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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 Redacted Version

Decision on the confirmation of charges

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PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively), having held the confirmation hearing in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,

HEREBY RENDERS THE FOLLOWING DECISION.

I. INTRODUCTION

A. Factual Background

1. *The Ituri district before 1 July 2002*

1. Ituri is a district in the Orientale Province of the Democratic Republic of the Congo ("the DRC"). It is bordered by Uganda to the east and Sudan to the north. Ituri district is composed of five territories sub-divided into *collectivités*,¹ themselves divided into *groupements*.² The conflict relevant to the charges discussed in this decision began in Djugu territory which is composed of 10 *collectivités*,³ and the city of Mongbwalu which has a special administrative status. It then spread to Irumu territory. Irumu territory is composed of 12 *collectivités* – one Ngiti (Walendu Bindi), and four Hema (Bahema Sud, Bahema Boga, Bahema Mitego and Bahema d'Irumu), with different ethnic groups composing the others.⁴ The *groupement* of Babiase consists of four localities – Dodoy, Bagaya, Nyakeru, and Talieba - with Bogoro as its administrative centre.⁵

2. Ituri has a population of 3.5 to 5.5 million people, and includes at least 18 different ethnic groups, the largest being the Alur, the Bira, the Hema, and the

¹ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267, at 273, para.13: "The Administrator of a territory is appointed by the Government, but works very closely with the traditional chieftains of each *collectivité*. The Administrator reports to the Governor of the province, based in Kisangani, who is the only one with the power to remove the Chief of the *collectivité*." and at footnote 5: "The *collectivités* are administrative sub-districts with a traditional chieftain, who exercises authority over the population in his area on the basis of tribal/ethnic allegiances. Chieftains are hereditary among the Hema, Bira and Alur groups but elected among Lendu and Ndo Okebo groups. The *collectivités* are divided into *groupements*, and *groupements* into *localités*".

² United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 273, footnote 5: "The *collectivités* are divided into *groupements*, and *groupements* into *localités* "

³ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 0273, footnote 6: Walendu Pitsi, Walendu Djatsi, Walendu Tatsi, Banyari Kilo, Mambisa, Mabendi, Ndo Okebo, Bahema Banywagi, Bahema Nord and Bahema Badjere.

⁴ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 273 footnote 7: Other *collectivités* are Andisoma (Bira population), Baboa-Bokoe, Babelbe, Banyari-Tchabi, Basili, Mobala and Wales Vonkutu.

⁵ Statement of W-166 at DRC-OTP-1007-0002 at 0005, para.13; Statement of W-233 at DRC-OTP-1007-0061 at 0063, para. 11.

Lendu, as well as the latter's southern sub-group, the Ngiti. Before the war, Bunia, the capital of Ituri, had a population of about 100,000.⁶ The Hema/Gegere and Lendu groups are concentrated in Djugu territory, while the Hema and Ngiti groups are found in Irumu territory.⁷

3. Ituri is rich in natural resources, including gold, oil, timber, coltan, and diamonds. For example, the Mongwalu mine, which is located approximately forty-five kilometres north-west of Bunia, is the most important gold mine in the DRC and one of the most important in Central Africa. Competition over control of Ituri's resources has been a major reason for the continued conflict in the region.⁸

4. In the summer of 1999, tensions arose over disagreements about the allocation of land in Ituri and the appropriation of its natural resources.⁹ During the second half of 2002, renewed violence flared up in several parts of the district, including the conflict among the Hema, the Lendu, and the Ngiti.¹⁰

2. *Germain Katanga*

5. Germain Katanga, allegedly also known as *Simba* or lion, was born on 28 April 1978 in Mambasa, in the territory of Mambasa, in the district of Ituri in the DRC.¹¹ He is partially of Ngiti (also called "Lendu South") ethnicity, is married and has two children.¹²

6. According to the evidence presented for the purposes of the confirmation hearing, by the end of 2002, Germain Katanga was a military leader of a

⁶ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 272, para. 12.

⁷ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 0273, para. 13.

⁸ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 274, para. 16.

⁹ ICC-01/04-01/07-649-Anx1A, paras 16-17.

¹⁰ ICC-01/04-01/07-649-Anx1A, para. 21: "The conflict between RCD-K/ML and the UPC erupted into violence in the city of Bunia on 6 August 2002"; See United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 278, para. 24: "In August 2002, UPDF forced the RCD-ML military forces out of Bunia."

¹¹ ICC-01/04-01/07-T-11-ENG ET at p. 31, lines 14-16; ICC-01/04-01/07-T-5-ENG ET at p. 6, lines 19-20; ICC-01/04-01/07-T-5-ENG at p. 6, line 22.

¹² ICC-01/04-01/07-T-39-ENG CT at p. 14, line 20.

predominantly Ngiti combatant group.¹³ The group allegedly became known in Ituri as the *Force de Résistance Patriotique en Ituri* (“the FRPI”), and its forces were allegedly based in the Walendu Bindi *collectivité* of the Irumu territory in the Ituri district.¹⁴

7. In early December 2004, President of the DRC Joseph Kabila appointed Germain Katanga *Brigadier-Général* in the *Forces Armées de la République Démocratique du Congo* (“the FARDC”), a post which he held at the time of his arrest by the DRC authorities, on or about 10 March 2005.¹⁵

3. Mathieu Ngudjolo Chui

8. Mathieu Ngudjolo Chui was born on 8 October 1970 in the Likoni locality of the *groupement* of Ezekere, within the Walendu Tatsi *collectivité* in Djugu territory.¹⁶ He is of Lendu ethnicity, from the Njotsi clan, is married and has six children.¹⁷ He studied medicine and worked as a nurse before engaging in military activities.¹⁸

9. According to the Prosecution, in August 2002, when the UPC succeeded in taking control of Bunia, Mathieu Ngudjolo Chui was working as a nurse in Bunia and in Zumbe, a village south-east of Bunia, in the Ezekere *groupement*.¹⁹ After the UPC’s takeover of Bunia in August 2002, he allegedly settled in the Ezekere *groupement* and was involved with Lendu combatants south of Bunia who were known as the *Front des Nationalistes et Intégrationnistes* (“the FNI”).²⁰

10. In or around August 2006, the media reported that Mathieu Ngudjolo Chui had signed a peace agreement with the Government of the DRC.²¹ Mathieu Ngudjolo

¹³ ICC-01/04-01/07-649-Anx1A, para. 24. See also Human Rights Watch, *Ituri: “Covered in Blood” – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 16, No. 11 (A), New York, July 2003 at DRC-OTP-00074-797 at 838.

¹⁴ ICC-01/04-01/07-649-Anx1A, para. 5.

¹⁵ ICC-01/04-01/07-649-Anx1A, para. 7. Also see the *Décret no. 04/094/ du 11 déc 2004 portant nomination dans la catégorie des officiers généraux des Forces Armées de la République Démocratique du Congo* at DRC-OTP-0086-0036 at 0037; Human Rights Watch, “D.R. Congo: Army Should Not Appoint War Criminals”, 14 January 2005 at DRC-OTP-0154-0433 at 0433-0434; IRIN, “DRC: Another key Ituri leader arrested”, 22 March 2005 at DRC-OTP-0074-0899 at 0899.

¹⁶ ICC-01/04-01/07-T-39-ENG CT at p. 6, lines 16-18.

¹⁷ ICC-01/04-01/07-T-39-ENG CT at p. 5, line 14; p. 6, lines 18-19.

¹⁸ ICC-01/04-01/07-T-39-ENG CT at p.6, lines 20-25; p. 7, lines 1-2.

¹⁹ ICC-01/04-01/07-649-Anx1A, para. 9.

²⁰ ICC-01/04-01/07-649-Anx1A, para. 10.

²¹ MONUC, “UN panel targets Congo militia over child soldiers”, 8 September 2008 at DRC-OTP-1018-0171 at 0171.

Chui declared that he and his fighters had been granted amnesty, were being integrated into the FARDC, and would be deployed in Ituri district.²² In October 2006, he obtained his current rank of colonel in the FARDC and was based in Ituri.²³ Prior to his transfer to the Court, Mathieu Ngudjolo Chui had been sent to Kinshasa for military training as part of the integration process of President Kabila's DRC government.²⁴ Mathieu Ngudjolo Chui was still a member of the FARDC at the time of his arrest on 6 February 2008.²⁵

4. Prosecution allegations against Germain Katanga and Mathieu Ngudjolo Chui

11. At the outset, the Chamber notes that the "Prosecution's Submission of Amended Document Containing the Charges and Additional List of Evidence"²⁶ filed on 12 June 2008 and the "Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648"²⁷ filed on 26 June 2008 will be equally referred to as the Prosecution's Amended Charging Document or the Amended Charging Document.

12. In the Prosecution's Amended Charging Document, the Prosecution submitted that at the time of the attack on Bogoro village, Germain Katanga was the FRPI's top commander of all Ngiti armed forces²⁸ and Mathieu Ngudjolo Chui the FNI military leader of all the Lendu fighters based in military camps south of Bunia.²⁹

13. The Prosecution submitted that in the fall of 2002, combatants predominately of Lendu and Ngiti ethnicity organised themselves as the FNI and FRPI as a means

²² MONUC, "UN panel targets Congo militia over child soldiers", 8 September 2008 at DRC-OTP-1018-0171 at 0171.

²³ Transcript of statement of W-258 at DRC-OTP-0173-0644 at 0645, lines 14-25; Statement of W-157 at DRC-OTP-1006-0054 at 0069, para. 103.

²⁴ ICC-01/04-01/07-649-Anx1A, para. 14; UN News Center "Transfer of ex-combatants major step for peace in northern DR Congo", 5 November 2007 at DRC-OTP-1018-0169 at 0169; MONUC, "Departure of leaders of Ituri armed groups to Kinshasa", 3 November 2007 at DRC-OTP-1018-0170 at 0170.

²⁵ ICC-01/04-01/07-T-39-ENG CT at p.7, lines 3-5.

²⁶ ICC-01/04-01/07-584-Anx1A.

²⁷ ICC-01/04-01/07-649-Anx1A.

²⁸ ICC-01/04-01/07-649-Anx1A, para. 6.

²⁹ ICC-01/04-01/07-649-Anx1A, para. 10.

of fighting other combatants, who were predominately of Hema ethnicity and had organised themselves under the *Union des Patriotes Congolais* ("the UPC") and the *Forces Patriotiques pour la Libération du Congo* ("the FPLC"). The Prosecution asserted that the FRPI was formed in late 2002 and became known as such in early 2003, whereas the FNI was formed and became known as such in December 2002.³⁰ The Prosecution further asserted that both militias were created and were then active between two key events in Ituri: the capture of the city of Bunia by the UPC on or about 9 August 2002, and its recapture by the FNI and FRPI seven months later, on or about 6 March 2003.³¹

14. The Prosecution submitted that during the period of time relevant to the crimes alleged in the Amended Charging Document, there existed a protracted armed conflict in Ituri territory involving armed groups based there, which had the hierarchical organisation and the ability to plan and carry out sustained military operations. From mid-2002 to mid-2003, these included the FNI, the FRPI, the UPC and its armed wing, the FPLC,³² and the *Parti pour l'unité et la sauvegarde de l'intégrité du Congo* ("the PUSIC").³³ The Prosecution further submitted that this armed conflict was fuelled by the involvement of Uganda, Rwanda, and the DRC government, each of which supported different Ituri-based militias at different times.³⁴

15. The Prosecution submitted that the alleged crimes occurred in the context of and were associated with this armed conflict, irrespective of whether the conflict was characterised as non-international or international. The Prosecution asserted that each of the counts characterised as "war crimes" in the Amended Document Containing the Charges, arises from conduct constituting a war crime under articles 8(2)(a) and (b) of the Rome Statute ("the Statute"), or articles 8(2)(c) and (e) of the Statute, regardless of whether the conflict is non-international or international.

16. The Prosecution submitted that at all times relevant to the alleged charges, Germain Katanga and Mathieu Ngudjolo Chui, as leaders of armed groups

³⁰ ICC-01/04-01/07-649-Anx1A, para. 3.

³¹ ICC-01/04-01/07-649-Anx1A, paras 25, 32.

³² ICC-01/04-01/07-649-Anx1A, paras 3, 25, 32.

³³ ICC-01/04-01/07-649-Anx1A, para. 29.

³⁴ ICC-01/04-01/07-649-Anx1A, para. 37.

participating in the conflict, were well aware of the existence of an armed conflict in Ituri.³⁵

17. The Prosecution further submitted that the crimes against humanity, as alleged in the Amended Charging Document occurred in the context of a widespread or systematic attack against the civilian population, within the meaning of article 7(1) of the Statute. The Prosecution asserted that from January 2001 to January 2004, the Lendu and Ngiti armed groups, known during that period as the FNI and the FRPI respectively, were responsible for perpetrating at least 10 attacks in which civilians were targeted and killed in significant numbers.³⁶ The Prosecution also asserted that while carrying out these alleged attacks, these armed groups were implementing a policy of targeting the Hema population.³⁷

18. The Prosecution submitted that at all times relevant to the alleged charges, Germain Katanga and Mathieu Ngudjolo Chui knew that their conduct was part of, or intended their conduct to be part of, a widespread or systematic attack directed against the civilian population.³⁸

19. The Prosecution submitted that on 24 February 2003, the FNI and the FRPI, acting with a common purpose, launched a military attack on Bogoro village in the Babiase *groupement*, Bahema Sud *collectivité*, in Irumu territory in the Ituri district. According to the Prosecution, the charges of war crimes and crimes against humanity against Germain Katanga and Mathieu Ngudjolo Chui are the result of acts committed during and in the aftermath of this attack.³⁹

20. The Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui under article 7(1)(a) of the Statute with murder constituting a crime against humanity at Bogoro village. The Prosecution submitted that such murder consisted of the killings of at least two hundred civilian residents of, or persons present at

³⁵ ICC-01/04-01/07-649-Anx1A, para. 39.

³⁶ ICC-01/04-01/07-649-Anx1A, para. 40.

³⁷ ICC-01/04-01/07-649-Anx1A, para. 40.

³⁸ ICC-01/04-01/07-649-Anx1A, para. 41.

³⁹ ICC-01/04-01/07-649-Anx1A, para. 3.

Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Suzanne Mabone and Matia Babona.⁴⁰

21. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(a)(i) of the Statute with wilful killing as a war crime in the case of an international armed conflict, or under article 8(2)(c)(i) of the Statute with murder as a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that such murder or wilful killing occurred in the killing of at least two hundred civilian residents of, or persons present at Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Suzanne Mabone and Matia Babona.⁴¹

22. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 7(1)(k) of the Statute with inhumane acts at Bogoro village constituting a crime against humanity. The Prosecution submitted that such inhumane acts occurred through the intentional infliction of serious injuries upon civilian residents of, or persons present at Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witnesses 132 and 287.⁴²

23. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(a)(ii) of the Statute with inhuman treatment as a war crime in the case of an international armed conflict, or under article 8(2)(c)(i) of the Statute with cruel treatment as a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that the suspects committed inhuman or cruel treatment of civilian residents of, or persons present at Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witness 268. Such treatment included detaining these persons, threatening them with weapons, and imprisoning them in a room filled with corpses of men, women, and children.⁴³

⁴⁰ ICC-01/04-01/07-649-Anx1A at p. 31.

⁴¹ ICC-01/04-01/07-649-Anx1A at pp. 31-32.

⁴² ICC-01/04-01/07-649-Anx1A at p. 32.

⁴³ ICC-01/04-01/07-649-Anx1A at p. 32.

24. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(xxvi) of the Statute with the war crime of using children to participate actively in hostilities in an international armed conflict, or under article 8(2)(e)(vii) of the Statute with the war crime of using children to participate actively in hostilities in the case of an armed conflict not of an international character. The Prosecution submitted that such use of children included the use of Witnesses 28 and 157 during the attack on Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district.⁴⁴

25. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo under article 7(1)(g) of the Statute with the crime against humanity of sexual slavery following the attack on Bogoro village. The Prosecution submitted that following the Bogoro attack, there was such enslavement of civilian female residents of, or civilian women present at Bogoro village, in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witnesses 132 and 249.⁴⁵

26. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(xxii) of the Statute with sexual slavery constituting a war crime in the case of an international armed conflict, or under article 8(2)(e)(vi) of the Statute with sexual slavery constituting a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that following the Bogoro attack, there was such enslavement of civilian female residents of, or civilian women present at Bogoro village, in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witnesses 132 and 249.⁴⁶

27. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 7(1)(g) of the Statute with rape constituting a crime against humanity. The Prosecution submitted that following the Bogoro attack, there was such rape of civilian female residents, or civilian women present at Bogoro

⁴⁴ ICC-01/04-01/07-649-Anx1A at pp. 32-33.

⁴⁵ ICC-01/04-01/07-649-Anx1A at p. 33.

⁴⁶ ICC-01/04-01/07-649-Anx1A at p. 33.

village, in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witnesses 132 and 249.⁴⁷

28. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(xxii) of the Statute with rape constituting a war crime in the case of an international armed conflict, or under article 8(2)(e)(vi) of the Statute with rape constituting a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that following the Bogoro attack, there was such rape of civilian female residents of, or civilian women present at Bogoro village, in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witnesses 132 and 249.⁴⁸

29. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(xxi) of the Statute with outrages upon personal dignity constituting a war crime in the case of an international armed conflict, or under article 8(2)(c)(ii) of the Statute with outrages upon personal dignity constituting a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that such outrages were committed upon the personal dignity of civilian female residents, or civilian women present at Bogoro village, in the Bahema Sud *collectivité*, Irumu territory, Ituri district, including Witness 287.⁴⁹

30. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(i) of the Statute with the war crime of intentionally directing an attack against the civilian population of Bogoro village in the case of an international armed conflict, or under article 8(2)(e)(i) of the Statute with the war crime of intentionally directing an attack against the civilian population of Bogoro village in the case of an armed conflict not of an international character. The Prosecution alleged that the suspects intentionally directed the attack against the civilian population of Bogoro village in the Bahema Sud *collectivité*, Irumu territory,

⁴⁷ ICC-01/04-01/07-649-Anx1A at p. 34.

⁴⁸ ICC-01/04-01/07-649-Anx1A at p. 34.

⁴⁹ ICC-01/04-01/07-649-Anx1A at p. 34.

Ituri district, and against individual civilians not taking direct part in hostilities, including Suzanne Mabone, Matia Babona, Witnesses 132, 249, 268 and 287.⁵⁰

31. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(xvi) of the Statute with pillaging constituting a war crime in the case of an international armed conflict, or under article 8(2)(e)(v) of the Statute with pillaging constituting a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that such pillaging occurred at Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district.⁵¹

32. The Prosecution additionally charged Germain Katanga and Mathieu Ngudjolo Chui under article 8(2)(b)(xiii) of the Statute with destruction of property constituting a war crime in the case of an international armed conflict, or under article 8(2)(e)(xii) of the Statute with destruction of property constituting a war crime in the case of an armed conflict not of an international character. The Prosecution submitted that such destruction occurred in Bogoro village and its vicinity in the Bahema Sud *collectivité*, Irumu territory, Ituri district.⁵²

33. The Prosecution submitted that Germain Katanga and Mathieu Ngudjolo Chui are each criminally responsible under article 25(3)(a) of the Statute for these war crimes and crimes against humanity, as listed above and in the Prosecution's Amended Charging Document. The Prosecution submitted that Germain Katanga and Mathieu Ngudjolo Chui each committed these crimes jointly with other commanders of the FRPI and the FNI by agreeing to a common plan to "wipe out" Bogoro. Such a plan consisted of indiscriminately attacking civilians not taking part in hostilities and UPC soldiers in a camp in Bogoro.⁵³

34. The Prosecution alleged that, as military chiefs of all the FRPI and FNI combatants and with the authority such positions conferred upon them, Germain Katanga and Mathieu Ngudjolo Chui each played an essential role in the

⁵⁰ ICC-01/04-01/07-649-Anx1A at pp. 34-35.

⁵¹ ICC-01/04-01/07-649-Anx1A at p. 35.

⁵² ICC-01/04-01/07-649-Anx1A at p. 35.

⁵³ ICC-01/04-01/07-649-Anx1A, paras 90, 93.

implementation of the common plan which led to the commission of the crimes described above. Their essential contribution to the common plan and to the crimes it furthered, included providing weapons and ammunition to FRPI and FNI commanders for the implementation of the common plan; overseeing and ensuring that the common plan was executed by the FRPI and FNI forces in a coordinated and joint manner; overseeing and directing the implementation of the common plan by the FRPI and FNI combatants by communicating details of the plan to commanders; and ordering their subordinates to execute the common plan.⁵⁴

35. The Prosecution alleged that by contributing to the common plan, Germain Katanga and Mathieu Ngudjolo Chui were each aware of their essential role and that such role provided them with joint control over the implementation of the common plan. The Prosecution asserted that they, as co-perpetrators, and other members of the common plan, at the very least, were mutually aware of, and agreed that implementing the common plan to “wipe out” Bogoro would result in the crimes listed in the Prosecution’s Amended Charging Document. The Prosecution submitted that, for these reasons, Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible for those war crimes and the crimes against humanity committed by FRPI and FNI combatants in Bogoro and its vicinity, during and in the aftermath of the joint attack on Bogoro on or about 24 February 2003, regardless of whether each had authority over the other’s subordinates.⁵⁵

36. In the alternative, the Prosecution submitted that Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible under article 25(3)(b) of the Statute for ordering the commission of war crimes and crimes against humanity. The Prosecution submitted that Germain Katanga and Mathieu Ngudjolo Chui – each vested with power and authority as chief of, respectively, all the FRPI combatants, or FNI combatants from Zombe – ordered the attack on the civilian population of

⁵⁴ ICC-01/04-01/07-649-Anx1A, paras 91-93.

⁵⁵ ICC-01/04-01/07-649-Anx1A, para. 93.

Bogoro and are therefore criminally responsible for the crimes alleged in the Prosecution's Amended Charging Document.⁵⁶

B. Major procedural steps

37. On 5 July 2004, the Presidency of the Court assigned the Situation in the Democratic Republic of the Congo to the Chamber.⁵⁷

38. On 7 March 2007, Judge Akua Kuenyehia was elected Presiding Judge of the Chamber.⁵⁸

39. On 22 and 25 June 2007, the Prosecution filed, in two parts, an application requesting the issuance of warrants of arrest for Germain Katanga and Mathieu Ngudjolo Chui.⁵⁹

40. On 2 July 2007, the Chamber issued the "Warrant of Arrest for Germain Katanga,"⁶⁰ and subsequently issued its "Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga" on 6 July 2007.⁶¹

41. On 6 July 2007, the Chamber issued the "Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui" as well as the "Warrant of Arrest for Mathieu Ngudjolo Chui."⁶²

42. On 17 October 2007, Germain Katanga was surrendered by the Congolese authorities and transferred to the seat of the Court in The Hague.

43. On 18 October 2007, the Chamber issued a decision unsealing the warrant of arrest for Germain Katanga.⁶³

44. On 22 October 2007, Germain Katanga made his first appearance before the Chamber at a hearing during which the Chamber was satisfied that he had been

⁵⁶ ICC-01/04-01/07-649-Anx1A, para. 94.

⁵⁷ ICC-01/04-1.

⁵⁸ ICC-01/04-323.

⁵⁹ ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp respectively.

⁶⁰ ICC-01/04-01/07-1-tENG.

⁶¹ ICC-01/04-01/07-4.

⁶² ICC-01/04-01/07-262; ICC-01/04-01/07-260-tENG.

⁶³ ICC-01/04-01/07-24.

informed of the crimes he is alleged to have committed and of his rights pursuant to the Statute and the Rules of Procedure and Evidence (“the Rules”). At this hearing, the Chamber announced that the confirmation hearing would be held on 28 February 2008.

45. On 6 February 2008, Mathieu Ngudjolo Chui was arrested, surrendered by the Congolese authorities and transferred to the seat of the Court in The Hague.

46. On 7 February 2008, the Chamber issued a decision unsealing the warrant of arrest for Mathieu Ngudjolo Chui.⁶⁴

47. On 11 February 2008, Mathieu Ngudjolo Chui made his first appearance before the Chamber at a hearing during which the Chamber was satisfied that he had been informed of the crimes which he is alleged to have committed and of his rights pursuant to the Statute and the Rules. At this hearing, the Chamber announced that the confirmation hearing would be held on 21 May 2008.

48. On 10 March 2008, the Chamber issued a decision joining the cases against Germain Katanga and Mathieu Ngudjolo Chui. The same decision designated Judge Sylvia Steiner as the Single Judge responsible for exercising the functions of the Chamber in the joint case, including those functions provided for in rule 121(2)(b) of the Rules. In addition, the confirmation hearing in the joint case was scheduled for 21 May 2008.⁶⁵ The decision to join the cases was subsequently upheld by the Appeals Chamber on 9 June 2008.⁶⁶

49. On 2 April 2008, the Single Judge issued the “Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08.”⁶⁷ The applicants who were granted the procedural status of victim authorised to participate in the proceedings are represented by Ms Bapita Buyangandu, Mr Keta and Mr Gilissen.⁶⁸

⁶⁴ ICC-01/04-01/07-269.

⁶⁵ ICC-01/04-01/07-307.

⁶⁶ ICC-01/04-01/07-573.

⁶⁷ ICC-01/04-01/07-357.

⁶⁸ Victims a/0327/07; a/0329/07; a/0330/07 and a/0331/07 are represented by Ms Carine Bapita Buyangandu (hereafter Ms Bapita Buyangandu); Victims a/0333/07 is conjointly represented by Mr Jean Louis Gilissen and Mr Joseph Keta (hereafter Mr Gilissen and Mr Keta).

50. On 18 April 2008, the Single Judge issued a decision on the evidentiary scope of the confirmation hearing and issues related to the preventive relocation of witnesses by the Prosecution.⁶⁹

51. On 21 April 2008, the Single Judge reviewed, *proprio motu*, the pre-trial detention of Germain Katanga.⁷⁰

52. On 25 April 2008, the Single Judge issued the "Decision on the Defence Request for Postponement of the Confirmation Hearing" and re-scheduled the confirmation hearing in the case against Germain Katanga and Mathieu Ngudjolo Chui for 27 June 2008.⁷¹ The Chamber subsequently issued a decision on the schedule of the confirmation hearing.⁷²

53. On 13 June 2008, the Single Judge decided on 97 applications for participation at the pre-trial stage of the case against Germain Katanga and Mathieu Ngudjolo Chui.⁷³ The applicants who were granted the procedural status of victim authorised to participate in the proceedings are represented by Ms Bapita Buyangandu, Mr Keta, Mr Gilissen, Mr Diakiese and Mr Mulamba Nsokoloni.⁷⁴ On 3 July 2008, the Chamber provisionally separated Mr Mulamba Nsokoloni from his functions as the Legal Representative of certain victims in the case because of an apparent conflict of interest raised by the Defence for Mathieu Ngudjolo Chui.⁷⁵ The Chamber reinstated him as Legal Representative of Victims on 16 July 2008.⁷⁶

54. The Chamber established the modalities of participation for anonymous and non-anonymous victims authorised to participate in the case, in a decision of the

⁶⁹ ICC-01/04-01/07-411-Conf-Exp, and its public redacted version ICC-01/04-01/07-428-Corr.

⁷⁰ ICC-01/04-01/07-426. See also ICC-01/04-01/07-222; ICC-01/04-01/07-330.

⁷¹ ICC-01/04-01/07-446.

⁷² ICC-01/04-01/07-587.

⁷³ ICC-01/04-01/07-578-Conf; ICC-01/04-01/07-579; ICC-01/04-01/07-589.

⁷⁴ Victims a/0009/08; a/0011/08; a/0012/08; a/0013/08 and a/0016/08 are represented by Mr Hervé Diakiese (hereafter Mr Diakiese); Victim a/0015/08 is conjointly represented by Mr Jean-Christophe Mulamba Nsokoloni (hereafter Mr Mulamba Nsokoloni) and Mr Diakiese; Victims 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; a/0035/08; are represented by Mr Mulamba Nsokoloni; Victims a/0038/08; a/0039/08; a/0043/08; a/0044/08; a/0046/08; a/0049/08; a/0050/08; a/0051/08; a/0056/08; a/0057/08; a/0060/08; a/0061/08; a/0066/08; a/0067/08; a/0070/08; a/0071/08; a/0073/08; a/0076/08; a/0077/08; a/0078/08; a/0079/08; a/0080/08; a/0083/08; a/0085/08; a/0088/08; a/0090/08; a/0092/08; a/0095/08; a/0096/08; a/0100/08; a/0101/08; a/0103/08; a/0104/08 and a/0110/08 are represented by Ms Bapita Buyangandu.

⁷⁵ ICC-01/04-01/07-660.

⁷⁶ ICC-01/04-01/07-683.

Single Judge dated 13 May 2008.⁷⁷ The limitations on the procedural rights for non-anonymous victims were set out in a decision of the Single Judge dated 30 May 2008.⁷⁸

55. On 12 June 2008, the Prosecution filed its Amended Charging Document⁷⁹ in which the Prosecution submitted that Germain Katanga and Mathieu Ngudjolo Chui were co-perpetrators in the attack on Bogoro village on 24 February 2003.

56. On 25 June 2008, following urgent requests from both Defence counsel, the Single Judge issued a decision ordering the Prosecution to re-file the Amended Charging Document in accordance with her findings.⁸⁰ Pursuant to this decision, the Prosecution re-filed the Amended Charging Document on 26 June 2008.⁸¹

57. Over the course of several months, the Single Judge rendered eight decisions on the various requests by the Prosecution for redactions pursuant to rule 81 of the Rules ("the Decisions on Redactions").⁸²

58. On 20 June 2008, the Single Judge issued a decision on article 54(3)(e) documents identified as exculpatory or otherwise material for the Defence's preparation for the confirmation hearing.⁸³

59. From 27 June 2008 until 16 July 2008, the confirmation hearing was held before Pre-Trial Chamber I. During the hearing, the parties and participants had the opportunity (i) to make their opening statements; (ii) to make challenges to the admissibility and probative value of the evidence, as well as to raise problems

⁷⁷ ICC-01/04-01/07-474.

⁷⁸ ICC-01/04-01/07-537.

⁷⁹ ICC-01/04-01/07-584 and its Annexes.

⁸⁰ ICC-01/04-01/07-648.

⁸¹ ICC-01/04-01/07-649 and its Annexes.

⁸² First Decision on Redactions: ICC-01/04-01/07-88-Conf-Exp, ICC-01/04-01/07-90; revised versions - ICC-01/04-01/07-223-Conf-Anx, ICC-01/04-01/07-224-Anx; Second Decision on Redactions: ICC-01/04-01/07-123-Conf-Exp, ICC-01/04-01/07-124-Conf, ICC-01/04-01/07-160; Third Decision on Redactions: ICC-01/04-01/07-247-Conf-Exp-Corr, ICC-01/04-01/07-248-Conf-Corr, ICC-01/04-01/07-249; Fourth Decision on Redactions: ICC-01/04-01/07-358-Conf-Exp, ICC-01/04-01/07-360-Conf, ICC-01/04-01/07-361; Fifth Decision on Redactions: ICC-01/04-01/07-405-Conf-Exp, ICC-01/04-01/07-424-Conf, ICC-01/04-01/07-427; Sixth Decision on Redactions: ICC-01/04-01/07-413-Conf-Exp, ICC-01/04-01/07-414-Conf, ICC-01/04-01/07-425; Seventh Decision on Redactions: ICC-01/04-01/07-511-Conf-Exp, ICC-01/04-01/07-525-Conf, ICC-01/04-01/07-526; Eighth Decision on Redactions: ICC-01/04-01/07-561-Conf-Exp, ICC-01/04-01/07-567-Conf, ICC-01/04-01/07-568.

⁸³ ICC-01/04-01/07-621.

related to procedural matters; (iii) in the case of the Prosecution, to present its evidence; (iv) in the case of both Defence teams and the Legal Representatives of the victims, to present their views on the evidence of the Prosecution; and (v) to make their closing statements.⁸⁴

60. On 22 July 2008, the final written observations on matters discussed during the hearing were submitted by the Prosecution⁸⁵ and the legal representatives of anonymous and non-anonymous victims.⁸⁶ The Defence for Germain Katanga⁸⁷ and Mathieu Ngudjolo Chui⁸⁸ submitted their final written observations on 28 July 2008.

II. PRELIMINARY EVIDENTIARY MATTERS⁸⁹

A. The standard under article 61(7) of the Statute

61. Pursuant to article 61(7) of the Statute:

The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre Trial Chamber shall:

- a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- c) Adjourn the hearing and request the Prosecutor to consider:

⁸⁴ ICC-01/04-01/07-T-38-ENG CT (27 June 2008); ICC-01/04-01/07-T-39-ENG CT (30 June 2008); ICC-01/04-01/07-T-40-ENG ET (2 July 2008); ICC-01/04-01/07-T-41-ENG ET (2 July 2008); ICC-01/04-01/07-T-42-ENG ET (3 July 2008); ICC-01/04-01/07-T-43-ENG ET (4 July 2008); ICC-01/04-01/07-T-44-ENG ET (7 July 2008); ICC-01/04-01/07-T-45-ENG ET (9 July 2008); ICC-01/04-01/07-T-46-ENG ET (11 July 2008); ICC-01/04-01/07-T-48-ENG CT (14 July 2008); ICC-01/04-01/07-T-49-ENG ET (15 July 2008); ICC-01/04-01/07-T-50-ENG ET (16 July 2008).

⁸⁵ ICC-01/04-01/07-692.

⁸⁶ ICC-01/04-01/07-689-tENG; ICC-01/04-01/07-690-tENG; ICC-01/04-01/07-691-tENG and ICC-01/04-01/07-693-tENG.

⁸⁷ ICC-01/04-01/07-698.

⁸⁸ ICC-01/04-01/07-699-tENG.

⁸⁹ During the confirmation hearing, the Defence for Germain Katanga objected to a statement made by the Prosecution on the 'amendment of the Amended Charging Document' submitting that: "Well. It's – it's news to us. It's new, and there's a significance, of course, between – a considerable one between being a co-perpetrator and being a member of a common plan, and this is a matter that we submit should have been raised at an earlier point and certainly should have been – we should have been put on notice of this before it was merely announced in – in open session, taking us by surprise and distracting us from the real work at hand." in ICC-01/04-01/07-T-43-ENG ET WT at p.67, lines 15-21. The Chamber notes that, in its Final Observations, the Defence for Germain Katanga withdraws its objection made on 4 July 2008. See ICC-01/04-01/07-698, para. 12.

- i) Providing further evidence or conducting further investigation with respect to a particular charge; or
- ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

62. The evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of “substantial grounds to believe”, as provided for in article 61(7) of the Statute.⁹⁰

63. The purpose of the confirmation hearing is to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges.⁹¹

64. Throughout the proceedings, the Chamber consistently reiterated this principle and asserted that the confirmation hearing has a limited scope and purpose and should not be seen as a “mini-trial” or a “trial before the trial.”⁹²

65. In the Decision on the Confirmation of Charges (“the *Lubanga* Decision”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“the *Lubanga* case”), the Chamber relied on internationally recognised human rights jurisprudence for its interpretation of the evidentiary standard of “substantial grounds to believe” in accordance with article 21(3) of the Statute. In the current case, the Chamber sees no compelling reason to depart from its application of the standard as established in the *Lubanga* case, and therefore considers that in order for the Prosecution to meet its evidentiary burden under article 61(7) of the Statute, it must present concrete and tangible evidence which “demonstrate[s] a clear line of reasoning underpinning its specific allegations.”⁹³

⁹⁰ “[T]he adoption of the ‘substantial grounds’ standard put an end to the discussion on the meaning and scope of the ‘*prima facie* case’ expression used in article 27 of the ICL Draft Statute”, GUARIGLIA, F., “Investigation and Prosecution”, in LEE, R.S. (Ed.), *The International Criminal Court – The making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 236, footnote 65.

⁹¹ ICC-01/04-01/07-428-Corr, para. 5; ICC-01/04-01/06-803-tEN, paras 37-39.

⁹² ICC-01/04-01/07-428-Corr, paras 5-6; ICC-01/04-01/07-412 at p. 4; ICC-01/04-01/07-475, para. 68; ICC-01/04-01/07-621, para. 66.

⁹³ ICC-01/04-01/06-803-tEN, paras 38-39.

66. In determining whether the Prosecution has met the evidentiary threshold, the Chamber recognises that the evidence the Prosecution presented must be analysed and assessed as a whole. In this respect, the Chamber notes that the Prosecution stated that “for the purposes of this confirmation [it] is relying on all the material contained on that list of evidence [and] ... will be focusing [...] on the core evidence, but all the material contained” on the list of evidence is evidence which the Prosecution requests should “be formally filed and provided with EVD numbers.”⁹⁴ The Chamber’s consideration of the evidence thus will not be limited to the evidence discussed during the confirmation hearing, but will include all of the evidence tendered by the Prosecution in the case file. Therefore, the Chamber may, unless it expressly rules that an evidentiary item is inadmissible, rely on any evidence either provided in the Prosecution’s Amended List of Evidence or presented at the confirmation hearing.⁹⁵

67. Moreover, as all of the evidence listed in the Prosecution’s Amended Charging Document and List of Evidence was tendered into evidence for the purposes of the confirmation hearing, this decision will rule on all challenges to the admissibility of that evidence, regardless of any Defence filings for request for leave to appeal on some evidentiary material.⁹⁶

68. As an additional matter, the Chamber notes that immediately prior to and during the confirmation hearing, the Defence for Germain Katanga and Mathieu Ngudjolo Chui challenged the admissibility of a number of items included in the Prosecution List of Evidence and the Prosecution Amended List of Evidence. With respect to most of the items, both Defence teams asserted that should the Chamber find these evidentiary items admissible, or in the alternative, the Chamber should decide that they are accorded only limited probative value.

69. After careful review of the Prosecution evidence, the Chamber will determine whether it is satisfied that the evidence tendered is sufficient to commit Germain

⁹⁴ ICC-01/04-01/07-T-42-ENG ET at pp. 9-10, line 23-4. Reiterated in the Prosecution’s final submission in ICC-01/04-01/07-692, para. 5.

⁹⁵ ICC-01/04-01/06-678 at p. 5; ICC-01/04-01/06-803-tEN, para. 67.

⁹⁶ ICC-01/04-01/07-T-42-ENG ET at p. 4, lines 12-17.

Katanga and Mathieu Ngudjolo Chui for trial. Although the Chamber will reference items of evidence which provide substantial grounds to believe that specific charges could or could not be confirmed, the citations in the Chamber's conclusions will not include references to all the evidence presented in respect of the specific charge.

70. Additionally, if the Chamber decides that a party's challenge to a particular item of evidence or portions thereof affects its probative value, such decision does not indicate that the Chamber will not rely on such evidence or portions thereof in making its conclusions. Rather, when the Chamber determines that the probative value of an item of evidence or portions thereof is affected, for example because the evidence contains only anonymous hearsay statements or inconsistencies, the Chamber will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution. However, as with any evidence presented, the Chamber will try, whenever possible, to cite additional evidence in the record which also supports the Chamber's conclusions.

B. Matters relating to the admissibility of evidence and its probative value

1. Preliminary observations

71. The Chamber recalls that should the charges against the suspects be confirmed, any ruling on the admissibility of a particular item of evidence for the purposes of the confirmation hearing and the present decision will not preclude a subsequent determination of the admissibility of that same evidence later in the proceedings because "the admission of evidence [at the pre-trial stage] is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value" of any evidence.⁹⁷

2. General challenges by the parties in relation to the admissibility or the probative value of evidence

72. As a general submission, the Defence for Mathieu Ngudjolo Chui challenged the probative value of all of the Prosecution evidence, on the grounds that: (i) the

⁹⁷ ICC-01/04-01/06-803-tEN, para. 90.

Prosecution failed to address whether the evidence submitted is reliable *prima facie* and, therefore, admissible; (ii) the accounts were contradictory, vague, imprecise, sometimes devoid of logic, and related to persons who had not personally experienced the events; and (iii) the Prosecution presented excerpts from witnesses' statements without addressing the reliability of their provenance or the degree of their relevance and probative value.⁹⁸

73. The Defence for Mathieu Ngudjolo Chui also raised a general challenge to the "reliability" of some of the statements and evidence as a whole and additionally challenged the authenticity of one particular piece of evidence which will be addressed below.

74. The Defence for Mathieu Ngudjolo Chui further submitted that under article 69(4) of the Statute, it is not sufficient for evidence merely to be introduced by the Prosecution in the confirmation hearing. Rather, in order to determine that there are substantial grounds to believe that the suspect committed the acts ascribed to him, such evidence must also be admissible, based on a determination of its legality, regularity, reliability, and probative value.

75. With regard to the Defence for Mathieu Ngudjolo Chui's general challenge to the reliability of the evidence, consideration of evidentiary reliability will not be undertaken in a manner that could lead to *prima facie* exclusion of the Prosecution's evidence unless there is a factual basis to do so.

76. With respect to the Defence for Mathieu Ngudjolo Chui's argument concerning the admissibility of evidence, the Chamber recalls that article 69(4) of the Statute provides:

[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

77. In the view of the Chamber, the interpretation of article 69(4) of the Statute by Mathieu Ngudjolo Chui's Defence is inconsistent with the Chamber's

⁹⁸ ICC-01/04-01/07-T-48-ENG CT at pp. 5-6.

jurisprudence.⁹⁹ As the Chamber has previously stated, under article 69(4) of the Statute the Chamber may exercise its discretion when determining the relevance and/or admissibility of any item of evidence. According to article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced at the confirmation hearing.

78. Despite the controversies which have arisen at the international tribunals, in particular at the International Criminal Tribunal for Former Yugoslavia (“the ICTY”), as to whether reliability is a separate or inherent component of the admissibility of a particular item of evidence, the Chamber prefers to adopt “[t]he alternative approach”, that is, “to consider reliability as a component of the evidence when determining its weight.”¹⁰⁰ This approach is the most consistent with rule 63(2) of the Rules, according to which “[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance and admissibility in accordance with article 69.”

3. Challenges by the parties relating to the admissibility and probative value of the evidence admitted for the purpose of the confirmation hearing

a. The “procès-verbal d’audition”¹⁰¹

⁹⁹ ICC-01/04-01/06-803-tEN, para. 132.

¹⁰⁰ MAY, R. & WIERDA, M., *International Criminal Evidence*, New York, Transnational Publishers, 2002, p. 109, para. 4.41.

¹⁰¹ DRC-OTP-0155-0318; DRC-OTP-1016-0150.

79. The Defence for Germain Katanga objected to the admissibility, for the purposes of the confirmation hearing, of the *procès-verbal d'audition* of a hearing held in Kinshasa on 20 January 2006 ("the *procès verbal*").¹⁰² The Defence for Germain Katanga submitted that the *procès-verbal* should be declared inadmissible because, in violation of his constitutional right pursuant to the DRC constitution and his internationally recognised human rights, Germain Katanga was not represented by counsel during the hearing in the DRC.¹⁰³ The Defence for Germain Katanga thus requested that the Chamber exclude this evidence, pursuant to article 69(7)(a) and/or (b) of the Statute.¹⁰⁴

80. At the hearing of 2 July 2008, the Prosecution stated that it no longer intended to rely on the *procès-verbal* for the purposes of the confirmation hearing.¹⁰⁵ However, in tendering all the evidence in the Prosecution's Amended List of Evidence into evidence for the purposes of the confirmation hearing, the *procès-verbal* remained in the case file.¹⁰⁶

81. At the hearing of 7 July 2008, Mr Diakiese referred to the *procès-verbal* as evidence in the record.¹⁰⁷

82. On 7 July 2008, the Defence for Germain Katanga submitted the Defence Request for Redactions,¹⁰⁸ requesting that the Chamber order the redaction of those parts of the transcript of the confirmation hearing relating to the *procès-verbal* on the ground that they were prejudicial to the rights of the suspect.

83. During the hearing of 11 July 2008, the Chamber rejected the Defence request for redactions in an oral decision, stating:

[t]he Chamber notes that the relevant excerpts of the transcript do not identify any person other than Mr. Germain Katanga. No victim or witness shall be put at risk as a result of the disclosure to the public of the excerpts of the confidential document in question, and therefore the requested redactions will serve no purpose. The Chamber is of the view that although the information comes from a confidential document, the excerpts can remain on the public record. The Chamber therefore decides to reject the request of the Defence for

¹⁰² ICC-01/04-01/07-641-Conf, para. 2.

¹⁰³ ICC-01/04-01/07-641-Conf, paras 15-30; ICC-01/04-01/07-T-41-ENG ET WT at pp. 5-6, lines 6-3.

¹⁰⁴ ICC-01/04-01/07-641-Conf, paras 26, 30.

¹⁰⁵ ICC-01/04-01/07-T-41-ENG CT at p. 15, lines 10-22.

¹⁰⁶ ICC-01/04-01/07-T-41-ENG CT at p. 15, lines 10-22; ICC-01/04-01/07-692, para. 5.

¹⁰⁷ ICC-01/04-01/07-T-44-ENG CT at p. 19, lines 8-18.

¹⁰⁸ ICC-01/04-01/07-663.

Germain Katanga for redactions to transcript as numbered above. Furthermore, the Chamber finds no reason why the request should remain confidential and hereby reclassifies document ICC-01/04-01/07-663-Confidential as public.¹⁰⁹

84. On 21 July 2008, the Defence for Germain Katanga filed the Notification of Defence Request for Leave to Appeal the Pre-Trial Chamber's Oral Decision of 11 July 2008 on Redactions of the Transcript,¹¹⁰ in which it informed the Chamber of its intention to request leave to appeal the Oral Decision of 11 July 2008 on the following grounds:

- the Pre-Trial Chamber took no account of the prejudice to the Defence of making such material public;
- the decision to make it a public document undermines any future submission on admissibility (deferred following the decision not to rely on the material by the Prosecution);
- the decision precedes any decision in respect of the admissibility of the document;
- in the event that the document is rendered inadmissible, disclosure of it to the public despite it being confidential is improper and defeats in part the purpose of rendering it inadmissible.¹¹¹

85. However, the Defence for Germain Katanga then noted that:¹¹²

the Defence reads the Prosecution's written submission that 'it relies on all of the evidence presented in its additional List of Evidence' to mean that the Prosecution relies on all of its evidence listed in this List of Evidence save for the *procès verbal*.¹¹³

86. In this regard, the Defence for Germain Katanga further emphasised that the parts of the *Lubanga* Decision referred to by one of the Legal Representatives of Victims were not applicable in the present case because the Prosecution had indicated that it was not relying on the *procès verbal*, either for the oral presentation or for the purposes of the confirmation hearing.¹¹⁴ The Defence for Germain Katanga therefore argued that the Prosecution should be entitled to withdraw evidence at any point prior to the Chamber's deliberation stage, since the burden of proof lies on the Prosecution. It also submitted that it was the Prosecution's and not the Pre-Trial Chamber's responsibility to collect and produce the evidence.¹¹⁵ Finally, it submitted

¹⁰⁹ ICC-01/04-01/07-T-46-ENG ET at pp. 24-25, lines 22-8.

¹¹⁰ ICC-01/04-01/07-688.

¹¹¹ ICC-01/04-01/07-688 at p. 5.

¹¹² ICC-01/04-01/07-698, paras 4-8.

¹¹³ ICC-01/04-01/07-698, para. 4.

¹¹⁴ ICC-01/04-01/07-698, paras 5-6.

¹¹⁵ ICC-01/04-01/07-698, para. 7.

that, should the Chamber find the *procès-verbal* admissible in the present case, “the Defence reiterate[d] the arguments set out previously and maintain[ed] that the document should be rendered inadmissible due to a violation of the fundamental right to legal representation.”¹¹⁶

87. In relation to the *procès verbal*, in his final submission Mr Diakiese referred to the ruling in the *Lubanga* case that the Chamber may rely on evidence tendered for the purposes of the confirmation hearing whether or not the Prosecution presented it at the confirmation hearing.¹¹⁷ Additionally, in the *Lubanga* case, the Chamber held that the Court was not bound by the decisions of national courts on evidentiary matters. This notwithstanding, Mr Diakiese also submitted that article 18 of the Congolese Transitional Constitution provided for the optional presence of a lawyer during the pre-trial, or inquisitorial, phase of judicial proceedings.¹¹⁸ He asserted that under Congolese law – contrary to common law systems – the absence of legal assistance at the preliminary phase of the proceedings does not impact on the validity of the procedure.¹¹⁹

88. In addition, on 25 July 2008, Mr Diakiese filed a response¹²⁰ to the Defence Notification of 21 July 2008, in which he submitted that because the respective piece of evidence had not been introduced by the Legal Representative of Victims but by the Prosecution, in accordance with the Chamber’s Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case,¹²¹ non-anonymous victims were entitled to discuss the evidence in the record.¹²²

89. The Chamber would first observe that evidence tendered by any of the parties into the record of the case becomes “Court evidence” rather than evidence of the respective parties. Judge Claude Jorda, acting as Single Judge in the *Lubanga* case,¹²³ stated:

¹¹⁶ ICC-01/04-01/07-698, para. 8.

