18. The Defence have not been able to produce any countervailing evidence to prove that the persons attacked were soldiers. The statements of witnesses 268, 250, 159 and 168 submitted by the Prosecutor make it clear that this was a civilian population, among them victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08 a/0032/08, a/0033/08, a/0034/08 and a/0035/08, all of whom were civilians, most of them being teachers at the Bogoro Institute or farmers or housewives. The list provided by witness 166 includes four persons mentioned by the victims (DRC-OTP 1007-0015).

#### **6. Pillaging and destruction**

19. The victims we represent suffered the pillaging and destruction of their property. Witness 280 stated: "[A]fter the attack on the camp, we started pillaging their property [...] Afterwards we burned the houses". Reference document (DRC-OTP 1007-1097). Similar information is provided by various witnesses 28, 159, 161, 233 and 268. As a result, the victims have lost their means of subsistence, which

consisted essentially of cattle, goats, sheep, property and materials attached to their houses and their fields. The report of the United Nations Special Investigations Team describes scenes of pillaging and destruction. Document (DRC-OTP 0152-0286).

#### **7. The responsibility of Germain Katanga and Mathieu Ngudjolo**

20. For the purpose of confirming the charges, the Pre-Trial Chamber will address not only the acts but also the responsibility therefor. In the instant case it is Germain Katanga and Ngudjolo who are legally responsible.

21. In his submissions, the Prosecutor alleges direct responsibility or, in the alternative, indirect responsibility. In our view there is not a shadow of a doubt as to the direct responsibility of the suspects Katanga and Ngudjolo in light of the evidence presented before the Chamber at the confirmation hearing. Germain Katanga and Mathieu Ngudjolo set up, trained and led militia groups with a view to crushing the Hema population. These groups contributed to the perpetration of breaches of the laws and customs of war, for which Germain Katanga and Ngudjolo must be held legally responsible.

22. Katanga and Ngudjolo incited their troops indiscriminately to attack civilians not taking part in the hostilities. As overall military leaders of the FRPI and FNI and as a result of the authority conferred upon them by these positions, they played a key role in the implementation of the common plan to raze Bogoro, that is, to commit murders, inflict cruel or inhuman treatment and commit violations of human dignity against a civilian population, and to commit acts of pillaging and destruction. The responsibility of Germain Katanga and Mathieu Ngudjolo as military superiors may be invoked under article 28 of the Statute, as has been shown by the Prosecutor in his opening and closing statements and by the evidence filed in the record.



## 8. The submissions of the Defence for Katanga

23. At the hearing of 11 July 2008, Katanga's Defence developed its arguments on the criminal responsibility of Mr Katanga as argued by the Prosecutor, relying on the ICTY decision in *The Prosecutor v. Stakic* and the doctrinal work of Mr Albin Eser, "Individual Criminal Responsibility, The Rome Statute of the International Criminal Court", while noting that the Chamber will render an appropriate decision, for two independent forces are involved here: the structure of the common plan, citing Gerhard Werle's article *Individual Criminal Responsibility*, which states that the requisite elements of the *actus reus* in joint commission are primarily multiplicity of persons - a group of persons - secondly the commission of a crime under international law and finally a significant contribution to the implementation of the common plan. The Chamber will note that Katanga's Defence did not provide evidence and did not challenge the evidence submitted by the Prosecutor.

24. With regard to the hearing of 14 July 2008, Defence for Mathieu Ngudjolo based its arguments largely on the assertion that the evidence presented by the Office had no probative value, since, in the view of the Defence, the Prosecutor gave no indication as to whether the evidence was reliable *prima facie* and hence admissible(1). Accordingly it raised nine specific and four general objections relating to the admissibility of the evidence.

25. It should be noted that the Defence confuses the probative value to be given to evidence at the confirmation hearing with the probative value to be given to evidence at the trial hearing. At the confirmation hearing, in accordance with article 61(5) of the Rome Statute ""( ), the Prosecutor underpins each of his charges with sufficient evidence to establish the existence of substantial grounds to believe that the person committed the crime with which he or she is charged, so that the Chamber may make its ruling.

26. The Chamber will note that Ngudjolo's Defence did not produce evidence in support of its arguments to exculpate the suspect.

27. Katanga's Defence invokes the argument that, at the time of the events, Katanga was only 24 years old and was not capable of commanding over 1, 300 troops. The Chamber will respond to that argument by reference to the provisions of article 26 of the Rome Statute, which states that the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

28. The representative of victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08 a/0032/08, a/0033/08, a/0034/08 and a/0035/08 is satisfied, on the basis of the evidence submitted both by the Prosecution and the Defence over the 21 days of the public session of the confirmation hearing, that Germain Katanga Sumba and Ngudjolo must be held criminally responsible for the crimes against humanity and war crimes perpetrated in Bogoro. It would be difficult for the victims to understand if, after several years of investigation, the Court were to decide that there is no evidence that civilians were killed on a massive scale, that rapes were perpetrated on a massive scale, and that pillaging and destruction were perpetrated systematically by the troops of the two military leaders and suspects.

29. The victims expect of the Pre-Trial Chamber that it will refer the suspects to the Trial Chamber for trial. The wrongs done to these victims are disturbing and shocking and cannot remain unpunished.

30. Accordingly, the victims concur with the Prosecutor in considering that, contrary to what is contended by the Defence on behalf of Katanga and Ngudjolo, there are substantial grounds to refer the suspects to the Trial Chamber for an examination of the merits of the case.

**FOR THESE REASONS**

31. May it please the Court to take note of our submission and to confirm the charges brought against the suspects by the Prosecutor and to refer the suspects to the Trial Chamber.

AND JUSTICE WILL BE DONE

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[signed]

**Maître Jean Chrysostome MULAMBA NSOKOLONI**

Legal Representatives for Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08,  
a/0027/08, a/0028/08, a/0029/08 a/0032/08, a/0033/08, a/0034/08 and a/0035/08

Dated this 21 July 2008

At Kisangani