¹¹⁷ ICC-01/04-01/07-690-Corr, paras 34-38. See also ICC-01/04-01/07-697, paras 14-15,17.

¹¹⁸ ICC-01/04-01/07-690-Corr, para. 36. See also ICC-01/04-01/07-697, para. 16.

¹¹⁹ ICC-01/04-01/07-690-Corr, para. 36.

¹²⁰ ICC-01/04-01/07-697.

¹²¹ ICC-01/04-01/07-474.

¹²² ICC-01/04-01/07-697, paras 9-10.

¹²³ ICC-01/04-01/06-678 at pp. 8-9.

[...] any item included in the Prosecution Additional List of Evidence filed on 20 October 2006 shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing.¹²⁴

90. This approach was reiterated by the Chamber in the *Lubanga* Decision¹²⁵ and endorsed by the Trial Chamber in the *Lubanga* case.¹²⁶

91. In relation to the requirement of evidentiary compliance with the domestic law of the DRC, in the *Lubanga* Decision the Chamber stated:

[...] the Chamber observes that under article 21(1)(c) of the Statute, where articles 21(1)(a) and (b) do not apply, it shall apply general principles of law derived by the Court from national laws. Having said that, the Chamber considers that the Court is not bound by the decisions of national courts on evidentiary matters. [...] This is clear from article 69(8) which states that “[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law.¹²⁷

92. In the same decision, the Chamber reaffirmed that, in accordance with article 69(7) of the Statute, evidence must be obtained in compliance with internationally recognised human rights.¹²⁸

¹²⁴ ICC-01/04-01/06-678 at p. 8.

¹²⁵ ICC-01/04-01/06-803-tEN, paras 40, 67 and 141-143: “[...] items and documents included in the Prosecution and the Defence Lists of Evidence and Lists of Additional Evidence cease to be separate pieces of evidence presented by the parties and become evidence on the record, which the Chamber may use to determine, pursuant to article 61(7) of the Statute, whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes which he or she alleged to have committed [...] The Chamber’s position is consistent with its previous decisions on this matter, for instance, its *Decision on the Practices of Witness Familiarisation and Witness Proofing*, where it noted that “...witnesses to a crime are the property neither of the Prosecution nor of the Defence and [...] should therefore not be considered as witnesses of either party, but as witnesses of the Court.

¹²⁶ ICC-01/04-01/06-1049, para. 34: “[t]he Trial Chamber agrees with the conclusion that witnesses are not attributable to parties, but rather are witnesses of the Court.” See also ICC-01/04-01/06-1311-Anx3, para. 23.

¹²⁷ ICC-01/04-01/06-803-tEN, para. 69. See also BEHRENS, H.J. “The Trial Proceedings”, in LEE, R.S. (Ed.), *The International Criminal Court: The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 246 according to this commentator on the Rome Statute, “[t]here is therefore a close link between paragraphs 7 and 8. Whereas a violation of internationally recognized human rights in principle qualifies as a ground for exclusion of evidence, a violation of national laws on evidence does not. The reason for that is that the Court should not be burdened with decisions on matters of purely national law.”. The Appeals Chamber of the ICTY has also already stated in ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Appeals Chamber, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 19 that ‘there is no reason to import such rules into the practice of the Tribunal, which is not bound by national rules of evidence. The purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal’. See also ICTY, *The Prosecutor v. Naser Oric*, Case No. IT-03-68-T, Trial Chamber, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October, 2004, para. 8.

¹²⁸ ICC-01/04-01/06-803-tEN, para. 70.

93. In consideration of the issue presented here, the Chamber is of the view that the right to legal representation applies not only to the trial but also to the pre-trial stages of the proceedings.¹²⁹ This right does not, however, confer unlimited access to legal representation.¹³⁰ The key issue is whether the absence of legal assistance during the preliminary stages of the proceedings is tantamount to “a violation of internationally recognised human rights” such that it “casts substantial doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings” pursuant to article 69(7) of the Statute. As the Chamber previously stated in the *Lubanga* Decision, it “endorses the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of violation and fairness of the trial as a whole.”¹³¹

94. In accepting the findings of the European Commission of Human Rights, the European Court of Human Rights (“the ECtHR”) held on several occasions that:

[t]aking the proceedings as a whole, the Commission was of the view that the absence of a lawyer at the applicant’s various interrogations did not lead to a disadvantage which was likely to affect the position of the defence at the trial and thus also the outcome of the proceedings.¹³²

[...] requirements of Article 6 (art. 6) - especially of paragraph 3 (art. 6-3) - may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.¹³³

[i]n addition, the Court points out that the manner in which Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) is to be applied during the preliminary investigation depends on the special

¹²⁹ European Court of Human Rights (hereinafter “ECtHR”), *Imbrioscia v. Switzerland*, Judgment, 24 November 1993, Application No. 13972/88, (hereinafter “*Imbrioscia v. Switzerland*”) para. 36. Principle endorsed by ECtHR, *Brennan v. The United Kingdom*, Judgment, 16 October 2001, Application No. 39846/98 (hereinafter “*Brennan v. The United Kingdom*”), para. 45; ECtHR, *John Murray v. The United Kingdom*, Judgment, 8 February 1998, Application No. 41/1994/488/57 (hereinafter “*John Murray v. The United Kingdom*”), paras 62-63; ECtHR, *Magee v. The United Kingdom*, Judgment, 6 June 2000, Application No. 28135/95 (hereinafter “*Magee v. The United Kingdom*”), para. 41.

¹³⁰ REID, K., *A Practitioner’s Guide to the European Convention on Human Rights*, 3rd ed., London, Sweet and Maxwell, 2007, p. 151.

¹³¹ ICC-01/04-01/06-803-tEN, para. 86; ECtHR, *Schenk v. Switzerland*, the Court decided that it “cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence [...] may be admissible”.

¹³² ECtHR, *Imbrioscia v. Switzerland*, para. 35.

¹³³ ECtHR, *Imbrioscia v. Switzerland*, para. 36. See also *John Murray v. The United Kingdom*, para. 62; *Ocalan v. Turkey*, Judgment, 12 March 2003, Application No. 46221/99, para. 140 – confirmed by the Grand Chamber in its Judgment of 12 May 2005, para. 131; *Salduz v. Turkey*, Judgment of 26 April 2007, Application No. 36391/02, para. 22 – referred to the Grand Chamber.

features of the proceedings involved and on the circumstances of the case; in order to determine whether the aim of Article 6 (art. 6) - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case.¹³⁴

[...] although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.¹³⁵

95. In cases in which the detained person had the opportunity to be represented by counsel at later stages of the proceedings – particularly at the trial and appeals stages – the ECtHR found no breach of article 6(3)(c) of the Convention.¹³⁶

96. The ECtHR also found that:

[w]hile it confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance [...]”, Article 6 para. 3 (c) (art. 6-3-c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.¹³⁷

97. The DRC has therefore taken the approach that the presence of defence counsel at preliminary stages of proceedings is not mandatory,¹³⁸ an approach which, to date, has not been found inconsistent with the requirements of a fair trial.

98. Accordingly, the Chamber has used the standard established by general principles of international human rights law for its consideration of the admissibility of the *procès-verbal* taken in accordance with DRC law. Because it has not been shown that this particular procedure amounted to a violation of internationally recognised human rights, Germain Katanga’s lack of assistance by a defence counsel during the

¹³⁴ ECtHR, *Imbrioscia v. Switzerland*, para. 38. See also *Granger v. the The United Kingdom*, Judgment of 28 March 1990, Application No. 11932/86, para. 44.

¹³⁵ ECtHR, *John Murray v. The United Kingdom*, para. 63. See also *Magee v. The United Kingdom*, para. 41; *Brennan v. The United Kingdom*, para. 45; *Yurttas v. Turkey*, Judgment of 27 May 2004, Application No. 25143/94 and 27098/95, para. 73; *Ocalan v. Turkey*, Judgment of 12 March 2003, Application No. 46221/99, para. 140 – confirmed by the Grand Chamber in its Judgment of 12 May 2005, para. 131; *Salduz v. Turkey*, para. 22.

¹³⁶ ECtHR, *Imbrioscia v. Switzerland*, paras 39-44. See also *Brennan v The United Kingdom*, para. 48; *Salduz v. Turkey*, paras 23-24.

¹³⁷ ECtHR, *Imbrioscia v. Switzerland*, para. 38.

¹³⁸ Article 18 of the DRC’s Transitional Constitution. See the submission of Mr Diakiese (ICC-01/04-01/07-690-Corr, para. 36; ICC-01/04-01/07-697, para. 16).

taking of the *procès-verbal* does not make the *procès-verbal* inadmissible as evidence *per se*.

99. Therefore, in the view of the Chamber, the *procès-verbal* is admissible for the purposes of the confirmation hearing.

b. *Items related to the deceased prosecution source referred to as Witness 167*¹³⁹

100. The Chamber recalls that in the “Fifth Decision on Redactions”¹⁴⁰ the Single Judge held that the person the Defence referred to as Witness 167 was not to be considered a Prosecution Witness but a deceased prosecution source. The deceased prosecution source: (i) was only screened as a potential witness and (ii) had not given a statement to the Prosecution before his death by natural causes but instead provided the Prosecution with his manuscript.¹⁴¹

101. Both Defence teams challenged the admissibility of the manuscript document (“the manuscript”) provided by the deceased prosecution source to the Prosecution.

Their challenges were based on:

- a. the format in which the manuscript was introduced by the Prosecution;
- b. the deceased prosecution source;
- c. the authenticity of the manuscript;
- d. the credibility of the deceased prosecution source; and
- e. the relevance of the manuscript.

¹³⁹ DRC-OTP-0140-0522, DRC-OTP-0140-0526, DRC-OTP-0140-0549, DRC-OTP-0140-0553, DRC-OTP-0140-0561, DRC-OTP-0140-0577, DRC-OTP-0140-0581, DRC-OTP-0140-0584, DRC-OTP-0140-0588, DRC-OTP-0140-0590, DRC-OTP-0140-0592, DRC-OTP-0140-0600, DRC-OTP-0140-0604, DRC-OTP-0140-0608, DRC-OTP-0140-0612, DRC-OTP-0140-0616, DRC-OTP-0140-0628, DRC-OTP-0140-0635, DRC-OTP-0140-0644, DRC-OTP-0140-0648, DRC-OTP-0140-0650, DRC-OTP-0140-0657, DRC-OTP-0140-0660, DRC-OTP-0140-0664, DRC-OTP-0140-0678, DRC-OTP-0140-0698, DRC-OTP-0140-0726, DRC-OTP-0140-0761, DRC-OTP-0140-0787, DRC-OTP-0140-0806, DRC-OTP-0140-0839, DRC-OTP-0140-0845, DRC-OTP-0140-0867, DRC-OTP-0140-0900, DRC-OTP-0140-0926, DRC-OTP-0140-0945, DRC-OTP-0140-0964 and DRC-OTP-0140-0992.

¹⁴⁰ ICC-01/04-01/07-405-Conf-Exp and its confidential redacted version (ICC-01/04-01/07-424-Conf) and public redacted version (ICC-01/04-01/07-427), paras 34-36.

¹⁴¹ ICC-01/04-01/07-405-Conf-Exp (ICC-01/04-01/07-424-Conf and ICC-01/04-01/07-427), para. 34.

a. Improper format of the manuscript

102. Both Defence teams challenged the format in which the manuscript was disclosed to the parties and submitted for the Chamber's consideration. The Defence for Germain Katanga asserted that the manuscript "[was] in a deplorable state to be presented to either the judges or the parties", and was produced by the Prosecution in its original manuscript state without the aid of a typed version.¹⁴² The Defence for Germain Katanga further expressed concern that some portions of the manuscript appeared to be a compilation of different documents.¹⁴³ The Defence for Mathieu Ngudjolo Chui also submitted that certain portions of the manuscript were illegible.

103. In the present case, the Prosecution disclosed the document in question to the Defence on three separate occasions between April and May 2007.¹⁴⁴ The Chamber is of the view that the Defence thus had ample opportunity to raise specific objections to the improper format of the manuscript before the confirmation hearing. Further, had they previously raised such objections, the issues presented could have been remedied by the Prosecution. However, the Defence teams chose not to avail themselves of these opportunities.

104. The Chamber notes that no general rule prescribes the format in which documents are to be tendered as evidence. The Chamber therefore exercises its discretion under article 69(4) of the Statute to assess the relevance or admissibility of such evidence.

105. The Chamber recalls that regulation 26(4) of the Regulations of the Court ("the Regulations") provides that "[i]n proceedings before the Court, evidence other than live testimony shall be presented in electronic form whenever possible. The

¹⁴² ICC-01/04-01/07-641-Conf, para. 62.

¹⁴³ The Defence for Germain Katanga referred to documents DRC-OTP-0140-0526; DRC-OTP-0140-0664; DRC-OTP-0140-0787; DRC-OTP-0140-0867; DRC-OTP-0140-0964.

¹⁴⁴ ICC-01/04-01/07-417-Conf on 21 April 2007; ICC-01/04-01/07-451-Conf on 25 April 2007; and ICC-01/04-01/07-519-Conf on 27 May 2007.

original form of such evidence shall be authoritative." Furthermore, as the Chamber itself was able to read the entire manuscript in its original format and did not find this format prohibitive of the Chamber's ability to assess the evidence properly, the Chamber rejects both Defence challenges to the format of the manuscript.

106. Additionally, the Chamber notes that, with regard to the format of submissions it receives, the present decision on admissibility and probative value has bearing on future submissions only to the extent that the Chamber reserves the right to assess them on a case-by-case basis.

b. Deceased prosecution source

107. The Defence for Germain Katanga also expressed its concern about not being able to assess the credibility of the deceased prosecution source through cross-examination.¹⁴⁵

108. The Prosecution submitted that:

[...] while the inability to question a witness on a statement or document could be a form of prejudice that may be examined when ruling in the admissibility of a witness statement at trial, where the statutory standard is *viva voce* testimony, it is submitted that the absence of such ability *at the stage of the confirmation hearing*, is not a basis for ruling a statement inadmissible.¹⁴⁶

109. As the Single Judge previously stated, if the charges against the suspect are confirmed, the fact that it is impossible to call the deceased author of the manuscript as a witness at trial is not in itself determinative of evidentiary admissibility in the pre-trial stage.¹⁴⁷ Rather, the parties' inability to cross-examine a Prosecution source is simply one factor in the Chamber's determination of the probative value accorded to the evidence in question.¹⁴⁸

¹⁴⁵ ICC-01/04-01/07-641-Conf, para. 65; ICC-01/04-01/07-698, para. 9.

¹⁴⁶ ICC-01/04-01/07-692, para. 11 [footnote omitted].

¹⁴⁷ ICC-01/04-01/07-412.

¹⁴⁸ ICC-01/04-01/06-1399, para. 28.

c. Authenticity of the manuscript

110. It must first be recalled that in respect of issues pertaining to the authenticity of pieces of evidence:

[u]nder the framework established by the Statute and the Rules, the Chamber notes that, at the stage of the confirmation hearing, the scope of which is limited to determining whether or not a person should be committed for trial, it is necessary to assume that the material included in the parties' Lists of Evidence is authentic. Thus, unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing. This is without prejudice to the probative value that could be attached to such evidence in the overall assessment of the evidence admitted for the purpose of this confirmation hearing.¹⁴⁹

111. In the present proceedings, both Defence counsel have challenged the authenticity of the manuscript on the grounds that: (i) it is unsigned and undated; (ii) the manuscript seems to have different handwritings; and (iii) the purported source of the manuscript remains unclear.

112. In respect of these challenges, the Chamber observes that the fact that a document is not signed or dated does not automatically make it inauthentic.¹⁵⁰ In addition, the Chamber observes that document DRC-OTP-0140-0522 is a letter from the purported author of the manuscript to a lawyer, signed by the purported author, in which the person claiming to be the author mentions the existence of a manuscript he wrote. On this basis, the Chamber finds that there are sufficient *indicia* of

¹⁴⁹ ICC-01/04-01/06-803-tEN, para. 97. See also ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber, Decision adopting guidelines on the standards governing the admission of evidence, 19 January 2006, Annex A "Guidelines on the Standards Governing the Admission of Evidence" para.6: "[w]hen objections are raised on grounds of authenticity or reliability, this Trial Chamber will follow the practise of this Tribunal, namely, to admit documents and video recordings and then decide on the weight to be given to them within the context of the trial record as a whole."

¹⁵⁰ ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber, Decision adopting guidelines on the standards governing the admission of evidence, 19 January 2006, Annex A "Guidelines on the Standards Governing the Admission of Evidence", para.5: "There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, a priori, render it void of authenticity. Authenticity and proof of authorship will assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces in the framework of the free evaluation of evidence". See also ICTY, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Trial Chamber, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para.18; ICTY, *The Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, paras 33-34.

authenticity as to the source of the manuscript. The Chamber therefore rejects both Defence challenges to the sufficiency of the manuscript's authenticity.

113. Thus, the Chamber decides that the challenge to the authenticity of the purported authorship of the manuscript does not affect the probative value accorded to the manuscript.

d. Credibility of the manuscript's author

114. The Defence for both suspects challenged the credibility of the deceased prosecution source, albeit on different grounds.

(i) Due to inconsistencies

115. Both Defence teams challenged the credibility of the deceased prosecution source due to the manuscript's confusing and inconsistent content.¹⁵¹

116. In the view of the Chamber, inconsistencies in the evidence alone do not require that the evidence is rejected as unreliable.¹⁵² Nevertheless, the Chamber retains discretion in evaluating any inconsistencies and in considering whether the evidence, assessed as a whole, is reliable and credible. Similarly, the Chamber retains the discretion to accept or reject any of the "fundamental features" of the evidence.¹⁵³ Accordingly, the Chamber is of the view that the inconsistencies in question are such that they could impact only upon the manuscript's probative value but not its admissibility.

¹⁵¹ ICC-01/04-01/07-699-tENG; ICC-01/04-01/07-641-Conf, paras 62, 66.

¹⁵² See also ICTY, *Prosecutor v. Kupreškic et al.*, Case No. IT-95-16-A, Appeals Judgment, 23 October 2001, para. 31 "The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence". See as well SCSL, Case No. SCSL-2004-16-T, 20 June 2007.

¹⁵³ ICTY, *Prosecutor v. Kupreškic et al.*, Case No. IT-95-16-A, Appeals Judgment, 23 October 2001, para. 31; See as well SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, 20 June 2007, para. 110.

(ii) Due to hearsay sources

117. The Defence of Germain Katanga also challenged the credibility of the deceased prosecution source since, according to the Defence, "his information appears to come mainly from hearsay."¹⁵⁴

118. As the Chamber has previously stated:

[...] there is nothing in the Statute or the Rules which expressly provides that the evidence which can be considered hearsay from anonymous sources is inadmissible *per se*. In addition, the Appeals Chamber has accepted that, for the purpose of the confirmation hearing, it is possible to use items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements.¹⁵⁵

Furthermore, ECHR jurisprudence evinces that the European Convention does not preclude reliance at the investigation stage of criminal proceedings on sources such as anonymous informants. Nevertheless, the ECHR specifies that the subsequent use of anonymous statements as sufficient evidence to found a conviction is a different matter in that it can be irreconcilable with article 6 of the European Convention, particularly if the conviction is based to a decisive extent on anonymous statements.¹⁵⁶

Accordingly, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.¹⁵⁷

119. The Chamber further recalls that in the *Lubanga* Decision it decided that it would determine the probative value of the statements that "contain anonymous hearsay evidence in light of other evidence also admitted for the purposes of the confirmation hearing. However mindful of the difficulties that such evidence may cause the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use this type of anonymous hearsay evidence only to corroborate other evidence."¹⁵⁸

120. Accordingly, in the view of the Chamber, the Defence challenges concerning information derived from anonymous hearsay within the manuscript do not affect the admissibility of the evidence but could affect its probative value. The Chamber

¹⁵⁴ ICC-01/04-01/07-641-Conf, para. 65.

¹⁵⁵ ICC-01/04-01/06-803-tEN, para. 101.

¹⁵⁶ ICC-01/04-01/06-803-tEN, para. 102; See as well ECtHR, *Kostovski v The Netherlands*, Judgment of 20 November 1989, Application No. 11454/85, para. 44.

¹⁵⁷ ICC-01/04-01/06-803-tEN, para. 103.

¹⁵⁸ ICC-01/04-01/06-803-tEN, para. 106.

reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.

(iii) Due to the monetary incentives of the author, and doubts concerning the author's faculties while writing the manuscript documents

121. The Defence for Mathieu Ngudjolo Chui further challenged the credibility of the author of the manuscript on the grounds that: (i) the author clearly had not intended to have his manuscript presented before a court but had written the manuscript with "lucrative" objectives in mind; and (ii) while writing the manuscript, the author was ill and in the hospital.¹⁵⁹ The Defence for Mathieu Ngudjolo Chui asserted that the author's illness called into question his mental capacity when writing the manuscript, an assertion the Defence supported by highlighting contradictions in the manuscript.¹⁶⁰

122. Furthermore, with regard to the issue of the monetary incentives raised by the Defence for Mathieu Ngudjolo Chui, the Chamber notes that document DRC-OTP-0140-0522 is a letter from the deceased prosecution source to a lawyer, and signed by him. It follows from this letter that, contrary to the Defence allegations, the author of the manuscript documents did intend to (i) present the manuscript before a court; and (ii) to testify before that court. Furthermore, the deceased prosecution source also intended to publish his manuscript. Nevertheless, the Chamber is of the view that the allegations of "lucrative" incentive by the Defence for Mathieu Ngudjolo Chui are merely speculative and therefore, do not affect the admissibility of the manuscript or its probative value.

e. Relevance of the manuscript

¹⁵⁹ DRC-OTP-00150-032 also registered as ICC-01/04-01/07-HNE-6 (see ICC-01/04-01/07-682-Anx1).

¹⁶⁰ Defence underlined as an example the date of creation of the Province of Ituri and nomination of the governor at DRC-OTP-0140-0678 at 0680 and DRC-OTP-0140-0698 at 0700.

123. The Chamber notes that, at the closed session and *ex parte* hearings held on 1 and 15 April 2008, the problem of the relevance of the manuscript was acknowledged by the Prosecution:

[n]ow, this person wrote a diary that we have submitted for proposed redaction that we would like to rely on for the purpose of the Confirmation Hearing, and for us it's like a document. It's a diary that was written before the witness even met with the Prosecution and provided -- he gave us a copy of. But to be fair to the integrity of the document, that's why we submitted the whole diary, even though, you know, limited parts are relevant to the case at hand.¹⁶¹

[...] the objective of the Prosecution, in fairness to obviously the Defence in the proceedings wanted to provide the whole diary in its totality even if chapters are not relevant necessarily to the Prosecution's position. So other chapters could have been just disclosed as disclosure to the Defence, but -- yes. Anyway, I'm informing the Chamber of this.¹⁶²

124. In light of the explanation provided by the Prosecution, the Chamber is of the view that since only part of the manuscript is *prima facie* relevant to this case at the pre-trial stage, the Defence challenges to relevance of the document as a whole do not affect its admissibility or probative value.

f. Conclusion

125. Given the above, the Chamber rejects both Defence requests to declare inadmissible, for the purposes of the confirmation hearing, the manuscript documents. However, the Chamber decides that some of the issues raised as challenges to the manuscript could affect its probative value. The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.

c. Video identifying the suspects¹⁶³

126. On 6 June 2008, the Prosecution disclosed to both Defence counsel a video lasting 1 hour, 49 minutes and 47 seconds, entitled “[REDACTED] with the Lendu

¹⁶¹ICC-01/04-01/07-T-22-CONF-EXP-ENG ET at p. 30, lines 19-25.

¹⁶²ICC-01/04-01/07-T-23-CONF-EXP-ENG ET at p.18, lines 20-25.

¹⁶³ Video of [REDACTED] with the Lendu commandant and UPC commandant at DRC-OTP-0080-0011.

Commandant and UPC Commandant"¹⁶⁴ ("the video"). Swahili is the language used most in the video; less than one minute of the video has been translated into French, one of the Court's two working languages.

127. Pursuant to articles 50(2), 61, 67(1) and 69(4) of the Statute, rule 121 of the Rules, and regulation 39 of the Regulations, the Defence for Germain Katanga requested that the video be excluded because it was not translated into one of the Court's working languages.¹⁶⁵

128. In response to the Defence's objection, during the confirmation hearing on 2 July 2008, the Prosecution submitted that:

It is true that [the video] is not in a language necessarily that is understood by Mr. Hooper, although I presume it was made - - extensively made this point - about the language of Mr. Katanga that Ms. Buisman speaks the language in any event. Mr. Katanga is able to direct his counsels as to the context of this excerpt. The excerpt speaks for itself. Mr. Katanga is introduced and he acknowledges and mentions where he is from. That is the only purpose of the admission of this - or sorry, the reason why the Prosecution wants to rely on this video. We're not relying on the totality of the video, and we're telling this to the Chamber, and we're saying it at this very moment. The only interest that we have is in that excerpt.¹⁶⁶

129. The Chamber recalls that it has previously decided that a prerequisite for the admissibility of evidence before the Court is translation into one of its working languages.¹⁶⁷ Although the Chamber takes note that the Prosecution has translated what it considers to be the relevant parts of the video, since the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the confirmation hearing, it must receive all the evidence presented in one of the working languages of the Court.

130. For these reasons, the Chamber decides that the video is inadmissible as evidence.

¹⁶⁴ Video of [REDACTED] with the Lendu commandant and UPC commandant at DRC-OTP-0080-0011.

¹⁶⁵ ICC-01/04-01/07-T-41-ENG CT at p. 10, lines 1-10.

¹⁶⁶ ICC-01/04-01/07-T-41-ENG CT at p. 21, lines 20-25; at p. 22, lines 1-5.

¹⁶⁷ ICC-01/04-01/06-676 at pp. 3-4.

*d. Hearsay by Prosecution witnesses not present during the attack, UN and NGO reports, etc.*¹⁶⁸

131. The Defence for Mathieu Ngudjolo Chui submitted that the Prosecution's evidence includes: (i) statements by some witnesses who provided information about the events at Bogoro but who were not present at the Bogoro attack;¹⁶⁹ and (ii) reports or documents from the United Nations ("the UN") or from non-governmental organisations ("the NGOs") which are based on information collected from sources unknown to the Defence.¹⁷⁰

132. The Defence for Mathieu Ngudjolo Chui primarily objected to the fact that those witness statements, reports, and documents were based on hearsay. It acknowledged that there is no rule prohibiting the presentation of hearsay evidence but submitted that the Prosecution must nonetheless demonstrate its relevance and probative value.¹⁷¹

133. In respect of the witness statements, the Defence for Mathieu Ngudjolo Chui argued that the Prosecution has an even greater obligation at the confirmation hearing stage to demonstrate the relevance and probative value of the hearsay evidence in these witness statements since the Defence does not have the opportunity, at the confirmation hearing, to cross-examine the Prosecution witnesses.¹⁷² The Defence for Mathieu Ngudjolo Chui further argued that the Chamber should take into consideration the context in which the hearsay evidence was collected by the original witness.¹⁷³ Thus, the Defence requested that the Chamber declare inadmissible the witness statements containing hearsay evidence.

¹⁶⁸ Statement of W-166 at DRC-OTP-1007-0002; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, No. 11(A), July 2003 at DRC-OTP-0074-0797.

¹⁶⁹ ICC-01/04-01/07-699-tENG, paras 34-39.

¹⁷⁰ ICC-01/04-01/07-699-tENG, para. 24.

¹⁷¹ ICC-01/04-01/07-699-tENG, para. 24.

¹⁷² ICC-01/04-01/07-699-tENG, para. 24.

¹⁷³ ICC-01/04-01/07-699-tENG, para. 25.

134. Second, with respect to the UN reports or NGO documents, the Defence for Mathieu Ngudjolo Chui submitted that the admissibility of this evidence “[was] contingent on a preliminary demonstration concerning the reliability of the methodology used in the compilation of the information contained in the said reports, on account of the inherent nature of such reports.”¹⁷⁴

135. In support of this argument, the Defence noted that: (i) the Prosecution was unable to explain the methodology used in the compilation of the information contained in the aforementioned documents; (ii) the sources cited in such documents are neither identified nor identifiable; and (iii) the Chamber will not be in a position to assess the reports fully as not all the exculpatory information which would counterbalance the information presented in these document has yet been disclosed to the Defence because of the Prosecution’s frequent recourse to article 54(3)(e) of the Statute.¹⁷⁵

136. The Chamber recalls that the statement of Witness 166 was the only one which the Defence specifically challenges as being based on hearsay information. Since the statement of Witness 166 is also the subject of several additional Defence objections, the Chamber will assess this challenge to Witness 166’s statement and related documents in a separate subsection.

137. As previously noted, the Chamber will exercise its discretion in determining the admissibility and probative value of all the evidence in accordance with the statutory framework of the Court, as previously set out in the *Lubanga* Decision.¹⁷⁶ Accordingly, the Chamber is of the view that any challenges to hearsay evidence may affect its probative value, but not its admissibility.¹⁷⁷

138. As previously indicated in the sub-section ‘Items related to the deceased prosecution source referred to as Witness 167’, the Chamber recalls that “as a general

¹⁷⁴ ICC-01/04-01/07-699-tENG, para. 28.

¹⁷⁵ ICC-01/04-01/07-699-tENG, para. 33.

¹⁷⁶ See sub-section entitled “Items related to the deceased prosecution source referred to as Witness 167”. See also, *inter alia*, ICC-01/04-01/06-803-tEN, para. 100.

¹⁷⁷ ICC-01/04-01/06-803-tEN, para. 103.

rule, it will use such anonymous hearsay evidence only to corroborate other evidence."¹⁷⁸

139. The Chamber therefore decides that information based on anonymous hearsay within an item of evidence could affect the probative value of those portions of the evidence which are based only on anonymous hearsay. The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.

140. Thus, in coming to its conclusions, the Chamber will not rely solely on anonymous hearsay evidence. However, the Chamber does hold that information based on anonymous hearsay evidence may still be probative to the extent that it (i) corroborates other evidence in the record, or (ii) is corroborated by other evidence in the record.

141. In relation to hearsay information, that is to say information not coming from an anonymous source but rather from a known source, the Chamber observes that its probative value is to be analysed on a case by case basis taking into account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the source and the possibility for the Defence to challenge the source.

*e. Interviews of minors as witnesses*¹⁷⁹

142. The Defence for Mathieu Ngudjolo Chui challenged the statements of witnesses who were minors on the ground that the interviews of these witnesses were conducted without certain procedural safeguards in place.¹⁸⁰ In particular, the Defence for Mathieu Ngudjolo Chui argues that: (i) Witness 28, who is a minor, was

¹⁷⁸ ICC-01/04-01/06-803-tEN, para. 106.

¹⁷⁹ Statement of W-28 at DRC-OTP-0155-0106 and DRC-OTP-0171-1828; Statement of W-157 at DRC-OTP-0164-0534 and DRC-OTP-1006-0054; Statement of W-279 at DRC-OTP-1007-1077.

¹⁸⁰ ICC-01/04-01/07-699-tENG, para. 49.

interviewed without the prior consent of a guardian; (ii) as to Witness 157, it is unclear if the person who consented to the witness's interview had the authority to give his consent; and (iii) although Witness 279's statement indicated that it was taken after consent had been given, no information was provided as to the capacity of that person to give his consent.¹⁸¹ The Defence for Mathieu Ngudjolo Chui asserted that because minors are especially vulnerable, the consent and presence of a legal guardian is a minimum requirement to ensure the credibility of their testimony.¹⁸² Therefore, the Defence for Mathieu Ngudjolo Chui requested that the Chamber accord only low probative value to the statements of Witnesses 28, 157 and 279, all of whom were minors at the time the Prosecution interviewed them.¹⁸³

143. The Prosecution submitted that it respected its obligations under article 54(1)(b) of the Statute, and further that there was no legal requirement in the Court's judicial framework requiring the consent of a parent or guardian prior to interviewing a witness under 18 years of age.¹⁸⁴ The Prosecution further explained that despite the absence of such a requirement, it had obtained the consent of a parental authority or legal guardian whenever possible.¹⁸⁵ For Witness 157, consent of a guardian was obtained for his first interview,¹⁸⁶ and a psychologist was also present.¹⁸⁷ During the second interview of Witness 157, consent was provided by his mother.¹⁸⁸ For Witness 279, the Prosecution secured the consent of a family member, and a psychologist was present during the interview.¹⁸⁹ No consent of a family member was given for Witness 28, but this was because he had lost all contact with his family.¹⁹⁰ Nevertheless, a psychologist from the Office of the Prosecutor was

¹⁸¹ ICC-01/04-01/07-699-tENG, para. 51.

¹⁸² ICC-01/04-01/07-699-tENG, para. 52.

¹⁸³ ICC-01/04-01/07-T-48-ENG CT at p.15, lines 4-25 to p.17, line 4.

¹⁸⁴ ICC-01/04-01/07-692, para. 15.

¹⁸⁵ ICC-01/04-01/07-692, para. 15.

¹⁸⁶ Statement of W-157 at DRC-OTP-0164-0534 at 0535, paras 1, 9.

¹⁸⁷ ICC-01/04-01/07-692, para. 16.

¹⁸⁸ ICC-01/04-01/07-692, para. 16. See also Statement of W-157 at DRC-OTP-1006-0054 at 0056, para. 4.

¹⁸⁹ Statement of W-279 at DRC-OTP-1007-1077 at 1078, para. 1

¹⁹⁰ ICC-01/04-01/07-692, para. 19.

present during his first interview,¹⁹¹ and his second interview was organised through the Victims and Witnesses Unit (“the VWU”).¹⁹²

144. The Chamber recalls that there are several provisions in the Statute and the Rules which deal with the participation of children in the proceedings. Among these, the Chamber notes the following:

- a. pursuant to article 54(1)(b) of the Statute, the Prosecutor shall take all appropriate measures to ensure the effectiveness of its investigations and in so doing, shall respect the interests and personal circumstances of victims and witnesses, including age [...] and take into account the nature of the crime, in particular where it involves [...] or violence against children;
- b. pursuant to article 42(9) of the Statute, the Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children;
- c. pursuant to rule 17(3) of the Rules, in performing its functions, the VWU shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, VWU may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child support person to assist a child through all stages of the proceedings; and
- d. pursuant to rule 19(f) of the Rules, in addition to the staff mentioned in article 43(6), and subject to article 44, VWU may provide, as appropriate, persons with expertise, *inter alia*, in the following areas “(f) Children, in particular traumatized children.”

145. The Chamber further observes that rule 89(3) of the Rules is the only provision in the Court’s legal framework which places a condition on the participation of children in the proceedings before the Court, namely that their

¹⁹¹ Statement of W-28 at DRC-OTP-0155-0106 at 0107, para. 2.

¹⁹² ICC-01/04-01/07-692, para. 19.

applications for participation as victims are submitted by persons acting on their behalf.¹⁹³

146. Therefore, the Chamber finds that no statutory provision makes the prior consent of a parent or a guardian a condition for a child's testimony.

147. In addition, in regions which have been or are being ravaged by conflict, parental consent can often be unavailable due to, *inter alia*, the disappearance of the child's parents, the separation of the child from his parents in the course of the conflict and/or the death of the child's parents. In the present case, notwithstanding the fact that the Prosecution had no legal obligation under the Statute or the Rules to do so, it took additional measures to secure the consent of a parent or legal guardian when such persons were available.¹⁹⁴

148. In the view of the Chamber, the Prosecution has complied with its obligations under article 54(1)(b) of the Statute.

149. Furthermore, the Chamber is of the view that the Defence for Mathieu Ngudjolo Chui has not sufficiently substantiated its assertion about the impact of the absence of prior consent of a parent or a guardian on the reliability of a minor's statement.

150. Nevertheless, the Chamber recalls that:

[...] the Chamber may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a trial evaluation of the testimony of a witness, in accordance with the Rules of Evidence and Procedure¹⁹⁵.

In exercising its discretion and in accordance with the jurisprudence of the ICTR, the Chamber declares that it will attach a higher probative value to those parts of the children's

¹⁹³ ICC-01/04-374, para. 12; ICC-02/04-125, para. 7. The only exception can be found at ICC-01/04-01/07-357 at p. 7: "CONSIDERING that although Applicant a/0333/07 is still a minor; he is turning 18 years old in the very near future; he has legal representation; and that thus, the Single Judge will consider his Application for the purpose of this decision."

¹⁹⁴ ICC-01/04-01/07-692, para. 15 and ICC-01/04-01/07-T-49-ENG ET at p.12, lines 24-25; p.13, lines 1-6.

¹⁹⁵ ICC-01/04-01/06-803-tEN, para. 120; See also ICC-01/04-01/06-690.

[...] evidence which have been corroborated, as is apparent from several sections of this decision.¹⁹⁶

151. The Chamber further recalls that “according to the jurisprudence of the ICTY, less probative value is not necessarily attached to parts of a witness statement that have not been specifically corroborated, and which do not vary from the statement as a whole.”¹⁹⁷

152. For the reasons provided above, and in light of the Chamber’s determination that there is no statutory obligation to obtain a guardian’s consent prior to an interview with a child witness, the Chamber finds that the challenges raised by the Defence teams do not affect the probative value of the statements of Witnesses 157 and 279.

153. With regard to Witness 28, the Chamber applies the same reasoning as to the first statement given of Witness 28. The Chamber notes that only the second interview of Witness 28 was conducted without the consent of or the presence of an adult person who represented the minor’s interests. For these reasons, the Chamber finds that, in relation to the second statement given by Witness 28, the arguments raised by the Defence could affect the probative value of the statement. The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.

*f. Non-corroborated summaries of Witnesses 243, 267 and 271*¹⁹⁸

154. The Defence for Mathieu Ngudjolo Chui raised an objection concerning the use of the summaries of the statements of Witnesses 243, 267 and 271 as evidence on the ground that uncorroborated testimony of anonymous witnesses is highly

¹⁹⁶ ICC-01/04-01/06-803-tEN, para. 121.

¹⁹⁷ ICC-01/04-01/06-803-tEN, para. 122.

¹⁹⁸ Summary of statement of W-243 at DRC-OTP-1016-0089; Summary of statement of W-267 at DRC-OTP-1016-0106; Summary of statement of W-271 at DRC-OTP-1019-0223.

prejudicial to the rights of the defence.¹⁹⁹ It submitted that because it is unable to verify the credibility or probative value of such evidence,²⁰⁰ the Chamber should decide that it is inadmissible, or, in the alternative, determine that it has little or no probative value.

155. In its submissions, the Prosecution responded that article 61(5) of the Statute permits the use of summary evidence at the confirmation hearing and that rule 63(4) of the Rules prohibits the Chamber from imposing a corroborative requirement in order to prove any crime, and in particular, that this provision specifically prohibits requiring corroboration for crimes of sexual violence. The Prosecution took the position that “corroboration is not a condition precedent to the admissibility of summary evidence at the stage of the confirmation hearing.”²⁰¹

156. Ms Bapita Buyangandu argued that the statements of the witnesses were supported by the victims’ own statements, which, as the Legal Representative argued, form part of the foundation on which victims’ participation in the proceedings arises.²⁰²

157. Concerning this issue, the Chamber recalls that the Appeals Chamber previously decided that:

[w]here the Pre-trial Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible.²⁰³

158. However, the Appeals Chamber also indicated that the Chamber may take into account that the ability of the Defence to challenge the evidence is affected by: (i) the fact that the Defence does not know the identities of the witnesses, and (ii) the

¹⁹⁹ ICC-01/04-01/07-699-tENG, para. 62.

²⁰⁰ ICC-01/04-01/07-699-tENG, para. 62.

²⁰¹ ICC-01/04-01/07-692, para. 21.

²⁰² ICC-01/04-01/07-691-tENG, paras 31-33.

²⁰³ ICC-01/04-01/06-773, para. 51.

fact that the Defence will only receive summaries, not the full statement or other information which could authenticate them.²⁰⁴

159. While the Chamber does take note of the Prosecution's reference to rule 63(4) of the Rules which states that the Chamber "shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the court", it is of the view that, this provision notwithstanding, the Chamber may, pursuant to article 69(4) of the Statute, determine that the evidence will have a lower probative value if the Defence does not know the witness's identity and only a summary of the statement, and not the entire statement, may be challenged or assessed.²⁰⁵

160. While there is no requirement *per se* that summaries of the statements of anonymous witnesses are corroborated in order for them to be admissible, the Chamber is of the view that lack of support or corroboration from other evidence in the record of the proceedings could affect the probative value of those summaries or statements. However, in respect of the summaries of anonymous statements of Witnesses 267, 243 and 271, the Chamber finds that the evidence in the record adequately support the accounts of these witnesses, such that the Chamber finds that the arguments raised by the Defence do not affect the probative value accorded to these statements.²⁰⁶

²⁰⁴ ICC-01/04-01/06-773, para. 51.

²⁰⁵ This point has been previously explained by Single Judge, in ICC-01/04-01/07-428-Corr, para. 89: "Moreover, despite the fact that, as already stated by the Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, summaries have a lesser probative value than unredacted parts of redacted statements, interview notes or interview transcripts, the difference in probative value between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal."

²⁰⁶ Similar accounts by other non-anonymous witnesses: Statement of W-132 at DRC-OTP-1016-0156 at 0162, paras 32-35; at 0172-0173, paras 95-107; Statement of W-249 at DRC-OTP-1015-0833 at 0836-0837, paras 17-29; Statement of W-233 at DRC-OTP-1007-0061 at 0081, paras 133-136; Statement of W-28 at DRC-OTP-0171-1828 at 1842-1843, paras 72, 74.

Accounts and information regarding abductions of women taken as sexual slaves: Statement of W-132 at DRC-OTP-1016-0156 at 0163-0165, paras 36-41; at 0171, para. 90; Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 26-29; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 61; Statement of W-233 at DRC-OTP-1007-0061 at 0080-0082, paras 130-136; Statement of W-268 at DRC-OTP-1007-0095 at 0105, para. 80; Statement of W-166 at DRC-OTP-1007-0002 at 0016, para.

g. *Contemporary photographs presented during the hearing*²⁰⁷

161. In the view of the Defence for Mathieu Ngudjolo Chui, because the Prosecution did not demonstrate the authenticity of photographs depicting the wounds of witnesses²⁰⁸ and the photographs of Bogoro Institute,²⁰⁹ those photographs should not be regarded as evidence and therefore should be declared inadmissible.²¹⁰

162. In response, the Prosecution argued that (i) the photographs of wounds were sufficiently authenticated by information provided in the witness statements;²¹¹ and (ii) photographs of Bogoro Institute were admissible for the limited purpose specifically referenced in the statement of Witness 268.²¹²

83; Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 72; Statement of W-258 at DRC-OTP-0173-0616 at 0776-0777, lines 732-762.

Accounts that abductions as described and rapes were common after FRPI/FNI battles: Battle in Bogoro: Statement of W-132 at DRC-OTP-1016-0156 at 0171, para. 90. Battle in Kasenyi: Statement of W-12 at DRC-OTP-0105-0085 at 0154, para. 375. Battle in Nyankunde: Statement of W-28 at DRC-OTP-0171-1828 at 1842-1843, para. 72-75; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110, para. 5; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Northeastern DR Congo*, Vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848-0849; United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 0282, paras 39-40; MONUC, *Rapport final de la commission de pacification de l'Ituri – Bunia du 4 au 14 Avril 2003* at DRC-OTP-0107-0223 at 0262-0279; United Nations, MONUC, *Report on Children associated with armed groups in Ituri - Draft* at DRC-OTP-0152-0256 at 0262-0263; United Nations Security Council, *Troisième rapport spécial du Secrétaire Général sur la Mission de l'Organisation des Nations Unies en République Démocratique du Congo*, United Nations Document S/2004/640 (16 August 2004) at DRC-OTP-0129-0347 at 0469-0470; *Déclaration politique sur la déconfiture de l'UPC et les interférences négatives du RDC-ML dans les événements de l'Ituri*, 11 March 2003 at DRC-OTP-0041-0104 at 0104.

²⁰⁷ For Witness 132: DRC-OTP-1016-0216; DRC-OTP-1016-0217; DRC-OTP-1016-0218; DRC-OTP-1016-0219 and DRC-OTP-1016-0220. For Witness 287: DRC-OTP-1013-0252; DRC-OTP-1013-0253; DRC-OTP-1013-0254 and DRC-OTP-1013-0255. For Bogoro Institute: DRC-OTP-1012-0011; DRC-OTP-1012-0014; DRC-OTP-1012-0020; DRC-OTP-1012-0024; DRC-OTP-1012-0033; DRC-OTP-1012-0035; DRC-OTP-1012-0036; DRC-OTP-1012-0038; DRC-OTP-1012-0098; DRC-OTP-1012-0099; DRC-OTP-1012-0102; DRC-OTP-1012-0105; DRC-OTP-1018-0202; DRC-OTP-1018-0203; DRC-OTP-1018-0204; DRC-OTP-1018-0205; DRC-OTP-1018-0206 and DRC-OTP-1018-0207.

²⁰⁸ DRC-OTP-1016-0216; DRC-OTP-1013-0255.

²⁰⁹ DRC-OTP-1012-0011 at 0014, 0020, 0024, 0033, 0035, 0036, 0038, 0098, 0099, 0102, 0105; DRC-OTP-1018-0202 at 0203, 0204, 0205, 0206; 0207.

²¹⁰ ICC-01/04-01/07-699-tENG, paras 65, 68 and 70.

²¹¹ ICC-01/04-01/07-692, para. 25.

²¹² ICC-01/04-01/07-692, para. 26.

163. Ms Bapita Buyangandu argued that the Defence challenge to the contemporary nature of the photographs was illogical insofar as the date of an investigation could not coincide with the date that the alleged crimes were perpetrated. She also submitted that it would be inconceivable that while the attack on 24 February 2003 in Bogoro was taking place, someone would have stopped to take photographs for use as evidence in a future trial before the Court. The Legal Representative thus suggested that the Defence objection should be dismissed.²¹³

164. In evaluating this issue, the Chamber is persuaded, in part, by the findings of Trial Chamber I concerning the relevance and probative value of documentary evidence which accompanies a witness statement. In weighing the potential probative value of such documentary evidence against its possible prejudicial effect, Trial Chamber I concluded that its admission would not be prejudicial to the fairness of the proceedings when the witness statements provide a solid enough basis to test and evaluate the reliability of the evidence.²¹⁴

165. In the view of the Chamber, where authentication of documentary evidence can be derived from other sources, including witness statements, photographic evidence will be admissible for the purposes for which it is submitted and will be accorded probative value in proportion to (i) the level of authentication provided by the witness who introduces the evidence, and (ii) the reliability of the accompanying witness statement.

h. *Preventive relocation of Witnesses 28, 250, 132 and 287*²¹⁵

²¹³ ICC-01/04-01/07-691-tENG, paras 42-46.

²¹⁴ ICC-01/04-01/06-1399, para. 41.

²¹⁵ Witness 28: DRC-OTP-0155-0106; DRC-OTP-0171-1828; DRC-OTP-1016-0049; Witness 250: DRC-OTP-0177-0147 to DRC-OTP-0177-0501 (including DRC-OTP-0177-0199; DRC-OTP-0177-0230; DRC-OTP-0177-0262; DRC-OTP-0177-0299; DRC-OTP-0177-0327; DRC-OTP-0177-0363; DRC-OTP-0177-0398; DRC-OTP-0177-0466); DRC-OTP-1004-0187; DRC-OTP-1013-0002; Witness 132: DRC-OTP-1016-0156; DRC-OTP-1016-0191; DRC-OTP-1016-0192; Witness 287: DRC-OTP-1013-0205.

166. The Defence for Mathieu Ngudjolo Chui submitted that the credibility of Witnesses 28, 250, 132 and 287, who had been preventively relocated by the Prosecution, might have been compromised because of promises the Prosecution may have made to those witnesses in exchange for their testimony. According to the Defence, these witnesses were entirely dependent on the Prosecution for their security, and their statements may have been influenced by that dependency. The Defence further raised concerns about the Prosecution statement that its investigators continued to have ongoing contact with witnesses in the field. For these reasons, the Defence for Mathieu Ngudjolo Chui submitted that the preventive measures taken by the Prosecution in relation to Witnesses 28, 250, 132 and 287 may be prejudicial to Mathieu Ngudjolo Chui's right to a fair trial, in accordance with article 67 of the Statute. The Defence submitted that the statements of Witnesses 28, 250, 132 and 287 should be declared inadmissible or at the very least, in the alternative, accorded only very limited probative value by the Chamber.²¹⁶

167. The Prosecution recalled that Witnesses 28 and 250 were relocated on an emergency basis by the Office of the Prosecutor because both were facing an immediate threat of harm. With regard to the Defence for Mathieu Ngudjolo Chui's argument concerning any ongoing contact between the investigators and the witnesses, the Prosecution explained that its obligation under article 68(1) of the Statute required that it ensure the personal security of witnesses, taking into account the risk level of the area where they lived. The Prosecution further submitted that the Defence had no evidentiary grounds for arguing that the Prosecution's preventive relocation of the witnesses may be prejudicial to Mathieu Ngudjolo Chui's right to a fair trial and claimed that the Defence's position was based on supposition and insinuation, and, as such, should be rejected by the Chamber.²¹⁷

168. The Chamber recalls that in the Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of

²¹⁶ ICC-01/04-01/07-699-tENG, para. 74.

²¹⁷ ICC-01/04-01/07-692, para. 32.

the Statute and Rule 77 of the Rules,²¹⁸ the Single Judge acknowledged that there might be exceptional circumstances in which a witness on whom the Prosecution intended to rely at the confirmation hearing or a potential witness, faces a serious threat of imminent harm because of his or her cooperation with the Court. The Chamber is of the view that this was in fact the case for both Witnesses 28 and 250. In his statement, Witness 28, who was subsequently preventively relocated by the Office of the Prosecutor, said that he had been threatened [REDACTED]. Moreover, Witness 250 was threatened [REDACTED]. After he had reported that incident, he was resettled.

169. Concerning Witnesses 132 and 287, the Single Judge in the Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287,²¹⁹ decided that any security concerns which had contributed to the evidence of Witnesses 132 and 287 being declared inadmissible no longer existed. Since such security concerns formed no impediment to the inclusion of the statements, interview notes and interview transcripts of Witnesses 132 and 287 in the Prosecution's Amended List Evidence, the Single Judge decided that they would be admissible for the purposes of the confirmation hearing.

170. Accordingly, the Chamber decides that the preventive relocation of Witnesses 28, 132, 287 and 250 does not affect the probative value accorded to these statements.

- i. *Contacts prior to the interviews of Witnesses 28, 157, 161 and 166*²²⁰

171. The Defence for Mathieu Ngudjolo Chui asserted that the Prosecution did not provide any information concerning its contact with Witnesses 28, 157, 161 and 166²²¹

²¹⁸ ICC-01/04-01/07-423-Conf (ICC-01/04-01/07-428-Corr), para. 35.

²¹⁹ ICC-01/04-01/07-523 at p. 8.

²²⁰ Witness 28: DRC-OTP-0155-0106; DRC-OTP-0171-1828; DRC-OTP-1016-0049; Witness 157: DRC-OTP-0164-0534; DRC-OTP-1006-0054; Witness 161: DRC-OTP-0164-0488; Witness 166: DRC-OTP-1007-0002; DRC-OTP-1007-0029 (List of victims provided by Witness 166).

prior to conducting interviews with those witnesses. The Defence alleged that it had no means to assess the extent to which the witnesses may have been influenced or prepared by the Prosecution in respect of their statements. The Defence submitted that any prior contact could have impacted on their reliability.²²²

172. The Prosecution stressed that Witnesses 28,²²³ 157,²²⁴ 161²²⁵ and 166²²⁶ had been screened by the Office of the Prosecutor before they were formally interviewed,²²⁷ and that the content of their screening notes²²⁸ had been disclosed to both Defence teams. The Prosecution also argued that the Defence for Mathieu Ngudjolo Chui had failed to substantiate its submissions.

173. The Chamber would first note that the statement of Witnesses 166 is the subject of several objections of both Defence teams to its admissibility and/or probative value. The Chamber will therefore assess all the challenges to Witness 166's statement and related documents in a separate subsection.

174. The Chamber observes that the notes prepared by the Office of the Prosecutor's investigators following the screening of the aforementioned persons were in fact disclosed to both Defence teams. Both teams thus have in their respective possession: (i) the screening notes of the contacts prior to the interviews with the abovementioned witnesses; and (ii) the statements given by those witnesses after the screenings. Under these circumstances, the Chamber is of the view that both Defence teams had in their possession the necessary material to challenge any influence on or preparation of the witnesses' statements. This notwithstanding, the Defence for Mathieu Ngudjolo Chui did not substantiate these challenges.

²²¹ The challenges to Witness 166's statement and related document will be analysed in a separate sub-section.

²²² ICC-01/04-01/07-699-tENG, paras 75-77.

²²³ DRC-OTP-0150-0177.

²²⁴ DRC-OTP-0150-0144.

²²⁵ DRC-OTP-0153-0106.

²²⁶ DRC-OTP-1016-0083.

²²⁷ ICC-01/04-01/07-692, paras 33-34.

²²⁸ ICC-01/04-01/07-T-7-CONF-EXP-ENG ET [30Oct2007] at p. 55, lines 21-22: "what we call screening [...] is a short [...] meeting with someone". Screening seems to be a meeting with a person at the very early stage.

175. For the reasons provided above, the Chamber decides that contact with Witnesses 28, 157 and 161 prior to their interviews does not affect the probative value accorded to these statements.

j. *Dual status of witness and suspect for Witnesses 258, 166, 238 and 250*²²⁹

176. The Defence for Germain Katanga submitted, in relation to Witness 258, that:²³⁰

[REDACTED].²³¹

[REDACTED].²³²

[REDACTED].²³³

177. The Defence for Mathieu Ngudjolo Chui submitted that the Prosecution failed to explain how persons such as Witnesses 258, 238 and 250, all of whom had at one time been approached as suspects by the Prosecution, could nonetheless provide credible and reliable accounts.²³⁴ The Defence for Mathieu Ngudjolo Chui argued that the considerable pressure of suspicion would have encouraged those witnesses to minimise their roles and to exaggerate those of other persons.²³⁵ The Defence for Mathieu Ngudjolo Chui also endorsed the Defence for Germain Katanga's arguments, in particular, those relating to the lack of credibility of a witness who

²²⁹ Witness 258: DRC-OTP-0173-0560 to DRC-OTP-0173-0846 (including DRC-OTP-0173-0589, DRC-OTP-0173-0616, DRC-OTP-0173-0644, DRC-OTP-0173-0683, DRC-OTP-0173-0718, DRC-OTP-0173-0755, DRC-OTP-0173-0788, DRC-OTP-0173-0813); DRC-OTP-0173-0912; Witness 166: DRC-OTP-1007-0002; DRC-OTP-1007-0029 (list of victims provided by W-166); Witness 238: DRC-OTP-0173-0265 to DRC-OTP-0173-0370 (including DRC-OTP-0173-0345); Witness 250: DRC-OTP-0177-0147 to DRC-OTP-0177-0501 (including DRC-OTP-0177-0199; DRC-OTP-0177-0230; DRC-OTP-0177-0262; DRC-OTP-0177-0299; DRC-OTP-0177-0327; DRC-OTP-0177-0363; DRC-OTP-0177-0398; DRC-OTP-0177-0466); DRC-OTP-1004-0187; DRC-OTP-1013-0002.

²³⁰ ICC-01/04-01/07-698, paras 9-10 and ICC-01/04-01/07-641-Conf, paras 31-49; ICC-01/04-01/07-T-41-ENG CT at p. 49, lines 16-22.

²³¹ ICC-01/04-01/07-641-Conf, para. 33.

²³² ICC-01/04-01/07-641-Conf, para. 38.

²³³ ICC-01/04-01/07-641-Conf, para. 40.

²³⁴ ICC-01/04-01/07-699-tENG, para. 79. The Defence for Mathieu Ngudjolo Chui also challenged the statement of Witness 166, particularly concerning his multiple statuses. As mentioned previously, Witness 166 will be addressed in a separate section of this decision.

²³⁵ ICC-01/04-01/07-T-48-ENG ET at p. 11, lines 1-11; p. 24, line 8 to p. 25, line 3; ICC-01/04-01/07-699-tENG, para. 79.

could be considered a co-perpetrator or participant in the common plan.²³⁶ Therefore, the Defence for Mathieu Ngudjolo Chui requested that only limited probative value should be accorded to evidence related to these witness/suspects.²³⁷

178. The Prosecution submitted that all the respective witnesses had been fully advised of their rights and that their statements had been taken in full compliance with the Statute and its subordinate texts.²³⁸

179. Ms Bapita Buyangandu submitted that the established jurisprudence of the *ad hoc* Tribunals accepts the testimony of perpetrators, regardless of whether they are penitent, prosecuted, or convicted. As such, only the Chamber could weigh the credibility of the witnesses' testimony with regard to whether the testimony had been compromised by "fabrication or covert settling of scores."²³⁹

180. The Chamber notes that the statement of Witness 166 is the subject of additional challenges to admissibility and probative value by both Defence teams. The Chamber will therefore assess all the challenges to the statement of Witness 166 and any related documents in separate subsections.

181. The Chamber notes its ruling in the *Lubanga* case²⁴⁰ that information regarding the criminal record and the suspect *status* of any of the witnesses on whose statements or summaries the Prosecution intends to rely at the confirmation hearing may affect the witness's credibility, and that such information therefore falls within the scope of article 67(2) of the Statute.²⁴¹

182. In the present case, the Chamber notes that the Prosecution disclosed the transcribed statements²⁴² – including the information that the aforementioned

²³⁶ ICC-01/04-01/07-699-tENG, paras 34, 41, 78-80; referring to document ICC-01/04-01/07-641-Conf, paras 31, 38, 41-49.

²³⁷ ICC-01/04-01/07-T-48-ENG ET at p. 25, lines 1-3. ICC-01/04-01/07-699-tENG, para. 80.

²³⁸ ICC-01/04-01/07-692, para. 35. See also ICC-01/04-01/07-T-41-ENG CT at p. 16, line 21 to p. 20, line 7.

²³⁹ ICC-01/04-01/07-691-tENG, paras 22-24.

²⁴⁰ ICC-01/04-01/06-649.

²⁴¹ ICC-01/04-01/06-649 at p. 3.

²⁴² Also referred to as the "Transcript of statement."

witnesses were also questioned as suspects – to both Defence teams: (i) Witness 250's transcribed statement was first disclosed to both Defence teams in March 2008;²⁴³ (ii) Witness 258's transcribed interview was first disclosed to both Defence teams in March 2008;²⁴⁴ and (iii) Witness 238's transcribed interview was first disclosed to both Defence teams in April 2008.²⁴⁵

183. Despite knowing that the aforementioned witnesses had been interviewed by the Prosecution as suspects, neither Defence team requested access to the respective criminal records even though they had ample opportunity to do so.

184. Furthermore, contrary to the Defence submissions, all the witnesses whose statements were challenged were informed of their respective rights by the Prosecution – most notably, the right to legal representation and the right not to incriminate oneself – in a manner consistent with the Court's legal framework.

185. Finally, in the view of the Chamber, the objections of both Defence teams in respect of any compromise of the witness' rights pursuant to article 55(2) of the Statute, or in relation to the credibility of their statements have not been substantiated and are rejected. Therefore, the Chamber decides that the aforementioned challenges to the Witnesses 238, 250 and 258's statements and related documents do not affect their probative value.

k. Interview of Witness 258²⁴⁶

²⁴³ See ICC-01/04-01/07-315-Conf-Exp-AnxA according to which the Defence for Germain Katanga received the transcribed statement of W-250 on 11 March 2008; See also, ICC-01/04-01/07-337-Conf-AnxF according to which the Defence for Mathieu Ngudjolo Chui received the transcribed statement of W-250 on 19 March 2008.

²⁴⁴ See ICC-01/04-01/07-313-Conf-AnxA according to which the Defence for Germain Katanga received the transcribed statement of W-258 on 11 March 2008 and ICC-01/04-01/07-337-Conf-AnxN according to which the Defence for Mathieu Ngudjolo Chui received the transcribed statement of W-258 on 19 March 2008.

²⁴⁵ See ICC-01/04-01/07-417-Conf-AnxA and AnxB according to which the transcribed statement of W-238 was disclosed to both Defences on 21 April 2008.

²⁴⁶ Witness 258 was originally referred to by the Prosecution as Witness 12. DRC-OTP-0173-0560; DRC-OTP-0173-0589; DRC-OTP-0173-0616; DRC-OTP-0173-0644; DRC-OTP-0173-0683; DRC-OTP-0173-0718; DRC-OTP-0173-0755; DRC-OTP-0173-0788; DRC-OTP-0173-0813.

186. The Defence for Germain Katanga submitted that Witness 258 is deceased, and requested that his statements be excluded on the following grounds:²⁴⁷ (i) the Defence will never have the opportunity to challenge the statements of this witness; (ii) the Court will never be able to assess the demeanour of the deceased witness; and (iii) there is no reasonable prospect of this evidence being admitted at trial.²⁴⁸ However, during the confirmation hearing, the Defence for Germain Katanga accepted the Chamber's ruling that the statement was admissible for the purposes of the hearing but still made its submissions in the alternative. The Defence for Germain Katanga argued that because of the particular circumstances of this deceased witness and of his interview, the Chamber should accord little or no weight to the statement.²⁴⁹ In its final submission, the Defence for Germain Katanga reiterated its previous arguments and again emphasised that the statements of deceased Witness 258 "should be rendered inadmissible or not be relied upon to confirm the charges."²⁵⁰

187. The Defence for Mathieu Ngudjolo Chui raised the question of admissibility of the interview of Witness 258 and argued that the confirmation hearing should not be given a reduced status; that there is no reason to consider evidence that will not be considered admissible at trial;²⁵¹ and that the evidence relating to the witness must be deemed inadmissible pursuant to article 69(4) of the Statute and rule 122(9) of the Rules.²⁵²

188. The Chamber recalls that the issue of admissibility was decided in the Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12,²⁵³ issued on 18 April 2008, in which the Single

²⁴⁷ ICC-01/04-01/07-641-Conf, paras 37 and 49. See also ICC-01/04-01/07-T-41-ENG CT at p. 7, line 9 to p. 9, line 16.

²⁴⁸ ICC-01/04-01/07-T-41-ENG CT at p. 9, lines 6-16. See also the Defence for Mathieu Ngudjolo Chui at ICC-01/04-01/07-699-tENG, para. 41.

²⁴⁹ ICC-01/04-01/07-T-41-ENG CT at p. 7, lines 9-24; at p. 8, lines 7-11.

²⁵⁰ ICC-01/04-01/07-698, para. 10.

²⁵¹ ICC-01/04-01/07-699-tENG, para. 41.

²⁵² ICC-01/04-01/07-T-48-FRA ET at p. 10, lines 6-8.

²⁵³ ICC-01/04-01/07-412.

Judge ruled that the transcripts of interviews of Witness 258 would be admissible for the purposes of the confirmation hearing.

189. Furthermore, in the “Decision on the Defences’ Applications for Leave to Appeal”,²⁵⁴ the Single Judge ruled that the Chamber was not competent to decide on the admissibility of evidence at trial and also that the confirmation hearing was not the appropriate stage for debate on the admissibility at trial of the evidence on which the parties intended to rely at the confirmation hearing.

190. Therefore, in the view of the Chamber, the issue of the admissibility of the transcripts of the interviews of Witness 258 is *res judicata*.

191. In addition, both Defence teams challenged the probative value of the interview of Witness 258. The Defence for Germain Katanga argued that this evidence should be given little or no weight because the witness was not provided with sufficient information for him to give an informed consent to waive his right to be represented by counsel during the interview. The Defence for Germain Katanga further argued that Witness 258 was not clearly told that his interview could be used against him, given that he was suspected of being a co-perpetrator and thus submitted that his waiver had not been given voluntarily. The Defence for Mathieu Ngudjolo Chui submitted that the Prosecution had provided no explanation as to the death of Witness 258.²⁵⁵

192. With regard to the Defence teams’ objections to the credibility of deceased Witness 258, the Prosecution submitted that the weight of the evidence, but not the credibility of the witness himself, could be challenged.²⁵⁶

193. In this regard, the Chamber recalls its previous decision, in which it found that:

²⁵⁴ ICC-01/04-01/07-496 at p. 7.

²⁵⁵ ICC-01/04-01/07-699-tENG, para. 41.

²⁵⁶ ICC-01/04-01/07-T-41-ENG CT at p. 20, lines 2-7.

[...] it is up to the competent Chamber to decide on the probative value of any piece of evidence introduced for the purpose of the confirmation hearing or the trial.²⁵⁷

[...] the admission of evidence at [the pre-trial] stage is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value of any evidence, including, *inter alia*, (i) any ruling on evidence gathered under article 56 of the Statute as a result of a unique investigative opportunity; or (ii) any prior recorded testimony pursuant to rule 68 of the Rules.²⁵⁸

194. Lastly, the Chamber is of the view that any dispute about the credibility of such evidence could not arise from issues of admissibility but from issues related to the appropriate weight to accord to that evidence.²⁵⁹

195. The Chamber observes that even the Prosecution does not contest that deceased Witness 258 was a suspect and that he was interviewed without counsel. This could, in principle, cast doubt on the reliability of his statement. Since Witness 258 is deceased, neither Defence will ever be able to cross-examine him. Based on these factors, the Chamber determines that the challenges raised by the Defence teams could affect the probative value of the statement of Witness 258. The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.

1. *Evidence of Witness 166*

196. Witness 166's statements and related documents were challenged by both Defence teams for several reasons. The Chamber addresses below the challenges to the admissibility and/or probative value of Witness 166's statement and related documents concerning:

- (i) the Prosecution's contact with Witness 166 prior to his interview;
- (ii) Witness 166's dual status as witness-victim;
- (iii) Witness 166's dual status as witness-suspect; and

²⁵⁷ ICC-01/04-01/07-428-Corr, para. 74.

²⁵⁸ ICC-01/04-01/07-412 at p. 5.

²⁵⁹ ICTY, *The Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgment, 3 March 2000, para. 36. See also ICC-01/04-01/06-1399, para. 40.

- (iv) the hearsay information contained in Witness 166's statement and related documents.

(i) Contacts prior to the interview with Witness 166

197. The Defence for Mathieu Ngudjolo Chui asserted that the Prosecution had not provided information about any contact it had with Witness 166 prior to interviewing him. The Defence alleged that it thus had no way to assess the extent to which the witness may have been influenced and/or prepared by the Prosecution in giving his statement. In sum, the Defence for Mathieu Ngudjolo Chui argued that any Prosecution contact with the witness prior to his interview impacted the reliability of his statement.²⁶⁰

198. The Prosecution stressed that it had screened Witness 166²⁶¹ before his formal interview,²⁶² and that the content of the relevant screening notes²⁶³ was disclosed to both Defence teams. The Prosecution also advanced that the Defence for Mathieu Ngudjolo Chui failed to substantiate its submissions.

199. The Chamber observes that the notes prepared by the Prosecution's investigators following the screening of Witness 166 were in fact disclosed to both Defence teams. Therefore, both Defence teams have in their respective possession: (i) the screening notes of Prosecution contacts with Witness 166 prior to his interview; and (ii) the statement given by Witness 166. Under these circumstances, the Chamber is of the view that both Defence teams had in their respective possession the relevant materials to question any Prosecution influence or preparation of the witness in respect of his statement. Despite possessing those documents, the Defence for Mathieu Ngudjolo Chui did not substantiate its challenges to the witness's statement.

²⁶⁰ ICC-01/04-01/07-699-tENG, paras 75-77.

²⁶¹ DRC-OTP-1016-0083.

²⁶² ICC-01/04-01/07-692, paras 33-34.

²⁶³ ICC-01/04-01/07-T-7-CONF-EXP-ENG ET at p. 55, lines 21-22: "what we call screening [...] is a short [...] meeting with someone". Screening seems to be a meeting with a person at the very early stage."

(ii) Dual witness-victim status²⁶⁴

200. The Defence for Mathieu Ngudjolo Chui submitted that many national systems do not recognise a dual status of witness-victim.²⁶⁵ The Defence for Mathieu Ngudjolo Chui further argued that it was “ambiguous” for a person both to be granted the procedural status of victim and to be a Prosecution witness, irrespective of whether the person is a key witness in the case.²⁶⁶ The Defence therefore submitted that the testimony of Witness 166 should not be admitted into evidence or, in the alternative, its probative value should be given reduced weight.²⁶⁷

201. The Prosecution observed in its final submission²⁶⁸ that the Defence for Mathieu Ngudjolo Chui had not cited any statutory provision which would prevent a participating victim from being a witness for either party at any stage of the proceedings. It argued that the Defence position implied that participating victims also could not be witnesses and that accepting such a position would be in contravention of the Statute. The Prosecution asserted that victims of crimes under the jurisdiction of this Court are entitled to participate in the proceedings, and ought not be forced to choose between the opportunity only to provide testimony to the Court or only to present their views and concerns under article 68(3) of the Statute.²⁶⁹ The Prosecution additionally noted that the statement of the only dual-status witness identified by the Defence, Witness 166, had been taken well before the witness was granted participatory rights in the pre-trial stages of this case.²⁷⁰ Consequently, the Prosecution submitted that this witness was not a victim participant at the pre-trial stage and that the Defence complaints had no applicability to this specific witness.²⁷¹

²⁶⁴ DRC-OTP-1007-0002, DRC-OTP-1007-0026, DRC-OTP-1007-0027, DRC-OTP-1007-0029, DRC-OTP-1016-0083.

²⁶⁵ ICC-01/04-01/07-T-48-ENG CT WT at p. 25, lines 6-7; ICC-01/04-01/07-699-tENG, paras 81-88.

²⁶⁶ ICC-01/04-01/07-T-48-ENG CT WT at p. 26, lines 1-4; ICC-01/04-01/07-699-tENG, paras 81-88.

²⁶⁷ ICC-01/04-01/07-T-48-ENG CT WT at p. 26, lines 4-8; ICC-01/04-01/07-699-tENG, paras 81-88.

²⁶⁸ ICC-01/04-01/07-692.

²⁶⁹ ICC-01/04-01/07-692, para. 36.

²⁷⁰ DRC-OTP-1007-0002, taken from 17-19 February 2007.

²⁷¹ ICC-01/04-01/07-692, para. 37.

202. In relation to the dual status of victim-witnesses, Mr Diakiese asserted that neither the Statute nor the Rules prohibited victims from appearing as witnesses insofar as they would attest to the alleged events of which they had personal experience.²⁷² Mr Diakiese averred that a joint reading of articles 68(3) and 69(1) of the Statute did not conclusively determine that the status of victim and the status of witness were legally incompatible. He submitted that granting dual status of victim-witness would not vitiate the Chamber's power to weigh testimony and evidence under article 69(4) of the Statute, but would, in fact, assist in the determination of legal truth that is the purpose of the trial.²⁷³ In arguing for the victims' right to stand as witnesses, the Legal Representative drew support from the Appeals Chamber Judgment of 11 July 2008,²⁷⁴ which granted a victim the right to tender evidence at trial as well as to discuss evidence adduced by the parties.²⁷⁵

203. Ms Bapita Buyangandu submitted that according to the most recent jurisprudence of the Court, the dual status of victim-witness is permitted in proceedings before it.²⁷⁶ She further submitted that it was impossible to find any witnesses who were "spectators" to the Bogoro attack and not victims also.²⁷⁷

204. The Chamber recalls that, in the Decision on the Application for Participation of Witness 166²⁷⁸ issued on 23 June 2008, the Single Judge granted Witness 166 the procedural status of victim at the pre-trial stage of the present case.²⁷⁹

205. The Chamber notes that none of the Defence teams has appealed the Decision on the Application for Participation of Witness 166.

²⁷² ICC-01/04-01/07-690-Corr, paras 22-28.

²⁷³ ICC-01/04-01/07-690-Corr, paras 23-25.

²⁷⁴ ICC-01/04-01/06-1432, paras 97, 99.

²⁷⁵ ICC-01/04-01/07-690-Corr, para. 26.

²⁷⁶ ICC-01/04-01/07-691-tENG, paras 18-20.

²⁷⁷ ICC-01/04-01/07-691-tENG, paras 21, 25-26.

²⁷⁸ ICC-01/04-01/07-631-Conf, a decision which has not been appealed by either of the parties.

²⁷⁹ ICC-01/04-01/07-631-Conf, paras 10, 17-31.

206. The Chamber further notes that in the Decision on Victims' Participation issued on 18 January 2008 in the *Lubanga* case, Trial Chamber I accepted the dual procedural status of victim and witness.²⁸⁰

207. Accordingly, the Chamber is of the view that Witness 166's statement and related documents cannot be declared inadmissible solely because he has also been granted the procedural status of victim authorised to participate in the proceedings related to the case at hand. Therefore, any challenge raised by the Defence for Mathieu Ngudjolo Chui may be considered only in relation to the probative value given to the statement of a witness who has also been granted the procedural status of victim.

208. In this regard, it is recalled:

that neither the Statute nor the rules contain any specific limitation on the probative value to be given to the evidence of a witness who also has the procedural status of victim in the same case.²⁸¹

209. The Chamber therefore is of the view that the dual status of witness and victim does not affect the probative value of Witness 166's statements and related documents.

(iii) Dual witness-suspect status

210. The Defence for Mathieu Ngudjolo Chui submitted that the statement of Witness 166 should be viewed with caution, particularly because the Prosecution had both approached him as a witness and questioned him as a suspect.²⁸² The Defence further submitted that the Prosecution had failed to explain how persons like Witness 166 – who had at one time been approached as a suspect by the Prosecution – could provide credible and reliable accounts. The Defence for Mathieu Ngudjolo Chui argued that the considerable pressure of suspicion would have

²⁸⁰ ICC-01/04-01/06-1119, paras 132-134. See also ICC-01/04-01/06-1311-Anx2, para. 73. See also ICC-01/04-01/07-631-Conf, para. 20.

²⁸¹ ICC-01/04-01/07-631-Conf, para. 24; ICC-01/04-01/07-632, para. 24 (public redacted version).

²⁸² ICC-01/04-01/07-T-48-ENG CT WT at p. 8, lines 11-15. See also ICC-01/04-01/07-699, para. 34.

encouraged an individual in his position to minimise his role in the alleged acts and to exaggerate that of other persons.²⁸³ It submitted that, for this reason, only limited probative value should be given to evidence related to witness-suspects.²⁸⁴

211. The Defence for Mathieu Ngudjolo Chui further submitted that the Prosecution had not explained why witness-suspects, including Witness 166, would have provided credible and reliable information when they were also being questioned as suspects.²⁸⁵ Consequently, the Defence alleged that witnesses such as Witness 166 appeared to have been accorded a status of “privileged witness”, and that the Prosecution had not substantiated why the Chamber should consider him reliable.²⁸⁶ The Defence thus requested that the Chamber not grant any probative value to evidence provided by Witness 166.²⁸⁷

212. The Prosecution submitted that the respective witnesses, including Witness 166, had all been fully advised of their rights and that the statements had been taken in full compliance with the Statute and its subordinate texts.²⁸⁸

213. Ms Bapita Buyangandu asserted that the established jurisprudence of the *ad hoc* Tribunals accepts the testimony of perpetrators – regardless of whether they are penitent, prosecuted, or convicted,²⁸⁹ and that therefore only the Chamber could weigh the credibility of the witnesses’ testimony as to whether the testimony had been compromised by “fabrication or covert settling of scores.”²⁹⁰ She further submitted that the suspects themselves may testify as witnesses.²⁹¹

214. As previously recalled by the Chamber, information about the criminal record and suspect status of any of the witnesses whose statements or summaries would be

²⁸³ ICC-01/04-01/07-T-48-ENG CT WT at p. 11, lines 1-11; at p. 24, line 8 to p. 25, line 3.

²⁸⁴ See also ICC-01/04-01/07-699tENG, paras 34, 78-80.

²⁸⁵ ICC-01/04-01/07-699-tENG, para. 79.

²⁸⁶ ICC-01/04-01/07-699-tENG, para. 80.

²⁸⁷ ICC-01/04-01/07-699-tENG, para. 80.

²⁸⁸ ICC-01/04-01/07-692, para. 35. See also ICC-01/04-01/07-T-41-ENG CT WT at p. 16, line 21 to p. 20, line 7.

²⁸⁹ ICC-01/04-01/07-691-tENG, paras 22-24.

²⁹⁰ ICC-01/04-01/07-691-tENG, para. 23.

²⁹¹ ICC-01/04-01/07-691-tENG, para. 24.

relied on by the Prosecution at the confirmation hearing may affect their credibility and that such information therefore falls within the scope of article 67(2) of the Statute.²⁹²

215. In the present case, the Prosecution disclosed Witness 166's statement and related documents to both Defence teams for the first time on 8 April 2008.²⁹³

216. Nevertheless, despite knowing that Witness 166 had been interviewed by the Prosecution as a suspect, neither Defence team requested access to his criminal record even though it had had ample opportunity to do so. The objections could have been substantiated by requesting that criminal record. Nonetheless, the Defence teams chose not to avail of this opportunity.

217. Furthermore, Witness 166 was informed of his rights by the Prosecution – most notably, the right to legal representation and the right not to incriminate oneself – in a manner consonant with the Court's legal framework.

218. Consequently, in the view of the Chamber, the Defence for Mathieu Ngudjolo Chui's arguments have not been substantiated and are thus rejected.

(iv) the hearsay information contained in Witness 166's statement and related documents

219. The Defence for Mathieu Ngudjolo Chui submitted that Witness 166's statement and related documents cannot be declared admissible.²⁹⁴ In this regard, the Defence first underlined that Witness 166 [REDACTED] during the alleged 24 February 2003 joint FRPI/FNI attack on Bogoro and that the sources used by Witness 166 are unknown.²⁹⁵ The Defence then highlighted the fact that in its descriptions relating to the charges of destruction of property and pillaging, the Prosecution relied primarily on Witness 166, despite the fact that he: (i) was not present during the alleged attack;

²⁹² ICC-01/04-01/06-649 at p. 3.

²⁹³ ICC-01/04-01/07-379-Conf-Exp.

²⁹⁴ ICC-01/04-01/07-699-tENG, para. 39.

²⁹⁵ ICC-01/04-01/07-699-tENG, paras 35-36.

and (ii) [REDACTED]. The Defence thus argued that the “failure to provide the context for the statement of Witness 166 leads to a certain distortion of the truth.”²⁹⁶

220. Additionally, the Defence for Mathieu Ngudjolo Chui objected to the admission into evidence of Witness 166’s statement and related documents on the ground that they are based on hearsay.

221. As previously indicated, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not concern the admissibility of the evidence but only its probative value.²⁹⁷

222. In the present case, the Chamber notes that Witness 166 was not present during the alleged 24 February 2003 joint FRPI/FNI attack on Bogoro²⁹⁸ and that [REDACTED].²⁹⁹ Although a lower probative value could be accorded to Witness 166’s statement, as part of it is based exclusively on anonymous hearsay, the Chamber observes that the content of his statement is corroborated by other statements of witnesses present during the Bogoro attack, including [REDACTED], Witness [REDACTED].

223. In addition, although he was not in Bogoro village during the attack, Witness 166 [REDACTED] that also includes victims of the alleged 24 February 2003 joint FRPI/FNI attack. In this respect, the Chamber notes that Witness 166 thoroughly explained [REDACTED],³⁰⁰ namely on the basis of (i) declaration by the family members [REDACTED]; (ii) [REDACTED] by a youth group at Bogoro of which [REDACTED] was a member; and (iii) [REDACTED] by the Committee of Displaced Persons from Bogoro set up in Bunia. Column nine of the table, *Responsable de la famille victime*, lists the names of those persons who reported the cases of those victims; and the names have been made available to both Defence teams.

²⁹⁶ ICC-01/04-01/07-699-tENG, paras 37-38.

²⁹⁷ See also ICC-01/04-01/06-803-tEN, paras 101-103.

²⁹⁸ DRC-OTP-1007-0002 at 0012, para. 60.

²⁹⁹ DRC-OTP-1007-0002 at 0017, para. 93.

³⁰⁰ Statement of W-166 at DRC-OTP-1007-0002 at 0013-0016, paras 66-85.

(v) **Conclusion**

224. Accordingly, the Chamber finds that Witness 166's statements and related documents are admissible. The Chamber also decides that the challenges to Witness 166's statements and related documents do not affect their probative value.

m. Theory of similar events: mode of proof by analogy

225. The Defence for Mathieu Ngudjolo Chui argued that the Prosecution appeared to be introducing a "mode of proof by analogy" by introducing evidence of facts that the Defence considered were unrelated to the charges.³⁰¹ The Defence provided as examples the evidence concerning attacks on Mandro, Tchomia or Bunia and argued that this evidence contravened the rights of the Defence because it forced the Defence to make a distinction between the charges against the suspects and other crimes which occurred in Ituri.

226. In response, the Prosecution argued that the attack on Bogoro should not be viewed in isolation but that the various attacks referred to in its presentation on the evidence form part of a wider armed conflict in Ituri during that period. Therefore, it submitted, evidence of other attacks was probative as to the suspects' intent and knowledge under article 30 of the Statute and as to whether the attack on Bogoro constituted part of a widespread or systematic attack in the region of Ituri.³⁰²

227. The Chamber recalls that in the *Lubanga* Decision, the Chamber stated:

The Chamber holds the view that nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omission with which

³⁰¹ ICC-01/04-01/07-T-48-ENG CT at p. 27, line 20 to p. 28, line 17; ICC-01/04-01/07-699-tENG, paras 89-90.

³⁰² ICC-01/04-01/07-692, para. 39.

the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred.³⁰³

228. In addition, the Chamber is of the view that providing evidence which may assist it in establishing the overall context in which the crimes are alleged to have occurred is not only helpful to its understanding of the evidence supporting the charges but is also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the Statute. On this basis, the Chamber finds that such evidence is admissible.

n. *Victims' application for participation*³⁰⁴

229. During the hearing on the confirmation of charges, the Defence teams for Germain Katanga and Mathieu Ngudjolo Chui objected to the Legal Representatives of Victims providing evidence to the judges or to referencing the victim applications as evidence to support the charges.³⁰⁵

230. Ms Bapita Buyangandu argued that there is no provision in the Statute, Rules or Regulations which expressly prohibits the admission of evidence, including testimony, from individuals who have been granted the procedural status of victim.³⁰⁶

231. The Chamber recalls that during the hearing on the confirmation of the charges, Presiding Judge Akua Kuenyehia stated:

I'd like to remind the Legal Representatives of the Victims that the victims' applications and the demands made thereon are not part of the evidence in the case that we're hearing today, and therefore they should keep this in mind when they are making their presentations.³⁰⁷

³⁰³ ICC-01/04-01/06-803-tEN, para. 152.

³⁰⁴ ICC-01/04-01/07-474 and ICC-01/04-01/07-579.

³⁰⁵ ICC-01/04-01/07-T-48-ENG CT at p. 29, lines 6-15; ICC-01/04-01/07-T-44-ENG ET at p. 27, lines 4-7.

³⁰⁶ ICC-01/04-01/07-691-tENG, para. 18.

³⁰⁷ ICC-01/04-01/07-T-44-ENG ET at p. 14, line 25 to p. 15, line 3.

232. Accordingly, the Chamber confirms that victims' applications are not evidence in the case and that it is therefore not necessary to decide on their admissibility.

III. MATERIAL ELEMENTS OF THE CRIMES

A. Existence and nature of the armed conflict in Ituri

233. The Prosecution's Amended Charging Document asserts that:

At all times relevant to this Document there existed in Ituri a protracted armed conflict between various armed groups of the Hema, on the one hand, and the Lendu and Ngiti militias, on the other, as well as between and among other groups.³⁰⁸

234. According to the Prosecution, "[t]his conflict was fuelled by the involvement of Uganda and Rwanda and the DRC government who supported one or the other of the Ituri-based militias at different times."³⁰⁹ Nevertheless the Prosecution explains that:

[...] for the purpose of this criminal case, it is immaterial whether the conflict, which involved the groups latter known as the FNI and the FRPI, is characterized as non-international or international. Each of the counts qualified as "war crimes" in this Document arises from conduct which constitutes a war crime regardless of whether the conflict is international or non-international. All of these counts describe conduct equally proscribed under the Rome Statute whether Article 8(2)(a) and (b), or Article 8(2)(c) and (e), serve as their statutory underpinning. For that reason, the Prosecution is charging KATANGA and NGUDJOLO in the alternative, based on counts reflecting the same conduct but related to war crimes in the context of a conflict of international character and of non-international character. The Prosecution will therefore present evidence in its possession pertaining to both the international and non-international aspects of the armed conflict.³¹⁰

235. At the confirmation hearing, the Prosecution discussed at length the nature of the armed conflict, stressing that at all times relevant to the Charging Document, the armed conflict was of an international character.³¹¹

³⁰⁸ ICC-01/04-01/07-649-Anx1A, para. 36.

³⁰⁹ ICC-01/04-01/07-649-Anx1A, para. 37.

³¹⁰ ICC-01/04-01/07-649-Anx1A, para. 38.

³¹¹ ICC-01/04-01/07-T-42-ENG ET WT at p. 28 lines 20-25; at pp. 29-31.

236. The legal representatives of victims also allege that due to the direct involvement of Uganda in the territory of Ituri, the armed conflict could be characterized as international.³¹²

237. The Chamber notes that neither Defence teams made observations on this specific issue.

238. Relying on a decision of the International Court of Justice ("the ICJ") in the case of the *Democratic Republic of Congo v. Uganda*,³¹³ the Chamber held in the *Lubanga* Decision that:

The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside with an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).³¹⁴

239. Pursuant to this reasoning, there is sufficient evidence to establish substantial grounds to believe that between August 2002 and May 2003, an armed conflict took place in the territory of Ituri between a number of local organised armed groups, including, *inter alia*, the *Union des Patriotes Congolais* ("the UPC")/*Forces Armées pour la Libération du Congo* ("the FPLC"),³¹⁵ the *Front Nationaliste et Intégrationniste* ("the

³¹² ICC-01/04-01/07-689-tENG, para. 13; ICC-01/04-01/07-693-tENG, p. 5; ICC-01/04-01/07-T-49-ENG CT at p. 21, lines 8-25; ICC-01/04-01/07-T-44-ENG-ET at p. 17, lines 2-25.

³¹³ ICJ, *Armed Activities on the Territory of the Congo (Democratic republic of Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 19 December 2005.

³¹⁴ ICC-01/04-01/06-803-tEN, para. 209.

³¹⁵ Official UPC Report, *Les groupes armés et les organes issus de la Commission de Pacification Bunia*, 5 August 2003 at DRC-OTP-0094-0251 at 0252; MONUC, *Special Investigations on Human Rights Situation in Ituri*, June 2003 at DRC-OTP-0152-0286 at 0291, para. 3; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0291-0292, para. 77; Statement of W-250 at DRC-OTP-1013-0002 at 0019, para. 109; Statement of W-157 at DRC-OTP-0164-0534 at 0536, para. 13 to 0537, para. 14; at 0541, paras 42-43, 45; at 0542, paras 46-47.

FNI"),³¹⁶ the *Force de Résistance Patriotique en Ituri* ("the FRPI")³¹⁷ and the *Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo* ("the PUSIC").³¹⁸ These armed groups:

- (i) had a certain degree of organisation, insofar as such groups acted under a responsible command and had an operative internal disciplinary system; and
- (ii) had the capacity to plan and carry out sustained and concerted military operations, insofar as they held control of parts of the territory of the Ituri District.

240. There is also sufficient evidence to establish substantial grounds to believe that Uganda directly intervened in this armed conflict through the *Ugandan People Armed Forces* ("the UPDF"). The evidence presented establishes direct participation of significant numbers of UPDF troops in several military operations on behalf of different armed groups including the UPC takeover in Bunia in early August 2002, the FNI/FRPI takeover in Bogoro in February 2003³¹⁹ and of Bunia in early March 2003.³²⁰ There is also sufficient evidence to establish substantial grounds to believe

³¹⁶ *Rapport sur la situation générale en Ituri présenté par l'organe exécutif intérimaire à l'assemblée spéciale intérimaire de l'Ituri lors de sa 5^e session*, Bunia, Novembre 2003 at DRC-OTP-0091-0218 at 0222, 0234; Statement of W-157 at DRC-OTP-0164-0534 at 0536-0537, para. 14; at 0541, paras 42-43, 45; at 0542, paras 46-47 Statement of W-250 at DRC-OTP-1013-0002 at 0016.

³¹⁷ *Rapport sur la situation générale en Ituri présenté par l'organe exécutif intérimaire à l'assemblée spéciale intérimaire de l'Ituri lors de sa 5^e session*, Bunia, Novembre 2003 at DRC-OTP-0091-0218 at 0222, 0234; Statement of W-157 at DRC-OTP-0164-0534 at 0536-0537, para. 14; at 0541, paras 42-43, 45; at 0542, paras 46-47; Statement of W-250 at DRC-OTP-1013-0002 at 0016.

³¹⁸ Statement of W-12 at DRC-OTP-0105-0085 at 0156-0157, paras 392-395.

³¹⁹ Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 16, No. 11 (A), New York, July 2003 at DRC-OTP-00074-797 at 805; Statement of W-157 at DRC-OTP-1006-0054 at 0058-0059, paras 20-21; Amnesty International, *Democratic Republic of Congo- Ituri: a need for protection, a thirst for justice*, No. AFR 62/032/2003, London, 21 October 2003 at DRC-OTP-0019-0153 at 0153-0156; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0271, para. 4; at 0278, paras 24-25, 27-28; at 0284, paras 46, 49; Statement of W-12 at DRC-OTP-0105-0085, at 0107, para. 126; at 0133, para. 259; at 0152, para. 363; Statement of W-161 at DRC-OTP-0164-0488, at 0494, paras 30-31.

³²⁰ Statement of W-12 at DRC-OTP-0105-0085, at 0130, paras 241-244; at 0132 para. 257. The Chamber also notes that the International Court of Justice, in ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, I.C.J. Reports 2005, 19 December 2005 at p. 101, para. 345 found that prior to the withdrawal of the UPDF from the territory of Ituri on 2 June 2003: "The Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the

that Uganda was one of the main supplier of weapons and ammunitions to these armed groups³²¹ and that the respective recipients' ability to successfully attack other groups was aided by this Ugandan military assistance.³²² As a result, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the conflict that took place in Ituri District between, at least, August 2002 and May 2003, was of an international character.

241. Part of the evidence admitted for the purposes of the confirmation hearing also refers to the roles of Rwanda and the central government of the DRC in the armed conflict in Ituri District after 1 July 2002.³²³ In this respect, in his oral submissions, the Legal Representative of Victims supported the assertion that Rwanda was involved in the Ituri conflict.³²⁴ Nevertheless, because of the limited evidence tendered by the Prosecution about the roles of Rwanda and the central government of the DRC in this conflict, the Chamber is unable to find that the evidence is sufficient to establish substantial grounds to believe that Rwanda and/or the central government of the DRC directly intervened in the armed conflict in the territory of Ituri district between August 2002 and May 2003.

DRC, violated the principle of non-use of force in international relations and the principle of non-intervention.”

³²¹ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 227, para. 23; Statement of W-12 at DRC-OTP-0105-0085 at 0089, para. 26; at 0112, para. 151; at 0122, paras 201-202.

³²² United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 278-279, paras 27-28.

³²³ United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 16, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 805; Statement of W-157 at DRC-OTP-1006-0054 at 0058-0059, paras 20-21.

³²⁴ ICC-01/04-01/07-T-38-ENG CT at p. 64, lines 7-11.

B. Existence of the offences under 8(2)(a)(i), 8(2)(a)(ii), 8(2)(b)(i), 8(2)(b)(xvi), 8(2)(b)(xxii), 8(2)(b)(xxvi), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute

242. At the outset, the Chamber recalls that, according to the Prosecution's Amended Charging Document:

Each of the counts qualified as "war crimes" in this Document arises from conduct which constitutes a war crime regardless of whether the conflict is international or non-international. All of these counts describe conduct equally proscribed under the Rome Statute whether Article 8(2)(a) and (b), or Article 8(2)(c) and (e), serve as their statutory underpinning.³²⁵

243. As the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that during the period relevant to the present case the armed conflict in the territory of the Ituri District was of an international character, it will consider only those offences charged in connection with an international armed conflict under article 8(2)(a) or (b) of the Statute.

244. Furthermore, since the last two elements of the crimes are common to all war crimes provided for in article 8(2)(a) and (b) of the Elements of Crimes, the Chamber will address them in a separate section. This section will therefore focus on the elements specific to each charge, as provided for in the Elements of Crimes.

245. Finally, because the responsibility of the two suspects, Germain Katanga and Mathieu Ngudjolo Chui, will be analysed in a separate section of this Decision, in the next section, the Chamber will analyse the objective elements of each charge, and, except for the charge related to the use of children under the age of fifteen in the hostilities, the subjective elements to be attributed to the FNI/FRPI combatants as direct perpetrators of the crimes.

1. Using children under the age of fifteen years to participate actively in the hostilities

a) Objective and subjective elements

³²⁵ ICC-01/04-01/07-649-Anx1A, para. 38.

246. In **Count 5**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(xxvi) of the Statute, with:

[...] the use of children under the age of fifteen to participate actively in hostilities, including W-28 and W-157, during the attack at Bogoro village in the Bahema Sud *collectivité*, Irumu territory, Ituri district.³²⁶

247. The war crime provided for in article 8(2)(b)(xxvi) of the Statute is defined as “using” children under the age of fifteen “to participate actively in hostilities.” According to the Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator’s awareness of the factual circumstances establishing the existence of such a conflict, this war crime requires the following three elements: (i) “the perpetrator [...] used one or more persons to participate actively in hostilities”; (ii) “such person or persons were under the age of fifteen”; and (iii) “the perpetrator knew or should have known that such person or persons were under the age of fifteen years.”

248. The Chamber observes that this war crime can be committed by a perpetrator against individuals in his own party to the conflict. Thus, the allegiance of the child who is used in hostilities is not relevant for the purposes of this provision, as long as the child in question is under the age of fifteen.

249. The Chamber finds no reason to depart from the *Lubanga* Decision’s interpretation of “national armed forces” in the context of the protracted armed conflict in the Democratic Republic of Congo.³²⁷ Moreover, as **Count 5** specifically pertains to the *use* of children under the age of fifteen to participate actively in hostilities, in the view of the Chamber, the material elements concerning the “conscripting” or “enlisting” of children into “national armed forces” are not relevant to the current case.

250. The Chamber considers that the definition of the phrase “active participation in hostilities” set out in the *Lubanga* Decision is relevant to this Decision. With regard

³²⁶ ICC-01/04-01/07-649-Anx1A at p. 3.

³²⁷ ICC-01/04-01/06-803-tEN, paras 268-285.

to the specific context of the war crime of using children in hostilities, the phrase applies to cases in which:

[...] children are used to guard military objectives, such as military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards). These activities are indeed related to hostilities in so far as (i) the military commanders are in a position to take all necessary decisions regarding the conduct of hostilities; (ii) they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.³²⁸

251. In respect of the subjective elements of this war crime, the perpetrator must satisfy the intent and knowledge requirement of article 30(1) and (2) of the Statute as well as a negligence standard set out in the phrase “should have known” with regard to the requirement that the victim be under the age of fifteen. Therefore this offence encompasses, first and foremost, cases of *dolus directus* of the first or second degrees.³²⁹

252. The negligence standard of “should have known” is met when the perpetrator:

- (i) did not know that the victim was under the age of fifteen years at the time he used the victim to participate actively in hostilities, and
- (ii) lacked such knowledge because he did not act with due diligence in the relevant circumstances (i.e the perpetrator “should have known” and his lack of knowledge resulted from his failure to comply with his duty to act with due diligence).³³⁰

³²⁸ ICC-01/04-01/06-803-tEN, para. 263.

³²⁹ The definition of the concept of *dolus directus* of the first and second degrees, and of *dolus eventualis*, can be found in ICC-01/04-01/06-803-tEn, para. 351. In the *Lubanga* Decision, the Chamber found that article 30(1) of the Statute encompasses also *dolus eventualis*. The majority of the Chamber endorses this previous finding. For the purpose of the present charges in the present Decision, it is not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence, since, as shown later, there are substantial grounds to believe that the crimes were committed with *dolus directus*. Judge Anita Ušacka disagrees with the position of the majority with respect to the application of *dolus eventualis*. Judge Anita Ušacka finds that, at this time, it is unnecessary for her to provide reasons, since the issue of whether article 30 of the Statute also encompasses cases of *dolus eventualis* is not addressed in the present Decision.

³³⁰ ICC-01/04-01/06-803-tEN, paras 357-359.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of using children under the age of fifteen years to participate actively in the hostilities was committed in the Bogoro attack on 24 February 2003

253. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the war crime of using children under the age of fifteen to participate actively in the hostilities was committed before, during and in the aftermath of the attack on the village of Bogoro on 24 February 2003.

254. The evidence is sufficient to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui used children for multiple purposes,³³¹ including direct participation in the attack on the village of Bogoro on 24 February 2003.³³²

³³¹ Statement of W-28 at DRC-OTP-0155-0106 at 0113-0114, paras 42-43 : “en tant que soldat, mon travail consistait à garder le village et le camp, et à partir au combat quand il y avait la guerre”; Statement of W-28 at DRC-OTP-0171-1828 at 1833, para. 22 : “ J’ai personnellement déchargé avec d’autres [...] des bombes (roquettes) ainsi que des munitions ”; Statement of W-250 at DRC-OTP-1013-0002 at 0013, para. 72; 0021, para. 120; Statement of W-268 at DRC-OTP-1007-0095 at 0103, paras 61-64; Statement of W-279 at DRC-OTP-1007-1077 at 1082, para. 38; Statement of W-280 at DRC-OTP-1007-1089 at 1097, para. 55; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0308, para. 149.

³³² Statement of W-250 at DRC-OTP-1013-0002 at 0021, paras 119-120 : “Je ne sais pas dans quel camp il y en avait le plus mais je pense que cela devait être à Ladile [...] Les « kagogos » qui étaient bien formé militairement participaient aux combats. Ceux qui n’étaient pas bien formés ne recevaient pas d’armes et participaient uniquement au pillage. ”; Statement of W-28 at DRC-OTP-0155-0106 at 0111, paras 28-29; at 0112, paras 33, 37-38; Statement of W-28 at DRC-OTP-0171-1828 at 1831, para. 14; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0331, lines 131-137; at 0332, lines 157-176; at 0333, lines 200-205; at 0493, lines 940-992; Statement of W-157 at DRC-OTP-1006-0054 at 0074-0075, paras 143-159, see para.143; Investigator’s note W-157 at DRC-OTP-0150-0144 at 0144, para. 8; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0108, paras 6-7; at 0109, para. 3; at 0110, para. 1; Statement of W-132 at DRC-OTP-1016-0156 at 0165, para. 49: “Dans le camp militaire de Songokoi, il y avait beaucoup de combattants. [...] Les plus jeunes avaient environ 13 ans”; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227, para. 4; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 228-246; Statement of W-280 at DRC-OTP-1007-1089 at 1091, para. 11; Investigator’s note W-280 at DRC-OTP-0150-0144 at p. 1, para. 8; Investigator’s note W-28 at DRC-OTP-1016-0049 at 0050 para. 1; MONUC, *Special Investigations on Human Rights Situation in Ituri*, June 2003 at 0288, para. 9; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0308, para. 147; Human Right

255. In the view of the Chamber, the evidence demonstrates that the training of child soldiers took place in FRPI³³³ and FNI³³⁴ camps. The evidence further shows that some of the children learned how to handle weapons, and received “*armes blanches*” (e.g. machetes and spears), or guns at the end of their training.³³⁵

256. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui consistently used children under the age of fifteen to take part in hostilities within the FNI/FRPI militias prior to,³³⁶ during,³³⁷ and following the Bogoro attack.³³⁸

Watch, *Ituri: “covered in Blood”- Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, No. 11(A), July 2003 at DRT-OTP-0074-0797 at 851, para. 6.

³³³ In the Aveba Camp: Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3: “D’après le témoin à Aveba, au fief du FRPI Germain KATANGA avait [...] plusieurs enfants soldats de moins de 15 ans dont certains faisaient partie de la garde de Germain KATANGA.”; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227, para. 4 ; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 228-246; Statement of W-28 at DRC-OTP-0155-0106 at 0112, para. 37.

³³⁴ In the Zumbe Camp: Statement of W-250 at DRC-OTP-1004-0187 at 0203, para. 102: “Ils ont organisé cette formation militaire à Zumbe directement. Je sais qu’ils étaient nombreux à avoir suivi la formation militaire mais je ne saurais pas dire combien de jeunes ont subi cette formation.”; Statement of W-279 at DRC-OTP-1007-1077 at 1079, paras 11-14, 16; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20. In the Lagura camp: Statement of W-250 at DRC-OTP-0177-0147 at 0332, lines 157-176; Investigator’s note W-280 at DRC-OTP-0150-0144 at p. 1, para. 3. Statement of W-250 at DRC-OTP-1013-0002 at 0009, paras 46-48: “La plupart du temps l’entraînement militaire avait lieu dans les camps de Ladile et Lagura.”;

³³⁵ Statement of W-28 at DRC-OTP-0155-0106 at 0111, paras 28-29; at 0118, para. 68; Statement of W-28 at DRC-OTP-0171-1828 at 1831, para. 14; Statement of W-132 at DRC-OTP-1016-0156 at 0165, para. 49: “Ceux qui avaient entre 14 et 15 ans avaient aussi des fusils.”; Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090, para. 6 : “La plupart d’entre eux avaient des armes blanches, comme des flèches et des lances et certains étaient équipés de fusils.”; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227, para. 4; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 228-246; Statement of W-250 at DRC-OTP-1013-0002 at 0009, paras 46-48: “Nous avons appris à marcher comme des militaires, à démonter et remonter nos armes. J’ai appris à manier des armes telles que des SMG et des MAG ”; Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 120 ; Statement of W-268 at DRC-OTP-1007-0095 at 0102, paras 54-55: “En ce qui concerne les enfants, ceux que j’ai vus qui avaient plus de 10 ans portaient des machettes et des lances.”; Statement of W-280 at DRC-OTP-1007-1089 at 1091 para. 13.

³³⁶ Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 26: “[REDACTED] [...] La troisième fois, nous avons chassé l’ennemi et nous avons pris Bogoro”; Statement of W-28 at DRC-OTP-0155-0106 at 0116, para. 57: “Les principales batailles [REDACTED], par ordre chronologique, ce sont la deuxième bataille de Nyakunde, la troisième attaque sur Bogoro, et l’attaque sur Mandro. Entre les batailles de Nyakunde et Bogoro [REDACTED]aux batailles de Singo, Songolo et Avenyuma, lors lesquelles [*sic*] on a réussi à repousser l’attaque de l’UPC de Bogoro”.

³³⁷ Statement of W-28 at DRC-OTP-0155-0106 at 0116, para. 57; at 0123, para. 88; Statement of W-28 at DRC-OTP-0171-1828 at 1838-1839, paras 51-52; “ Il y avait aussi des « kadogos » au sein du FNI qui ont participé [*sic*] à la bataille de Bogoro [...] Toujours selon mon estimation, certains semblaient plus jeunes que moi. ”; Statement of W-268 at DRC-OTP-1007-0095 at 0107, para. 91 :

257. More specifically, the evidence shows that during the attack on the village of Bogoro on 24 February 2003, some combatants were identified by the inhabitants of Bogoro as children who were visibly under the age of fifteen years.³³⁹ These children attacked the village of Bogoro killing civilians, destroying properties, and pillaging goods.³⁴⁰

“Ils étaient âgés de 10-11 ans.”; Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 26; Statement of W-280 at DRC-OTP-1007-1089 at 1097, para. 51; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 59; Statement of W-250 at DRC-OTP-1013-0002 at 0018, para. 104; at 0021, para. 118; Statement of W-249 at DRC-OTP-1004-0115 at 0122, para. 52; Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 25; Statement of W-287 at DRC-OTP-1013-0205 at 0211, para. 34; Statement of W-132 at DRC-OTP-1016-0156 at 0160, para. 19; Statement of W-157 at DRC-OTP-0164-0534 at 0540, para. 37; Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123; Statement of W-157 at DRC-OTP-0164-0534 at 0544, para. 60; Statement of W-233 at DRC-OTP-1007-0061 at 0085, para. 159.

³³⁸ Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0422, lines 838-860; Statement of W-280 at DRC-OTP-1007-1089 at 1099, para. 64: “Quelques jours après l’attaque de Bogoro, j’ai participé à une attaque contre Mandro.”; Statement of W-280 at DRC-OTP-1007-1089 at 1100, para. 77: “Après un mois, ils nous ont dit, on va frapper Kasenyi. Après Kasenyi, on a attaqué Tchomia.”; Statement of W-132 at DRC-OTP-1016-0156 at 0169, para. 77; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20: “Quand j’étais [REDACTED] avec le FNI j’ai participé aux grandes batailles de Bogoro, Mandro et Bunia (le 6 mars 2003).” United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l’homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 283 para. 41; Human Right Watch, *Ituri: “covered in Blood”- Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, No. 11(A), July 2003 at DRT-OTP-0074-0797 at 851, para. 6.

³³⁹ Statement of W-268 at DRC-OTP-1007-0095 at 0102, paras 54-55: “En ce qui concerne les enfants, ceux que j’ai vus [*sic*] qui avaient plus de 10 ans portaient des machettes et des lances.” Statement of W-268 at DRC-OTP-1007-0095 at 0107, para. 91; Statement of W-132 at DRC-OTP-1016-0156 at 0160, para. 19: “Parmi les combattants que j’ai vu, il y avait aussi des *kadogos* et des jeunes gens. Quand je dis *kadogo* c’est des enfants petits, d’environ 10 ans ou plus. J’ai vu que certains étaient armés d’armes à feu et certains de machettes.”; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 59; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 63: “j’ai pu voir que parmi les combattants il y avait des « *Kadogos* ». [...] En les observant, il m’a semblé que les plus jeunes avaient 10 ou 12 ans tandis que les plus âgés devaient avoir aux environs d’une quinzaine d’années.”; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0224, para. 2: “les deux salles étaient gardées à l’extérieur par de nombreux militaires armés qui comprenaient parmi eux des enfants soldats (« *kadogo* ») qui, d’après leur taille et leur physionomie, devaient avoir entre douze et quinze ans.”;

³⁴⁰ Statement of W-159, DRC-OTP-0164-0472 at 0482, para. 64: “J’ai également vu des « *Kadogos* » autour de NGUDJOLO lorsque ce dernier se trouvait dans le camp UPC. Ces enfants avaient aussi des armes et des tenues militaires. [...] Je les ai vu piller et tuer lorsqu’ils se trouvaient avec NGUDJOLO dans le camp de l’UPC.”; Statement of W-28 at DRC-OTP-0171-1828 at 1838, paras 51-52; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0422, lines 838-860; at 0493, lines 940-992; Statement of W-249 at DRC-OTP-1004-0115 at 0122, para. 52; Statement of W-268 at DRC-OTP-1007-0095 at 107, para. 91; Statement of W-287 at DRC-OTP-1013-0205 at 0211, para. 34: “Parmi eux il y avait beaucoup d’enfants soldats qui étaient armés d’armes à feu et machettes. Les attaquants discutaient s’il fallait me tuer tout de suite”; Statement of W-132 at DRC-OTP-1016-0156 at 0162, para. 32; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227, para. 4; Statement of W-233 at DRC-OTP-1007-0061 at 0080, para. 126; at 0085, para. 159: “[...] qui a été blessé par une hache par un enfant. Cet enfant milicien avait surgi et l’avait attaquée sur la nuque. [...] Elle a dit que l’enfant avait environ 12 ans.”; Statement of W-268 at DRC-OTP-1007-0061 at

258. As previously found, there are substantial grounds to believe that, in addition to having been fully integrated into the militias during the attack on the village of Bogoro on 24 February 2003,³⁴¹ some of the children under the age of fifteen years were also used by Mathieu Ngudjolo Chui, Germain Katanga and other FNI/FRPI commanders as personal escorts and bodyguards.³⁴²

259. As previously found by the Chamber, there is sufficient evidence to establish substantial grounds to believe that a large number of FNI/FRPI combatants who participated in hostilities were under the age of fifteen.³⁴³

0102, paras 54-55; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0288, para. 65.

³⁴¹ Statement of W-250 at DRC-OTP-1013-0002 at 0018, para. 104; at 0021, para. 118: “Des enfants soldats ont participé aux combats de Bogoro [...] il y en avait qui avaient moins de quinze ans, certains me paraissaient être très jeunes.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0339, lines 408-428; at 0341, lines 462-474; Statement of W-157 at DRC-OTP-0164-0534 at 0544, para. 60: “Comme il s’agissait d’une rébellion, il n’y manquait pas d’enfants. Un enfant de huit ans ne pouvait pas prendre une arme, car c’était trop lourd, mais à partir de dix ans on pouvait en prendre. Donc, les enfants avaient 10-11 ans et plus.”; Statement of W-132 at DRC-OTP-1016-0156 at 0160, para. 19: “Parmi les combattants que j’ai vu, il y avait aussi des *kadogos* et des jeunes gens. Quand je dis *kadogo*, c’est des enfants petits, d’environ 10 ans ou plus. J’ai vu que certains étaient armés d’armes à feu et certains de machettes.”

³⁴² For Mathieu Ngudjolo Chui: Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 23: “Il y avait des enfants et des adultes dans la garde de NGUDJOLO.”; Statement of W-280 at DRC-OTP-1007-1089 at 1098, para. 5; Statement of W-287 at DRC-OTP-1013-0205 at 0210, paras 31-32; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 64: “J’ai également vu des « *Kadogos* » autour de NGUDJOLO lorsque ce dernier se trouvait dans le camp UPC.”; Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123.

For Germain Katanga: Investigator’s note W-28 at DRC-OTP-1016-0049 at 0050, para. 3; Statement of W-28 at DRC-OTP-0155-0106 at 0108, para. 11; at 0112, para. 36; Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 69; Statement of W-280 at DRC-OTP-1007-1089 at 1100, para. 75: “GERMAIN a dit qu’il allait rentrer. [...] On avait demandé à la garde de l’accompagner [*sic*] dans son camp BCA; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0342, lines 504-514: “les *kadogo* [*sic*] étaient les gardes de certains commandants”.

³⁴³ Statement of W-280 at DRC-OTP-1007-1089 at 1090-1091, para. 8; Statement of W-280 at DRC-OTP-1007-1089 at 1099, para. 64; at 1100, para. 77; Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 26; Statement of W-28 at DRC-OTP-0155-0106 at 0108, para. 11; at 0119, para. 69; at 0111, para. 29; Statement of W-28 at DRC-OTP-0171-1828 at 1830, para. 8; at 1831, para. 14; at 1832, para. 21; at 1836, para. 35; Statement of W-28 at DRC-OTP-0155-0106 at 0116, para. 57; Statement of W-28 at DRC-OTP-0171-1828 at 1840, para. 61; Investigator’s note W-28 at DRC-OTP-1016-0049 at 0049 para. 3; Statement of W-28 at DRC-OTP-0171-1828 at 1839 para. 52; Statement of W-157 at DRC-OTP-1006-0534 at 0539, para. 32; Investigator’s note W-157 at DRC-OTP-0150-0144 at 0144, para. 3; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20; Statement of W-157 at DRC-OTP-1006-0054 at 0062, paras 47-50; at 0068, para. 90; Investigator’s note W-157 at DRC-OTP-0150-0144 at 0144, para. 3; Statement of W-157 at DRC-OTP-1006-0534 at 0535, para. 9; Investigator’s note W-157 at DRC-OTP-0150-0144 at 0144, para. 3; Statement of W-311 at DRC-OTP-1018-0103 at 0105, para. 12; Statement of W-279 at DRC-OTP-1007-1077 at

260. In reaching this finding, the Chamber takes into account, *inter alia*, the following evidence:

- i. the statements of Witness 28, who was a child soldier and actively participated in the hostilities against the village of Bogoro on 24 February 2003.³⁴⁴ Witness 28 [REDACTED] was approximately thirteen years old during the attack on Bogoro on 24 February 2003.³⁴⁵ [REDACTED];³⁴⁶
- ii. the statements of Witness 157, who was a child soldier and actively participated in the hostilities on the village of Bogoro³⁴⁷ on 24 February 2003. Witness 157 [REDACTED] was less than fifteen years old during the Bogoro attack on 24 February 2003.³⁴⁸ [REDACTED];³⁴⁹

1080, para. 25; Attestation de naissance de l'intéressé at DRC-OTP-1018-0110 at 0110; ADAMSBAUM, C. , REY-SALMON, C., *Rapport d'examen de radiographies aux fins de détermination d'âge physiologique du sujet 0157*, 11 December 2007 at DRC-OTP-0180-0863 at 0867; Carte d'élève du secondaire at DRC-OTP1015-0552 at 0553; Statement of W-250 at DRC-OTP-1013-0002 at 0009, paras 46-48; at 0018, para. 104; at 0021, para. 118; Statement of W-268 at DRC-OTP-1007-0061 at 0102, paras 54-55 ; Statement of W-250 at DRC-OTP-1004-0187 at 0203, para. 102; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0335, lines 277-282; Statement of W-250 at DRC-OTP-1004-0187 at 0203, para. 102; Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090, para. 5; Statement of W-157 at DRC-OTP-0164-0534 at 0544, para. 60 ; Statement of W-157 at DRC-OTP-1006-0054 at 0068, para. 90 ; Statement of W-28 at DRC-OTP-0171-1828 at 1839 para. 52; Statement of W-280 at DRC-OTP-1007-1089 at 1091, para. 12; Statement of W-280 at DRC-OTP-1007-1089 at 1100, para. 73 ; Statement of W-249 at DRC-OTP-1004-0115 at 0122, para. 52; Statement of W-233 at DRC-OTP-1007-0061 at 0080, para. 126; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 59; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0224, para. 2; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 63; Statement of W-28 at DRC-OTP-0171-1828 at 1839 para. 52.

³⁴⁴ Statement of W-28 at DRC-OTP-0155-0106 at 0108, para. 11; at 0111, para. 29; at 0119, para. 69; Statement of W-28 at DRC-OTP-0171-1828 at 1830, para. 8; at 1831, para. 14; at 1832, para. 21; at 1836, para. 35; at 1840, para. 61; Statement of W-28 at DRC-OTP-0155-0106 at 0116, para. 57.

³⁴⁵ Investigator's note W-28 at DRC-OTP-1016-0049 at 0049, para. 3; Bulletin de la 2e année secondaire de W-28 at DRC-OTP-0171-1826 at 1826; Bulletin de la 1ère année secondaire de W-28 at DRC-OTP-0171-1827 at 1827.

³⁴⁶ Investigator's note W-28 at DRC-OTP-1016-0049 at 0050, para. 3; Screening Notes W-28 at DRC-OTP-0150-0177 at 0177, para. 7; Statement of W-28 at DRC-OTP-0155-0106 0112, paras 36 and 39; Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 69; at 1843, para. 78.

³⁴⁷ Statement of W-157 at DRC-OTP-0164-0534 at 0539, para. 32; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20; at 0062, paras 47-50; at 0068, para. 90.

³⁴⁸ Statement of W-157 at DRC-OTP-1006-0534 at 0535, para. 9 ; Investigator's note W-157 at DRC-OTP-0150-0144 at 0144, para. 3; Statement of W-311 at DRC-OTP-1018-0103 at 0105, para. 12; Attestation de naissance de l'intéressé at DRC-OTP-1018-0110 at 0110; ADAMSBAUM, C. , REY-SALMON, C., *Rapport d'examen de radiographies aux fins de détermination d'âge physiologique du sujet 0157*, 11 December 2007 at DRC-OTP-0180-0863 at 0867 ; Carte d'élève du secondaire at DRC-OTP1015-0552 at 0553.

³⁴⁹ Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123.

- iii. the statement of Witness 280, who was a child soldier and actively participated in the hostilities against the village of Bogoro on 24 February 2003.³⁵⁰ Witness 280 [REDACTED] was twelve years old during the Bogoro attack on 24 February 2003.³⁵¹ [REDACTED];³⁵² and
- iv. the statement of Witness 279, who was a child soldier and actively participated in the hostilities on the village of Bogoro on 24 February 2003.³⁵³ Witness 279 [REDACTED] was approximately eleven years old during the Bogoro attack on 24 February 2003.³⁵⁴ [REDACTED].³⁵⁵

261. As previously found, the evidence tendered by the Prosecution is sufficient to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui knew or should have known that these persons were under the age of fifteen years. The evidence shows that Germain Katanga³⁵⁶ and Mathieu Ngudjolo Chui³⁵⁷ both used children as escorts. Many children in FRPI and FNI camps were visibly under fifteen years of age,³⁵⁸ received military training pursuant to the orders of Germain Katanga and Mathieu Ngudjolo Chui,³⁵⁹ and were often paraded in their presence.³⁶⁰ The evidence shows that in 2003, Germain Katanga accepted the

³⁵⁰ Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 26.

³⁵¹ Statement of W-280 at DRC-OTP-1007-1089 at 1090-1091, para. 8; Investigator's note W-280 at DRC-OTP-0150-144 at p. 1, para. 3; Investigator's note W-280 at DRC-OTP-0150-144 at p. 2, para. 11; Statement of W-280 at DRC-OTP-1007-1089 at 1099, para. 64; at 1100, para. 77; at 1093, para. 26; Investigator's note W-280 at DRC-OTP-0150-144 at p. 2, para. 9

³⁵² Statement of W-280 at DRC-OTP-1007-1089 at 1098, paras 59, 61.

³⁵³ Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 25.

³⁵⁴ Statement of W-279 at DRC-OTP-1007-1077 at 1077.

³⁵⁵ Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 20.

³⁵⁶ Investigator's note W-28 at DRC-OTP-1016-0049 at 0050, para. 3; Screening Notes W-28 at DRC-OTP-0150-0177 at 0177, para. 7; Statement of W-28 at DRC-OTP-0155-0106 at 0108, para. 11; at 0112, para. 36; Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 69; Statement of W-280 at DRC-OTP-1007-1089 at 1100, para. 75; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0342, lines 504-514; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 288, para. 9.

³⁵⁷ Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 23; Statement of W-280 at DRC-OTP-1007-1089 at 1098, para. 59; Statement of W-287 at DRC-OTP-1013-0205 at 0210, paras 31-32; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 64; Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123.

³⁵⁸ Statement of W-28 at DRC-OTP-0155-0106 at 0111, para. 28; Statement of W-268 at DRC-OTP-1007-0061 at 0102, paras 54-55; Statement of W-132 at DRC-OTP-1016-0156 at 0165, para. 49.

³⁵⁹ Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 37.

³⁶⁰ Statement of W-250 at DRC-OTP-1013-0002 at 0016, para. 87: "Cela se passait dans le courant de l'après-midi après la parade [REDACTED] et au moment de la parade [REDACTED]. Mathieu

presence of child soldiers in FRPI camps,³⁶¹ as he was the key decision-maker regarding the transfer of children to, from and within those camps.³⁶²

262. The evidence also shows that Germain Katanga used child soldiers because “[il] préférait être escortée [sic] par les enfants soldats âgés de moins de 15 ans parce qu’ils exécutaient sans oppositions.”³⁶³ In relation to Mathieu Ngudjolo Chui, the evidence shows that he personally gave a machine gun to a child soldier.³⁶⁴

263. In conclusion, the Chamber is of the view that there is sufficient evidence to establish substantial grounds to believe that the war crime defined in article 8(2)(b)(xxvi) of the Statute was committed by Germain Katanga and Mathieu Ngudjolo Chui before, during and in the aftermath of the 24 February 2003 attack on the village of Bogoro.

2. Directing an attack against the civilian population

a) Objective and subjective elements

NGUDJOLO [...] étaient également présents lorsque BAHATI de Zumbe a fait cette annonce.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0332, lines 157-176; at 0333, lines 200-205; at 0348, lines 704-723; Statement of W-279 at DRC-OTP-1007-1077 at 1079, paras 13, 15; at 1081, paras 28-29; Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 27: “Nous avons fait une parade et NGUDJOLO nous a dit qu’il partait pour Beni pour se procurer des armes qui nous permettrons [sic] d’attaquer Bogoro.”; Statement of W-280 at DRC-OTP-1007-1089 at 1094, para. 30; Investigator’s note W-280 at DRC-OTP-0150-0144 at 0145, para. 11; Statement of W-157 at DRC-OTP-1006-0054 at 0070, para. 114; Statement of W-250 at DRC-OTP-1013-0002 at 0009, para. 47; Statement of W-280 at DRC-OTP-1007-1089 at 1091, para. 14; Investigator’s note W-157 at DRC-OTP-0150-0144 at 0145, para. 11.

³⁶¹ Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3: “D’après le témoin à Aveba, au fief du FRPI Germain KATANGA avait [...] plusieurs enfants soldats de moins de 15 ans dont certains faisaient partie de la garde de Germain KATANGA.”; *Accord de cessation des hostilités*, 18 March 2003 at DRC-OTP-0043-0201 at 0203, para. 3: “Les parties s’engagent à interrompre tout recrutement et toute utilisation d’enfants soldats au sein de leur forces armées, et reconnaissent qu’une telle pratique est contraire à la loi internationale”.

³⁶² Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 6: “c’est KATANGA qui prenait toutes les décisions, par exemple c’est lui qui organisait le transfert des enfants provenant de chacun des 6 bataillons du FRPI.”; Statement of W- 28 at DRC-OTP-0155-0106 at 0113, para. 38: “les enfants qui venaient volontairement et ceux recrutés par la force au camp d’Aveba étaient formés sur place par le commandant ADOLPHE, qui était le responsable de la formation des nouvelles recrues parce qu’il avait des connaissances militaires (il était un ancien militaire). Il avait été nommé [sic] instructeur par ordre du commandant Germain KATANGA”.

³⁶³ Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 37.

³⁶⁴ Statement of W-157 at DRC-OTP-0164-0534 at 0545, para. 65: “[REDACTED].”; Statement of W-157 at DRC-OTP-1006-0054 at 0064, para. 63.

264. In **Count 11**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(i) of the Statute, with:

[...] intentionally directing of an attack against the civilian population of Bogoro village in the Bahema Sud Collectivité, Irumu Territory, Ituri district, and against individual civilians not taking direct part in hostilities, including Suzanne MABONE, Matia BABONA, W-132, W-249, W-268 and W-287.³⁶⁵

265. The war crime provided for in article 8(2)(b)(i) of the Statute is defined as “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities.” According to the Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator’s awareness of the factual circumstances establishing the existence of such a conflict, this war crime requires the following three elements: (i) “the perpetrator directed an attack”; (ii) “the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities”; and (iii) “the perpetrator intended the civilian population as such or individual civilians not taking part in hostilities to be the object of the attack.”

266. The war crime provided for in article 8(2)(b)(i) of the Statute consists of carrying out an attack against one or more individual civilians³⁶⁶ not taking active part in hostilities³⁶⁷ or against a civilian population³⁶⁸ whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator. In this regard, the Chamber notes that in article 49(1) of the Protocol Additional to the Geneva

³⁶⁵ ICC-01/04-01/07-649-Anx1A, p. 34.

³⁶⁶ According to article 50(1) AP I, “[c]ivilian is any person who does not belong to any of the categories of persons referred to in Article 4 (A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is civilian, that person shall be considered to be a civilian.” For the purpose of this Decision, whenever the Chamber refers to “civilians”, “civilian population”, “protected persons”, “protected civilians”, or “persons protected” under the Geneva Conventions, it considers that this also encompasses the relevant provisions of the AP I.

³⁶⁷ The expressions “direct part in hostilities” and “active part in hostilities” are to be treated as synonymous. See DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 135.

³⁶⁸ According to article 50(2) and (3) AP I, “the civilian population comprises of all persons who are civilians [...] The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.

Conventions of 12 August 1949 (“the AP I”), the term “attack” is defined as an “act of violence against the adversary, whether in offence or defense.”

267. The war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as “conduct of hostilities crimes”).³⁶⁹ Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.³⁷⁰

268. The Chamber notes that the jurisprudence of the ICTY has emphasised that an individual civilian, or a civilian population, falls into the hands of an adverse or hostile party to the conflict when it comes under the control of its members.³⁷¹

269. In the view of the Chamber, after an individual civilian not taking an active part in the hostilities or the civilian population falls into the hands of such an adverse or hostile party to the conflict, an act of violence against them does not fall

³⁶⁹ FRANCK, D., “Article 8(2)(b)(ii) – Attacking Civilians”, in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, p. 140.

³⁷⁰ Or into the hands of the armed forces or organised armed group to which the perpetrator belongs.

³⁷¹ ICTY, *The Prosecutor v. Martinovic*, Case No. IT- 98-34-T, Trial Judgement, 23 March 2003, paras 203: “Article 4 (1) of Geneva Convention IV, which defines protected persons as “those civilians who find themselves” in the hands of a Party to the conflict or Occupying Power of which they are not nationals. It further submits that the expression “in the hands of” should not be interpreted literally, and that persons who find themselves in territory that is under the control of an occupying power are protected under Article 4 (1) of the Geneva Convention IV.”; ICTY, *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgement, 24 March 2000, paras 147-152: “The Prosecution submits that, if it is established that the conflict was international by reason of Croatia’s participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable. See also PICTET, J.S. (Ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, p. 47: “[T]he expression ‘in the hands of’ is used in extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power. [...] In other words, the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person is in the territory which is under the control of the Power in question”.

under article 8(2)(b)(i) of the Statute but under other provisions of the Statute, which are addressed below .

270. The war crime provided for in article 8(2)(b)(i) of the Statute is committed when the attack (or the act of violence) is launched because, unlike article 85(3) AP I, it does not require any material result or a “harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack on a civilian population or individual civilians not taking direct part in hostilities, who have not yet fallen into the hands of the attacking party.”³⁷² Such material results include, for instance, that the attack caused death or serious injury to the body or health of the targeted civilians.³⁷³

271. As regards the subjective elements, in addition to the standard *mens rea* requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack. This offence therefore, first and foremost, encompasses *dolus directus* of the first degree.

272. Hence, once the perpetrators launch the attack with the intent to target individual civilians not taking direct part in the hostilities or the civilian population, the offence is completed. This is the case when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack.

273. The crime is also committed when the perpetrator launches the attack with two distinct specific aims: (i) to target a military objective within the meaning of articles 51 and 52 of AP I; and simultaneously, (ii) to target the civilian population or individual civilians not taking direct part in the hostilities who reside in the vicinity. In such a case, the crime is committed when an attack is launched against a village

³⁷² ICC-01/04-01/07-55, para. 37 ; ICC-01/04-01/07-267, para. 38.

³⁷³ FRANCK, D., “Article 8(2)(b)(ii) – Attacking Civilians”, in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, pp. 141-142; DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 130.

which has significant military value because of its strategic location and when the village contains two distinct targets:

- (i) the defending forces of the adverse or hostile party in control of the village (that is, when only the defeat of these forces would permit the attacking party to seize control of the village); and
- (ii) the civilian population of the village, if its allegiance is with the adverse or hostile party in control of the village thus leading the attacking forces to consider the “destruction” of that civilian population as the best method for securing control of the village once it has been seized.

274. This second type of case must be distinguished from the other situations in which an attack is launched with the specific aim of targeting only a military objective, albeit with the awareness that incidental loss of life or injury to civilians will or may result from such an attack.³⁷⁴

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of attacking civilians, as provided for in article 8(2)(b)(i) of the Statute, was committed during the Bogoro attack on 24 February 2003

275. In the view of the Chamber, and as shown below, there is sufficient evidence to establish substantial grounds to believe that even if the attack launched on 24 February 2003 against the village of Bogoro was intended to target a military objective within the meaning of articles 51 and 52 AP I – the UPC military camp

³⁷⁴ The situation in which an attack is launched solely against a military objective, and in which the attackers are aware that such attack will or may cause incidental loss of life or injury to civilian persons or civilian objects, is labeled a “disproportionate attack”. The Rome Statute includes such a violation of the principle of proportionality in the provision of article 8(2)(b)(iv), which is limited to punishing the very violation of the principle of proportionality. In such a situation, the awareness of the perpetrators of the consequences of the attack is an objective element of the crime. See *Elements of Crimes*, footnote 37. Conversely, the crime described in article 8(2)(b)(i) of the Statute, with which Germain Katanga and Mathieu Ngudjolo Chui are charged, is a crime of mere action, that does not require any factual consequences or any awareness of the perpetrators of the consequences of the attack.

placed in the centre of the Bogoro village – it was also intended to target the civilian population or individual civilians not taking direct part in the hostilities who lived within the village of Bogoro as a way to secure control over the village and to be a reprisal against the Hema population there. It is therefore the view of the Chamber that the evidence tendered by the Prosecution is sufficient to establish substantial grounds to believe that, on 24 February 2003, FNI/FRPI combatants intentionally directed an attack on the civilian population of the village of Bogoro and that the object of the attack was the civilian population as such and those civilians not taking direct part in the hostilities.

276. For the purposes of its findings, the Chamber adopts the objective elements as defined in the above paragraphs, in respect of the concepts of “attack”; “civilians”, and “direct part in the hostilities”, because each is consistent with the definitions established, *inter alia*, by common article 3 of the Geneva Conventions (“the GC”), and articles 49, 50 and 51 of the AP I.³⁷⁵

277. The Chamber observes that a military camp occupied by UPC military personnel was in the centre of the village of Bogoro,³⁷⁶ where, according to the evidence, approximately 150 UPC soldiers were based.³⁷⁷ However, the evidence shows that the attack was not planned, executed, and directed solely against this military target but directed principally against the entire civilian population of the

³⁷⁵ Therefore, the Chamber adopts the concepts of (i) “attack” as any acts of violence against the adversary, whether in offence or defence; (ii) “civilians” as being any persons not taking direct part in the hostilities; (iii) in case of doubt as to whether a person is to be considered a civilian, that person shall be considered as civilian; (iv) civilian population comprises all civilian persons; (v) the presence within the civilian population of individuals who not fall within the definition of civilians does not deprive that population of its civilian character; (vi) these civilians and the civilian population are protected against attacks unless and for such time they take direct part in the hostilities; and (vii) direct part in the hostilities, in accordance with common article 3 GC, means “active participation” in combat and, according to previous findings of this Chamber and stated in the previous section, combat-related activities also.

³⁷⁶ There are also references indicating that small detachments of UPC soldiers could be located in other points of the village, but no sufficient evidence has been brought to substantiate this.

³⁷⁷ Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96: “Germain KATANGA m’avait dit que l’attaque avait été faite pour se venger de massacres que les Hemas avaient fait dans un autre village [...] Germain expliquait qu’ils avaient attaqué le village lorsqu’il [*sic*] ne s’y attendaient pas et que les [*sic*] peu de militaires qu’il y avait de l’UPC avait fui.”; Statement of W-28 at DRC-00105-152, para. 364: “[...] Connaissant la stratégie habituelle des Lendus et Ngitis, il ne fait pas doute que toutes personnes, civiles ou militaires, trouvées dans le village, avaient été tués [*sic*]”].

village.³⁷⁸ In the view of the Chamber, the evidence clearly demonstrates that the killing and/or displacement of the civilian population, together with the destruction of civilian property, was the strategy the perpetrators chose to secure control of the village once it had been seized.

278. The evidence tendered by the Prosecution establishes substantial grounds to believe that because of its strategic position, the village of Bogoro³⁷⁹ had previously been attacked by Lendu militias in 2001 and 2002.³⁸⁰

279. At the time of the first attack in 2001, there was no military camp in the village, and only a few APC soldiers were present.³⁸¹ In the view of the Chamber, this fact is relevant because it corroborates the finding that the attacks on the village of Bogoro were not aimed at military targets but at the wilful killing and/or expulsion of the Hema population, the destruction of the village, and the consequent Lendu/Ngiti assumption of control over the village.

³⁷⁸ Statement of W-166 at DRC-OTP-1007-0002 at 0011-0012, para. 58: “Dans la période entre l’attaque de août [sic] 2002 et celle de février 2003 il y a eu des attaques des combattants Lendus sur Bogoro, mais il s’agissait des affrontements [sic] seulement entre les combattants et les éléments de l’UPC, donc des affrontements [sic] entre les soldats [...] En tout, il y a eu entre trois et quatre affrontements”; Statement of W-233 at DRC-OTP-1007-0061 at 0080, para. 127: L’attaque de 24 février 2003 était dirigée contre tout le monde: les militaires et la population civile. Les attaquants tiraient sur tout le monde et ne faisaient pas de distinction entre les civils et les militaires, ni entre les ethnies.”

³⁷⁹ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0288, para. 64: “Bogoro is located on the Bunia-Kasenyi main road. The presence of the UPC therefore prevented the Lendu communities of Walendu Bindi from using the road to reach Bunia”.

³⁸⁰ Statement of W-159 at DRC-OTP-0164-0472 at 0474, para. 15: “Il y a eu plusieurs attaques sur le village de Bogoro. En tout je m’en souviens de quatre; Statement of W-166 at DRC-OTP-1007-0002 at 0006-0007, para. 24: “ Il y a eu trois grandes attaques à Bogoro. J’étais présent au [sic] deux premières attaques.”; Statement of W-268 at DRC-OTP-1007-0095 at 0097, para. 14.

³⁸¹ Statement of W-159 at DRC-OTP-0164-0472 at 0474, para. 16: “La seconde attaque a eu lieu au cours de l’année 2001. [...] Je ne sais pas pourquoi ils avaient attaqué le village et ne sais pas non plus qui était leur chef lors de cette attaque. A cette époque-là, il n’y avait personne pour défendre le village. Il n’y avait pas d’armée ni de police.”; Statement of W-166 at DRC-OTP-1007-0002 at 0007, para. 27: “La première attaque à Bogoro a eu lieu le 9 janvier 2001, où environ 110 personnes civiles Hemas on été tués [sic]. [...] A l’époque il y avait la Force d’Arme Congolaise, le FAC à Bogoro. Ils venaient d’arriver et n’avaient pas encore construit un camp. [...] Les militaires des FAC [...] étaient à Bogoro avec quelques soldats de l’UPDF de l’Ouganda, mais les militaires ont pris la fuite.”; Statement of W-233 at DRC-OTP-1007-0061 at 0065-0066, para. 26: “Entre 2001 et 2003, il y a eu trois attaques à Bogoro [...] Comme je vous ai déjà indiqué, en janvier 2001, une vingtaine de militaires de l’APC étaient installés sur la route vers Kasenyi.”

280. The Prosecution tendered sufficient evidence to establish substantial grounds to believe that, prior to the attack, combatants from FRPI and FNI militias recited songs with lyrics indicating that they should kill the Hema people, and show mercy towards the Ngiti and Bira.³⁸²

281. The evidence also provides substantial grounds to believe that the intention of the FNI/FRPI combatants was that the civilian population and also the individual civilians not taking direct part in the 24 February 2003 attack would be the first target;³⁸³ that the object of the attack was the entire village and not just the military camp;³⁸⁴ and that the roads to and from the village were blocked by the attackers in order to kill any civilians attempting to flee.³⁸⁵ The evidence also shows that

³⁸² Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 68: “[REDACTED], avant la bataille de Bogoro et lors de notre déplacement [REDACTED], on chantait en Lingala et Swahili des chants injurieux qui faisait [*sic*] référence à l’ennemi Hema. On chantait que si l’on attrapait un Héma, on l’égorgerait et on le tuerait.”; Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 121: “Il y avait d’autres chansons pour maintenir [*sic*] le moral et que l’on chantait [REDACTED]. Il y en avait qui concernait les Hemas, la chanson disait que si l’on trouvait un Hema il fallait le tuer et qu’il n’y avait pas de pardon. Dans nos chansons on disait aussi que si on rencontrait des Ngiti [*sic*] ou des Biras il fallait leur pardonner.”; Also see Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 121.

³⁸³ Statement of W-280 at DRC-OTP-1007-1089 at 1096-1097, paras 44, 48, 52: “NGUDJOLO nous a alors donné l’ordre de prendre le village en commençant par les maisons qui se trouvent à l’extrémité du village [REDACTED]. [...] Ce village est petit. Nous avons commencé directement [REDACTED] et nous sommes montés jusqu’au centre. [...] L’ordre de NGUDJOLO, transmis par KUTE, était le suivant: « Vous prenez vos couteaux et machettes, vous cassez la porte des maisons et vous tuez tous [*sic*] le monde ». C’était un ordre. Je n’avais pas de choix. Nous avons tous fait la même chose. Durant une heure, nous sommes rentrés dans les maisons et nous avons tués les civils [...] Une fois que nous avons [*sic*] terminé avec les maisons, nous nous sommes dirigés vers le camp de soldats UPC.”

³⁸⁴ Statement of W-268 at DRC-OTP-1007-0095 at 0101, para. 49: “Les coups de balles venaient de partout. Nous étions encerclés.”; Statement of W-250 at DRC-OTP-1013-0002 at 0019, paras 106-108; at 0019, para. 110: “ De toute façon, dès que l’on trouvait quelqu’un, on le tuait. On ne faisait pas de différence entre civils ou militaires, hommes, femmes ou enfants.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0360, lines 1129-1130 : “on avait commencé même à tuer même les civils.”; Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 13; “the attackers made no distinction between civilians and military.”; Statement of W-268 at DRC-OTP-1007-0061 at 0102, para. 59; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0296, line 1156: “tous les civils furent tués.”; at 0296, line 1162: “tous ceux qui étaient là, on les avait tous exterminés.”

³⁸⁵ Statement of W-161 at DRC-OTP-0164-0488 at 0495, para. 36: “Lors de cette quatrième attaque, les miliciens ont apparemment encerclés [*sic*] Bogoro et sont entrés dans le village en venant de toutes les directions”; Statement of W-268 at DRC-OTP-1007-0095 at 0101, para. 49; Statement of W-157 at DRC-OTP-0164-0534 at 0542, paras 46-47: “[REDACTED] placé à l’ouest de Bogoro (FNI et FRPI) a barré la route de Bunia, pour que l’aide de l’UPC de Bunia ne puisse pas venir. Ceux de l’UPC qui était [*sic*] à l’entrée de Bogoro ne pouvaient pas s’en sortir non plus. À la fin, c’était l’échec total pour l’UPC, car ils ne pouvaient pas recevoir du renfort et ils étaient complètement encerclés.”; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 41: “Les groupes de YUDA et de GERMAIN avaient pris leurs positions. Le groupe de YUDA se trouvait à l’entrée de Bogoro

unarmed civilians, including women and small children, were attacked³⁸⁶ or burned alive inside their homes.³⁸⁷

282. The evidence presented by the Prosecution is also sufficient to establish substantial grounds to believe that the attack was directed against civilians not taking direct part in the hostilities, including women and small children, who were killed inside their houses with gunshots or machetes.³⁸⁸ The evidence also shows that the attacks on the civilian population lasted throughout the day.³⁸⁹

283. Finally, the Prosecution's evidence is sufficient to establish substantial grounds to believe that the purpose of the attack was to "wipe out" the village of Bogoro³⁹⁰ in order to secure to Lendus and Ngitis control of the route to Bunia³⁹¹

sur le chemin de Geti. Le groupe de GERMAIN se trouvait à l'entrée de Bogoro sur le chemin de Kasenyi. [REDACTED]. La stratégie était de boucher toutes les sorties du village pour empêcher les ennemies [*sic*] de s'échapper."

³⁸⁶ Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48: "Il y a eu des morts du côté de la population civile de Bogoro. Des vieillards, hommes et femmes ont été tués dans leur maison. [*sic*]"; Statement of W-132 at DRC-OTP-1016-0156 at 0158-0159, paras 9-11, 13; Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 48: "nous sommes rentrés dans les maisons et nous avons tués [*sic*] les civils.";

³⁸⁷ Statement of W-161 at DRC-OTP-0164-0488 at 0497, para. 48: "Il y avait cinq personnes, trois enfants et deux mamans. Les combattants les ont placés dans [REDACTED] maison et y ont mis le feu. Du fait de la distance, je ne pouvais pas vraiment distinguer de qui s'agissait [*sic*] [...] Les combattants étaient nombreux et je me souvient [*sic*] qu'ils ont mis le feu à [REDACTED] maison après y avoir enfermé les cinq personnes. Ces deux femmes ainsi que les trois enfants ont donc été brûlés vifs."; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0320, line 761: "Et on avait tués [*sic*] beaucoup de gens. On les avait brûlés dans leur maison."

³⁸⁸ Statement of W-280 at DRC-OTP-1007-1089 at 1096, paras 44, 48, 52; Statement of W-132 at DRC-OTP-1016-0156 at 0158-0159, paras 9-11, 13.

³⁸⁹ Statement of W-159 at DRC-OTP-0164-0472 at 0480, para. 50: "Tout au long de la journée j'ai pu voir que les combattants tuaient toutes les personnes qu'ils trouvaient."; Statement of W-268 at DRC-OTP-1007-0095 at 0101, para. 49: "Le matin, j'entendais de très forts coups de balles de la cachette où je me trouvais. Cela a duré de 06:00 le matin jusqu'à 07:00 le soir. [...] Les coups de balles venaient de partout."

³⁹⁰ Statement of W-157 at DRC-OTP-1006-0054 at 0071-0072, paras 123, 125: "[...][REDACTED]. Il a dit qu'il fallait écraser Bogoro, car on avait déjà essayé de l'écraser deux fois. La troisième fois [*sic*] il fallait réussir."; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37: "[REDACTED], KUTE nous a transmis de nouveau les ordres de NGUDJOLO: « Lorsque vous arriverez à Bogoro, il faudra tout effacer ». Je sais que c'est de NGUDJOLO que cet ordre venait. Le chef de KUTE était NGUDJOLO. Ce dernier donnait les ordres [*sic*] à KUTE et KUTE n'avait pas d'autre choix que de suivre les ordres."; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0243, lines 427-428: "le but était qu'on puisse se mettre ensemble pour attaquer BOGORO. On voulait effacer BOGORO."; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0279, line 571.

³⁹¹ Statement of W-159 at DRC-OTP-0164-0472 at 0476, para. 27: "Le camp de l'UPC était placé à un endroit stratégique, en effet il protégeait la route venant de Bunia et allant vers Kasenyi, d'une part; et Gety, d'autre part."; Statement of W-166 at DRC-OTP-1007-0002 at 0011, para. 55.

which would, among other things, facilitate transit of goods along the Buria-Lake Albert axis.³⁹²

284. In conclusion, the Chamber finds that there are substantial grounds to believe that the war crime of attacking civilians, as defined in article 8(2)(b)(i) of the Statute was committed by FNI/FRPI members during the 24 February 2003 attack against the civilian population of the village of Bogoro.

3. *Wilful killing*

a) **Objective and subjective elements**

285. In **Count 2**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(a)(i) of the Statute, with:

[...] the killings of at least two hundred civilian residents of, or persons present at Bogoro village in the Bahema Sud collectivité, Irumu territory, Ituri district, including Suzanne MABONE and Matia BABONA.³⁹³

286. The war crime provided for in article 8(2)(a)(i) of the Statute is defined as the “wilful killing” of any of the persons protected by the Geneva Conventions. In addition to a nexus with an international armed conflict and the perpetrator’s awareness of the factual circumstances establishing the existence of such a conflict, this war crime requires the following three elements: (i) “the perpetrator killed one or more persons”; (ii) “such person or persons were protected under one or more of the Geneva Conventions of 1949”; and (iii) “the perpetrator was aware of the factual circumstances that established the protected status”.

³⁹² United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 274, para. 16: “Ituri’s natural wealth has driven the conflict in the district. Apart from the region’s farmland and forests, most notably coffee plantations, and valuable cross-border trade, Ituri is the house of the Kilo-Motu gold field, one of the world’s largest. Of added interest are potential large oil reserves in the lake Albert basin. The competition for control of resource –rich centres such as Mongbwalu, Gety and Mabanga (gold fields) and Aru, Mahagi, Tchomia and Kasenyi (wood, fishing, customs revenues) by the combatant forces and their allies – Uganda, Rwanda and the Kinshasa authorities – has been a major factor in the prolongation of the crisis since they provide those who control production and export with very considerable profits.”

³⁹³ ICC-01/04-01/07-649-Anx1A at p. 31.

287. Pursuant to article 8(2)(a)(i) of the Statute, the war crime of wilful killing occurs when it is committed by someone who, by action or omission, causes the death of one or more persons referred to in articles 13, 24, 25 and 26 GC I, articles 13, 36 and 37 GC II, article 4 GC III and articles 4, 13 and 20 GC IV.³⁹⁴

288. Count 2 of the Prosecution's Amended Charging Document charges the suspects with the killing of civilians during and in the aftermath of the joint FNI/FRPI 24 February 2003 attack, including both the residents and non-residents of Bogoro present on the day of the attack. The Prosecution charges do not include the deaths of UPC/FPLC soldiers after they had surrendered to the FNI/FRPI attacking forces.³⁹⁵ Thus, for the purposes of the present case, there is no need to determine who are the persons protected under Geneva Conventions I, II and III .

289. For this reason, and also further to article 4 GC IV, protected persons are those individual civilians³⁹⁶ who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not *nationals*" (emphasis added).

290. The ICTY Appeals Chamber in the *Tadić* case found that "nationality", as provided for in article 4 GC IV, is not the crucial test for determining whether an individual civilian has protected status under GC IV. According to the ICTY Appeals Chamber:

[...] not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggests that allegiance to a Party to the

³⁹⁴ Articles 13, 24-26 GC I, Articles 13, 36-37 GC II, Article 4 GC III, Articles 4, 13, 16, 20 GC IV, Articles 8, 44, 45, 73, 75 and 77 AP I.

³⁹⁵ The Chamber notices, however, that at least one testimony ensures that "Les combattants de l'UPC que l'on trouvait et qui ne pouvaient plus se défendre, ont les tuaient à coups de machette pour ne pas gaspiller nos munitions. Nous n'avons fait aucun combattant de l'UPC prisonnier" at Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48.

³⁹⁶ According to article 4 GC, civilian is any person who does not belong to any of the categories of persons referred to in article 4(A)(1), (2), (3) and (6) of the Third Convention. As seen above, article 50(1) API extends the definition of civilians to those who do not belong to any of the categories referred to in Article 43 AP I. Moreover, according to article 50(1) AP I, "[i]n case of doubt whether a person is civilian, that person shall be considered to be a civilian."

conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.³⁹⁷

291. This Chamber also adopts the approach that the term “nationals” in article 4 GC IV, which was drafted in 1949, reflected, at that time, the perceived importance of nationality in determining the allegiances of individual civilians. Although the nexus between nationality and allegiance remains an important factor in determining protected status for persons involved in international armed conflicts, as the ICTY jurisprudence demonstrates, it is no longer the definitive test.³⁹⁸

292. Consequently, article 8(2)(a)(i) of the Statute applies to those cases in which protected civilians are killed “in the hands of” a party to the conflict. Under the case law of the international tribunals, an individual civilian falls “into the hands of” a party to the conflict when that individual is in the territory under the control of such a party.³⁹⁹

³⁹⁷ ICTY, *The Prosecutor v. Tadić*, Case No. IT-04-1-AR72-A, Appeals Judgement, 15 July 1999, para. 166. See also ICTY, *The Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Trial Judgement, 31 March 2003, paras 204-205: “The Naletilić Defence submits that in order for victims to gain “protected persons” status, it is required that the person be of a different nationality than the perpetrators of the alleged offence. For its part, the Martinović Defence argues that the conflict was political rather than ethnic and that the victims may not be considered as protected persons “since they were of the same nationality as the opposing forces. Article 4 of Geneva Convention IV defines as protected persons “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” According to the Commentary to Geneva Convention IV there are two main types of protected persons: (i) “enemy nationals” and (ii) “the whole population” of occupied territories (excluding nationals of the Occupying Power).” ICTY, *The Prosecutor v. Tadić*, Case No. IT-04-1-AR72, Appeals Judgement, 15 July 1999, paras 164, 165, 168: “the Geneva Conventions intend to protect civilians “who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons”, bearing in mind that “already in 1949, the legal bond of nationality was not regarded as crucial”. In doing so, the Appeals Chamber determined that: “Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. [...] In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.” ICTY, *The Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeals Judgement, 20 February 2001, paras 57, 82: “The Appeals Chamber held that already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. Formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds”.

³⁹⁸ In Elements of Crimes, footnote 33 makes it clear that “[with] respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict [...]”.

³⁹⁹ PICTET, J.S. (Ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, p. 47: “[T]he

293. Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question. Article 8(2)(a)(i) of the Statute thus prohibits the wilful killing of those civilians in such a circumstance.

294. Additionally, article 8(2)(a)(i) of the Statute also applies to the wilful killing of the protected persons by an attacking force, when such killings occur after the overall attack has ended, and defeat or full control of the targeted village has been secured.

295. Article 30 of the Statute sets out the subjective element for crimes falling under the jurisdiction of the Court, including the war crime under article 8(2)(a)(i). Thus, this offence includes the *mens rea* of, first and foremost, *dolus directus* of the first degree.

296. The Chamber also adopts the ICTY conclusion that “the conduct of the accused must be a substantial cause of the death of the victim.”⁴⁰⁰

expression ‘in the hands of’ is used in extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power. [...] In other words, the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person is in the territory which is under the control of the Power in question.” See also ICTY, *The Prosecutor v Martinovic*, Case No. IT-98-34-T, Trial Judgement, 23 March 2003, paras 203, 208, 221: “The Prosecution relies on Article 4(1) of Geneva Convention IV, which defines protected persons as “those civilians who find themselves” in the hands of a Party to the conflict or Occupying Power of which they are not nationals. It further submits that the expression “in the hands of” should not be interpreted literally, and that persons who find themselves in territory that is under the control of an occupying power are protected under Article 4(1) of the Geneva Convention IV.” “Furthermore, the Chamber accepts the argument of the Prosecution that the expression “in the hands of” a party or occupying power, as it appears in Article 4 of Geneva Convention IV, refers to persons finding themselves on the territory controlled by that party or occupying power.” “The Chamber accepts this to mean that the application of the law of occupation as it affects “individuals” as civilians protected under Geneva Convention IV do not require that the occupying power have actual authority. For the purposes of those individuals’ rights, a state of occupation exists upon their falling into “the hands of the occupying power.” Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established.”

⁴⁰⁰ DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, p. 40, footnote 6 citing ICTY, *The Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgement, 16 November 1998, para. 424 and ICTY, *The*

297. Finally, article 8(2)(a)(i) of the Statute also requires that the perpetrator is “aware of the factual circumstances that established that protected status” of the victim. Thus, it is not necessary for the perpetrator to have evaluated and concluded that the victim was in fact a protected person under any of the Geneva Conventions.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of wilful killing, as provided for in article 8(2)(a)(i) of the Statute, was committed during and in the aftermath of the Bogoro attack on 24 February 2003

298. As previously found by the Chamber, the 24 February 2003 attack by FNI/FRPI troops was directed towards, and intended both against a military objective and civilians not taking direct part in the hostilities and the civilian population of the village of Bogoro.

299. The Chamber also found that there is sufficient evidence to establish substantial grounds to believe that the killing of protected civilians – who had already fallen into the hands of the attacking forces – was the intended consequence of the attack.

300. The Chamber considers that the evidence tendered by the Prosecution is sufficient to establish substantial grounds to believe that the 24 February 2003 attack was planned and executed in a manner which would ensure that the civilian population was targeted first.⁴⁰¹ The evidence also shows that unarmed civilians

Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 229.

⁴⁰¹ Statement of W-280 at DRC-OTP-1007-1089 at 1096, paras 44, 48, 52.

were attacked with firearms or machetes⁴⁰² or were burned alive inside their homes.⁴⁰³

301. The evidence is also sufficient to establish substantial grounds to believe that the attacks on the civilian population continued throughout the day⁴⁰⁴ and even after the military camp had been taken over by the FRPI and FNI combatants when the UPC soldiers ran out of ammunition and fled the camp.⁴⁰⁵

302. The evidence is sufficient to establish substantial grounds to believe that the FNI/FRPI attackers, after taking control of the UPC military camp in the centre of Bogoro village, willfully killed civilians – most of them women, children and elderly – who sought refuge in the Bogoro Institute, a school situated within the UPC military camp.⁴⁰⁶

303. The evidence is also sufficient to establish substantial grounds to believe that after having taken control of the UPC camp and Bogoro village, FNI/FRPI combatants continued to kill civilians who were hidden in and around the village⁴⁰⁷

⁴⁰² Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48; Statement of W-132 at DRC-OTP-1016-0156 at 0158-0159, paras 9-13.

⁴⁰³ Statement of W-161 at DRC-OTP-0164-0488 at 0497, paras 43, 48.

⁴⁰⁴ Statement of W-159 at DRC-OTP-0164-0472 at 0480, para. 50; Statement of W-268 at DRC-OTP-1007-0095 at 0101, para. 49.

⁴⁰⁵ Statement of W-159 at DRC-OTP-0164-0472 at 0479-0480, paras 43-46: “[...] c’est ainsi que vers 11 heures du matin j’ai entendu un militaire de l’UPC don’t j’ai reconnu la voix qui criait aux civils que [*sic*] se trouvaient dans le camp, qu’ils n’avaient plus de munitions et que chacun devait maintenant se débrouiller [...] [REDACTED] ont été tués alors qu’ils fuyaient avec tout un groupe de civils [...] Au moment où j’ai assisté à cette scène, je pouvais voir que le camp UPC était déjà occupé par les combattants Lendus.”; see also United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 288, para. 65: “When UPC forces ran out of ammunition, they opened a corridor through which they fled, together with some civilians [...]”

⁴⁰⁶ Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 49: “Il y avait une école avec plusieurs classes dans le camp militaire de l’UPC. J’ai vu beaucoup de corps de bébés, d’enfants et de femmes qui avaient été tués par balles dans cette école.”; Statement of W-161 at DRC-OTP-0164-0488 at 0496-0497, paras 46-47: “Au milieu du camp UPC il y avait une école avec six (06) salles de classe. Beaucoup de civils s’étaient réfugiés dans ces salles de classe. [...] Les combattants exécutaient les gens dans les salles de classe mais je n’ai pas pu voir cela [...] par contre j’entendais clairement les coups de feu et les cris des gens.”; Statement of W-268 at DRC-OTP-1007-0095 at 0104-0105, paras 72-74; See also Statement of W-287 at DRC-OTP-1013-0205 at 0208, paras 19-20; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0319, line 673.

⁴⁰⁷ Statement of W-287 at DRC-OTP-1013-0205 at 0211, para. 37: “Plus tard les attaquants ont mis le feu à la brousse pour faire sortir les gens qui s’y étaient cachés. [...] Les attaquants criaient en swahili : « Sortez de la brousse. Si nous vous trouvons dans la brousse, ça signifie que vous êtes nos

and/or had tried to flee. Indeed, the evidence demonstrates that the FNI/FRPI combatants used captured Hema civilians to lure civilians from their hiding places, by shouting to them that there was no longer any risk to revealing themselves and emerging from hiding.⁴⁰⁸

304. The evidence is sufficient to establish substantial grounds to believe that, during and in the aftermath of the attack on the village of Bogoro, about 200 people were killed.⁴⁰⁹ Drawing on information gathered from remaining family members in Bunia, from NGO's, and from their own investigations after returning to Bogoro in 2005, some survivors of the attack prepared lists with the names of the victims.⁴¹⁰

305. Finally, as previously stated, the war crime of wilful killing provided for in article 8(2)(a)(i) of the Statute also requires that the perpetrator is "aware of the factual circumstances that established that protected status" of the victim. Thus, it is not necessary for the perpetrator to have made the necessary value judgement to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions.

306. Based on the record of evidence tendered by the Prosecution, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that when directing attacks on the civilian population as described in the previous

ennemis'. [...] J'ai entendu qu'une deuxième personne est sortie de la brousse et les attaquants ont dit : 'Il faut le tuer, c'est un vieux.' J'ai entendu des coups de balles, mais je ne pourrais pas dire si c'était sur cette personne qu'on a tiré."; Statement of W-132 at DRC-OTP-1016-0156 at 0161, para. 27; Note d'entretien of W-166 at DRC-OTP-1016-0083 at 0086, para. 32.

⁴⁰⁸ Statement of W-233 at DRC-OTP-1007-0061 at 0073, para. 78: "Ils s'adressaient à la population et non pas aux militaires de l'UPC. Ils criaient en swahili et en Hema. Ils voulaient faire croire à la population qu'ils étaient Hema et que nous pouvions rentrer chez nous."; Statement of W-268 at DRC-OTP-1007-0095 at 0106-0108, paras 71,83, 93, 102: "J'ai été fait prisonnier par les combattants pour toute la nuit. [...] Il ne faisait pas encore complètement jour quand les combattants sont venus me chercher dans la salle de classe. [...] Le chef m'a dit d'aller les appeler. Les combattants lendu ont dit : « Allons-y chercher les autres, on va te relâcher'. [...] Les combattants ont continué à tirer vers les gens qui étaient supposés se cacher dans les roseaux."; Statement of W-132 at DRC-OTP-1016-0156 at 0161, para. 29.

⁴⁰⁹ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 288, para. 65; Statement of W-12 at DRC-00105-085 at 130, para. 245: "Le massacre de Bogoro avait fait quant à lui environ 200 victimes parmi les civils Hema."

⁴¹⁰ Statement of W-233 at DRC-OTP-1007-0061 at 0084, paras 152-153; Statement of W-166 at DRC-OTP-1007-0002 at 0013-0016, paras 66-85; List of W-166 at DRC-OTP-1007-0029-0034.

section and when killing the civilian population, as described in the previous paragraphs, the FNI/FRPI combatants (i) intended to kill civilians not taking direct part in the hostilities, and the civilian population as such; (ii) knew that in the ordinary course of the events, the attack on Bogoro would include: (a) killings targeted at protected persons and unarmed persons – including women, children, and the elderly – most of whom could not have been mistaken for combatants; and (b) civilian victims who belonged to the adverse party to the conflict. The Chamber thus infers such awareness on an objective basis and in accordance with the precedents established by the international criminal tribunals.⁴¹¹

307. In conclusion, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the war crime of willful killing, as defined in article 8(2)(a)(i) of the Statute was committed by FNI/FRPI members during and in the aftermath of the 24 February 2003 attack against the village of Bogoro.

4. Destruction of property

a) Objective and subjective elements

308. In **Count 13**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(xiii) of the Statute, with:

[...] the destruction of Bogoro village and surrounding areas in the Bahema *Sud collectivité*, Irumu territory, Ituri district.⁴¹²

309. The war crime provided for in article 8(2)(b)(xiii) of the Statute is defined as “destroying [...] the enemy’s property unless such destruction [...] be imperatively demanded by the necessities of war.” According to the Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator’s awareness of the factual circumstances establishing the existence of such a conflict, this crime requires the following five elements: (i) “the

⁴¹¹ DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, at pp. 29-32.

⁴¹² ICC-01/04-01/07-649-Anx1A at p. 34.

perpetrator destroyed [...] certain property”; (ii) “such property was property of a hostile party”; (iii) “such property was protected from that destruction [...] under the international law of armed conflict”; (iv) “the perpetrator was aware of the factual circumstances that established the status of the property”; and (v) the destruction [...] was not justified by military necessity.

310. This crime requires, first and foremost, the destruction, by action or omission, of property belonging to an “enemy” or “hostile” party to the conflict. In the view of the Chamber, this means that the property in question – whether moveable or immovable, private or public – must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator.

311. Article 8(2)(b)(xiii) of the Statute applies not only when the attack is specifically directed at a military objective but also when it targets and destroys civilian property. Thus, the provision includes scenarios in which the aim of the attack is to target only civilians or civilian objects and scenarios in which the attack is simultaneously aimed at both military objectives and civilians or civilian objects.

312. The Chamber recalls that the destroyed property must have been “protected from that destruction under the international law of armed conflict.” Military objectives are not covered by this provision, thus excluding the destruction during an attack of “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage”, in accordance with article 52(2) AP I.

313. Likewise, in the view of the Chamber, the provision does not apply to incidental destruction of civilian property during an attack specifically directed at a military objective, as long as the destruction does not violate the proportionality rule provided for in article 51 AP I and in article 8(2)(b)(iv) of the Statute. In this regard,

civilian property constitutes those objects not falling within the definition of “military objective” as provided for in article 52(2) AP I.⁴¹³

314. In the view of the Chamber, the destruction of the civilian properties constitutes a crime under the protection of international law of armed conflict. Article 147 GC IV provides that “extensive destruction and appropriation of property” constitutes a grave breach. Pursuant to the jurisprudence of the ICTY, in order to constitute a grave breach, destruction unjustified by military necessity must be extensive, unlawful, and wanton.⁴¹⁴ The notion of “extensive” is evaluated according to the facts of the case; however, even a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.⁴¹⁵ Furthermore, article 53 GC IV states that, “any destruction [...] of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited [...].” Moreover, international law imposes strict limitations on the measures that a party to the armed conflict may take in relation to the private and public property of an opposing party.⁴¹⁶

315. Article 30 of the Statute governs the subjective element of the war crime of destruction of property under article 8(2)(b)(xiii), requiring the perpetrator’s intent to destroy the property and knowledge that his action or omission will cause the destruction of the protected property. Thus, this offence encompasses, first and foremost, cases of *dolus directus* of the first degree.

⁴¹³ Article 52(1) AP I: “Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.” Article 52(2) AP I: “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Moreover, according to article 52(3) AP I: “[...] in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

⁴¹⁴ ICTY, *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, paras 584-585.

⁴¹⁵ ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, para. 157.

⁴¹⁶ ICTY, *The Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, para. 587.

316. In addition to the standard *mens rea* requirement provided in article 30 of the Statute, article 8(2)(b)(xiii)(4) of the Elements of Crimes also requires the perpetrator's awareness of "the factual circumstances that established the status of the property." Thus, it is not required that the perpetrator make the necessary value judgement in order to conclude that the property is in fact protected under the international law of armed conflict.⁴¹⁷

317. Finally, article 8(2)(b)(xiii) of the Statute and the Elements of Crimes exculpate the perpetrator's destruction of enemy property where such destruction or seizure was justified by military necessity.

318. However, the Chamber notes that as neither Defence team raised this ground as a justification for the conduct charged, there is presently no need to elaborate on its scope beyond noting that it covers, *inter alia*, a situation in which: (i) the property destroyed constituted a military objective before having fallen into the hands of the attacking party; and (ii) having fallen into the hands of the attacking party, its destruction was still necessary for military reasons. However, this ground for justification can only be invoked "if the laws of armed conflict provide for it and only to the extent that these laws provide for it."⁴¹⁸

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of destruction of property was committed during and in the aftermath of the Bogoro attack on 24 February 2003

319. In the view of the Chamber, the evidence is sufficient to establish substantial grounds to believe that during and in the aftermath of the 24 February 2003 attack on

⁴¹⁷ Elements of Crimes, footnote 32 establishes that awareness can be inferred from "factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict".

⁴¹⁸ BODDENS HASSANG, H., "Article 8 (2)(b)(xiii) – Destroying or Seizing the Enemy's Property", in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, p. 171.

the village of Bogoro, FNI/FRPI combatants intentionally destroyed property belonging to the civilian population of Bogoro.

320. The evidence demonstrates that the combatants destroyed a large number of houses of “the enemy”,⁴¹⁹ and many of them were set on fire.⁴²⁰ The evidence further demonstrates that many buildings, including the trade centre in Bogoro, were completely destroyed by FNI/FRPI combatants.⁴²¹ In other cases, for the buildings which remained standing after the attack, roofs, doors, and windows were destroyed.⁴²²

321. In reaching this finding the Chamber takes into account, *inter alia*, the information provided in the statements of Witnesses 268 and 233. In their statements, the witnesses indicated that the main buildings of Bogoro, such as the commercial centre, the school and others, were destroyed.⁴²³ From their hiding place, Witness 268 and 233 saw houses burned.⁴²⁴

322. In the view of the Chamber, the evidence demonstrates that the destruction of property in the village of Bogoro was extensive⁴²⁵ and that most of the destroyed

⁴¹⁹ Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 65: “Les combatants Lendus et Ngitis ont pillé et détruit un grand nombre de maisons. La quasi-totalité des maisons ont été détruites.”; Statement of W-132 at DRC-OTP-1016-0156 at 0158, para. 11: “les combatants sont arrivés à notre maison, ils ont tout pris et tout détruit.”; Statement of W-166 at DRC-OTP-1007-0002 at 0018, para. 101.

⁴²⁰ Statement of W-268 at DRC-OTP-1007-0095 at 0103, paras 61-64; Statement of W-280, DRC-OTP-1007-1089 at 1097, para. 55: “Après cela, on a brûlé les maisons”; Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48; Statement of W-132 at DRC-OTP-1016-0156 at 0161, para. 28; Statement of W-279 at DRC-OTP-1007-1077 at 1082, para. 41; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 60: “Les miliciens ont pillé et détruit les maisons; ils sont même partis avec la toiture des maisons. Ils ont pillé l’école et l’église, [REDACTED]. Ils ont aussi brûlé des maisons où ils avaient bloqué des gens à l’intérieur.”; Statement of W-132 at DRC-OTP-1016-0156 at 0161, para. 28.

⁴²¹ Statement of W-166 at DRC-OTP-1007-0002 at 0017, para. 93; Statement of W-233 at DRC-OTP-1007-0061 at 0064, para. 18: “Lors de l’attaque sur Bogoro en 2003 toutes ces écoles, sauf pour l’Institut de Bogoro, on été détruites.”; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 65.

⁴²² Statement of W-166 at DRC-OTP-1007-0002 at 0018, paras 98-100; Statement of W-268 at DRC-OTP-1007-0095 at 0103, para. 61.

⁴²³ Statement of W-166 at DRC-OTP-1007-0002 at 0018, paras 98-100.

⁴²⁴ Statement of W-268 at DRC-OTP-1007-0095 at 0103, paras 61-63; Statement of W-233 at DRC-OTP-1007-0061 at 0064, paras 88-89.

⁴²⁵ Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 65; Statement of W-132 at DRC-OTP-1016-0156 at 0158, para. 11; at 0161, para. 28; Statement of W-166 at DRC-OTP-1007-0002 at 0018, para. 101; Statement of W-268 at DRC-OTP-1007-0095 at 0103, paras 61-64; Statement of W-280 at,

property belonged not to the military personnel but to the members of the Hema population.⁴²⁶

323. In addition, evidence demonstrates that there are substantial grounds to believe that FNI/FRPI combatants were aware of the status of the property they destroyed during the Bogoro attack on 24 February 2003, given that this property consisted mainly of houses, shops, schools, or was public⁴²⁷ or private property belonging to the civilian population.⁴²⁸ Even though the FNI/FRPI combatants knew that the Institute of Bogoro was located within the UPC military camp, the evidence shows that the combatants, arriving at the village from four different directions, began by destroying and burning houses, before reaching and destroying the centre of Bogoro, where the UPC military camp was located.⁴²⁹

324. The evidence tendered by the Prosecution also shows that the destruction was not justified by military necessity. The Chamber finds substantial grounds to believe

DRC-OTP-1007-1089 at 1097, para. 55; Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48; Statement of W-279 at DRC-OTP-1007-1077 at 1082, para. 41; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 60; Statement of W-166 at DRC-OTP-1007-0002 at 0017, para. 93; at 0018, paras 98-100; Statement of W-233 at DRC-OTP-1007-0061 at 0064, paras 81, 87-89; Statement of W-268 at DRC-OTP-1007-0095 at 0103, para. 61.

⁴²⁶ Statement of W-268 at DRC-OTP-1007-0095 at 0103, para. 62: “je pouvais voir les Lendu qui pillaient et détruisaient la maison qui était près [REDACTED], à une vingtaine de mètres d’où je me trouvais.”; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 65.

⁴²⁷ Statement of W-233 at DRC-OTP-1007-0061 at 0064, para. 18: “Lors de l’attaque sur Bogoro en 2003 toutes ces écoles, sauf pour l’Institut de Bogoro, on été détruites.”

⁴²⁸ Statement of W-159 at DRC-OTP-0164-0472 at 0483, para. 67; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 60: “Les miliciens ont pillé et détruit les maisons; ils sont même partis avec la toiture des maisons. Ils ont pillé l’école et l’église, [REDACTED]. Ils ont aussi brûlé des maisons où ils avaient bloqué des gens à l’intérieur.”; Statement of W-166 at DRC-OTP-1007-0002 at 0018, para. 101; Statement of W-280, DRC-OTP-1007-1089 at 1098, para. 60: “Ngudolo [sic] avait l’habitude de visiter le lieu de l’attaque pour vérifier lui-même le travail. Ngudjolo nous a dit : “Je vous félicite pour votre travail.” Il a aussi dit qu’il aurait fallu ne pas brûler les maisons, ca désormais il n’était plus possible de les utiliser ou d’emporter les toits.”

⁴²⁹ UPC military camp was in the center of Bogoro: Statement of W-233 at DRC-OTP-1007-0061 at 0064, para. 21; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0286, lines 827-834; at 0287, line 865; at 0295, lines 1120-1129; Statement of W-159 at DRC-OTP-0164-0472 at 0475, para. 17; Statement of W-159 at DRC-OTP-0164-0472 at 0476, para. 27; Statement of W-268 at DRC-OTP-1007-0095 at 0098, paras 21-26; Statement of W-157 at DRC-OTP-0164-0534 at 0541, para. 45: “le groupe de l’UPC placé au centre de Bogoro .”; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 0288, para. 64; MONUC, *Special Investigations on Human Rights Situation in Ituri*, June 2003 at DRC-OTP-0152-0286 at 0304 para. 67. The troops split to approach Bogoro from different sides: Statement of W-28 at DRC-OTP-0155-0106 at 0122, para. 85; Statement of W-157 at DRC-OTP-0164-0534 at 0541, para. 42; Statement of W-157 at DRC-OTP-1006-at 0072, para.128.

that the objects destroyed by FNI/FRPI combatants were mainly civilian. In this respect, the Chamber recalls that article 47(2) of the ICRC Draft Protocol in 1970-1971 states that: “objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort.” As mentioned previously, the property destroyed by the combatants was mainly houses, shops, schools and/or were the public or private property belonging to the civilian population, and thus did not constitute military objects by virtue of their location and purpose.

325. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that when directing the attack against the civilian population, the FNI/FRPI combatants (i) intended to destroy civilian properties; (ii) knew that such destruction was not justified by military necessity.

326. In conclusion, the Chamber finds that there are substantial grounds to believe that the war crime of destruction of property, as defined in article 8(2)(b)(xiii) of the Statute was committed by FNI/FRPI members during and in the aftermath of the 24 February 2003 attack on Bogoro village.

5. *Pillaging*

a) Objective and subjective elements

327. In **Count 12**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(xvi) of the Statute, with:

[...] the pillaging of Bogoro village in the Bahema Sud collectivité, Irumu territory, Ituri District.

328. The war crime provided for in article 8(2)(b)(xvi) of the Statute is defined as “pillaging a town or place, even when it is taken by assault”. According to Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator’s awareness of the factual circumstances that

established the existence of such a conflict, the war crime of pillaging requires the following three elements: (i) “the perpetrator appropriated certain property”; (ii) “the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use”; and (iii) “the appropriation was without the consent of the owner”.

329. Like the war crime of destruction of property under article 8(2)(b)(xiii), the war crime of pillaging under article 8(2)(b)(xvi) of the Statute requires that the property subject to the offence belongs to an “enemy” or “hostile” party to the conflict. Therefore, the pillaged property – whether moveable or immovable, private or public – must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator.⁴³⁰

330. Whereas the war crime of destruction of property under article 8(2)(b)(xiii) of the Statute can take place before the destroyed property has fallen into the hands of the party to the conflict to which the perpetrator belongs, the war crime of pillaging occurs when the enemy’s property has come under the control of the perpetrator. Only then is the perpetrator in a position to “appropriate” such property.

331. The intent and knowledge requirement of article 30 of the Statute applies to the war crime of pillaging under article 8(2)(b)(xvi). This offence encompasses, first and foremost, cases of *dolus directus* of the first degree. It may also include *dolus directus* of the second degree.

⁴³⁰ Unlike the war crime of destruction of property, under article 8(2)(b)(xiii), the war crime of pillage described in article 8(2)(b)(xvi) does not require, explicitly, that the property pillaged belongs to an “enemy” or “hostile” party to the conflict. However, part of the doctrine endorses the view that, as any war crime, the crime of pillage is committed against the adverse party to the conflict. See DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, pp. 279-280. Therefore, even if the attackers pillaged property that belonged not only to the Hemas, but also to Biras, Alur, Ngiti, etc., what is at stake is the fact that properties in the attacked village were pillaged, with the intention (i) to destroy the village, (ii) to deprive the owners of their properties, (iii) to displace the persons that lived there and (iv) to appropriate of the villagers belongings for private or personal use.

332. However, this offence additionally requires two elements, or *dolus specialis*. First, the act of physical appropriation must be carried out with the intent to deprive the owner of his property. Second, the act of physical appropriation must also be carried with the intent to utilise the appropriated property for private or personal use.⁴³¹

333. Finally, the Elements of Crimes expressly provide for the exculpation of the perpetrator's unlawful conduct where the perpetrator appropriated property with the owner's consent. As neither Defence team invoked this ground for justification, the Chamber finds that it is not necessary to elaborate further on the scope of this justification for the purposes of the present Decision.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of pillage was committed immediately after the 24 February 2003 attack on the village of Bogoro.

334. The Chamber finds that the evidence brought by the Prosecution is sufficient to establish substantial grounds to believe that, in the aftermath of the 24 February 2003 attack on Bogoro, the FNI/FRPI combatants intentionally pillaged property belonging mainly to the Hema population in the village of Bogoro.⁴³² The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that pillaging was committed by the FNI/FRPI combatants after the village of Bogoro was

⁴³¹ GASSER, H.-P. "Protection of the Civilian Population", in FLECK, D. (Ed.), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford, Oxford University Press, 2000, p. 220; DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, pp. 251, 485-486; BOTHE, M., in FLECK, D. (Ed.), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford, Oxford University Press, 2000, pp. 403-422; HOSANG, H.B., "Article 8(2)(b)(xiii) – Destroying and Seizing the Enemy's Property", in LEE, R.S. (Ed.), *The International Criminal Court. Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, pp. 172-174.

⁴³² Statement of W-279 at DRC-OTP-1007-1077 at 1082, para. 41: "J'ai vu les milices FNI et FRPI piller tout du village. Ils ont même pillé les toits des maisons. J'ai vu des miliciens mettre le feu aux maisons."

effectively controlled by the FNI/FRPI⁴³³ and that pillaging continued for several days after the battle ended.⁴³⁴

335. The evidence tendered by the Prosecution demonstrates that the FNI/FRPI combatants pillaged a large number of houses.⁴³⁵ Some of the common features of the pillaging included the removal of the roofing sheets, the breaking of the doors, and the removal of furniture and tables.⁴³⁶ The evidence also shows that the roofs of shops and businesses in the centre of Bogoro were also removed⁴³⁷ and looted,⁴³⁸ and that even one school and the church were pillaged.⁴³⁹

336. Moreover, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the FNI/FRPI combatants “intended to deprive the owner of the property and to appropriate it for private or personal use.” After a house had been pillaged, eye witnesses described the combatants taking the furniture and other goods along with them for their personal use.⁴⁴⁰ In the view of the Chamber, there is also sufficient evidence demonstrating that many of these

⁴³³ Statement of W-287 at DRC-OTP-1013-0205 at 0208, para. 16; Statement of W-280, DRC-OTP-1007-1089 at 1097, para. 55: “Après l’attaque du camp, on a commencé à piller les biens. Chacun prenait ce qui lui semblait utile”; Statement of W-250 at DRC-OTP-1004-0187 at 0209, para. 131: “En règle générale, il ne fallait pas commettre du pillage lors des attaques. Cela arrivait cependant après les combats.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0359, lines 1102-1103: “Terminer d’abord avec la guerre et après si vous voulez piller, vous pouvez piller.”

⁴³⁴ Statement of W-132 at DRC-OTP-1016-0156 at 0161, para. 28.

⁴³⁵ Statement of W-159 at DRC-OTP-0164-0472 at 0483, para. 68; Statement of W-287 at DRC-OTP-1013-0205 at 0211, para. 35: “les attaquants avaient commencé d’aller de maison en maison pour chercher les gens et piller”; Statement of W-132 at DRC-OTP-1016-0156 at 0159, para. 13: “[...]m’a aussi dit qu’elle a vue des femmes qui sont venue piller et détruire les maisons.”

⁴³⁶ Statement of W-268 at DRC-OTP-1007-0095 at 0103, para. 61: “j’entendais que les Lendu [*sic*] enlevaient les tôles sur les toits des maisons, et ils cassaient les portes des maisons. Ces bruits ont duré presque jusqu’au soir.”

⁴³⁷ Statement of W-268 at DRC-OTP-1007-0095 at 0108, para. 98.

⁴³⁸ Statement of W-287 at DRC-OTP-1013-0205 at 0211, paras 34-35.

⁴³⁹ Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 60; Statement of W-233 at DRC-OTP-1007-0061 at 0064, para. 18.

⁴⁴⁰ Statement of W-268 at DRC-OTP-1007-0095 at 0103, para. 61: “Les femmes se battaient les unes contre les autres pour dire qui prenait les choses”; Statement of W-233 at DRC-OTP-1007-0061 at 0072, para. 73: “Parmi ce groupe, il y avait aussi des femmes et des enfants, que j’ai vu plus tard dans la journée emporter les biens pillés.”; Statement of W-287 at DRC-OTP-1013-0205 at 0208, para. 16: “Lorsque j’étais cahée dans la forêt, j’ai vu que les femmes lendu [*sic*] et ngitis portaient des biens qu’ils avaient pillés dans les maisons, comme par exemple des valises contenant des habits ou des casseroles.”; Statement of W-280 at DRC-OTP-1007-1089 at 1097, para. 55: “Chacun prenait ce qui lui semblait utile.”

goods were taken from Bogoro to Zumbe by the FNI/FRPI combatants.⁴⁴¹ Vehicles were also stolen for the purpose of transporting the pillaged goods.⁴⁴² In some cases, witnesses described the pillaged goods being resold by individual Lendus.⁴⁴³

337. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the pillaging was committed without the consent of civilian owners of the pillaged property. For example, the evidence shows that some of the Hema civilians whose goods were taken were either hiding in the forest to escape from the “enemy” while their homes were being pillaged or⁴⁴⁴ were forced to transport pillaged goods for the combatants.⁴⁴⁵

338. In conclusion, the Chamber finds that there are substantial grounds to believe that the war crime of pillaging, as defined in article 8(2)(b)(xvi) of the Statute was committed by FNI/FRPI members in the aftermath of the 24 February 2003 attack on the village of Bogoro.

6. *Sexual slavery and rape*

a) Objective and subjective elements

339. In **Count 9**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(xxii) of the Statute, with:

[...] the rape of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu territory, including W-132 and W-249.⁴⁴⁶

340. In **Count 7**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(xxii) of the Statute, with:

⁴⁴¹ Statement of W-287 at DRC-OTP-1013-0205 at 0211, para. 34: “Les attaquants discutaient s’il fallait me tuer tout de suite ou s’il fallait me faire transporter des biens pillés chez eux vers Zumbe.”

⁴⁴² Statement of W-233 at DRC-OTP-1007-0061 at 0077, para. 110.

⁴⁴³ Statement of W-233 at DRC-OTP-1007-0061 at 0085, para. 161: “les Lendu [*sic*] avaient détruit les restes de bâtiments et ils revendaient les matériaux.”

⁴⁴⁴ Statement of W-268 at DRC-OTP-1007-0095 at 0103, paras 61-64; Statement of W-233 at DRC-OTP-1007-0061 at 0064, para. 16; Statement of W-132 at DRC-OTP-1016-0156 at 0159, para. 13.

⁴⁴⁵ Statement of W-233 at DRC-OTP-1007-0061 at 0073, para. 79; Statement of W-287 at DRC-OTP-1013-0205 at 0210, para. 27: “C’était l’habitude des attaquants de prendre des femmes et les amener jusque chez eux. [...] ils leur faisaient transporter des choses jusque chez eux”.

⁴⁴⁶ ICC-01/04-01/07-649-AnxIA at p. 33.

[...] the sexual enslavement of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu district, including W-132 and W-249.⁴⁴⁷

341. These two offences are enumerated in article 8(2)(b)(xxii) of the Statute as serious violations of the laws and customs applicable in international armed conflict. In addition to establishing a nexus between the crime and an international armed conflict and the perpetrator's awareness of the factual circumstances that established the existence of such conflict, the Elements of Crimes further specify distinct elements for sexual enslavement and rape.

342. The war crime of rape, under article 8(2)(b)(xxii)-1 of the Elements of Crimes, requires that: (i) the perpetrator must invade the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with an object or any other part of the body; and (ii) the invasion must be committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

343. For the war crime of sexual slavery under article 8(2)(b)(xxii)-2 of the Elements of Crimes, the perpetrator must: (i) exercise any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and (ii) cause such person or persons to engage in one or more acts of sexual nature. The instances cited under the first element above do not constitute an exhaustive list.⁴⁴⁸

344. Footnote 53 to the Elements of Crimes also states that "[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced

⁴⁴⁷ ICC-01/04-01/07-649-Anx1A at p. 33.

⁴⁴⁸ DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 328.

labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking of persons, in particular women and children.”

345. The war crimes of sexual enslavement and rape are counts in the Amended Charging Document that, along with the crime of pillaging, refer to crimes which allegedly occurred following the FNI/FRPI attack on the village of Bogoro.⁴⁴⁹ In this regard, the Prosecution alleged that women in Bogoro:

[...] were raped and forcibly taken to military camps. Once there, they were sometimes given as a “wife” to their captors or kept in the camp’s prison, which was a hole dug in the ground. The women detained in these prisons were repeatedly raped by soldiers and commanders alike and also by soldiers who were punished and sent to prison.

346. Article 30 of the Statute requires intent and knowledge for the subjective element of the war crimes of rape and sexual slavery under article 8(2)(b)(xxii). This subjective element applies to: (i) the act of invasion of the body of a person resulting in penetration, by force, or by threat of force or coercion; and (ii) the exercise of any or all the powers attaching to the right of ownership over one or more persons, imposing on such person(s) her/his deprivation of liberty, and causing such person(s) to engage in one or more acts of sexual nature. The subjective elements of both crimes include, first and foremost, *dolus directus* of the first degree. They also may include *dolus directus* of the second degree.

b) Whether there is sufficient evidence to establish substantial grounds to believe that war crimes of sexual slavery and rape were committed following the attack to the village of Bogoro on 24 February 2003

⁴⁴⁹ The headings of counts 7 and 9 expressly refer to the fact that sexual slavery and rape took place «following the attack on Bogoro ». See, ICC-01/04-01/07-649-Anx1A at pp. 32-33.

347. In the view of the Chamber, the evidence is sufficient to establish substantial grounds to believe that, following the 24 February 2003 attack on the village of Bogoro, FNI/FRPI combatants committed rape and sexual enslavement of civilian women.⁴⁵⁰

348. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack,⁴⁵¹ imprisoned,⁴⁵² and forced into becoming the 'wives' of FNI/FRPI combatants, required to cook for and obey the orders of FNI or FPRI combatants.⁴⁵³

349. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that these civilian women were forced to engage in acts of a sexual nature.⁴⁵⁴

⁴⁵⁰ Statement of W-132 at DRC-OTP-1016-0156 at 0162-0164, paras 31-41; 0172-0173, paras 97-107 : "il est revenu et il m'a fait violence. [...] Il m'a mis ses ongles dans les jambes et il m'a griffée. [...] Il a enlevé ses pantalons et il m'a fait violence. Des parties de son corps touchaient mon corps. [...] c'est-à-dire le pénis, qui a pénétré mon corps. [...] la partie de mon corps qu'il a pénétré, c'est-à-dire le vagin. Il m'a pénétrée là où sortent mes règles. [...] Il m'a fait violence deux fois ce soir là [...]. Aussi la deuxième fois il a versé dans moi. [...] j'ai remarqué que j'étais blessée et que je saignais aux cuisses et aux bras, car il m'avait griffée." ; at 0179-0181, paras 138-148 ; at 0179-0181, paras 161-173 : "Ces quatre combattants ont couché avec moi et l'autre femme prisonnière at 0185-0186, paras 181-186 : "Je ne peux pas dire combien de fois les combattants m'ont pris par la force. [...] Ils me prenaient et couchaient avec moi" ; Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 17 : "The attackers took my clothes, leaving me in my slip and slippers. Three of the attackers, who were wearing all-green military clothes, took me aside. One of them violated me. This happened right there, where I came out from the bush" ; at 0119, para. 28: "[REDACTED]. He was the one who abused me regularly" ; Statement of W-249 at DRC-OTP-1015-0833 at 0837, para. 29: "The soldiers who came to the camp also abused me, when they came and left for work [...] They would force me to have sexual relations with them." ; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0225, para. 3: "[REDACTED], les combattants ngiti disaient que le témoin 0271 était leur butin et qu'ils pouvaient l'exterminer. Ils disaient qu'elle était une "mateka" (c'est-à-dire un prisonnier)."; para. 4: "le commandant [*sic*] supérieur du commandant qui l'a violée a été interpellé pour savoir s'il pouvait autoriser une chose pareille. Ce commandant supérieur a répondu que le témoin 0271 n'était qu'un simple butin."

⁴⁵¹ Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 17; at 0119, paras 28-29; Statement of W-132 at DRC-OTP-1016-0156 at 0183, paras 160-164.

⁴⁵² Statement of W-249 at DRC-OTP-1004-0115 at 0119, para. 27; Statement of W-132 at DRC-OTP-1016-0156 at 0163, para. 36; at 0165, para. 47.

⁴⁵³ Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 27, 30; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 61 : "Lors de la quatrième attaque sur Bogoro, les combattants ont fait des prisonniers et les ont utilisés comme porteurs pour aller à Gety et Zumbe. Nous avons appris qu'ils les ont ensuite éliminés; certains ont réussi à s'enfuir. La plupart des prisonniers étaient des femmes et des jeunes filles et certaines ont été gardées par les miliciens pour en faire leurs épouses" .

⁴⁵⁴ Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 28-29; Statement of W-132 at DRC-OTP-1016-0156 at 0183, paras 160-164; at 0185, paras 178, 180.

350. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the civilian women were raped in the aftermath of the attack on the village of Bogoro⁴⁵⁵ and/or during their period of enslavement.⁴⁵⁶

351. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that these rapes resulted in the invasion of the body of these civilian women by the penetration of the perpetrator's sexual organ⁴⁵⁷ or other body parts.⁴⁵⁸

352. The evidence admitted for the purposes of the confirmation hearing also gives substantial grounds to believe that these invasions were committed by force,⁴⁵⁹ threat or fear of violence or death,⁴⁶⁰ and/or detention.⁴⁶¹

353. In reaching this finding, the Chamber takes into account, *inter alia*, the following evidence:

- a. Witness 249 is a Hema civilian woman [REDACTED].⁴⁶² She was abducted, undressed, and raped by an Ngiti combatant at the village of Bogoro.⁴⁶³ Following death threats, she became the 'wife' of an Ngiti combatant,⁴⁶⁴ and was repeatedly raped.⁴⁶⁵ She had a child as a result of these rapes during her captivity.⁴⁶⁶

⁴⁵⁵ Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 17; Statement of W-132 at DRC-OTP-1016-0156 at 0179-0180, paras 141-143.

⁴⁵⁶ Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 28-29; Statement of W-132 at DRC-OTP-1016-0156 at 0183, paras 160-164.

⁴⁵⁷ Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 28-29; Statement of W-132 at DRC-OTP-1016-0156 at 0179-0180, para. 141.

⁴⁵⁸ Statement of W-132 at DRC-OTP-1016-0156 at 0179-0184, para. 172.

⁴⁵⁹ Statement of W-249 at DRC-OTP-1004-0115 at 0119, para. 29; Statement of W-132 at DRC-OTP-1016-0156 at 0183, para. 162; Statement of W-132 at DRC-OTP-1016-0156 at 0183, paras 160-164; Statement of W-132 at DRC-OTP-1016-0156 at 0185, para. 179.

⁴⁶⁰ Statement of W-249 at DRC-OTP-1004-0115 at 0118, paras 19-21.

⁴⁶¹ Statement of W-132 at DRC-OTP-1016-0156 at 0183, paras 160-164.

⁴⁶² Statement of W-249 at DRC-OTP-1004-0115 at 0116, para. 8.

⁴⁶³ Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 17.

⁴⁶⁴ Statement of W-249 at DRC-OTP-1004-0115 at 0118, paras 19, 23.

⁴⁶⁵ Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 28-29.

⁴⁶⁶ Statement of W-249 at DRC-OTP-1004-0115 at 0119, paras 35, 38.

- b. Witness 132 is a Hema civilian woman [REDACTED].⁴⁶⁷ She fled the village of Bogoro during the attack and was still in hiding when she was abducted by the combatants.⁴⁶⁸ She was repeatedly raped at the site of her abduction⁴⁶⁹ and while in captivity.⁴⁷⁰ She had a child as a result of these rapes during her captivity.⁴⁷¹

354. In conclusion, the Chamber finds that there are substantial grounds to believe that the war crimes of rape and sexual slavery, as defined in article 8(2)(b)(xxii) of the Statute, were committed by FNI/FRPI members in the aftermath of the 24 February 2003 attack on the village of Bogoro.

7. *Inhuman treatment*

a) **Objective and subjective elements**

355. In **Count 4**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(a)(ii) of the Statute, with:

[...] the cruel treatment of civilians residents of, or persons present at Bogoro village in the Bahema Sud collectivité, Irumu territory, Ituri district, including W-268, by detaining them, menacing them with weapons, and imprisoning them in a room filled with corpses of men, women, and children.⁴⁷²

356. The war crime provided for in article 8(2)(a)(ii)-2 of the Elements of Crimes is defined as the infliction of “inhuman treatment” upon any persons protected under the 1949 Geneva Conventions. According to the Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator’s awareness of the factual circumstances that established the existence of such a conflict, this war crime requires the following three elements: (i) “the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons”; (ii) “such person or persons were protected under one or more of the

⁴⁶⁷ Statement of W-132 at DRC-OTP-1016-0156 at 0156-0157, para. 7.

⁴⁶⁸ Statement of W-132 at DRC-OTP-1016-0156 at 0162, paras 31-32; at 0179, para. 139.

⁴⁶⁹ Statement of W-132 at DRC-OTP-1016-0156 at 0179-0180, paras 141-143.

⁴⁷⁰ Statement of W-132 at DRC-OTP-1016-0156 at 0183, paras 160-164.

⁴⁷¹ Statement of W-132 at DRC-OTP-1016-0156 at 0174, para. 108.

⁴⁷² ICC-01/04-01/07-649-Anx1A at p. 31.

Geneva Conventions of 1949”; and (iii) “the perpetrator was aware of the factual circumstances that established the protected status”.

357. Article 8(2)(a)(ii)-2 of the Elements of Crimes establishes as a war crime a conduct which is committed by one who causes - by action or omission - severe physical or mental pain or suffering of one or more persons who are accorded protected status under articles 13, 24, 25 and 26 GC I, articles 13, 36 and 37 GC II, article 4 GC III and articles 4, 13 and 20 GC IV. Nevertheless, in the Prosecution’s Amended Charging Document, the count of inhuman treatment applies only to actions inflicted on civilians, including both residents of Bogoro and those who were merely present during the joint FNI/FRPI 24 February 2003 attack. Thus, as previously stated in the present Decision, pursuant to article 4 GC IV protected persons include individual civilians⁴⁷³ who find themselves “in the hands of a Party to the Conflict or Occupying Power of which they are not *nationals*”⁴⁷⁴ (emphasis added).

358. Article 8(2)(a)(ii) of the Statute therefore applies to those situations in which protected civilians are inhumanely treated “in the hands of” a party to the conflict,⁴⁷⁵ and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured. In addition, this provision prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village.

359. Article 30 of the Statute sets out the subjective element for crimes within the jurisdiction of the Court, including the war crimes provided for in article 8(2)(a)(ii) of the Statute. Thus, this offence includes, first and foremost, cases of *dolus directus* of

⁴⁷³ According to article 4GC, civilian is any person who does not belong to any of the categories of persons referred to in article 4(A)(1), (2), (3) and (6) of the Third Convention. As seen above, article 50(1) API extends the definition of civilians to those who do not belong to any of the categories referred to in Article 43 AP I. Moreover, according to article 51(1) AP I, “[i]n case of doubt whether a person is civilian, that person shall be considered to be a civilian.”

⁴⁷⁴ See previous footnote on the concept of “nationality”.

⁴⁷⁵ See previous footnote on the concept of “in the hands of”.

the first degree. In the view of the Chamber, this offence also encompasses *dolus directus* of the second degree.

360. Finally, article 8(2)(a)(ii)-2 of the Elements of Crimes also requires that the perpetrator is “aware of the factual circumstances that established that protected status” of the victim. In accordance with footnote 33 of the Elements of Crimes, it is not necessary for the perpetrator to have evaluated and concluded that the victim was a legally a protected person under any of the four Geneva Conventions, but rather that the perpetrator knows that “the victim belonged to an adverse party to the conflict”.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of inhuman treatment was committed during and in the aftermath of the Bogoro attack on 24 February 2003

361. In the view of the Chamber, there is sufficient evidence to establish substantial grounds to believe that, during and in the aftermath of the 24 February 2003 attack on Bogoro village, FNI/FRPI combatants inhumanely treated protected persons of Bogoro.

362. The evidence establishes that protected civilians such as Witness 268, were inhumanely treated “in the hands of” FNI/FRPI combatants. According to the evidence tendered, Witness 268 was detained and imprisoned⁴⁷⁶ by FNI/FRPI combatants in a room in the Bogoro Institute which was filled with corpses of men,

⁴⁷⁶ Statement of W-268 at DRC-OTP-1007-0095 at 0104, paras 72-74: “J’ai été fait prisonnier par les combattants pour toute la nuit. J’ai été détenu dans une des salles de classe de l’Institut de Bogoro.[...] Quand l’attaque avait commencé, une partie de la population civile de Bogoro s’était réfugiée dans l’institut. Donc, quand les combattants lundu ont pris le camp, certains civils hema ont été faits prisonniers. Les combattants lundu m’ont placé dans la première salle de classe à droite en arrivant par le chemin. [...] J’étais avec huit autres prisonniers, et au milieu d’environ quarante cadavres dans la salle. [...] La plupart des cadavres étaient ceux d’enfants, de femmes et de vieillards, mais il y avait aussi des hommes. Ils étaient tous en tenues civiles. [...] J’ai vu des corps de gens qui avaient été tués par des coups de machettes, d’autres par des coups de balles”.

women, and children.⁴⁷⁷ The witness and other detained civilians remained in captivity throughout the night and were later used by FNI/FRPI combatants to lure other civilians⁴⁷⁸ from their hiding places in order for those combatants to kill them.

363. In the view of the Chamber, there is also sufficient evidence to establish substantial grounds to believe that severe physical and mental pain and suffering as a result of their imprisonment with their hands tied for many hours in a classroom filled with dead bodies was inflicted on these civilians, including Witness 268.⁴⁷⁹

364. In conclusion, the Chamber is of the view that there is sufficient evidence to establish substantial grounds to believe that the war crime of inhuman treatment, as defined in article 8(2)(a)(ii) of the Statute, was committed by FNI/FRPI members during and in the aftermath of the 24 February 2003 attack on the village of Bogoro.

8. *Outrages upon personal dignity*

a) **Objective and subjective elements**

365. In **Count 10**, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 8(2)(b)(xxi) of the Statute, with:

[...] outrages upon personal dignity of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu District, including W-287.⁴⁸⁰

366. According to the Prosecution:

⁴⁷⁷ Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0319-0321 line 673: “Parce que tous les civils qui étaient à l’école, tous étaient tués.”; Transcript of statement of W-258 at DRC-OTP-0173-0755 at 0771, lines 550-558; MONUC, *Special Investigations on Human Rights Situation in Ituri*, June 2003 at DRC-OTP-0152-0286 at 0288, para. 7; Statement of W-268 at DRC-OTP-1007-0095 at 0104-0106, paras 73, 77-82.

⁴⁷⁸ Statement of W-268 at DRC-OTP-1007-0095 at 0108-0109, paras 100-105: “Rendus à la forêt près d’où je m’étais caché la journée précédente, les combattants m’ont demandé d’appeler les autres qui étaient cachés.”

⁴⁷⁹ Statement of W-268 at DRC-OTP-1007-0095 at 0104, para. 73: “J’étais toujours ligoté. [REDACTED]”; at 0105, para. 78: “Je n’ai pas eu vraiment de conversations avec les autres prisonniers: on avait tellement peur. On ne connaissait pas notre sort: on attendait notre mort. Les combattants nous entouraient. Ils étaient [*sic*] juste là, dehors à la porte de l’entrée”

⁴⁸⁰ ICC-01/04-01/07-649-Anx1A at p. 34.

Women, who were captured at Bogoro and spared because they hid their ethnicity, were raped, sexually enslaved or humiliated. Threatened with death by the combatants, one woman was stripped and forced to parade half naked in front of them.”⁴⁸¹

367. Article 8(2)(b)(xxi) of the Statute provides for the war crime of “committing outrages upon personal dignity, in particular humiliating and degrading treatment.” According to the Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator’s awareness of the factual circumstances that established the existence of such a conflict, this war crime requires the following two elements: (i) “the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons”; and (ii) “the severity of the humiliation, degradation or other violation was of such a degree as to be generally recognized as an outrage upon personal dignity”.

368. This war crime requires that the perpetrator, by action or omission, caused the humiliation, degradation, or violation of the personal dignity of individuals: (i) who are aligned or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator; and (ii) who are in the hands of the party to the conflict to which the perpetrator belongs.

369. The types of actions or omissions which could constitute a crime under article 8(2)(b)(xxi) were left undefined. As a result, the core element of this war crime is the humiliation, degradation, or violation of the person’s dignity.⁴⁸² In addition, the acts of humiliation, degradation or violation to the person’s dignity must be committed with objectively sufficient gravity so as to be “generally recognized as an outrage

⁴⁸¹ ICC-01/04-01/07-649-Anx1A, para. 89.

⁴⁸² See DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, p. 316; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Martinus Nijhoff Publishers, 1987, para. 3047; ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Trial Judgement, 25 June 1999, para. 56; ICTY, *The Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgement, 10 December 1998, para.183, the ICTY pointed out that “the essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.”

upon personal dignity.”⁴⁸³ Nevertheless, the jurisprudence of the ICTY provides that “so long as the serious humiliation or degradation is real and serious,” there is no requirement that such suffering be lasting,⁴⁸⁴ or that it is “necessary for the act to directly harm the physical or mental well-being of the victim.”⁴⁸⁵

370. In the view of the Chamber, for the purposes of the present Decision, the findings of the Human Rights Committee that “hanging naked from handcuffs or being forced to maintain a certain position for long periods of time” constitute a specific form of humiliating treatment of female prisoners,⁴⁸⁶ are particularly relevant.

371. The Chamber further notes the jurisprudence of the ICTY and ICTR which has indicated that the following acts constitute outrages upon personal dignity: compelling victims to dance naked on a table,⁴⁸⁷ using detainees as human shields or trench diggers; forcing detainees to relieve bodily functions in their clothing; imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees; forced incest, burying corpses in latrine pits; and leaving infants without care after killing their guardians.⁴⁸⁸

372. Article 30 of the Statute provides the subjective element of the war crime of article 8(2)(b)(xxi), requiring that the perpetrator has intent and knowledge about the grave acts of humiliation, degradation, or violation of the victim’s personal dignity.

⁴⁸³ See DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 319; ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23-1, Trial Judgment, 22 February 2001, paras 501-507.

⁴⁸⁴ ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23-1, Trial Judgment, 22 February 2001, para. 501.

⁴⁸⁵ ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Trial Judgement, 25 June 1999, para. 56.

⁴⁸⁶ DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 323, footnote 33.

⁴⁸⁷ ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23-1, Trial Judgment, 22 February 2001, paras 766-774.

⁴⁸⁸ ICTR, *The Prosecutor v. Bagosora*, Case No. ICTR-94-1-T, Trial Chamber, *Decision on Motions for Judgement of Acquittal*, 2 February 2005, para. 40; ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Trial Judgement, 25 June 1999, para. 229; ICTY, *The Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Judgement, 2 November 2001, para. 173; ICTY, *The Prosecutor v. Kunarac*, IT-96-23&23/1, Trial Judgement, 22 February 2001, para. 157.

This subjective element includes, first and foremost, *dolus directus* of the first degree and *dolus directus* of the second degree.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of outrages upon personal dignity was committed during and in the aftermath of the 24 February 2003 attack on the village of Bogoro

373. In the view of the Chamber, the evidence tendered by the Prosecution is sufficient to establish substantial grounds to believe that, during and in the aftermath of the 24 February 2003 attack on the village of Bogoro, FNI/FRPI combatants committed outrages upon the personal dignity of at least one civilian woman, Witness 287.

374. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Witness 287: (i) is a civilian Hema woman [REDACTED] on the day of the attack;⁴⁸⁹ and that (ii) she fell into the hands of the FNI/FRPI combatants during the attack.⁴⁹⁰

375. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that while she was in the hands of the FNI/FRPI combatants, Witness 287: (i) was undressed so that she wore only a blouse and underwear;⁴⁹¹ (ii) was then asked to show the FNI/FRPI combatants the UPC weapons and ammunitions depot;⁴⁹² and (iii) while walking through the centre of Bogoro, a combatant cut off her underwear with his knife, thus leaving her wearing only her blouse until she eventually escaped.⁴⁹³

⁴⁸⁹ Statement of W-287 at DRC-OTP-1013-0205 at 0205-0206, para. 8.

⁴⁹⁰ Statement of W-287 at DRC-OTP-1013-0205 at 0209, paras 23-24.

⁴⁹¹ Statement of W-287 at DRC-OTP-1013-0205 at 0209-0210, para. 26.

⁴⁹² Statement of W-287 at DRC-OTP-1013-0205 at 0209-0210, para. 26.

⁴⁹³ Statement of W-287 at DRC-OTP-1013-0205 at 0209-0210, para. 26; at 0210-0211, paras 33-37.

376. The Chamber also finds that, taking into account the circumstances under which the crime was committed, this conduct was serious enough to be generally recognised as an outrage upon personal dignity.

377. In conclusion, the Chamber finds that there are substantial grounds to believe that the war crime of outrage upon personal dignity, as defined in article 8(2)(b)(xxi) of the Statute, was committed by FNI/FRPI members during and in the aftermath of the 24 February 2003 attack on the village of Bogoro.

C. Existence of a nexus between the armed conflict and the alleged crimes

378. The Prosecution highlighted that all war crimes alleged in its Amended Charging Document, “occurred in the context of and were associated with an armed conflict, irrespective of its characterization.”⁴⁹⁴

379. In order to constitute war crimes, the crimes allegedly committed in, or in connection with, the joint FNI/FRPI 24 February 2003 Bogoro attack, must have occurred in the context of, or in association with, the established armed conflict of an international character.⁴⁹⁵

380. The Chamber has defined that a crime has taken place in the context of, or in association with an armed conflict where “the alleged crimes were closely related to the hostilities.”⁴⁹⁶ This means that the armed conflict “must play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in

⁴⁹⁴ ICC-01/04-01/07-649-Anx1A, para. 37.

⁴⁹⁵ CASSESE, A., *International Criminal Law*, 2nd ed., Oxford, Oxford University Press, 2008, p. 83: “[S]pecial attention should be paid to crimes committed by civilians against other civilians. They may constitute war crimes, provided there is a link or connection between the offence and the armed conflict. In the absence of such a link, the breach simply constitutes an ‘ordinary’ criminal offence under the law applicable in the relevant territory”.

⁴⁹⁶ ICC-01/04-01/06-803-tEn, para. 288; Also see DÖRMANN, K., LA HAYE, E. & VON HEBEL, H., “The Context of War Crimes” in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, p.120: “[T]he material element uses the expression ‘in the context of and associated with’. These concepts are borrowed from the case law of the ICTY. In the case law, however, both expressions are normally used alternatively, not cumulatively. There is, however, no consistent pattern in the use of either of these concepts.”

which the conduct was ultimately committed.”⁴⁹⁷ It is not necessary, however, for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle.⁴⁹⁸

381. As neither the Statute nor the Elements of Crimes define the phrases “in the context of” and/or “was associated with”, the Chamber applies the case law of the international tribunals, according to which:

[w]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁴⁹⁹

382. In relation to the nexus between a conduct and the armed conflict, the Chamber endorses the ICTY finding that:

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.⁵⁰⁰

383. Therefore, criminal acts or offences unrelated to the armed conflict are not considered to be war crimes.

384. In conclusion, and on the basis of the evidence admitted for the purposes of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that the offences committed during and in the aftermath of the joint FNI/FRPI 24 February 2003 attack on the village of Bogoro took place in the context of and were associated with the protracted armed conflict in the Ituri District.

⁴⁹⁷ ICC-01/04-01/06-803-tEn, para. 287.

⁴⁹⁸ ICC-01/04-01/06-803-tEn, para. 287.

⁴⁹⁹ ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 2005, paras 68, 70.

⁵⁰⁰ ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, Appeals Judgement, 12 June 2002, para. 59.

D. Perpetrators' awareness of the factual circumstances that establish the existence of such armed conflict

385. Based on the evidence referred to in the previous sections, the Chamber finds that there are substantial grounds to believe that, because of its strategic location in terms of geography, economy and military advantages, the village of Bogoro was the scene of attacks on the civilian population, killings, inhuman treatment, rape and sexual slavery, outrages upon personal dignity, pillaging and destruction of property.

386. Furthermore, the Chamber finds that there are substantial grounds to believe that child soldiers under the age of fifteen were used by Germain Katanga and Mathieu Ngudjolo Chui as bodyguards and soldiers, and to participate in hostilities alongside the FNI and FRPI militia members, including in the attack on the village of Bogoro and to fight the Hema "enemies".

387. Based on the evidence referred to in the previous sections, the Chamber finds that there are substantial grounds to believe that FNI/FRPI members, as well as their leaders Germain Katanga and Mathieu Ngudjolo Chui, were fully aware of the existence of an armed conflict, and that the attack on the village of Bogoro, and the offences committed during and in the aftermath of the attack, were part of the strategic common plan to secure control over the village.

388. In conclusion, and in accordance with the Introduction to article 8 of the Elements of Crimes, the Chamber finds that there are substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui, as well as other FNI/FRPI commanders and combatants, were fully aware of the factual circumstances that established the existence of an armed conflict in the Ituri District between, at least, August 2002 and May 2003, and that the 24 February 2003 attack on Bogoro was part of that armed conflict.

E. Widespread or systematic attack directed against civilian population: contextual, objective and subjective elements

389. The Chamber recalls that the Prosecution's Amended Charging Document alleges that:

The crimes alleged in this Document occurred in the context of a widespread or systematic attack against the civilian population within the meaning of Article 7(1) of the Statute. In fact, from January 2001 to January 2004, the Lendu and Ngiti armed groups which became known, during this period, as the FNI and the FRPI were responsible for perpetrating at least 10 attacks, in which civilians were targeted and killed in significant numbers. [...] While carrying out attacks, these armed groups were, throughout the conflict, implementing a policy of targeting the Hema population and pillaging and destroying its property.⁵⁰¹

390. Pursuant to article 7(1) of the Statute:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]

391. Any of the acts enumerated in article 7(1) of the Statute will thus constitute a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population.

392. The term "attack" directed against any civilian population is defined in the Statute at article 7(2)(a):

'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.⁵⁰²

393. The requirement that in order to qualify as a crime against humanity the attack must have been committed pursuant to or in furtherance of State or organisational policy is also embodied in article 7(2)(a) of the Statute. Thus, pursuant to paragraph 3 of the introduction of article 7 of the Elements of Crimes, "[a]ttack directed against a civilian population' is understood to mean a course of conduct

⁵⁰¹ ICC-01/04-01/07-649-Anx1A, para. 40.

⁵⁰² See also METTRAUX, G.. *International Crimes and the ad hoc Tribunals*, Oxford, Oxford University Press, 2005, p. 156.

involving the multiple commission of acts, enumerated in article 7(1) of the Statute, against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁵⁰³

394. The Chamber notes that the terms “widespread” or “systematic” are not specifically defined in the Statute.⁵⁰⁴ However, the Chamber has previously stated that:

[T]he expression “widespread or systematic” in article 7(1) of the Statute excludes random or isolated acts of violence. Furthermore, the adjective “widespread” connotes the large-scale nature of the attack and the number of targeted persons, whereas the adjective “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.⁵⁰⁵

395. In the jurisprudence of the *ad hoc* Tribunals, the term “widespread” has also been explained as encompassing an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians.⁵⁰⁶

396. Accordingly, in the context of a widespread attack, the requirement of an organisational policy pursuant to article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a

⁵⁰³ Footnote 6 of the Elements of Crimes: “A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”

⁵⁰⁴ LEE, R. S. (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Evidence*, New York, Transnational Publishers, 2001, p. 78: “agreement was quickly reached among most delegations that such issues should not be addressed in the Elements and should be left to evolving jurisprudence.”

⁵⁰⁵ ICC-02/05-01/07-1-Corr, para. 62, quoted in ICC-01/04-01/07-4, para. 33. Cited jurisprudence: ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, paras 545-546.

⁵⁰⁶ ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, para. 206; ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94. See also WERLE, G., *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, p. 225, para. 656.

specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population.⁵⁰⁷ The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.⁵⁰⁸

397. The term “systematic” has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts⁵⁰⁹ or as “patterns of crimes” such that the crimes constitute a “non-accidental repetition of similar criminal conduct on a regular basis.”⁵¹⁰

398. Thus, in the context of a systematic attack, the requirement of a “multiplicity of victims” pursuant to article 7(2)(a) of the Statute ensures that the attack involved a multiplicity of victims of one of the acts referred to in article 7(1) of the Statute.

399. The drafters in Rome also left the exact meaning of the term “any civilian population” undefined.⁵¹¹ However, the Chamber observes that, as opposed to war crimes which are provided for in article 8 of the Statute, the term “civilian

⁵⁰⁷ See e.g. 1991 Draft Code, commentary on art. 21, para. 5: “Private individuals with de facto power or organized in criminal gangs or groups”; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-40-T, Trial Judgment, 2 September 1998, para. 580; ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 179; ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 123; United Nations General Assembly, *Report on the International Law Commission to the General Assembly*, 51 U.N. GAOR Supp. No. 10 at 94, United Nations Document A/51/10 (1996).

⁵⁰⁸ WERLE, G., *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, p. 227, para. 660.

⁵⁰⁹ ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-40-T, Trial Judgment, 2 September 1998, para. 580; ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 123. ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 179.

⁵¹⁰ ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para. 101; ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23-1, Trial Judgment, 22 February 2001, para. 580; and Appeals Judgment, 12 June 2002, para. 94; ICTR, *The Prosecutor v. Akayesu*, Case No. IT-96-4-T, Trial Judgment, 2 September 1998, para. 580.

⁵¹¹ Lee, R. S., (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Evidence*, New York, Transnational Publishers, 2001, p. 78: “Most delegations quickly agreed that this was too complex a subject and evolving area in the law, better left to resolution in case-law.”

population” within the meaning of article 7 of the Statute affords rights and protections to “any civilian population” regardless of their nationality, ethnicity or other distinguishing feature.⁵¹²

[t]he requirement in Article 5 [of the ICTY Statute] that the enumerated acts be “directed against any civilian population” contains several elements. The inclusion of the word “any” makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality. However, the remaining aspects, namely the definition of a “civilian” population and the implications of the term “population”, require further examination.⁵¹³

400. To meet the requirement “as part of” an attack, the acts referred to in article 7(1) of the Statute must be committed in furtherance of the widespread or systematic attack against the civilian population.

401. Finally, in order to constitute a crime against humanity, article 7(1) of the Elements of Crimes requires that the acts were committed with “knowledge of the attack” such that “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” Such knowledge should “not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”⁵¹⁴ It may be noted that the *ad hoc* tribunals have understood this phrase to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack.⁵¹⁵

402. Therefore, in the view of the Chamber, knowledge of the attack and the perpetrator’s awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused’s position in the military

⁵¹² See ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1, Trial Judgment, 7 May 1997, para. 635.

⁵¹³ ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1, Trial Judgment, 7 May 1997, para. 635. See also ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 54.

⁵¹⁴ Paragraph 2 of the Introduction to article 7 of the Elements of Crimes.

⁵¹⁵ See e.g. ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 99; ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para. 124; ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 332.

hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.

1. Whether the civilian population of the Bogoro village was "attacked" on 24 February 2003

403. The Chamber finds that there are substantial grounds to believe that in the early morning of 24 February 2003, FRPI and FNI combatants armed with heavy weapons,⁵¹⁶ automatic firearms⁵¹⁷ and machetes (*armes blanches*)⁵¹⁸ encircled Bogoro village from all the roads leading to it.⁵¹⁹ The evidence tendered provides substantial grounds to believe that civilians in Bogoro village awakened on that day to gunfire⁵²⁰ as Lendu and Ngiti combatants began attacking the entire village,⁵²¹ starting with the

⁵¹⁶ Statement of W-161 at DRC-0164-0488 at 0495, para. 36: "Je me souviens qu'à un moment donné nous avons vu comme une bombe qui a été lancée en direction du camp de l'UPC et qui a fait beaucoup de morts en explosant."

⁵¹⁷ Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 14: "My family just ran away as soon as we heard the gunfire."; Statement of W-233 at DRC-OTP-1007-0061 at 0080, para. 125: "D'après les sons que j'ai entendus, les attaquants étaient armés de mortiers, de lance-roquettes, de SMG, et de NATO "; Statement of W-268 at DRC-OTP-1007-0095 at 0102, para. 55: « Parmi les combattants lendu que j'ai vu passer lorsque j'étais caché vers la rigole Matama, certains avaient des armes à feu et d'autres portaient des armes blanches. »

⁵¹⁸ Statement of W-268 at DRC-OTP-1007-0095 at 0102, para. 55; Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 49: " On les tuait avec la machette ou le couteau ".

⁵¹⁹ Statement of W-161 at DRC-OTP-0164-0488 at 0495, para. 36: "les miliciens ont apparemment encerclé Bogoro et sont entrés dans le village en venant de toutes les directions"; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 41: "Le groupe de Yuda se trouvait à l'entrée de Bogoro sur le chemin de Geti. Le groupe de Germain se trouvait à l'entrée de Bogoro sur le chemin de Kasenyi. [REDACTED]. La stratégie était de boucher toutes les sorties du village pour empêcher les ennemies[sic] de s'échapper"; Statement of W-157 at DRC-OTP-0164-0534 at 0542, para. 46: "[REDACTED] (FNI et FRPI) placé à l'ouest de Bogoro a barré la route de Bunia, pour que l'aide de l'UPC de Bunia ne puisse pas venir. Ceux de l'UPC qui étaient à l'entrée de Bogoro ne pouvaient pas s'en sortir non plus."

⁵²⁰ Statement of W-233 at DRC-OTP-1007-0061 at 0071, para. 65: "L'attaque a commencé vers quatre heures du matin le 24 février 2003. J'étais chez moi et je dormais lorsque j'ai entendu des coups de fusils et de canons. [...] Je me suis réveillé à cause des coups de balles."; Statement of W-268 at DRC-OTP-1007-0095 at 0100-0101, paras 42-45: "Quand l'attaque a commencé, il devait être 06:00 du matin. [...] et je dormais [...]. Ce sont les crépitements de balles et les bruits qui m'ont réveillé".

⁵²¹ Statement of W-268 at DRC-OTP-1007-0095 at 0101, para. 49: "Les coups de balles venaient de partout. Nous étions encerclés."; Transcript of statement of W-250 at DRC-OTP-0177-0327 at 0360, lines 1129-1130; Statement of W-268 at DRC-OTP-1007-0095 at 0104, para. 73: "La plupart des cadavres étaient ceux d'enfants, de femmes et de vieillards, mais il y avait aussi des hommes. Ils étaient tous en tenues civiles."; Statement of W-249 at DRC-OTP-1015-0833 at 0836, para. 13: " the attackers made no distinction between civilians and military ".

houses at the perimeter.⁵²² As the Chamber has previously found, there are substantial grounds to believe that although there was a UPC military camp in the centre of the village and UPC soldiers were based at this military camp,⁵²³ the attack was not only directed against the military target but also against the predominantly Hema civilian population of the village.⁵²⁴

2. Whether the attack on Bogoro village was directed against the civilian population

404. Firstly, the Chamber finds that there are substantial grounds to believe that prior to the 24 February 2003 attack against the civilian population of Bogoro, combatants led by Mathieu Ngudjolo Chui⁵²⁵ and Germain Katanga⁵²⁶ and largely of Lendu and Ngiti ethnicity⁵²⁷ initially organised themselves under the military groups

⁵²² Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 44: “Ngudjolo nous a alors donné l’ordre de prendre le village en commençant par les maisons qui se trouvent à l’extrémité du village [REDACTED]”; Statement of W-161 at DRC-OTP-0164-0488 at 0495, para. 36: “les miliciens ont apparemment encerclé Bogoro et sont entrés dans le village en venant de toutes les directions”.

⁵²³ Statement of W-268 at DRC-OTP-1007-0095 at 0098, paras 21-25.

⁵²⁴ Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96: “Germain Katanga m’avait dit que l’attaque avait été faite pour se venger de massacres que les Hemas avaient fait dans un autre village [...] Germain expliquait qu’ils avaient attaqué le village lorsqu’ils ne s’y attendaient pas et que le peu de militaires qu’il y avait de l’UPC avaient fui.”; Statement of W-12 at DRC-00105-152 at 152, para. 364: “Connaissant la stratégie habituelle des Lendus et Ngitis, il ne fait pas doute que toutes personnes, civiles ou militaires, trouvées dans le village, avaient été tuées”; Statement of W-166 at DRC-OTP-1007-0002 at 0011-0012, para. 58; Statement of W-233 at DRC-OTP-1007-0061 at 0080, para. 127: “L’attaque de 24 février 2003 était dirigée contre tout le monde: les militaires et la population civile. Les attaquants tiraient sur tout le monde et ne faisaient pas de distinction entre les civils et les militaires, ni entre les ethnies.”

⁵²⁵ Statement of W-157 at DRC-OTP-0164-0534 at 0536, para. 14: “Les Lendus étaient composés de deux groupes: d’une part, il y avait ceux qui habitaient du côté de Zumbe, dont le chef est NGUDJOLO [...] Ces groupes s’appelaient FNI.”; Statement of W-28 at DRC-OTP-0171-1828 at 1834, para. 27: “C’est toutefois NGUDJOLO qui était le chef de tous les combattants du FNI.”; Statement of W-250 at DRC-OTP-1013-0002 at 0004-0005, paras 14-18; Statement of W-258 at DRC-OTP-0173-0589 at 0609, lines 668-672.

⁵²⁶ Statement of W-28 at DRC-OTP-0171-1828 at 1834-1835, para. 30: “Parmi les commandants du FRPI présents il y avait: Germain KATANGA”; Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 41: “Le commandant Germain KATANGA était très respecté par tous parce qu’il était le grand chef du FRPI.”; Statement of W-132 at DRC-OTP-1016-0156 at 0166, para. 59: “Germain était le président de tous les combattants Ngitis. Je crois que son nom complet est Germain KATANGA”.

⁵²⁷ Statement of W-160 at DRC-OTP-0153-0006 at 0019, paras. 77-80: “L’origine ‘tribale’ du conflit explique la raison pour laquelle le FNI était composé pour la plupart de Lendu et le FRPI, qui a été créé au Sud, de Ngiti.”; Statement of W-28 at DRC-OTP-0155-0106 at 0110, para. 23: “A[sic] l’origine, le mouvement FRPI était créé pour repousser l’UPC et défendre la population Ngiti. La grand[sic] majorité des ses membres était d’origine Ngiti.”

of the FNI and FRPI as a means of fighting other combatants, largely of Hema ethnicity.⁵²⁸

405. However, as the Chamber has previously found, there is sufficient evidence to establish substantial grounds to believe that the joint attack on Bogoro village on 24 February 2003 was directed not only against a military camp that existed in that village, but was also directed against the civilian population of the village,⁵²⁹ and in particular, against the Hema civilians living in Bogoro and in the vicinity.⁵³⁰ In the view of the Chamber, there is sufficient evidence to establish substantial grounds to believe that FNI/FRPI combatants, before starting the attack, chanted songs in which

⁵²⁸ Statement of W-28 at DRC-OTP-0155-0106 at 0110, paras 20-25: “Il y a deux tribus en Ituri: les Hemas et les Ngiti. [...] À l’origine, le mouvement FRPI était créé pour repousser l’UPC et défendre la population Ngiti.”; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0106: “Selon le témoin, en 2002 la communauté Ngiti de la collectivité Walendu-Bindi du district de l’Ituri a dû se protéger contre les envahisseurs ougandais/UPDF et les Hemas. Pour organiser la défense de la communauté ngiti, ses leaders ont considéré que tout le monde, à savoir les adultes autant que les enfants devaient participer à cet effort de guerre. [...] Selon le témoin, c’est alors que le mouvement de résistance communautaire ngiti s’organise de façon plus structurée. [...] [ses] leaders [ont] apport[é] une structure à cette résistance. Au sein de ce mouvement certains jeunes gens comme Germain Katanga, Cobra Matata, Yuda et Bebi se sont distingués par leur bravoure. À la fin de l’année 2002, la milice FRPI a vu le jour. Déjà à cette époque, le FRPI et le FNI entretenaient des rapports étroits.”; Statement of W-160 at DRC-OTP-0153-0006 at 0019, paras 77-80: “Il faut savoir que le conflit en Ituri a commencé au nord avec les tensions entre les Hemas Nord, ou Gegere, et les Lendus Nord; ensuite, le conflit s’est étendu vers le sud, entre les Hemas du Sud et les Ngitis. [...] Le FRPI était pour la plupart composé de Ngitis et était influent dans le sud de l’Ituri. C’est pour cela que lorsque je parle de Ngitis, je veux dire FRPI; tandis que quand je parle de Lendus, je veux dire le FNI. Des deux mouvements sont alliés”.

⁵²⁹ Statement of W-233 at DRC-OTP-1007-0061 at 0080, para. 127; Statement of W-161 at DRC-OTP-0164-0488, para. 38; at 0498-0499, paras 57-58; Statement of W-12 at DRC-OTP-0105-0085 at 0151-0152, paras 361-366, Statement of W-280 at DRC-OTP-1007-1089 at 1095 and 1101, paras 37, 81, 83; Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 13; United Nations Security Council, *Troisième rapport spécial du Secrétaire général sur la Mission de l’Organisation des Nations Unies en République démocratique du Congo*, United Nations Document S/2004/640 (16 August 2004) at DRC-OTP-0129-0437 at 0469-0470; IRIN, “DRC: Fear of massacres as Lendus, UPDF storm Bunia, force out UPC”, 6 March 2003 at DRC-OTP-0074-0019 at 0019, para. 2; Transcript of statement of W-250 at DRC-OTP-0177-0363 at 0366-0367, lines 102-137; Statement of W-250 at DRC-OTP-1013-0002 at 0011, para. 58; United Nations Security Council, *Quatorzième rapport du Secrétaire Général sur la mission de l’Organisation des Nations Unies en République Démocratique du Congo*, United Nations Document S/2003/1098 at DRC-OTP-0130-0409 at 0409, para. 3; Statement of W-160 at DRC-OTP-0153-0006 at 0019, paras 77-80.

⁵³⁰ Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96; Statement of W-28 at DRC-OTP-0155-0106 at 0124, para. 94; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-00129-0267 at 0271, para. 4; IRIN, “DRC: Fear of massacres as Lendus, UPDF storm Bunia, force out UPC”, 6 March 2003 at DRC-OTP-0074-0019 at 0019, para. 1.

they made it clear that they would kill Hema individuals, but would show mercy to Ngiti or Bira individuals.⁵³¹

406. As previously found by the Chamber, there is sufficient evidence to establish substantial grounds to believe that the attack was intended to “wipe out” or “raze” Bogoro village by killing the predominately Hema civilian population⁵³² and destroying the homes of civilian inhabitants⁵³³ during and in the aftermath of the attack.

407. On this basis, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the FNI/FRPI attacks on villages inhabited predominately by Hema civilians in the Ituri region, including the 24 February 2003 attack on Bogoro village, were directed against the civilian population of the region of Ituri in the DRC.

3. Whether the attack on the civilian population of the Bogoro village was a part of a widespread or systematic attack

408. Firstly, there is sufficient evidence to establish substantial grounds to believe that the attack against the predominantly Hema population of the relatively small geographical area of Bogoro village resulted in the deaths of a large number of victims. Although exact estimates differ, there is sufficient evidence to establish substantial grounds to believe that the attack on Bogoro village on 24 February 2003 itself resulted in the deaths of approximately 200 civilians.⁵³⁴

⁵³¹ Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 68; Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 121.

⁵³² See among others Statement of W-157 at DRC-OTP-1006-0054 at 0071-0072, paras 123-125; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37; Statement of W-28 at DRC-OTP-0155-0106 at 0121, para. 80. See also evidence referred to in section of War Crimes, Attack against civilian population.

⁵³³ See evidence referred to in section of War Crimes, Destruction of Civilian Property.

⁵³⁴ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-0129-0267 at 0288, para. 65 ; Statement of W-12 at DRC-0105-0085 at 0130, para. 245: “Le massacre de Bogoro avait fait quant à lui environ 200 victimes parmi les civils Hema.”

409. Secondly, there are substantial grounds to believe that the attack against the civilian population of Bogoro village was part of a widespread campaign of military attacks against civilians in the large geographical area of Ituri. For example, the evidence establishes that, prior to the attack against the civilian population of Bogoro, the FNI and/or the FRPI killed approximately 1200 civilians throughout the region of Ituri in the DRC, in particular in the village of Nyankunde.⁵³⁵

410. In addition, the Chamber finds that there is also sufficient evidence to establish substantial grounds to believe that in the month following the attack against the civilian population of Bogoro approximately 900 civilians, predominantly from the Hema ethnic group, were also killed by the FNI/FRPI in Bunia/Nyakasanza,⁵³⁶ Tchomia,⁵³⁷ and Katoto.⁵³⁸ There are also substantial grounds

⁵³⁵ Human Rights Watch report: *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0834, para. 6: "Over a ten-day period, these forces systematically massacred at least 1200 Hema, Gegere and Bira civilians [in Nyankunde]"; Statement of W-28 at DRC-OTP-0155-0106 at 0117, paras 60-78 United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267, at 0285 paras 52, 62; Statement of W-157 at DRC-OTP-1006-0054 at 0061, para. 42: "Beaucoup de personnes sont morts[sic] à Nyankunde."

⁵³⁶ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0292, para. 79 ; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20: "Quand j'étais [REDACTED] avec le FNI j'ai participé aux grandes batailles de Bogoro, Mandro et Bunia (le 6 mars 2003)."

⁵³⁷ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at 0293, para. 85 ; United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 0283 para. 41; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0851, para. 6; DRC Panel on Exploitation of Natural Resources, *Ituri Province Follow Up*, 28 July 2003 at DRC-OTP-0044-0333 at 0350; Statement of W-280 at DRC-OTP-1007-1089 at 1100, para. 77: "Après un mois, ils nous ont dit on va frapper Kasenyi. Après Kasenyi, on a attaqué Tchomia."; Statement of W-12 at DRC-OTP-0105-0085 at 0152- 0155, paras 369-386: "Lorsque je suis entré dans Tchomia, j'ai pu voir qu'il y avait beaucoup de victimes et notamment à l'hôpital de Tchomia où se trouvait de nombreux patients. [...] Pour autant que je m'en souviens, au cours de cette attaque les Lendus avaient tué 39 civils et patients à l'hôpital de Tchomia et un total d'environ 80 civils pour l'ensemble du village. [...] Le 15 juillet 2003, je me trouvais à Kasenyi lorsque j'ai entendu des tirs en rafale venir de la direction de Tchomia. Vu le nombre de coups de feu que j'entendais, il était clair pour moi que Tchomia était en train d'être attaquée. [...] Il y avait de nombreuses victimes dont des familles entières. [...] Je ne connais pas le nombre exact des victimes. Lorsque je suis arrivé sur place, les villageois survivants avaient déjà commencé à enterrer les corps des victimes."

⁵³⁸ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267, at 0294, para. 88.

to believe that by the end of July 2003,⁵³⁹ approximately 600 civilians, predominantly from the Hema ethnic group, were killed by the joint forces of the FNI/FRPI in Mandro⁵⁴⁰, Kilo⁵⁴¹ and Drodro.⁵⁴²

⁵³⁹ United Nations Security Council, *Troisième rapport spécial du Secrétaire général sur la Mission de l'Organisation des Nations Unies en République démocratique du Congo*, United Nations Document S/2004/640 (16 August 2004) at DRC-OTP-0129-0437 at 0469-0470: "Depuis juin 2003, 48 civils auraient été exécutés, décapités ou mutilés. Les personnes enlevées appartiennent à divers groupes ethniques, mais les récits de ceux qui se sont échappés ont confirmé les rumeurs selon lesquelles seuls ont été exécutés des membres du groupe ethnique Hema/Gegere. Environ 134 pêcheurs auraient disparus et auraient été mis en esclavage ou exécutés par les milices Ngitis"; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267, at 0290-0294, paras 72-73, 75, 85, 88, 90-91. Human Rights Watch, *Le Fléau de l'Or*, June 2005 at DRC-OTP-0163-0357 at 0410, paras 2-3; Statement of W-12 at DRC-OTP-0105-0085 at 0151, para. 362: "Germain Katanga m'avait donc expliqué que les attaques contre Bogoro le 25/26 février 2003 et Mandro le 04 mars 2003, étaient une réaction de la part des Ngitis représentés par le FRPI pour faire savoir leur opposition à l'alliance créée au sein du FIPI à l'époque entre le FNI-FRPI et les Hemas. [...] Pour bien montrer leur opposition à cette alliance, ils avaient donc attaqué Bogoro et Mandro qui étaient alors sous le contrôle de l'UPC. [...] La seule chose qui comptait était d'attaquer des villages Hemas."; at 0152-0154, paras 368-374: "Tchomia a été attaqué[sic] le 31 mai 2003 par les Lendus du FNI-FRPI. [...] Ndjabu m'avait alors répondu que c'était Mathieu Ngudjolo qui avait organisé l'attaque et que lui-même l'avait questionné sur les raisons de cette attaque. D'après Ndjabu, Ngudjolo avait été incapable de fournir des raisons précises quant aux motifs de l'attaque mais avait implicitement reconnu en être l'auteur."; at 154, paras 375-377: "Le 11 juin 2003, les Lendus de Zombe, et Gety ont attaqué les forces du PUSIC à Kasenyi. [...] Par ailleurs, cela m'a confirmé que l'attaque avait été organisée soit directement par Ngudjolo ou tout du moins avec son consentement puisque c'est lui qui avait la charge de la zone de Zombe."

⁵⁴⁰ MONUC, Special investigations on Human Rights Situation in Ituri, June 2003 at DRC-OTP-0152-0286 at 0288, para. 8; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0290, para. 72; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0422, lines 831-837; at 0296, lines 1152-1162; Statement of W-250 at DRC-OTP-1013-0002 at 0019, para. 106; Statement of W-28 at DRC-OTP-0155-0106 at 0124, paras 92-95: "Juste quelques jours après la bataille de Bogoro, j'ai participé au combat de Mandro qui était un petit centre commercial Hema où il y avait une base de l'UPC. Cette fois, FNI a planifié l'attaque et a demandé un renfort du côté du FRPI. Ainsi, un petit group du FRPI, [REDACTED], mélangé à des membres du FNI [...] Ngudjolo était le chef du FNI à Zombe. [...] on est parti ensemble à Mandro. [...] on a commencé l'attaque à Mandro."; Statement of W-157 at DRC-OTP-1006-0054 at 0058-0059, para. 20: "Quand j'étais [REDACTED] avec le FNI, j'ai participé aux grandes batailles de Bogoro, Mandro et Bunia (le 6 mars 2003) [...] Entre la bataille de Bogoro et celle de Bunia il y a eu la bataille de Mandro."; at 0062-0071, paras 47-119: "Après la victoire du FNI et du FRPI à Bogoro, j'ai participé à la bataille de Mandro. Il y a eu une grande bataille à Mandro. L'objectif du FNI et du FRPI était de déplacer le centre de formation de l'UPC [...] Quand on allait attaquer Mandro [REDACTED] on nous a mis ensemble, le FNI et le FRPI, dans une compagnie. [...] Le FNI a emmené un peloton et demi et le FRPI un peloton et demi, donc ensemble une compagnie. [...] Le FNI et le FRPI ensemble peuvent avoir plus de 4000 hommes."; at 0066, para. 75; "A[sic] Bogoro il y avait un plan. Nous ne sommes pas resté à Mandro."; at 0064, paras 60-61; at 0069, para. 102: "Nous sommes arrivés jusqu'au premier camp sur le sentier [REDACTED] pour aller à Mandro. [...] À Mandro j'ai vu les civils fuir de loin."; Statement of W-280 at DRC-OTP-1007-1089 at 1099, para. 64; United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, United Nations Document A/58/534, 24 October 2003 at DRC-OTP-0130-0273 at 283, para. 41; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically*

411. On this basis, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the attack against the predominately Hema civilian population of the Bogoro village, on 24 February 2003, was part of a widespread FNI/FRPI attack directed against the civilian population, predominately of Hema ethnicity, of the region of Ituri in the DRC.

412. The Chamber notes that the terms “widespread” and “systematic” are presented in the alternative.⁵⁴³ Thus, since the Chamber found that the attack was widespread, the Chamber need not consider whether the attack was also systematic.⁵⁴⁴ However, for the purposes of completeness, the Chamber also notes that there is sufficient evidence to establish substantial grounds to believe that the attack against the civilian population of Bogoro village was also part of a systematic attack against the civilian population, predominately of Hema ethnicity, living in the Ituri region.

413. In the view of the Chamber, there are substantial grounds to believe that the violent acts which occurred in Bogoro village on 24 February 2003 were not random

Targeted Violence In Notheastern DR Congo, vol. 15, No. 11 (A), New York, July 2003 at DRT-OTP-00074-797 at 851, para. 6.

⁵⁴¹ Human Rights Watch, *Le Fléau de l'Or*, June 2005 at DRC-OTP-0163-0357 at 0406-0407, para. 5: “Ugandan and Lendu forces attacked Kilo [...] according to local sources, they killed at least 100.”

⁵⁴² United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0291, para. 75.

⁵⁴³ See also ICTR, *The Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 579, footnote 143; whereby the Trial Chamber clarified that: “[i]n the original French version of the Statute, these requirements were worded cumulatively [...] thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation”. Confirmed in ICTR, *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 123. See also ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, paras 101, 111; ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, Appeals Judgment, 12 June 2002, para. 435; ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, para. 207; ICTY, *The Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23-1, Trial Judgment, 22 February 2001, para. 427; ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment, 6 December 1999, paras 67-68; ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 178; ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment, 1 December 2003, paras 869-870; ICTY, *The Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Judgment, 30 November 2005, para. 183.

⁵⁴⁴ ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, Appeals Judgment, 12 June 2002, para. 93.

acts of violence against the civilian population but were committed pursuant to a common policy and an organised common plan⁵⁴⁵ which was, *inter alia*, (i) part of a larger campaign of reprisals specifically directed against the predominantly Hema civilians living in villages in the Ituri region;⁵⁴⁶ (ii) a demonstration of the FNI/FRPI's opposition to any alliance between the UPC (Hema) and the FNI/FRPI (Lendu and

⁵⁴⁵ Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96 ; at 0024, para. 106; Statement of W-279 at DRC-OTP-1007-1077 at 1081, paras 31-32; Statement of W-280 at DRC-OTP-1007-1089 at 1101, paras 32, 83; Statement of W-28 at DRC-OTP-0171-1828 at 1836, paras 37-38: "Suite à la reunion, les commandants présents sont retournés dans leur camp militaire respectif. [...] Avant de partir ces commandants ont reçu une part de munitions de Germain Katanga qu'ils devaient redistribuer aux soldats de leur camp en préparation de l'attaque de Bogoro. [...] Les commandants qui étaient absents ont reçu une lettre leur expliquant les détails du plan pour l'attaque de Bogoro. [...] Ces lettres émanaient de Germain Katanga." ; Transcript of statement of W-258 at DRC-OTP-0173-0265 , at 0361-0363, lines 595-658 ; at 0364, lines 687-689; at 0364-0365, lines 720-727.

⁵⁴⁶ United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo* , United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 0283, paras 39-42; *Procès Verbal Pro-Justitia* at DRC-OTP-0039-0060 at 0060; Statement of W-157 at DRC-OTP-1006-0054 at 0058-0059, para. 20 ; at 0062-0071, paras 47-119: "Après la victoire du FNI et du FRPI à Bogoro, j'ai participer à la bataille de Mandro. Il y a eu une grand bataille à Mandro. L'objectif du FNI et du FRPI était de déplacer le centre de formation de l'UPC [...] Quand on allait attaquer Mandro [REDACTED] on nous a mis ensemble, le FNI et le FRPI, dans une compagnie. [...] Le FNI a emmené un peloton et demi et le FRPI un peloton et demi, donc ensemble une compagnie. [...] Le FNI et le FRPI ensemble peuvent avoir plus de 4000 hommes. "; Statement of W-280 at DRC-OTP-1007-1089 at 1099, paras 66-67: "[REDACTED] les commandants Kute, Lobho et Pichene de Lagura. Germain et Yuda étaient déjà arrivés à Zumbe. Germain et Yuda sont arrivés avec cinq personnes chacun. Ils sont arrivés à pied. Nous nous sommes tous dirigés ensemble vers Mandro. [...] La stratégie était d'arriver de toutes les directions pour les encercler et les empêcher de s'enfuir. On est arrivé à 6h00 du matin"; Statement of W-12 at DRC-OTP-0105-0085 at 0130, para. 245: "Kahwa [...] dit [...] que [...] à savoir le FNI, avait attaqué deux jours auparavant. Le 04 mars 2003, le village de Mandro [...] Il ajouté qu'une semaine auparavant, à savoir aux environs du 24 février 2003, les troupes du FNI avaient massacré ;la population civile Hema à Bogoro." ; *Declaration politique sur la deconfiture de l'UPC et les interférences négatives du RCD-ML dans les evenements de l'Ituri*, 11 March 2003 at DRC-OTP-0041-0104 at 0104; Statement of W-157 at DRC-OTP-0164-0534 at 0536, para. 12; MONUC, Special investigations on Human Rights Situation in Ituri, June 2003, at DRC-OTP-0152-0286 at 0304, para. 68; United Nations Security Council, *Troisième rapport spécial du Secrétaire général sur la Mission de l'Organisation des Nations Unies en République démocratique du Congo*, United Nations Document S/2004/640 (16 August 2004) at DRC-OTP-0129-0437 at 0469-0470; Human Rights Watch, *Ituri. "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0805, 0822; IRIN "DRC: Fear of massacres as Lendus, UPDF storm Bunia, force our UPC", 6 March 2003 at DRC-OTP-0074-0019 at 0019, para. 2; International Crisis Group, *Congo Crisis: Military Intervention in Ituri*, 13 June 2003 at DRC-OTP-1015-0592 at 0594; at 0600-0601; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0290-0294, paras 72-73, 75, 85, 88, 90-91; Human Rights Watch, *Le Fléau de l'Or*, June 2005 at DRC-OTP-0163-0357 at 0410, paras 2-3. See also subsequent footnotes. United Nations Security Council, *Quatorzième rapport du Secrétaire Général sur la mission de l'Organisation des Nations Unies en République Démocratique du Congo*, United Nations Document S/2003/1098 (17 November 2003) at DRC-OTP-0130-0409 at 0409, para. 3 ; Statement of W-28 at DRC-OTP-0155-0106 at 0110, paras 20-25 ; at 0124, paras 92-95; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0106; Statement of W-160 at DRC-OTP-0153-0006 at 0019, paras 77-80.

Ngiti) within the FIPI,⁵⁴⁷ and (iii) a means to “wipe out”⁵⁴⁸ the village of Bogoro so as to ensure FNI/FRPI control over the route to Bunia⁵⁴⁹ and to facilitate the transit of goods along the Bunia-Lake Albert axis.⁵⁵⁰

414. The Chamber also finds that there are substantial grounds to believe that, prior to and after the 24 February 2003 attack against the civilian population of Bogoro, members of the FNI/FPRI regularly abducted,⁵⁵¹ imprisoned in military camps,⁵⁵² and subsequently raped and sexually enslaved⁵⁵³ women and girls predominantly of Hema ethnicity.⁵⁵⁴

⁵⁴⁷ Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96; Statement of W-12 at DRC-OTP-0105-0085 at 0151-0152, para. 362: “Germain Katanga m’avait donc expliqué que les attaques contre Bogoro 25/26 février 2003 et Mandro le 04 mars 2003, étaient une réaction de la part des Ngitis représentés[sic] par le FRPI pour faire savoir leur opposition à l’alliance créée au sein du FIPI à l’époque entre le FNI-FRPI et les Hemas. [...] La seule chose qui comptait était d’attaquer des villages Hemas.”; Statement of W-280 at DRC-OTP-1007-1089 at 1095-1096, paras 37, 44.

⁵⁴⁸ See among others Statement of W-157 at DRC-OTP-1006-0054 at 0071-0072, paras 123-125; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37; Statement of W-28 at DRC-OTP-0155-0106 at 0121, para. 80.

⁵⁴⁹ See among others Statement of W-159 at DRC-OTP-0164-0472 at 0476, para. 27; Statement of W-166 at DRC-OTP-1007-0002 at 0011, para. 55.

⁵⁵⁰ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-0129-0267 at 0274, para. 16.

⁵⁵¹ Statement of W-132 at DRC-OTP-1016-0156 at 0162, paras 31-35; Statement of W-249 at DRC-OTP-1015-0833 at 0836-0837, paras 16-21; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110; Statement of W-28 at DRC-OTP-0171-1828 at 1842-1843, paras 72, 74; Statement of W-233 at DRC-OTP-1007-0061 at 0081, paras 133-136; Statement of W-250 at DRC-OTP-1004-0187 at 0210, para. 141; Transcript of statement of W-258 at DRC-OTP-0173-0755 at 0776, lines 732-734; at 0777, lines 735-762.

⁵⁵² Statement of W-132 at DRC-OTP-1016-0156 at 0164, para. 40; Statement of W-249 at DRC-OTP-1015-0833 at 0837, para. 23; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 259-260; at 0854, lines 261-263; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 61.

⁵⁵³ United Nations Security Council, *Troisième rapport spécial du Secrétaire Général sur la Mission de l’Organisation des Nations Unies en République démocratique du Congo*, United Nations Document S/2004/573 (16 August 2004) at DRC-OTP-0129-0437 at 0469-0470: “Depuis juin 2003, 48 civils auraient été exécutés, décapités ou mutilés. Certains seraient forcés de travailler pour les milices en pêchant ou en travaillant la terre, tandis que les femmes seraient utilisées comme esclaves sexuelles”; Statement of W-249 at DRC-OTP-1015-0833 at 0836, paras 16-21, 23-29; Statement of W-132 at DRC-OTP-1016-0156 at 0162, paras 31-35; at 0163, para. 37; at 0162-0163, paras 34-39; at 0164, paras 40-41; at 0171, paras 89-90; at 0172-0173, paras 95-107; at 0179-0181, paras 138-148; at 0179-0181 paras 160-173; at 0185-0186, paras 181-186; Statement of W-233 at DRC-OTP-1007-0061 at 0081, paras 133-136: “Pendant l’attaque de Bogoro, il y a eu des femmes qui ont été violées.[...] D’autres ont été capturées et emportées pour être ensuite violées et tuées.”; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 61; United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l’homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 0283, para. 40...

⁵⁵⁴ United Nations General Assembly, *Troisième rapport spécial du Secrétaire Général sur la Mission de l’Organisation des Nations Unies en République démocratique du Congo* at DRC-OTP-0129-0437

415. In particular, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that women and girls were sexually enslaved and raped during and in the aftermath of the attacks on Kasenyi,⁵⁵⁵ Nyankunde⁵⁵⁶ and other villages.⁵⁵⁷ Hence, there is sufficient evidence to establish substantial grounds to believe that rape and sexual slavery was committed by the FNI/FRPI frequently and consistently throughout the region of Ituri in the DRC.

416. On this basis, the Chamber finds that there is also sufficient evidence to establish substantial grounds to believe that the 24 February 2003 attack against the civilian population of Bogoro was part of a systematic FNI/FRPI attack directed against the civilian population in the region of Ituri in the DRC, from the end of 2002 until the middle of 2003.

4. Whether acts committed against the civilian population of Bogoro village were committed with knowledge that the conduct was part of a widespread or systematic attack against the civilian population

417. The Chamber finds that there are substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui, through Commander Boba Boba and others under their command, met in Aveba and planned the attack on Bogoro village on 24 February 2003.⁵⁵⁸ Accordingly, the Chamber finds that Germain Katanga and Mathieu Ngudjolo Chui had knowledge of the attack. As detailed below, the

at 0469-0470; *Declaration politique sur la déconfiture de l'UPC et les interférences négatives du RCD-ML dans les événements de l'Ituri* at DRC-OTP-0041-0104 ", 11 March 2003 at 0104.

⁵⁵⁵ Statement of W-12 at DRC-OTP-0105-0085 at 0154, para. 375.

⁵⁵⁶ Statement of W-28 at 0171-1828 at 1843, para. 74; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848-0849.

⁵⁵⁷ Summary of statement of W-271 at DRC-OTP-1019-0223 at 0225, para. 5; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0295, para. 95; *Déclaration politique sur la déconfiture de l'UPC et les interférences négatives du RCD-ML dans les événements de l'Ituri*, 11 March 2003 at DRC-OTP-0041-0104 at 0104; Summary of statement of W-243 at DRC-OTP-1016-0089 at 0089; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110, para. 5.

⁵⁵⁸ Statement of W-250 at DRC-OTP-1004-0187 at 0206, para. 120: "Quand nous sommes partis à Aveba sur ordre de NGUDJOLO pour aller rencontrer Germain KATANGA, je me souviens que nous nous appelions déjà FNI."; Statement of W-250 at DRC-OTP-1013-0002 at 0011-0012, paras 59-60; Statement of W-28 at DRC-OTP-0171-1828 at 1834-1835, paras 27, 30-33: "Le but de leur visite était de discuter de Bogoro."; at 1836, paras 36-38: " Les commandants qui étaient absents ont reçu une lettre leur expliquant les détails du plan pour l'attaque de Bogoro. Ces lettres leur donnaient aussi l'ordre de venir au camp d'Aveba pour recevoir leur part de munitions en préparation de l'attaque. "

Chamber also finds that there are substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui (i) knew that there would be an attack on the civilian population in the village of Bogoro in February 2003; (ii) knew that their actions were an essential part of the attack; and (iii) intended to further this attack.⁵⁵⁹ Further, the Chamber finds that Germain Katanga and Mathieu Ngudjolo Chui knew that the conduct of the members of the FNI/FRPI at Bogoro village on 24 February 2003 was part of a series of widespread or systematic attacks committed against the predominantly Hema civilian population living in the Ituri region.⁵⁶⁰

⁵⁵⁹ Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37: “[REDACTED], KUTE nous a transmis de nouveau les ordres de NGUDJOLO: «Lorsque vous arriverez à Bogoro, il faudra tout effacer». Je sais que c’est de NGUDJOLO que cet ordre venait”; Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96: “Germain Katanga m’avait dit que l’attaque avait été faite pour se venger de massacres que les Hemas avaient fait dans un autre village.”; Statement of W-28 at DRC-00105-152, para. 364. Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37; Statement of W-157 at DRC-OTP-1006-0054 at 0071-0072, paras 123, 125; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0243, lines 427-428: “le but était qu’on puisse se mettre ensemble pour attaquer Bogoro. On voulait effacer Bogoro.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0279, line 571: “attaquer puis écraser Bogoro.”; Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96: “Germain Katanga m’avait dit que l’attaque avait été faite pour se venger de massacres que les Hemas avaient fait dans un autre village [...] Germain expliquait qu’ils avaient attaqué le village lorsqu’ils ne s’y attendaient pas et que les peu de militaires qu’il y avait[sic] de l’UPC avait fui.”; Statement of W-28 at DRC-OTP-0171-1828 at 1836, para. 37: “Avant de partir, ces commandants ont reçu une part de munitions de Germain Katanga qu’ils devaient redistribuer aux soldats de leur camp en préparation de l’attaque de Bogoro.”; Statement of W-159 at DRC-OTP-0164-0472 at 0481, para. 56; Statement of W-28 at DRC-OTP-0171-1828 at 1836, paras 37-38: “Suite à la reunion, les commandants présents sont retournés dans leur camp militaire respectif. [...] Avant de partir ces commandants ont reçu une part de munitions de Germain Katanga qu’ils devaient redistribuer aux soldats de leur camp en préparation de l’attaque de Bogoro.”; Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123.

⁵⁶⁰ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 277, para. 23: “having fled to the bush after the destruction of their villages between 1999 and 2001, the Lendu people of Djugu, and later those of Irumu, chose to take justice into their own hands. Their reprisals resulted in the massacre of thousands of innocent Hema civilians. They replaced arrows and machetes from the first period of the conflict with modern weapons that they were able to buy mostly from Uganda, using the illegal mining revenues of the Mongbwalu gold field.”; at 285, para. 52: “During and after the attack to Nyankunde and its neighbouring towns and villages carried out jointly by Ngiti, APC and Mai-Mai on 5 September 2002, more than 1.000 people may have been victims of deliberate killings because they belonged to the Hema, Hema/Gegere and Bira ethnic groups. Nyankunde and apparently many of the 45 localities [...] suffered destruction, looting and massive displacement.”; at 290, paras 71-72: “Mandro was attacked several times by Lendus since the beginning of 2003 but the UPC forces were able to push them back and hold town. On 4 March 2003, early in the morning, the Lendu and the Ngiti attack on UPC positions in Mandro lasted for no more than a few hours [...] killing some 168 persons.”; Statement of W-159 at DRC-OTP-0164-0472 at 0474, para. 15: “Il y a eu plusieurs attaques sur le village de Bogoro. En tout, je m’en souviens de quatre.”

F. Existence of the offences under article 7(1)(a), 7(1)(g) and 7(1)(k) of the Statute

418. Having concluded that the joint FNI/FRPI attack against the civilian population of Bogoro village was part of a widespread and systematic attack against the predominantly Hema civilian population living in the Ituri region, the Chamber will now analyse whether the objective and subjective elements of the offences under articles 7(1)(a), 7(1)(g) and 7(1)(k) of the Statute were committed.

419. The Chamber notes that conduct which satisfies the objective elements of a war crime under article 8 of the Statute may also satisfy the objective elements of the crimes under article 7 of the Statute. However, the Chamber observes that, for example, murder pursuant to article 7(1)(a) of the Statute and willful killing pursuant to article 8(2)(a)(i) of the Statute have different contextual and material elements. Thus, the suspects may be tried for conduct under article 7 and article 8 of the Statute, simultaneously.⁵⁶¹ In this regard, the Chamber will evaluate all the requisite elements of each of the crimes charged both under articles 7 and 8 of the Statute.

1. Murder

a) Objective and subjective elements

420. In **Count 1**, the Prosecution charges Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 7(1)(a) of the Statute, with having:

[...] committed, jointly with others, or each ordered the commission of crimes against humanity which in fact occurred, namely, the killings of at least two hundred civilian residents of, or persons present at Bogoro village in the Bahema Sud collectivité, Irumu territory, Ituri district, including Suzanne MABONE and Matia BABONA.

⁵⁶¹ See also ICTY, *The Prosecutor v. Jelisić* Case No. IT-95-10-A, Appeals Judgement, 5 July 2001, para. 82; ICTY, *The Prosecutor v. Kupreškić et al.* Case No. IT-95-16-A, Appeals Judgment, 23 October 2001, para. 388; ICTY, *The Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, Appeals Judgement, 12 June 2002, para. 176.

421. The objective element of the crime against humanity of murder as provided in article 7(1)(a) of the Statute and the Elements of Crimes occurs when the perpetrator kills or causes the death⁵⁶² of one or more persons.⁵⁶³

422. The Prosecution specifically alleges that Mathieu Ngudjolo Chui and Germain Katanga are responsible for the killings of Suzanne MABONE and Matia BABONA.⁵⁶⁴ The Chamber observes that, pursuant to article 7(1)(a) of the Statute, it is sufficient to demonstrate that there are substantial grounds to believe that the suspects intended to cause and did cause the death of civilians as part of the widespread or systematic attack, even if their identities are unknown.⁵⁶⁵

423. Article 30 of the Statute governs the subjective element of the crime against humanity of murder and requires the perpetrator's intent to kill one or more persons. Thus, this offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the crime against humanity of murder, as provided for in article 7(1)(a) of the Statute, was committed during or in the aftermath of the 24 February 2003 attack

424. The Chamber finds that the evidence is sufficient to establish substantial grounds to believe that during and particularly in the aftermath of the joint FRPI and FNI attack against the village of Bogoro on 24 February 2003, members of the FRPI and the FNI: (i) lured civilians from their hiding places in order to kill them;⁵⁶⁶ (ii)

⁵⁶² Elements of Crimes, footnote. 7.

⁵⁶³ See, e.g., 1996 Draft Code, commentary on art. 18(a), para. 7. "Murder is a crime that is clearly understood and well defined in the national law of every state. This prohibited act does not require further explanation."

⁵⁶⁴ ICC-01/04-01/07-649-Anx1A at p. 30.

⁵⁶⁵ ICTR, *The Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Trial Judgment and Sentence, 25 February 2004, para. 700.

⁵⁶⁶ Statement of W-250 at DRC-OTP-0177-0262 at 0296, lines 1142-1150; Statement of W-249 at DRC-OTP-1015-0833 at 0836, paras 16-17; Statement of W-233 at DRC-OTP-1007-0061 at 0073, para. 77-81 ; at 0080, paras 127-128: " le civil d'une quarantaine d'années qui, dans la même cachette que moi, est sorti en croyant que tout était terminé." ; Statement of W-268 at DRC-OTP-1007-0095 at 0108-0109, paras 101-105: "Les combattants ont continué à tirer vers les gens qui étaient supposés se

chased down civilians who were fleeing, notably in the direction of Mount Waka, and shot at them with firearms or fatally wounded them with machete blows;⁵⁶⁷ (iii) shot certain civilians in their houses;⁵⁶⁸ (iv) killed others by setting their houses on fire;⁵⁶⁹ and (v) killed civilians attempting to find refuge in the UPC camp, in particular in the classrooms of the former Institute of Bogoro.⁵⁷⁰

425. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that members of the FRPI and the FNI caused the death of approximately 200 civilians⁵⁷¹ in the village of Bogoro on 24 February 2003, most of whom were killed once they fell into the hands of FRPI or FNI combatants.⁵⁷²

426. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the FNI/FRPI members entered Bogoro village with guns⁵⁷³

cacher dans les roseaux. [...] j'ai entendu un homme [...] qui est sorti avec sa femme et un enfant [...] Les combattants les ont pris [...] Ils les ont arrêtés et ils les ont emmenés.”; Statement of W-166 at DRC-OTP-1007-0002 at 0017, para. 91.

⁵⁶⁷ Statement of W-233 at DRC-OTP-1007-0061 at 0076, para. 99; Statement of W-268 at DRC-OTP-1007-0095 at 0101, para. 46; Statement of W-161, DRC-OTP-0164-0488 at 0496, paras 41, 44; Statement of W-161 at DRC-OTP-0164-0488 at 0497-0498, paras 49-54: “[REDACTED]. J’ai vu qu’elle a d’abord été touchée par une balle et est tombée au sol. [...] [REDACTED]. J’ai vu très clairement ce même combattant tuer [...] [la fille] à coups de machette. [...] J’ai été le témoin de la mort d’une autre femme [...]. Elle a subi exactement le même sort [REDACTED].”; Statement of W-249 at DRC-OTP-1015-0833 at 0836, paras 14, 16-17; Statement of W-159 at DRC-OTP-0164-0472 at 0479-0480, paras 44-48.

⁵⁶⁸ Statement of W-157 at DRC-OTP-0164-0534 at 0544, para. 64; Statement of W-233 at DRC-OTP-1007-0061 at 0073, para. 77; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 60; Statement of W-280, DRC-OTP-1007-1089 at 1097, para. 51; Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48.

⁵⁶⁹ Statement of W-157 at DRC-OTP-0164-0534 at 0544, para. 64; Statement of W-233 at DRC-OTP-1007-0061 at 0073, para. 77; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 60; Statement of W-280, DRC-OTP-1007-1089 at 1097, para. 51.

⁵⁷⁰ Statement of W-161 at DRC-OTP-0164-0488 at 0496-0497, para. 46; Statement of W-233 at DRC-OTP-1007-0061 at 0071, para. 67; Statement of W-268 at DRC-OTP-1007-0095 at 0106, para. 86 ; at 0100, paras 37-38 ; at 0104, paras 72-73; Statement of W-28 at DRC-OTP-0171-1828 at 1838, paras 48-49: “Il y avait une école avec plusieurs classes dans le camp militaire de l’UPC. J’ai vu beaucoup de corps de bébés, d’enfants et de femmes qui avaient été tués par balles dans cette école.”

⁵⁷¹ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004), at DRC-0129-0267 at 288, para. 65; Statement of W-12 at DRC-0105-0085 at 0130, para. 245: “Le massacre de Bogoro avait fait, quant à lui, environ 200 victimes parmi les civils Hemas.”

⁵⁷² Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96.

⁵⁷³ Statement of W-161 at DRC-OTP-0164-0488 at 0495, para. 36; Statement of W-233 at DRC-OTP-1007-0061 at 0071, para. 65: “L’attaque a commencé [...] J’étais chez moi et je dormais lorsque j’ai entendu des coups de balles de fusils et de canons. ” ; Statement of W-268 at DRC-OTP-1007-0095 at 0100-0101, paras 42-45: “J’entendais que les coups de feu qui provenaient de l’ouest et du nord s’intensifiaient [...] Les coups des balles venaient de partout. Nous étions encerclés.”; Statement of

and machetes⁵⁷⁴ to: (i) attack the village, (ii) “take the village, starting [with] the houses”,⁵⁷⁵ (iii) “erase everything”,⁵⁷⁶ and (iv) avenge the massacres they believed the Hema had perpetrated in other villages,⁵⁷⁷ they did so with the intent to kill such civilians.

427. In conclusion, the Chamber finds that there are substantial grounds to believe that the crime against humanity of murder, as detailed in article 7(1)(a) of the Statute, was committed by FNI/FRPI members during and in the aftermath of the 24 February 2003 attack on Bogoro village

2. *Sexual slavery*

a) Objective and subjective elements

428. In **Count 6**, the Prosecution charges Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 7(1)(g) of the Statute, with having:

[...] committed, jointly with others, or each ordered the commission of crimes against humanity which in fact occurred, namely, the sexual enslavement of civilian female

W-161 at DRC-OTP-0164-0488 at 0497-0498, paras 49-54”; Statement of W-157 at DRC-OTP-0164-0534 at 0544, para. 61: “Quant aux civils, ils tombaient inévitablement. Quand il y a le crépitement des balles, tu peux essayer de t’enfuir, mais si le feu t’attrape, tu peux mourir. Et là, tu peux voir des cadavres, même des enfants”; Statement of W-268 at DRC-OTP-1007-0095 at 0104, para. 74; Statement of W-132 at DRC-OTP-1016-0156 at 0159, para. 13; at 0160, para. 21; at 0161, para. 26.

⁵⁷⁴ Statement of W-250 at DRC-OTP-0177-0363 at 0374, lines 370-390; Statement of W-161 at DRC-OTP-0164-0488 at 0497-498, paras 49-54; Statement of W-258 at DRC-OTP-0173-0718 at 0747, lines 0957-0971; at 0748, lines 1008-1011; Statement of W-159 at DRC-OTP-0164-0472 at 0479-0480, paras 44-48: “Depuis l’endroit où je me trouvais, j’ai pu voir un grand nombre de civils être tués par les attaquants. [...] [REDACTED] ont été tués alors qu’ils fuyaient avec tout un groupe de civils. [...] Je les ai vu tomber ainsi que deux ou trois autres personnes. [...] Je me souviens qu’une nommée [...] a également été tuée [...] Elle aussi a été achevée par un combattant à coups de machette.”; Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48: “Il y a eu des morts du côté de la population civile de Bogoro. Des vieillards, hommes et femmes ont été tués dans leur maison. Certains avaient été tués par balles, d’autres à coups de machette. Au lieu d’enterrer les cadavres, les combattants ont brûlé leurs maisons”; Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 49: “On n’utilisait pas les armes à feu pour tuer les civils. On les tuait avec la machette ou le couteau.”; Statement of W-268 at DRC-OTP-1007-0095 at 0104, para. 74; Statement of W-268 at DRC-OTP-1007-0095 at 0107-0108, paras 96-97; Statement of W-132 at DRC-OTP-1016-0156 at 0159, para. 13.

⁵⁷⁵ Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 44.

⁵⁷⁶ Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37.

⁵⁷⁷ Statement of W-12 at DRC-OTP-0105-0085 at 151-152, paras 361-366. See also evidence referred to in section of Widespread and systematic attack directed against civilian population.

residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu territory, Ituri district, including W-132 and W-249.

429. The crime against humanity of sexual slavery pursuant to article 7(1)(g) of the Statute and article 7(1)(g)-2 of the Elements of Crimes, occurs when:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

430. The Chamber notes that although sexual slavery is included as a separate offence in article 7(1)(g) of the Statute, it may be regarded as a particular form of enslavement. Accordingly, footnotes 11 (Crime Against Humanity of Enslavement) and 18 (Crime Against Humanity of Sexual Slavery) of the Elements of Crimes, both indicate that “such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.” The Supplementary Convention lists institutions or practices which include debt bondage, serfdom, forced marriage practices and forms of child labour, which constitute particular forms of enslavement.⁵⁷⁸

431. In the view of the Chamber, sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.⁵⁷⁹ Forms of sexual slavery can, for example, be “practices such as the detention of

⁵⁷⁸ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956*, 226 U.N.T.S. 3, 30 April 1957.

⁵⁷⁹ See United Nations Economic and Social Council, *Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict*, United Nations Document E/CN.4/Sub.2/1998/13, para. 30, available at <http://www.unhchr.ch/huridocda/huridoca.nsf/0/3d25270b5fa3ea998025665f0032f220?OpenDocument>; United Nations Economic and Social Council, *Report of the Special Rapporteur on Violence against Woman, its Causes and Consequences*, United Nations Doc. E/CN.4/1998/54, para. 42.

women in 'rape camps'⁵⁸⁰ or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery."⁵⁸¹

432. The second element of the crime against humanity of sexual slavery requires that "the perpetrator caused such person or persons to engage in one or more acts of a sexual nature."⁵⁸² Thus, a particular parameter of the crime of sexual enslavement - in addition to limitations on the victim's autonomy, freedom of movement and power - is the ability to decide matters relating to his or her sexual activity.⁵⁸³

433. Article 30 of the Statute governs the subjective element of the crime against humanity of sexual slavery requiring the perpetrator's intent to impose a deprivation of liberty and cause the victim to engage in one or more acts of a sexual nature. Thus, this offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the crime against humanity of sexual slavery, as provided for in article 7(1)(g) of the Statute, was committed in the aftermath of the 24 February 2003 attack.

434. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that before and in the aftermath of the joint FRPI/FNI attack against the village of Bogoro on 24 February 2003, combatants from the FRPI and the

⁵⁸⁰ ICTY, *The Prosecutor v. Gagovic (Foča)*, Case No. IT-96-23-1, Indictment, 26 June 1996, paras 1.5, 4.8.

⁵⁸¹ See United Nations Economic and Social Council, *Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict*, United Nations Document E/CN.4/Sub.2/1998/13, para. 8; United Nations Economic and Social Council, *Report of the Special Rapporteur on Violence against Woman, its Causes and Consequences*, United Nations Document E/CN.4/1998/54; referenced by HALL, C. K., "Article 7 – Crimes against Humanity", in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., München, C.H.Beck, 2008, para. 45.

⁵⁸² BOOT, M. revised by HALL, C. K., "Article 7 – Crimes against Humanity", in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., München, C.H.Beck, 2008, para. 47.

⁵⁸³ See, BASSIOUNI M. C, "Enslavement as an International Crime", 23 N.Y.U.J. Int'l L. & Pol. 458 (1991).

FNI: (i) abducted women and/or girls from villages or areas surrounding the camps⁵⁸⁴ for the purpose of using them as their "wives";⁵⁸⁵ (ii) forced and threatened women and/or girls to engage in sexual intercourse with combatants and to serve as sexual slaves for combatants and commanders alike;⁵⁸⁶ and (iii) captured and imprisoned women and/or girls to work in a military camp servicing the soldiers.⁵⁸⁷ More specifically, there are substantial grounds to believe that during the attack on Bogoro, women were captured, raped and subsequently abducted by Ngiti attackers.⁵⁸⁸ The women were taken to camps where they were kept as prisoners in order to provide domestic services, including cooking and cleaning, and to engage in forced sexual acts with combatants and commanders.⁵⁸⁹

435. Finally, as previously found by the Chamber, there is sufficient evidence to establish substantial grounds to believe that when the combatants (i) abducted women from the village of Bogoro, (ii) captured and imprisoned them and kept them as their "wives", and (iii) forced and threatened them to engage in sexual intercourse, they intended to sexually enslave the women or knew that by committing such acts, sexual enslavement would occur.

⁵⁸⁴ Summary of statement of W-271 at DRC-OTP-1019-0223 at 0228, para. 6; Statement of W-267 at DRC-OTP-1016-0106 at 0110: "Selon les connaissances du témoin, les femmes qui étaient dans le FRPI étaient enlevées par les miliciens"; Statement of W-28 at DRC-OTP-0171-1828 at 1843, para. 74: "[...] a kidnappé 2 jeunes filles lors de la première attaque de Nyankunde".

⁵⁸⁵ Statement of W-249 at DRC-OTP-1015-0833 at 0837, paras 23-29: "Après, j'ai été mariée"; Statement of W-267 at DRC-OTP-1016-0106 at 0110: "On les enlevait pour être les femmes des combattants".

⁵⁸⁶ Statement of W-249 at DRC-OTP-1015-0833 at 0837, paras 23-29: "je suis devenue la femme du soldat [...] Les soldats qui venaient dans le camp m'ont également soumise à des violences sexuelles lorsqu'ils venaient et partaient pour le travail [...] Ils me forçaient à avoir des relations sexuelles avec eux"; Statement of W-12 at DRC-0105-0085 at 0154, para. 375: " Les Lendus avaient principalement enlevé des femmes dont ils se sont servis ensuite comme esclave".

⁵⁸⁷ Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 72: "J'ai entendu dire, de mes amis combattants, que des femmes ont été fait[sic] prisonnières à Bogoro et elles ont été amenées au camp de Kagaba"; at 1843, para. 74: "Au camp d'Avenyuma, il y avait aussi des filles prisonnières "; Statement of W-132 at DRC-OTP-0106-0156 at 0164, para. 40: "Au début j'étais seule dans la prison. Ensuite, les combattants ont ramené d'autres femmes "

⁵⁸⁸ Statement of W-249 at DRC-OTP-1004-0115 at 0117-0118, paras 17-21: "[During the attack on Bogoro] I came out and this is when some of the Ngitis attackers abducted me [...] One of them violated me. This happened right there, where I came out from the bush. [...]"; at 0119, paras 27-30: "We women could not go anywhere on our own. The Ngitis were surveilling us, and making sure that we did not leave. We were like prisoners, cooking for [REDACTED] and taking orders from [REDACTED] the others."; Statement of W-132 at DRC-OTP-1016-0156 at 0162-0165, paras 32-48.

⁵⁸⁹ Statement of W-249 at DRC-OTP-1004-0115 at 0117-0118, paras 17-21; at 0119, paras 27-30; Statement of W-132 at DRC-OTP-1016-0156 at 0162-0165, paras 31-48.

436. In conclusion, the Chamber finds that there are substantial grounds to believe that the crime against humanity of sexual slavery, as detailed in article 7(1)(g) of the Statute, was committed by FNI/FRPI members in the aftermath of the 24 February 2003 attack on Bogoro village

3. *Rape*

a) Objective and subjective elements

437. In **Count 9**, the Prosecution charges Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 7(1)(g) of the Statute, with having:

[...] committed, jointly with others, or each ordered the commission of war crimes which in fact occurred, namely, the rape of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu territory, Ituri district, including W-132 and W-249.

438. The crime against humanity of rape pursuant to article 7(1)(g) of the Statute and article 7(1)(g)-1 of the Elements of Crimes, occurs when:

(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

(2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

439. The objective elements of the crime against humanity of rape are further explained in footnotes 15 and 16 of the Elements of Crimes to mean that “the concept of ‘invasion’ is intended to be broad enough to be gender neutral” and “that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.”

440. With regard to the term “coercion”, the Chamber notes the finding of the ICTR Trial Chamber in *The Prosecutor v. Akayesu* that a coercive environment does not require physical force. Rather, “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion

may be inherent in certain circumstances, such as armed conflict or military presence.”⁵⁹⁰

441. Finally, article 30 of the Statute governs the subjective element of the crime against humanity of rape requiring the perpetrator’s intent to invade another person’s body “with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body”⁵⁹¹ by force or threat of force or coercion. Thus, this offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the crime against humanity of rape, as provided for in article 7(1)(g) of the Statute, was committed in the aftermath of the 24 February 2003 attack.

442. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that members of the FNI and FRPI, by force or threat, invaded the body, or parts of it, of women and girls abducted before, during and after the February 2003 attack on the village of Bogoro. In particular, there are substantial grounds to believe that during and after the attack on Bogoro, women were raped by FNI/FRPI combatants in or around the village of Bogoro.⁵⁹²

443. Thus, in the view of the Chamber, there is also sufficient evidence to establish substantial grounds to believe that rape was a common practice following an

⁵⁹⁰ ICTR, *The Prosecutor v. Akayesu*, Case No IT-96-4-T, Trial Judgment, 2 September 1998, para. 688.

⁵⁹¹ Elements of Crimes, article 7(1)(g)-1(1).

⁵⁹² Statement of W-233 at DRC-OTP-1007-0061 at 0081-0082, paras 133-136: “Pendant l’attaque de Bogoro, il y a eu des femmes qui ont été violées [et] m’ont raconté que certaines femmes ont été violées et tuées sur place par les attaquants. D’autres ont été capturées et emportées pour être ensuite violées et tuées. [...] Cette fille devait avoir entre 14 et 15 ans. [...] Elles sont toutes devenues des femmes de combattants Ngiti.”; Statement of W-249 at DRC-OTP-1004-0115 at 0117-0118, paras 17-21; Statement of W-132 at DRC-OTP-1016-0156 at 0179, para. 139: “Le troisième jour après l’attaque de Bogoro, [REDACTED], les combattants Ngitis m’ont trouvée. [...] Ils voulaient me tuer. Trois de ces combattants ont couché avec moi. J’ai bien vu ces combattants, mais je ne sais pas si je pourrais les reconnaître. Ils ont dit qu’ils allaient s’amuser avec moi, car j’étais leur femme. Ils m’ont dit ça en Swahili.”; Human Rights Watch, *Ituri: “Covered in Blood” – Ethnically Targeted Violence In Northeastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848.

attack⁵⁹³ and that combatants who forced women to engage in sexual intercourse intended to commit such acts by force or threat of force.⁵⁹⁴

444. In conclusion, the Chamber finds that there are substantial grounds to believe that the crime against humanity of rape, as detailed in article 7(1)(g) of the Statute, was committed by FNI/FRPI members in the aftermath of the 24 February 2003 attack on Bogoro village

4. Other inhumane acts

a) Objective and subjective elements

445. In Count 3, the Prosecution charges Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 7(1)(k) of the Statute, with having:

[...] committed, jointly with others, or each ordered the commission of crimes against humanity which in fact occurred, namely, inhumane acts of intentionally inflicting serious injuries upon civilian residents of, or upon persons present at Bogoro village in the Bahema Sud collectivité, Irumu territory, Ituri district, including W-132 and W-287.

446. The crime against humanity of other inhumane acts pursuant to article 7(1)(k) of the Statute requires the commission of “other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

447. In addition, article 7(1)(k) of the Elements of Crimes requires that:

1. [t]he perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

⁵⁹³ Statement of W-28 at DRC-OTP-0171-1828 at 1843, para. 73: “Pendant les combats, les féticheurs nous interdisaient de piller, de voler de l’argent ou de violer. Une fois les combats terminés, les combattants faisaient ce qu’ils voulaient. Je n’ai pas vu de filles ou de femmes se faire violer après les combats mais j’ai toutefois entendu dire que cela ce produisait. Je n’ai va pas vu de combattants se faire punir pour cela, ni entendu dire que des combatants avaient été punis pour avoir commis des viols”; Human Rights Watch, *Ituri: “Covered in Blood” – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848.

⁵⁹⁴ Statement of W-233 at DRC-OTP-1007-0061 at 0081-0082, paras 133-136; Statement of W-249 at DRC-OTP-1004-0115 at 0117-0118, paras 17-21; Statement of W-132 at DRC-OTP-1016-0156 at 0179, para. 139; Human Rights Watch, *Ituri: “Covered in Blood” – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848.

2. [s]uch act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. [t]he perpetrator was aware of the factual circumstances that established the character of the act.

448. In the view of the Chamber, in accordance with article 7(1)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law,⁵⁹⁵ which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.

449. The Chamber notes that, according to the jurisprudence of the ICTY Trial Chamber in *The Prosecutor v. Blaškić*,⁵⁹⁶ the conduct of intentionally causing serious physical or mental injury constitutes a serious violation of international customary law and of human rights of a similar nature and gravity to the crimes referred to in article 7(1) of the Statute. However, in determining whether such acts meet the requirements of article 7(1)(k) of the Statute, the Chamber also considers that in each case:

[c]onsideration must be given to all of the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.⁵⁹⁷

450. The Chamber notes, however, that the Statute has given to “other inhumane acts” a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived “other inhumane acts” as a “catch all provision”,⁵⁹⁸ leaving a broad margin for the jurisprudence to determine its limits. In

⁵⁹⁵ ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, para. 566; ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 721.

⁵⁹⁶ ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, para. 239.

⁵⁹⁷ ICTY, *The Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 25 February 2004, para. 165.

⁵⁹⁸ BOOT, M. revised by HALL, C. K., “Article 7 – Crimes against Humanity”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., München, C.H.Beck, 2008, p. 230, para. 79.

contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action.

451. According to article 7(1)(k)(2) of the Elements of Crimes, an other inhumane act must be of a similar character to any other act referred to in article 7(1) of the Statute. Footnote 30 of the Elements of Crimes states that “character” shall be understood as referring to the nature and gravity of the act.

452. Although this similarity is required, article 7(1)(k) of the Statute defines the conduct as “other” inhumane acts, which indicates that none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as an other inhumane act encompassed by article 7(1)(k) of the Statute.

453. Article 7(1)(k) of the Statute and article 7(1)(k)(1) of the Elements of Crimes further require that great suffering, or serious injury to body or to mental or physical health occur *by means* of an inhumane act.

454. For example, to establish bodily injury as a crime against humanity, the ICTY Appeals Chamber in *The Prosecutor v. Kordić and Čerkez* found that the following conditions should be met:

- (a) the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- (b) the suffering must be the result of an act or omission of the accused or his subordinate; and
- (c) when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.⁵⁹⁹

455. In respect of the subjective element, the Chamber notes that in addition to the requirement that the objective elements were committed with intent and knowledge pursuant to article 30 of the Statute, article 7(1)(k)(3) of the Elements of Crimes establishes that the “perpetrator must also [have been] aware of the factual

⁵⁹⁹ ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 117.

circumstances that established the character of the act.” This offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.

b) Whether there is sufficient evidence to establish substantial grounds to believe that the crime against humanity of other inhumane acts as provided for in article 7(1)(k) of the Statute was committed during and in the aftermath of the 24 February 2003 attack

456. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that during and in the aftermath of the joint attack by the FRPI and the FNI against the civilian population of the village of Bogoro on 24 February 2003, members of the FRPI and the FNI inflicted serious injuries upon civilians, notably as a result of gunfire⁶⁰⁰ or machete blows.⁶⁰¹ In particular, the Chamber notes that the Prosecution provided sufficient evidence to establish substantial grounds to believe that Witnesses 132 and 287 suffered serious, and potentially life-threatening injuries,⁶⁰² caused by FNI/FRPI combatants during the attack on Bogoro in 24 February 2003.⁶⁰³

⁶⁰⁰ Statement of W-268 at DRC-OTP-1007-0095 at 0110, para. 113: “ Par exemple, un enfant [REDACTED] m’a dit qu’il reçu une balle à une fesse. Il m’a montré sa blessure .”; See also evidence referred to in “Existence of the offences under 8(2)(a)(i), 8(2)(a)(ii), 8(2)(b)(i), 8(2)(b)(xvi), 8(2)(b)(xxii), 8(2)(b)(xxvi), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute”, section of “Directing an attack against the civilian population”.

⁶⁰¹ See also evidence referred to in “Existence of the offences under 8(2)(a)(i), 8(2)(a)(ii), 8(2)(b)(i), 8(2)(b)(xvi), 8(2)(b)(xxii), 8(2)(b)(xxvi), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute”, section of “Directing an attack against the civilian population”.

⁶⁰² Photographs of W-132 at DRC-OTP-1016-0216; DRC-OTP-1016-0217; DRC-OTP-1016-0218; DRC-OTP-1016-0219; DRC-OTP-1016-0220. Photographs of W-287 at DRC-OTP-1013-0252; DRC-OTP-1013-0253; DRC-OTP-1013-0254; DRC-OTP-1013-0255. Statement of W-132 at DRC-OTP-1016-0156 at 0160, para. 23: “Les combattants m’ont aussi couru après. J’ai été atteinte par une balle [REDACTED]. J’ai vu le sang qui coulait [REDACTED] et je me suis cachée un peu plus loin. J’ai vu que les combattants m’ont dépassé et ont continué à courir.”; Statement of W-287 at DRC-OTP-1013-0205 at 0209, para. 23: “Ensuite, ils ont tiré sur moi trois fois avec un fusil. Plus tard, je me suis rendue compte que j’étais blessée, mais à ce moment là je ne l’ai pas su.”; at 0212, paras 39-40: “Je suis tombée et j’ai senti une douleur forte [REDACTED] à cause de ma blessure. Des liquides graisseux sortaient [REDACTED].”

⁶⁰³ Statement of W-250 at DRC-OTP-0177-0299 at 0314-0315, lines 494-550; Statement of W-250 at DRC-OTP-0177-0327 at 0328-0329, lines 22-27; at 0328-0329, lines 39-43; at 0328-0329, lines 59-60; Statement of W-132 at DRC-OTP-1016-0156 at 0160, para. 19; Statement of W-287 at DRC-OTP-1013-0205 at 0207, paras 12-13; Statement of W-28 at DRC-OTP-0155-0106 at 0123, para. 88; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20; Statement of W-157 at DRC-OTP-0164-0534 at 0542, para. 47 ; at 0540, para. 36: “Au troisième tour, on s’est divisé en trois groupes pour attaquer la ville [Bogoro]. [...] À la fin, c’était l’échec total pour l’UPC, car ils ne pouvaient pas

457. The Chamber also finds that there are substantial grounds to believe that, pursuant to article 30 of the Statute, the combatants knew that by indiscriminately shooting at civilians with firearms or striking civilians with lances or machetes in Bogoro village, killings or serious bodily injury would occur in the ordinary course of events.

458. Based on the evidence tendered by the Prosecution, the majority of the Chamber, Judge Anita Ušacka dissenting, finds, however, that the combatants, in attacking civilians during and in the aftermath of the 24 February 2003 attack on Bogoro, and by indiscriminately using machetes, firearms and heavy weapons against civilians in such attacks, had the specific intent to kill such civilians,⁶⁰⁴ rather than the intent to cause severe injuries. They commenced the execution of the conduct of killing civilians by means of a substantial step toward the killing of one or more persons,⁶⁰⁵ but did not achieve the act because of circumstances independent of the perpetrator's intent.

recevoir du renfort et ils étaient complètement encerclés.”; Statement of W-159 at DRC-OTP-0164-0472 at 0481, para. 59; Statement of W-258 at DRC-OTP-0173-0755 at 0762, lines 233-246; at 0763, lines 247-258; Statement of W-233 at DRC-OTP-1007-0061 at 0077, para. 108: “J’ai aussi appris par après qu’il y avait trois groupes d’attaquants provenant de différentes directions : une groupe de combattants Lendus venait du territoire de Djungu, un groupe de combattants Ngitis venait du sud, et un troisième groupe venait de la collectivité Bira.”; Statement of W-268 at DRC-OTP-1007-0095 at 0100, para. 43; at 0101, para. 49: “nous avons commencé à fuir en courant. [...] J’entendais que les coups de feu qui provenaient de l’ouest et du nord s’intensifiaient [...] Les coups de balles venaient de partout. Nous étions encerclés.”; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 0288, para. 65.

⁶⁰⁴ Statement of W-160 at DRC-OTP-0153-0006 at 0022, para. 96: “Germain KATANGA m’avait dit que l’attaque avait été faite pour se venger de massacres que les Hemas avaient fait dans un autre village [...] Germain expliquait qu’ils avaient attaqué le village lorsqu’il [sic] ne s’y attendaient pas et que les [sic] peu de militaires qu’il y avait de l’UPC avait fui.”; Statement of W-28 at DRC-00105-152, para. 364: “Connaissant la stratégie habituelle des Lendus et Ngitis, il ne fait pas doute que toutes personnes, civiles ou militaires, trouvées dans le village, avaient été tués [sic]”; Statement of W-28 at DRC-OTP-0171-1828 at 1838, para. 48; Statement of W-250 at DRC-OTP-1013-0002 at 0019, paras 106-108; at 0019, para. 110: “De toute façon, dès que l’on trouvait quelqu’un, on le tuait. On ne faisait pas de différence entre civils ou militaires, hommes, femmes ou enfants.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0296, line 1156; at 0296, line 1162; at 0360, lines 1129-1130; Statement of W-249 at DRC-OTP-1004-0115 at 0117, para. 13; Statement of W-268 at DRC-OTP-1007-0061 at 0102, para. 59; Statement of W-132 at DRC-OTP-1016-0156 at 0158-0159, paras 9-11, 13; Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 48.

⁶⁰⁵ Statement of W-280, DRC-OTP-1007-1089 at 1095, para.37: “[REDACTED], KUTE nous a transmis de nouveau les ordres de NGUDJOLO : « Lorsque vous arriverez à Bogoro, il faudra tout effacer »; Statement of W-157, DRC-OTP-1006-0054 at 0071-0072, paras 123-125; Transcript of

459. In the view of the majority of the Chamber, the intent to perpetrate a specific act necessarily precedes the decision to further the act. In other words, the subjective elements, or the *mens rea*, is to be inferred from the moment in which the perpetrator takes the *action that commences its execution by means of a substantial step*, according to the language of article 25(3)(f) of the Statute.

460. The majority of the Chamber endorses the doctrine that establishes that the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete. Therefore, the *dolus* that embodies the attempt is the same than the one that embodies the consummated act.⁶⁰⁶ As a consequence, in order for an attempt to commit a crime to be punished, it is necessary to infer the intent to further an action that would cause the result intended by the perpetrator, and the commencement of the execution of the act.⁶⁰⁷

461. In the view of the majority of the Chamber, the crime against humanity of murder, under article 7(1)(a) of the Statute, even in its attempted form, in accordance with article 25(3)(f) of the Statute, cannot be charged simultaneously under article 7(1)(k) of the Statute as *other* inhumane acts.

462. As already found by the Chamber in previous section of the present Decision, including those related to the war crime of wilful killing, and the crime against humanity of murder, the evidence tendered by the Prosecution establishes substantial grounds to believe that FNI/FRPI members had the specific intent to murder the civilian population of Bogoro, and that the attack on Bogoro village on 24 February 2003 included that: (i) it was directed against the predominantly Hema civilian population; (ii) the civilian population was the first to be targeted; (iii)

Statement of W-250 at DRC-OTP-0177-0147 at 0243, lines 427-428: “le but était qu’on puisse se mettre ensemble pour attaquer BOGORO. On voulait effacer BOGORO.”; Transcript of Statement of W-250 at DRC-OTP-0177-0147 at 0279, line 571; Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 68: “[REDACTED], avant la bataille de Bogoro et lors de notre déplacement [REDACTED], on chantait en Lingala et Swahili des chants injurieux qui faisait [*sic*] référence à l’ennemi Hema. On chantait que si l’on attrapait un Héma, on l’égorgerait et on le tuerait.”; Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 121.

⁶⁰⁶ JESCHECK, H.H., *Tratado de derecho penal – Parte general*, vol.2. Trad. Mir Puig and Munoz Conde. Barcelona, Bosch ed., p. 703.

⁶⁰⁷ FRANCO, A.S.,(org) *Código Penal e sua Interpretação*,. S. Paulo, RT, 2008, p. 133.

civilians, including elderly, women and children, were killed by gunfire and machete wounds, and some were killed by being burned alive; and (iv) civilians were killed inside their houses or while trying to flee, during and in the aftermath of the attack.⁶⁰⁸

463. Therefore, in the view of the majority of the Chamber, the clear intent to kill persons cannot be transformed into intent to severely injure persons by means of inhumane acts solely on the basis that the result of the conduct was different from that which was intended and pursued by the perpetrators.⁶⁰⁹

464. The majority of the Chamber therefore finds that, for the purposes of the decision whether or not to confirm the charge, the Prosecution has not tendered sufficient evidence to establish substantial grounds to believe that the combatants, in attacking civilians with deadly weapons by either indiscriminately shooting civilians with firearms or in striking civilians with lances or machetes, had the intent to only cause serious injury to body or to mental or physical health of the civilian population of Bogoro.

465. In conclusion, the majority of the Chamber finds that there is not sufficient evidence to establish substantial grounds to believe that the crime against humanity of other inhumane acts, as defined in article 7(1)(k) of the Statute was committed by FNI/FRPI members during and in the aftermath of the 24 February 2003 attack on Bogoro village and, in accordance with article 61(7)(b) of the Statute, declines to confirm such charge.

⁶⁰⁸ See evidence relevant to the mentioned charges

⁶⁰⁹ BOOT, M. revised by HALL, C. K. , "Article 7 – Crimes against Humanity", in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., München, C.H.Beck, 2008, p .232, para. 83: "Paragraph 1(k) seems to follow the interpretation of the ICTY and excludes inhumane acts which cause the enumerated consequences without intent".

IV. CRIMINAL RESPONSIBILITY

A. Modes of liability

1. Introduction

466. Having found that the evidence and information provided by the Prosecution met the threshold requirements of article 58(1)(a) of the Statute, the Chamber issued warrants of arrest for Germain Katanga and Mathieu Ngudjolo Chui. In the respective decisions regarding the two suspects, the Chamber determined that there are reasonable grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui may be criminally responsible under article 25(3)(a) of the Statute as principals to the crimes committed by members of the FRPI/FNI during and in the aftermath of the joint FRPI/FNI attack against the village of Bogoro on or about 24 February 2003.

467. In the alternative, the Chamber affirmed the existence of reasonable grounds to believe that the suspects may be criminally responsible under article 25(3)(b) of the Statute as accessories to the crimes committed by their subordinates during and in the aftermath of the attack.⁶¹⁰

2. Scope of the analysis

468. Pursuant to rule 121(3) of the Rules, the Prosecution shall provide “a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing”. Also, pursuant to regulation 52(c) of the Regulations of the Court, the Amended Charging Document must include “a legal characterization of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.”

469. Accordingly, in the Amended Charging Document, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui, pursuant to article 25(3)(a) of the Statute, with criminal responsibility as co-perpetrators of a common plan.⁶¹¹

470. In the alternative, the Prosecution charged Germain Katanga and Mathieu Ngudjolo Chui with criminal responsibility under article 25(3)(b) of the Statute for

⁶¹⁰ ICC-01/04-01/07-4-US-Exp, para. 60; ICC-01/04-01/07-3-US, para. 61.

⁶¹¹ ICC-01/04-01/07-649-Anx1A, para. 90.

ordering the commission of war crimes and crimes against humanity. The Prosecution submitted that Germain Katanga and Mathieu Ngudjolo Chui – each being vested with the power and authority as chief of all the FRPI combatants or FNI combatants from Zumbe area, respectively – acted as accessories by ordering their subordinates to attack the civilian population of Bogoro with the necessary intent and knowledge to provoke or induce the commission of the crimes charged.⁶¹²

471. If the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are jointly responsible as principals for having committed the crimes listed in the Amended Document Containing the Charges through their subordinates, such a finding renders moot further questions of accessorial liability. This means that the Chamber will not consider other forms of accessorial liability provided for in article 25(3)(b) to (d) of the Statute or the alleged superior responsibility of the two suspects provided for in article 28 of the Statute.

3. The submissions of the parties and participants

472. At the outset, both the Defence for Germain Katanga and the Prosecution acknowledged that a detailed discussion of the legal elements of the mode of liability is inappropriate at this stage of the proceedings.⁶¹³ The Defence for Mathieu Ngudjolo Chui reserved its right to comment on this matter, and as such, did not address it extensively in its submissions.⁶¹⁴ The Prosecution further submitted that such discussions should be deferred for presentation before the Trial Chamber, in the event that the charges against Germain Katanga and Mathieu Ngudjolo Chui are confirmed.⁶¹⁵ However, the Defence for Germain Katanga requested that the Chamber set out its theory of liability as a co-perpetrator pursuant to article 25(3)(a) of the Statute in the interest of determining the scope of the modes of liability

⁶¹² ICC-01/04-01/07-649-Anx1A, para. 94.

⁶¹³ ICC-01/04-01/07-692, para. 44; ICC-01/04-01/06-698, para. 15.

⁶¹⁴ ICC-01/04-01/07-699, para. 93.

⁶¹⁵ ICC-01/04-01/07-692, para. 44.

charged and whether any challenge to the liability mode adopted and potentially confirmed would be warranted at the trial level.⁶¹⁶

473. During the hearing on the confirmation of charges, the Prosecution did not request an amendment to the Document Containing the Charges on modes of liability. The Prosecution's position was that, "Mathieu Ngudjolo Chui and Germain Katanga are alleged to have had an essential role in the implementation of the common plan and to have provided the necessary contribution, and are therefore alleged to be co-perpetrators pursuant to article 25(3)(a)."⁶¹⁷ The Prosecution was of the opinion that article 25(3)(a) of the Statute adopts a concept of co-perpetration based on the notion of control of the crime, in the sense that a person can become a co-perpetrator of a crime only if he or she has "joint control" over the crime as a result of the "essential contribution" ascribed to him or her. The Prosecution submitted that, in light of the Defence's failure to present any reasons to justify the Chamber's departing from its previous findings on these matters, it should refrain from any such departure in this Decision.⁶¹⁸

474. The Defence for Germain Katanga raised several issues relating to co-perpetration under article 25(3)(a) of the Statute and the interpretation of the mental element in article 30 of the Statute. In particular, it disagreed with the Chamber's legal findings in the *Lubanga* Decision in this respect.⁶¹⁹ First, according to the Defence, the Chamber defined the concept of co-perpetration in article 25(3)(a) in a

⁶¹⁶ ICC-01/04-01/06-698, para. 15.

⁶¹⁷ ICC-01-04-01-07-590, para. 11: "Katanga and Ngudjolo are alleged to have had an essential role in the implementation of the common plan and to have provided the necessary contribution, and are thus alleged to be coperpetrators pursuant to Article 25(3)(a)." The same understanding of the Prosecution's theory was also recognised by the Single Judge, see *Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document*, ICC-01/04-01/07-648, para. 23: "Germain Katanga and Mathieu Ngudjolo Chui, who, according to the Prosecution's Consolidated Response, are the only co-perpetrators of the crimes included in the Prosecution's Amended Charging Document, insofar as they were the only members of the common plan whose role and contribution give them control over the commission of the crime[s]." Also see ICC-01/04-01/07-692, para. 40.

⁶¹⁸ ICC-01/04-01/07-692, para. 43. The Pre-Trial Chamber I had previously elaborated in great detail on the concept of co-perpetration and on the mental elements, as embodied in the Statute, in *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, paras 322-367. This is particularly significant in the instant proceedings, as no other Chamber of the Court has thus far provided any divergent interpretation of these matters.

⁶¹⁹ ICC-01/04-01/06-698, paras 14-16; ICC-01/04-01/07-T-46-ENG-ET at p. 28, lines 11 *et seq.*

manner inconsistent with the intention of the drafters of the Statute.⁶²⁰ Second, it submitted that the concept of co-perpetration, as defined in the *Lubanga* Decision, is not supported by domestic, customary, or international law.⁶²¹ Third, it objected to the theory of co-perpetration based on joint control, as developed in the *Lubanga* Decision, on the following grounds: (i) it merged the liability modes of co-perpetration and indirect perpetration; (ii) it defined the common plan in a broad and imprecise manner; and (iii) it incorporated the concept of *dolus eventualis*.⁶²²

475. Mr Gilissen stressed that the criminal liability of the suspects appears *prima facie* sufficiently substantiated in light of the Joint Criminal Enterprise theory (“the JCE”) and the command responsibility theory as embodied in article 28 of the Statute.⁶²³

476. Mr Mulamba Nsokoloni stressed that the criminal liability of Germain Katanga and Mathieu Ngudjolo Chui could be attributed either as individual criminal liability under article 25 of the Statute, or by responsibility of commanders and other superiors under article 28 of the Statute.⁶²⁴

477. Mr Diakiese observed that article 21(2) of the Statute allows the Court to “apply principles and rules of law as interpreted in its previous decisions.” According to Mr Diakiese, article 25(3) of the Statute was correctly interpreted in the *Lubanga* Decision, and he submitted that the Chamber should therefore follow its own precedent.⁶²⁵ Referring to the *Stakić*⁶²⁶ decision of the ICTY, Mr Diakiese emphasised that the Appeals Chamber reversed the Trial Chamber’s decision:

[...]the Appeals Chamber finds that the Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of “co-perpetratorship”. This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers.⁶²⁷

⁶²⁰ ICC-01/04-01/06-698, para. 14.

⁶²¹ ICC-01/04-01/06-698, para. 16.

⁶²² ICC-01/04-01/06-698, para. 18; ICC-01/04-01/07-T-46-ENG-ET at p. 31, lines 6-12.

⁶²³ ICC-01/04-01/07-693 at p. 9.

⁶²⁴ ICC-01/04-01/07-689, paras 21-22.

⁶²⁵ ICC-01/04-01/07-690-Corr, para. 9.

⁶²⁶ ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-31-T, Trial Judgement, 31 July 2003.

⁶²⁷ ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Judgement, 22 March 2006, para. 62.

478. Mr Diakiese further submitted that after having analysed the concept of criminal liability required in a joint criminal enterprise,⁶²⁸ the Appeals Chamber of the ICTY in *Stakić*⁶²⁹ decided that the Appellant had criminal responsibility.⁶³⁰ Finally, with regards to the concept of *dolus eventualis*, Mr Diakiese recalled⁶³¹ that the Appeals Chamber of the ICTY in *Stakić* found a basis for that concept in customary international law.⁶³² Hence, the liability mode of co-perpetration, as defined in the jurisprudence of the ICTY and the recent *Lubanga* Decision, should be applied in respect of the criminal liability of Germain Katanga and Mathieu Ngudjolo Chui.⁶³³

479. Ms Bapita Buyangandu shared the Prosecution's opinion on the interpretation of the concept of co-perpetration in article 25(3) of the Statute.⁶³⁴ According to Ms Bapita Buyangandu, co-perpetration implies a material element and a mental element. The material element is the *de jure* or *de facto* control over the armed formation that carried out the crime.⁶³⁵ The subjective element is the intention to

⁶²⁸ ICC-01/04-01/07-690-Corr, paras 10-12.

⁶²⁹ ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Judgement, 22 March 2006, para. 87 : "for the application of third category joint criminal enterprise liability, it is necessary that: (a) crimes outside the Common Purpose have occurred; (b) these crimes were a natural and foreseeable consequence of effecting the Common Purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose."

⁶³⁰ ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Judgement, 22 March 2006, paras 97-98: "This finding fulfills the requisite elements required for third category joint criminal enterprise liability: the crime of extermination was a natural and foreseeable consequence of carrying out the Common Purpose of the joint criminal enterprise, and the Appellant reconciled himself to that outcome. In light of these findings, the Appeals Chamber concludes that the factual findings of the Trial Chamber demonstrate that the Appellant had the requisite *mens rea* to be found responsible under the third category of joint criminal enterprise for the crimes of murder (as a war crime and as a crime against humanity) and extermination."

⁶³¹ ICC-01/04-01/07-690-Corr, para. 13.

⁶³² ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Judgement, 22 March 2006, paras 101-103: "A basis in customary law having been established, the Appeals [...] came to the conclusion that the notion of joint criminal enterprise did not violate the principle of *nullum crimen sine lege*. As the concept of *dolus eventualis* (or "advertent recklessness") is clearly "required for the third form of joint criminal enterprise" [...] As joint criminal enterprise does not violate the principle of legality, its individual component parts do not violate the principle either. [...] The Appeals Chamber therefore concludes that [...] the use of *dolus eventualis* within the context of the third category of joint criminal enterprise does not violate the principles of *nullum crimen sine lege* and *in dubio pro reo*."

⁶³³ ICC-01/04-01/07-690-Corr, para. 14.

⁶³⁴ ICC-01/04-01/07-691-tENG, para. 61.

⁶³⁵ ICC-01/04-01/07-691-tENG, para. 61.

pursue a common goal.⁶³⁶ Ms Bapita Buyangandu stressed that the Defence for Germain Katanga erred in its reading and application of the *Stakić* decision.⁶³⁷

4. Control of the crime approach

480. In the *Lubanga* Decision, the Chamber found that when a criminal offence is committed by a plurality of persons, the definitional criterion of the concept “joint commission” is linked to the distinguishing criterion between principals and accessories to a crime.⁶³⁸ After a concise analysis of the three main approaches for distinguishing between principals and accessories to a crime — the objective criterion approach, the subjective criterion approach and the “control over the crime” approach — the Chamber provided its reasons for supporting the leading approach of “control over the crime”.⁶³⁹

481. The methodology for deciding between these three approaches was to analyse their consistency with the Statute, which is the first source of applicable law for this Court under article 21(1)(a) of the Statute. Application of the Statute requires not only resorting to a group of norms by applying any of the possible meanings of the words in the Statute but also requires excluding at least those interpretations of the Statute in which application would engender an asystematic *corpus juris* of unrelated norms.

482. The latter is precisely the effect that would result should co-perpetration be based on the objective criterion approach to distinguishing between principals and accessories. According to this approach, only those individuals who physically carry out one or more elements of the crimes could be considered principals to the crime.⁶⁴⁰ In the *Lubanga* Decision, the Chamber ruled that the objective criterion approach was rejected by article 25(3)(a) of the Statute, which provides for “commission through another person”.⁶⁴¹ If, under the Statute, it is possible for a

⁶³⁶ ICC-01/04-01/07-691-tENG, para. 61.

⁶³⁷ ICC-01/04-01/07-691-tENG, para. 53.

⁶³⁸ ICC-01/04-01/06-803-tEN, paras 328 *et seq.*

⁶³⁹ ICC-01/04-01/06-803-tEN, paras 326-339.

⁶⁴⁰ ROXIN, C., *Taterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006 at p. 34 *et seq.*

⁶⁴¹ ICC-01/04-01/06-803-tEN, paras 328, 333.

person who does not physically carry out any of the elements of the crime to be considered a principal, the objective criterion should be rejected as the leading principle for the distinction between principals and accessories. In addition, the modern doctrine has generally rejected the objective criterion approach.⁶⁴²

483. The Chamber next observed that an interpretation of the Statute by an application of the subjective criterion would be inconsistent with the provision for accessory responsibility in article 25(3)(d) of the Statute.⁶⁴³ If the subjective approach were the basis for distinguishing between principals and accessories, those who know of the intent of a group of persons to commit a crime, and who then aim to further this criminal activity by intentionally contributing to its commission, should be considered principals rather than accessories to a crime. In particular, the Chamber noted that because article 25(3)(d) of the Statute begins with, “[i]n any other way *contributes to the commission* or attempted commission of such a crime” (emphasis added), it must be concluded that the Statute rejects the subjective criterion approach.⁶⁴⁴ Additionally, the modern legal doctrine rejects this approach for distinguishing between principals and accessories to a crime.⁶⁴⁵

484. By adopting the final approach of control over the crime, the Chamber embraces a leading principle for distinguishing between principals and accessories to a crime, one that synthesises both objective and subjective components, since:

[...] the doctrine of control over the crime corresponds to an evolution of subjective and objective approaches, such that it effectively represents a synthesis of previously opposed views and doubtless owes its broad acceptance to this reconciliation of contrary positions.⁶⁴⁶

⁶⁴² The deficit of the formal objective theory in explaining the commission through another person as a form of commission is well recognized in the legal literature. See ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, p. 36; ROXIN, C., *Strafrecht, Allgemeiner Teil II*, München, C.H. Beck, 2003, § 25/29; JOECKS, W. & MIEBACH, K. (Ed.), *Münchener Kommentar zum Strafgesetzbuch I*, München, C.H. Beck, 2003, vor § 25/10. The objective criterion has also been seen as conflicting with the law when it provides for co-perpetration (or commission jointly with another person) see STRATENWERTH, G. & KUHLEN L., *Strafrecht, Allgemeiner Teil*, 5th ed., Köln, Heymanns, 2004, § 12/4; KÜHL, K., *Strafrecht, Allgemeiner Teil*, 4th ed., München, Vahlen, 2002, § 20/24; ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006 at pp. 37-38.

⁶⁴³ ICC-01/04-01/07-803-tEN, para. 334.

⁶⁴⁴ ICC-01/04-01/06-803- tEN, paras 329, 334-337.

⁶⁴⁵ See the explanation made in ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006 at pp. 52-59, with more references.

⁶⁴⁶ ROXIN, C., *Strafrecht, Allgemeiner Teil II*, München, C.H. Beck, 2003, § 25/30.

485. The control over the crime approach has been applied in a number of legal systems, and is widely recognised in legal doctrine.⁶⁴⁷ The key insight underpinning this approach has been described as follows:

[P]rincipals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.⁶⁴⁸ (emphasis added).

486. The Chamber considers that in order for the Statute to be understood as a consistent body of predictable law, the criminal responsibility of a person — whether as an individual, jointly with another or through another person — must be

⁶⁴⁷ SANCINETTI, M., *Teoría del delito y disvalor de acción . una investigación sobre las consecuencias prácticas de un concepto personal de ilícito circunscripto al disvalor de acción*, Buenos Aires, Hammurabi, 1991, pp. 644-645; QUINTERO OLIVARES, G., *Derecho Penal, Parte General*, 1st ed., Barcelona, Signo, 1986, pp. 533-534; BACIGALUPO, E., *La noción del autor en el Código Penal*, Buenos Aires, Abeledo-Perrot, 1965, p. 45; BACIGALUPO, E., *Principios de derecho: parte general*, 5th ed., Madrid, Akal Publisher, 1998, pp. 313-314; FLETCHER, G.P., *Rethinking Criminal Law*, New York, Oxford University Press, 2000, p. 639; WERLE, G., *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, margin No. 354; BLOY, R., *Die Beteiligungsform als Zurechnungstypus im Strafrecht*, Berlin, Duncker und Humblot, 1985, pp. 192 et seq.; BOCKELMANN, P., *Strafrecht, Allgemeiner Teil*, 3rd ed., München, Beck, 1979, p. 177; BOTTKÉ, W., *Täterschaft und Gestaltungsherrschaft*, Heidelberg, Müller, 1992, pp. 35 et seq.; CERESO, M. J., *Estudio sobre la moderna reforma penal española*, Madrid, Technos, 1993, p. 236; GALLAS, W., *Die moderne Entwicklung der Begriffe Täterschaft und Teilnahme*, Sonderheft der ZStW, 1957, pp. 3 et seq.; GÓMEZ BENÍTEZ, J. M., *Teoría jurídica del delito: derecho penal parte general*, 1st ed., Madrid, Civitas, 1984, p. 124; GROPP, W., *Strafrecht, Allgemeiner Teil*, 3rd ed., Berlin/Heidelberg/New York, Springer, 2005, § 10/34; HERLITZ, C.E., *Parties to a Crime and the Notion of a Complicity Object*, Uppsala, Iustus Förlag, 1992, pp. 259 et seq.; JAKOBS, G., *Strafrecht, Allgemeiner Teil*, 2nd ed., Berlin/New York, De Gruyter, 1991, §§ 21/35 et seq.; JESCHECK, H., *SchZStr.*, 71, 1956, pp. 225-243; KREY, V., *Deutsches Strafrecht, Allgemeiner Teil, Bd.2*, 2nd ed., Stuttgart, Kohlhammer, 2005, § 26/86; KÜHL, K., *Strafrecht, Allgemeiner Teil*, 5th ed., München, Vahlen, 2005, § 20/29; KOHLRAUSCH, E. & LANGE, R., *Strafgesetzbuch [für das Deutsche Reich] mit Erläuterungen und Nebengesetzen*, 43rd ed., Berlin, de Gruyter, 1961, vor § 47 O, 4, p. 160; *Leipziger Kommentar zum Strafgesetzbuch*, 11th ed., Berlin, De Gruyter, 1993, § 25; MAURACH, R., *Deutsches Strafrecht, Lehrbuch Allgemeiner Teil*, 2nd ed., Karlsruhe, C.F. Müller, 1958, p. 517; MURMANN, U., *Die Nebentäterschaft im Strafrecht*, Berlin, Duncker und Humblot, 1993, pp.69 et seq.; NIESE, W., “Die finale Handlungslehre und ihre praktische Bedeutung”, *Deutsche Richterzeitung* (1952), p. 23; ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, chap. 2; SAX, W., *Dogmatische Streifzüge durch den Entwurf des Allgemeinen Teils eines Strafgesetzbuches nach den Beschlüssen der Großen Strafrechtskommission*, ZStW 69, 1957, p. 430; SCHÖNKE, A. & SCHRÖDER, H., *Kommentar zum Strafgesetzbuch*, 26th ed., München, Beck, 2001, vor § 25 n. 71; STRATENWERTH, G. & KUHLEN L., *Strafrecht, Allgemeiner Teil*, 5th ed., Köln, Heymanns, 2004, § 12/15; RUDOLPHI, H.-J. & WOLTER, J. (Ed.), *Systematischer Kommentar zum Strafgesetzbuch*, Frankfurt am Main, Metzner, 2001, § 25, vor 25; WELZEL, H., *Lehrbuch des deutschen Strafrechts*, 7th ed., Berlin, De Gruyter, 1960, pp. 89-99; WESSELS J. & BEULKE, W., *Strafrecht, Allgemeiner Teil*, 28th ed., Heidelberg, Müller, 1998, n. 517; WESSELS, J. & BEULKE, W., *Strafrecht, Allgemeiner Teil*, 35th ed., Heidelberg, Müller, 2005, § 13/518.

⁶⁴⁸ ICC-01/04-01/06-803-tEN, para. 330.

determined under the control over the crime approach to distinguishing between principals and accessories.

5. *Principal responsibility under article 25(3)(a)*

487. Article 25(2) of the Statute establishes that individual responsibility must be consistent with the Statute. This provision expresses the idea that a person may not be criminally responsible under the Statute unless the attributed conduct constitutes a crime under the jurisdiction of the Court (article 22(1) of the Statute).⁶⁴⁹

488. A definition of a principal that is predicated on the requirement of exercising control over the crime means that, for the purposes of distinguishing the three forms of principal liability provided for in article 25(3)(a) of the Statute, a principal is one who:

- a. physically carries out all elements of the offence (commission of the crime as an individual);
- b. has, together with others, control over the offence by reason of the essential tasks assigned to him (commission of the crime jointly with others); or
- c. has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).

489. The Chamber will analyse the liability – as principals – of the suspects to the crimes discussed in the Section of the Material Elements of the Crimes. The crime of using children under the age of fifteen years to actively participate in the hostilities must be distinguished from the remaining counts for which the Prosecution is seeking confirmation. With regard to the former, the Chamber will discuss and consider the suspects as co-perpetrators. The remaining counts will be assessed from the point of view of joint commission through another person.

⁶⁴⁹ ESER, A., “Individual Criminal Responsibility”, in CASSESSE, A., GAETA, P. & JONES, J. (Ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford, Oxford University Press, 2002, p. 771: “There is neither individual nor any other criminal liability unless provided by law”.

490. First, the Chamber recalls that the Defence for Germain Katanga submitted that, while article 25(3)(a) of the Statute provides, respectively, for “co-perpetration” and “indirect perpetration”, it does not incorporate a combined notion of “indirect co-perpetration” because article 25(3)(a) of the Statute states, “[...] jointly with another *or* through another person”, and not, “jointly with another *and* through another person” (emphasis added).⁶⁵⁰

491. The Chamber notes that article 25(3)(a) uses the connective “or”, a disjunction (or alternation). Two meanings can be attributed to the word “or” – one known as weak or *inclusive* and the other strong or *exclusive*.⁶⁵¹ An inclusive disjunction has the sense of “either one or the other, and possibly both” whereas an exclusive disjunction has the sense of “either one or the other, but not both”. Therefore, to interpret the disjunction in article 25(3)(a) of the Statute as either “inclusive” or “exclusive” is possible from a strict textualist interpretation.⁶⁵² In the view of the Chamber, basing a person’s criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability “in accordance with the Statute”.⁶⁵³

492. The Chamber finds that there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of “senior leaders” adequately.

493. An individual who has no control over the person through whom the crime would be committed cannot be said to commit the crime by means of that other

⁶⁵⁰ ICC-01/04-01/07-698, para. 24.

⁶⁵¹ COPI, I., *Introduction to Logic*, 3rd ed., New York, Macmillan, 1968, p. 216.

⁶⁵² Articles 7 and 8 of the Statute contain several examples of the weak or “inclusive” use of the disjunction “or”. For instance, the objective elements of crimes against humanity consisting on “widespread” or “systematic” attack, meaning that the attack can be widespread, or systematic, or both; the war crime of torture consisting in infliction of “severe physical or mental pain or suffering”, in which, as a logical conclusion, the victim can be inflicted with severe physical or mental pain or suffering, or both.

⁶⁵³ See article 25(2) of the Statute.

person. However, if he acts jointly with another individual — one who controls the person used as an instrument — these crimes can be attributed to him on the basis of mutual attribution. Although the importance of this notion to the present case will be further clarified below, it must be kept in mind that, due to ethnical loyalties within the respective organisations led by Germain Katanga (FRPI) and Mathieu Ngudjolo Chui (FNI), some members of these organisations accepted orders only from leaders of their own ethnicity⁶⁵⁴.

494. This mode of individual criminal liability based on a control over the crime approach has distinct requirements. The Chamber will first address the general objective elements for the commission of a crime through another person. Second, the Chamber will address the additional objective elements present in two scenarios: (i) two or more principals jointly commit a crime through another person; (ii) how the use of child soldiers belonging to the different factions (FNI) and (FRPI) can be mutually attributed to the suspects. And finally, the Chamber will address the subjective elements.

I. Objective elements for commission of the crime through another person, regardless of whether that other person is criminally responsible

⁶⁵⁴ Statement of W-160 at DRC-OTP-0153-0006 at 0020, para. 82: “Lorsque l’alliance entre le FRPI et le FNI a été créée, Germain KATANGA est devenu le chef de la branche militaire du FNI-FRPI. Cependant, en réalité, Germain KATANGA n’avait pas de contrôle effectif sur toute l’armée FNI-FRP mais seulement sur les combattants Ngiti du FRPI. Du côté des Lendu du FNI, il y avait d’autres chefs qui étaient plutôt indépendants de Germain [...] Je suppose qu’avec cette distribution des tâches, ils s’étaient entendus à ce qu’il y ait un chef important côté FNI et un chef important côté FRPI, qui occupent les positions les plus importantes”; at 0020, para. 83: “Tout le monde savait aussi qu’en réalité, Germain travaillait du côté des Ngiti et qu’il y avait d’autres commandants militaires du côté des Lendu”; at 0021, para. 89: “Personnellement, je pense que dans l’alliance FNI-FRPI il y avait une branche politique unie, qui était moindre, et deux branches militaires: une du côté Sud des Ngiti du FRPI et une deuxième du côté Nord des Lendu du FNI. Comme j’ai déjà mentionné, on disait que Germain KATANGA était le chef militaire des Ngiti et qu’il ne contrôlait pas vraiment les chefs Lendu”; at 0021, para. 91: “Les Lendu obéissent à leur propre leader militaire, c’est-à-dire qu’ils respectent le commandant de leur région, qui travaille directement avec eux, mais pas un commandant qui travaille dans une autre région et qui n’est pas lié à eux”; Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 45: “GERMAIN et YUDA avaient un motorola, mais ils ne pouvaient pas utiliser leur motorola pour parler avec les gens de Zombe. Ils pouvaient utiliser leur motorola pour parler avec leurs gens, pas avec nous.”

495. The commission of a crime through another person is a model of criminal responsibility recognised by the world's major legal systems.⁶⁵⁵ The principal (the 'perpetrator-by-means') uses the executor (the direct perpetrator) as a tool or an instrument for the commission of the crime. Typically, the executor who is being used as a mere instrument will not be fully criminally responsible for his actions.⁶⁵⁶ As such, his innocence will depend upon the availability of acceptable justifications and/or excuses for his actions. Acceptable justifications and excuses include the person's: i) having acted under a mistaken belief; ii) acted under duress; and/or iii) not having the capacity for blameworthiness.

496. A concept has developed in legal doctrine that acknowledges the possibility that a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible. This doctrine is based on the early works of Claus Roxin and is identified by the term: 'perpetrator behind the perpetrator' (*Täter hinter dem Täter*).⁶⁵⁷

497. The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator. As such, in some scenarios it is possible for both perpetrators to be criminally liable as principals: the direct perpetrator for his fulfilment of the subjective and objective elements of the crime, and the perpetrator behind the perpetrator for his control over the crime via his control over the will of the direct perpetrator.

498. Several groups of cases have been presented as examples for the perpetrator behind the perpetrator's being assigned principal responsibility despite the existence of a responsible, direct perpetrator (i.e., one whose actions are not exculpated by

⁶⁵⁵ See FLETCHER, G.P., *Rethinking Criminal Law*, New York, Oxford University Press, 2000, p. 639; WERLE, G., "Individual criminal responsibility under Article 25 of the Rome Statute", 5 J. Int'l Criminal Justice 963 (2007).

⁶⁵⁶ AMBOS, K., "Article 25: Individual Criminal Responsibility", in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, p. 479; JIMÉNEZ DE ASÚA, L., *Lecciones de Derecho Penal*, México, Colección Clásicos del Derecho, 1995, p. 337.

⁶⁵⁷ ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", *Goldammer's Archiv für Strafrecht*(1963), pp. 193-207.

mistake, duress, or the lack of capacity for blameworthiness).⁶⁵⁸ This notwithstanding, the cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of “control over an organisation” (*Organisationsherrschaft*).⁶⁵⁹

499. Despite some criticism of this doctrine,⁶⁶⁰ the Chamber notes that the drafters of the Rome Statute sought to establish a mode of commission in article 25(3)(a) of the Statute which encompasses the commission of a crime through a non-innocent individual (i.e. responsible) acting as an instrument. Accordingly, contrary to suggestions of Germain Katanga’s Defence at the hearing on 11 July 2008,⁶⁶¹ assigning the highest degree of responsibility for commission of a crime — that is, considering him a principal — to a person who uses another, individually responsible person to commit a crime, is not merely a theoretical possibility in scarce legal literature, but has been codified in article 25(3)(a) of the Statute.

a. Control over the organisation

500. For the purposes of this Decision, the control over the crime approach is predicated on a notion of a principal’s “control over the organisation”. The Chamber relies on this notion of “control over the organisation” for numerous reasons, including the following: (i) it has been incorporated into the framework of the

⁶⁵⁸ Such scenarios include, *inter alia*, cases in which the perpetrator behind the perpetrator commits a crime through the direct perpetrator by misleading the latter about the seriousness of the crime; the qualifying circumstances of the crime; and/or the identity of the victim. See STRATENWERTH, G. & KUHLEN L., *Strafrecht, Allgemeiner Teil I*, 5th ed., Köln, Heymanns, 2004, § 12/59-67; ROXIN, C., *Strafrecht, Allgemeiner Teil II*, München, C.H. Beck, 2003, § 25/94-104.

⁶⁵⁹ ROXIN, C., “Straftaten im Rahmen organisatorischer Machtapparate”, *Goldammer’s Archiv für Strafrecht* (1963), pp. 193-207; AMBOS, K., *La parte general del derecho penal internacional*, Montevideo, Temis, 2005, p. 240.

⁶⁶⁰ This mode of liability has been criticised for its apparent inconsistency in conceiving of the direct perpetrator both as a person who is fully responsible, and as a person who is used as a tool, or in other words, one whose will is controlled by another. Essentially, the possibility that a person may so control the will of another such that he can be said to perpetrate a crime through that other, seems incompatible with a meaningful notion of that other as a fully responsible actor. ROXIN, C. responded to these criticisms in “Organisationsherrschaft und Tatentschlossenheit”, *7 Zeitschrift für Internationale Strafrechtsdogmatik* (2006), p. 296. See also AMBOS, K., *La parte general del derecho penal internacional*, Montevideo, Temis, 2005, p. 220. Additionally, challenges to the application of this mode of liability have been particularly prevalent in jurisdictions where the law does not expressly proscribe the commission of a crime through another person, or, where such a modality is expressly recognised, the law nevertheless does not provide for the use of non-innocent persons as instruments.

⁶⁶¹ ICC-01/04-01/07-T-46-ENG ET at p.36, lines 14-19.

Statute; (ii) it has been increasingly used in national jurisdictions; and (iii) it has been addressed in the jurisprudence of the international tribunals. Such notion has also been endorsed in the jurisprudence of Pre-Trial Chamber III of this Court.

501. The most important reason for this Chamber's deciding for this mode of liability is that it has been incorporated into the framework of the Statute. The crimes falling within the jurisdiction of this Court – those of “the most serious [...] concern to the international community as a whole”,⁶⁶² and which “threaten the peace, security, and well-being of the world”⁶⁶³ – will almost inevitably concern collective or mass criminality.⁶⁶⁴ The Chamber finds that by specifically regulating the commission of a crime through another responsible person, the Statute targets the category of cases which involves a perpetrator's control over the organisation.⁶⁶⁵

502. Prior and subsequent to the drafting of the Statute, numerous national jurisdictions relied on the concept of perpetration through control over an organisation in order to attribute principal responsibility to “leaders” in respect of such crimes.⁶⁶⁶ Generally, in crimes committed by several people, these jurisdictions have treated those further from the actual execution of the criminal acts as less culpable.

⁶⁶² Article 5(1) of the Rome Statute.

⁶⁶³ Preamble to the Rome Statute.

⁶⁶⁴ AMBOS, K., “Article 25: Individual Criminal Responsibility”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., Baden-Baden, Nomos, 2008, p. 750.

⁶⁶⁵ AMBOS, K., “Article 25: Individual Criminal Responsibility”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., Baden-Baden, Nomos, 2008, n.10-13; AMBOS, K., *Internationales Strafrecht*, München, Beck, 2006, 7/27; CASSESSE, A., GAETA, P. & JONES, J. (Ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford, Oxford University Press, 2002, p. 794; KREß, C., “Organisationsherrschaft und Völkerstrafrecht”, *Goldammer's Archiv für Strafrecht* (2006), pp. 307-308; SATZGER, H., *Internationales und Europäisches Strafrecht*, Baden-Baden, Nomos, 2005, § 14 n. 43; VOGEL, J., “Individuelle Verantwortlichkeit im Völkerstrafrecht. Zugleich ein Beitrag zu den Regelungsmodellen der Beteiligung”, 114 *ZStW* 427 (2002), WERLE, G., *Volkerstrafrecht*, Tübingen, Mohr Siebeck, 2003, p. 159, n 408.

⁶⁶⁶ Federal Supreme Court of Germany, BGHSt 40, 218, at pp. 236 *et seq.*; 45, 270 at p. 296; BGHSt 47, 100; BGHSt 37, 106; BGH NJW 1998, 767 at p. 769. The Federal Appeals Chamber of Argentina, *The Juntas Trial*, Case No. 13/84, chap. 7/5. Judgement of the Supreme Court of Justice of Peru, Case No. 5385-200, 14 December 2007. Supreme Court of Chile (investigating magistrate), Fallos de Mes, ano XXXV, noviembre de 1993, 12 November 1993; Supreme Tribunal of Spain, penal chamber, Case No. 12966/1994, 2 July 1994 (Judge Bacigalupo). National Court of Spain, Central investigating tribunal No. 5, 29 March 2006

503. However, a person's blameworthiness has also been described as increasing *in tandem* with a rise in the hierarchy: the higher in rank or farther detached the mastermind is from the perpetrator, the greater that person's responsibility will be.

As articulated by the District Court of Jerusalem in the *Eichmann Trial*:

In such an enormous and complicated crime [...] wherein many people participated at various levels and in various modes of activities [...] committed in masse [...] the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim means nothing as far as the measure of his responsibility is concerned. In the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command.⁶⁶⁷

504. As previously mentioned, many national jurisdictions used the notion of control over the organisation to hold the highest authorities within an organisation responsible as the principal, rather than as an accessory. The Defence for Germain Katanga submitted that, although this notion was applied by the Appeals Chamber in the Argentine Junta Trial, the decision was overturned by the National Supreme Court.⁶⁶⁸ According to the Defence for Germain Katanga, the Supreme Court rejected the theory on the ground that it had not been applied in Germany (its country of origin), and also because it could lead to inequitable results.⁶⁶⁹

505. Rejection by an Argentine court can hardly be said to preclude the International Criminal Court from resorting to this notion of criminal responsibility if it finds compelling reasons to do so. Nonetheless, German jurisprudence was in fact applied to this notion in the East German Border Trials.⁶⁷⁰ Moreover, while the present Decision will not discuss the Argentine Supreme Court's reasons for rejecting liability based upon 'control over an organised apparatus of power' in the aforementioned case, it is worth noting that the concept was impugned in part because it created a "contradiction" in its simultaneous incorporation, as principals, of an indirect perpetrator and a direct perpetrator.⁶⁷¹ As already stated, article

⁶⁶⁷ Jerusalem District Court, *The Attorney General v. Eichmann*, Case No. 40/61, Judgement, 36 I.L.R. 5-14, 18-276, 12 December 1961, para. 197.

⁶⁶⁸ ICC-01/04-01/07-698, para. 26.

⁶⁶⁹ ICC-01/04-01/07-698, para. 26.

⁶⁷⁰ BGHSt, 40, 218.

⁶⁷¹ The Supreme Court of Argentina, *The Juntas Trial*, Case No. 13, paras 23, 24.

25(3)(a) of the Statute has criminalised precisely the kind of responsibility that embodies such an apparent contradiction.

506. This doctrine has also been applied in international criminal law in the jurisprudence of the international tribunals.⁶⁷² In *The Prosecutor v. Milomir Stakić* Judgement, Trial Chamber II of the ICTY relied on the liability theory of co-perpetration of a crime through another person as a way to avoid the inconsistencies of applying the so-called "Joint Criminal Enterprise" theory of criminal liability to senior leaders and commanders.⁶⁷³

507. As noted by the Defence for Germain Katanga,⁶⁷⁴ the Trial Chamber's Judgement was overturned on appeal. However, the reasoning of the ICTY Appeals Chamber's Judgement is of utmost importance to an understanding of why the impugned decision does not obviate its validity as a mode of liability under the Rome Statute.

508. The Appeals Chamber rejected this mode of liability by stating that it did not form part of customary international law.⁶⁷⁵ However, under article 21(1)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of

⁶⁷² ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Judgement, "separate opinion of Judge Schomburg", 7 July 2006, paras 14-22; ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, paras 439 *et seq.*; paras 741 *et seq.* According to AMBOS, K., *Internationales Strafrecht*, München Beck 2006, §7/29, its principles are to be recognized in the Nuremberg's jurisprudence, *United States of America v. Alstotter et al.* ("The Justice Case"), 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

⁶⁷³ ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 439: "The Trial Chamber prefers to define 'committing' as meaning that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others. The accused himself need not have participated in all aspects of the alleged criminal"; para. 741. "the Accused is not alleged to be the direct perpetrator of the crimes. Rather, as the leading political figure in Prijedor municipality, he is charged as the perpetrator behind the direct perpetrator/actor and is considered the co-perpetrator of those crimes together with other persons with whom he co-operated in many leading bodies of the Municipality."

⁶⁷⁴ ICC-01/04-01/07-698, para. 26.

⁶⁷⁵ ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Judgement, para. 62: "This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is "firmly established in customary international law" and is routinely applied in the Tribunal's jurisprudence (...) In view of these reasons, it appears that the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal." About the Rome Statute's rejection of the notion of Joint Criminal Enterprise see WERLE, G., *Völkerstrafrecht*, Tübingen, Mohr Siebeck, 2003, n. 425.

international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court. This is a good example of the need not to transfer the *ad hoc* tribunals' case law mechanically to the system of the Court.⁶⁷⁶

509. Finally, most recently, the Pre-Trial Chamber III of the Court also endorsed this notion of individual criminal responsibility in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. Having established the suspect's position as the leader of the organisation and described the functioning of the militia, the Pre-Trial Chamber III stated:

In light of the foregoing, the Chamber considers that there are reasonable grounds to believe that, as a result of his authority over his military organisation, Mr. [...] had the means to exercise control over the crimes committed by MLC troops deployed in the CAR.⁶⁷⁷

510. In sum, the acceptance of the notion of 'control over an organised apparatus of power' in modern legal doctrine,⁶⁷⁸ its recognition in national jurisdictions,⁶⁷⁹ its

⁶⁷⁶ WERLE, G., "Individual Criminal Responsibility in Article 25 ICC Statute", 5 J. Int'l Criminal Justice 953 (2007), pp. 961-962: "the ICC Statute must be seen on its own as an independent set of rules. Hence, a mechanical transfer of the *ad hoc* tribunals' case law is definitely not the correct approach; WERLE, G., *Volkerstrafrecht*, 2nd ed., Tübingen, Mohr Siebeck, 2007, paras 425 *et seq.*

⁶⁷⁷ ICC-01/05-01/08-14-tENG, para. 78.

⁶⁷⁸ SANCINETTI, M., *Teoría del delito y disvalor de acción · una investigación sobre las consecuencias prácticas de un concepto personal de ilícito circunscripto al disvalor de acción*, Buenos Aires, Hammurabi, 1991, pp. 712 *et seq.*; SANCINETTI, M., *Derechos humanos en la Argentina post dictatorial*, Buenos Aires, Lea, 1988, pp. 27 *et seq.*; SANCINETTI, M. & FERRANTE, M., *El derecho penal en la protección de los derechos humanos*, Buenos Aires, Hammurabi, 1999, p. 313; BACIGALUPO, E., *Principios de Derecho Penal, Parte General*, Buenos Aires, Hammurabi, 1987, p. 334; AMBOS, K., *La parte general del derecho penal internacional*, Montevideo, Temis, 2005, pp. 216-240; AMBOS, K., *Internationales Strafrecht*, München, Beck, 2006, §§ 7/29 *et seq.*; STRATENWERTH, G. & KUHLEN, L., *Strafrecht, Allgemeiner Teil I*, 5th ed., Köln, Heymanns, 2004, § 12/65 *et seq.*; KÜHL, K., *Strafrecht, Allgemeiner Teil*, 4th ed., München, Vahlen, 2002, § 20/73 *et seq.*; WESSELS, J. & BEULKE, W., *Strafrecht, Allgemeiner Teil*, 36th ed., Heidelberg, Müller, 2006, n. 541; ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", *Goltdammer's Archiv für Strafrecht* (1963), pp. 193-207; ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 248 *et seq.*; ROXIN, C., "Organisationsherrschaft und Tatentschlossenheit", 7 *Zeitschrift für Internationale Strafrechtsdogmatik* (2006), p. 294; ROXIN, C., "Anmerkungen zum Vortrag von Prof. Herzberg", in AMELUNG, K. (Ed.), *Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft*, Sinzheim, Pro Universitate, 2000, pp. 55 *et seq.*; HERZBERG, R.D., *Täterschaft und Teilnahme*, München, Beck, 1977, pp. 42 *et seq.*; HIRSCH, H., *Rechtsstaatliches Strafrecht und staatlich gesteuertes Unrecht*, Opladen, Westdeutscher Verlag, 1996, pp. 22-23; BLOY, R., "Grenzen der Täterschaft bei fremdhändiger

discussion in the jurisprudence of the *ad hoc* tribunals which, as demonstrated, should be distinguished from its application before this Court, its endorsement in the jurisprudence of the Pre-Trial Chamber III of the International Criminal Court but, most importantly, its incorporation into the legal framework of the Court, present a compelling case for the Chamber's allowing this approach to criminal liability for the purposes of this Decision.

b. Organised and hierarchical apparatus of power

511. There are several aspects of an organisational apparatus of power that allow it to serve the object and purpose of enabling the perpetrator behind the perpetrator to commit crimes through his subordinates.

512. The Chamber finds that the organisation must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.

513. In the view of the Chamber, it is critical that the chief, or the leader, exercises authority and control over the apparatus and that his authority and control are manifest in subordinates' compliance with his orders. His means for exercising

Tatausführung", *Goldammer's Archiv für Strafrecht* (1996), pp. 425-442; SCHÖNKE, A. & SCHRÖDER, H., *Kommentar zum Strafgesetzbuch*, 26th ed., München, Beck, 2001, § 25/25a; TRÖNDLE, H. & FISCHER, T., *Strafgesetzbuch, Kommentar*, 53rd ed., München, Beck, 2006, § 25/7; KÜPPER, G., "Zur Abgrenzung der Täterschaftsformen", *Goldammer's Archiv für Strafrecht* (1998), p. 524; SCHLÖSSER, J., *Soziale Tatherrschaft*, Berlin, Duncker und Humblot, 2004, p. 145 *et seq.*; RADTKE, H., "Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht", *Goldammer's Archiv für Strafrecht* (2006), pp. 350 *et seq.*

⁶⁷⁹ Federal Supreme Court of Germany, BGHSt 40, 218, at pp. 236 *et seq.*; 45, 270 at p. 296; BGHSt 47, 100; BGHSt 37, 106; BGH NJW 1998, 767 at p. 769. The Federal Appeals Chamber of Argentina, *The Juntas Trial*, Case No. 13/84, chap. 7/5. Judgement of the Supreme Court of Justice of Peru, Case No. 5385-200. 14 December 2007. Supreme Court of Chile (investigating magistrate), Fallos de Mes, ano XXXV, noviembre de 1993, 12 November 1993; Supreme Tribunal of Spain, penal chamber, Case No. 12966/1994, 2 July 1994 (Judge Bacigalupo). National Court of Spain, Central investigating tribunal No. 5, 29 March 2006

control may include his capacity to hire, train, impose discipline, and provide resources to his subordinates.

514. The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court.⁶⁸⁰

c. Execution of the crimes secured by almost automatic compliance with the orders

515. In addition, particular characteristics of the organised and hierarchical apparatus enable the leader to actually secure the commission of crimes. In essence, the leader's control over the apparatus allows him to utilise his subordinates as "a mere gear in a giant machine" in order to produce the criminal result "automatically":

[...] the direct author of the crime is still a free and responsible agent, who is punishable as the perpetrator with personal responsibility. But this circumstance is irrelevant in relation to the control exercised by the intellectual author, since from his viewpoint, the perpetrator does not represent a free and responsible individual, but an anonymous, interchangeable figure. While his power of control over his own actions is unquestionable, the perpetrator is nonetheless, at the same time, a mere gear in the wheel of the machinery of power who can be replaced at any time, and this dual perspective places the intellectual author alongside the perpetrator at the heart of events.⁶⁸¹

516. Above all, this "mechanisation" seeks to ensure that the successful execution of the plan will not be compromised by any particular subordinate's failure to comply with an order.⁶⁸² Any one subordinate who does not comply may simply be replaced by another who will; the actual executor of the order is merely a fungible individual.⁶⁸³ As such, the organisation also must be large enough to provide a sufficient supply of subordinates.

⁶⁸⁰ ROXIN, C., *Taterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, p. 245; BGHSt 40, 218 at p. 236.

⁶⁸¹ ROXIN, C., *Taterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, p. 245.

⁶⁸² The Federal Appeals Chamber of Argentina, *The Juntas Trial*, Case No. 13/84, chap. 7/6.

⁶⁸³ KÜHL, K., *Strafrecht, Allgemeiner Teil*, 4th ed., München, Vahlen, 2002, § 20 n. 73 *et seq.*; LACKNER, K. & KÜHL, K., *Strafgesetzbuch, Kommentar*, München, Beck, § 25 n. 2; *Leipziger*

517. The main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders. Thus, “[s]uch Organisation develops namely a life that is independent of the changing composition of its members. It functions, without depending on the individual identity of the executant, as if it were automatic.”⁶⁸⁴ An authority who issues an order within such an organisation therefore assumes a different kind of responsibility than in ordinary cases of criminal ordering. In the latter cases, article 25(3)(b) of the Statute provides that a leader or commander who orders the commission of a crime may be regarded as an accessory.

518. Attributes of the organisation — other than the replaceability of subordinates — may also enable automatic compliance with the senior authority’s orders. An alternative means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict, and violent training regimens. For example, abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape, and kill, may be an effective means for ensuring automatic compliance with leaders’ orders to commit such acts. The leader’s ability to secure this automatic compliance with his orders is the basis for his principal — rather than accessorial — liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed.

II. Objective elements of joint commission of a crime

519. The Chamber has established the elements that allow for the criminal actions of subordinates to be attributed to their leaders — in this case, FRPI and FNI

Kommentar zum Strafgesetzbuch, 11th ed., Berlin, De Gruyter, 1993, § 25 n. 122, 127; MAURACH, R., GÖSSEL, K.H. & ZIPF, H., *Strafrecht, Allgemeiner Teil 2*, Heidelberg, Müller, 2008, § 48 n. 88, SCHÖNKE, A. & SCHRÖDER, H., *Kommentar zum Strafgesetzbuch*, 26th ed., München, Beck, 2001, § 25 n. 25.

⁶⁸⁴ ROXIN, C., *Taterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, p. 245.

combatants to Germain Katanga and Mathieu Ngudjolo Chui respectively. It is now necessary to explain how those crimes may be jointly attributed to both of them. With regard to the crime of using soldiers under the age of fifteen, the Chamber will analyse whether that Germain Katanga and Mathieu Ngudjolo Chui “used” those minors, themselves rather than through another person. The Chamber will subsequently address the basis for mutual attribution of liability in such use of children of different ethnicities. As previously mentioned, the leaders’ horizontal sharing of responsibility is critical because the distinction between the Ngitis and the Lendus made it unlikely for combatants to comply with the orders of a leader who was not of the same ethnicity. In particular, the Defence for Germain Katanga submitted that it was improper to hold a co-perpetrator criminally liable for the crimes committed by the fully responsible subordinates of his co-perpetrator.⁶⁸⁵

520. However, in the view of the Chamber, these crimes may be ascribed to each of them on the basis of mutual attribution, if the additional objective elements for the mode of liability known as joint commission of the crime are satisfied. The *Lubanga* Decision, which referred to joint commission as “co-perpetration”, defined and explained this mode of liability under article 25(3)(a), as follows:

[t]he concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.⁶⁸⁶

521. Co-perpetration based on joint control over the crime involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime. As explained, the fulfilment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person.

⁶⁸⁵ ICC-01/04-01/07-698, para. 27.

⁶⁸⁶ ICC-01/04-01/06-803-tEN, para. 325; AMBOS, K., “Article 25: Individual Criminal Responsibility”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, p. 479, margin No. 8.

a. Existence of an agreement or common plan between two or more persons

522. In the view of the Chamber, the first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between the persons who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual. Participation in the crimes committed by the latter without coordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute.

523. As explained in the *Lubanga* Decision, the common plan must include the commission of a crime.⁶⁸⁷ Furthermore, the Chamber considered that the agreement need *not be explicit*, and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.⁶⁸⁸

b. Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

524. The Chamber considers that the second objective requirement of co-perpetration based on joint control over the crime is the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.

525. When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime. Where such persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.

⁶⁸⁷ ICC-01/04-01/06-803-tEN, para. 344.

⁶⁸⁸ ICC-01/04-01/06-803-tEN, para. 345.

526. Although some authors have linked the essential character of a task – and hence, the ability to exercise joint control over the crime – to its performance at the execution stage,⁶⁸⁹ the Statute does not encompass any such restriction. Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime).

III. Subjective elements

a. The suspects must carry out the subjective elements of the crimes

527. The Chamber finds that the commission of the crimes requires that the suspects carry out the subjective elements of the crimes with which they are charged, including any required *dolus specialis* or ulterior intent for the type of crime involved.⁶⁹⁰

528. Article 30 of the Statute sets out the general subjective element for all crimes within the jurisdiction of the Court, specifying that, “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” The general mental element of the crime is satisfied:

⁶⁸⁹ ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 292 *et seq.* According to ROXIN, those who contribute only to the commission of a crime at the preparatory stage cannot be described as co-perpetrators even if they carry out tasks with a view to implementing the common plan. This point of view is shared by MIR PUIG, S., *Derecho Penal, Parte General*, Editorial Reppertor, 6th ed., Barcelona, Editorial Reppertor, 2000, p. 385; HERZEBERG, R.D., *Täterschaft und Teilnahme*, München, Beck, 1977, pp. 65 *et seq.*; KÖHLER, M., *Strafrecht Allgemeiner Teil*, Berlin, Springer, 1997, p. 518. However, many other authors do not share this point of view. See inter alia: MUÑOZ CONDE, F., “Dominio de la voluntad en virtud de aparatos organizados en organizaciones no desvinculadas del Derecho”, 6 *Revista Penal* (2000), p. 113; PÉREZ CEPEDA, A., “Criminalidad en la empresa: problemas de autoría y participación”, 9 *Revista Penal* (2002), p. 106 *et seq.*; JESCHECK, H. & WEIGEND, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed., Berlin, Duncker und Humblot, 1996, p. 680; KÜHL K., *Strafrecht Allgemeiner Teil*, 2nd ed., München, Vahlen, 1997, p. 111; KINDHÄUSER, U., *Strafgesetzbuch, Lehr- und Praxiskommentar*, Baden-Baden, Nomos, 2002, para. 25, No. 38.

⁶⁹⁰ *The Prosecutor v Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 495.

- i. if the person means to engage in the relevant conduct with the intent to cause the relevant consequence, and/or is aware that it will occur in the ordinary course of events; and
- ii. if the person is “[aware] that a circumstance exists or a consequence will occur in the ordinary course of events”.

529. The cumulative reference to “intent” and “knowledge” requires the existence of a volitional element on the part of the suspect. This volitional element encompasses, first and foremost, those situations in which the suspect: (i) knows that his or her actions or omissions will bring about the objective elements of the crime; and (ii) undertakes such actions or omissions with the express intent to bring about the objective elements of the crime (also known as *dolus directus* of the first degree).⁶⁹¹

530. The above-mentioned volitional element also encompasses another form of the concept of *dolus* which has been explained by the jurisprudence of this Chamber, relied on by the jurisprudence of the *ad hoc* tribunals and commonly accepted in the legal literature.⁶⁹² This form of *dolus* concerns those situations in which although the suspect does not have the intent to bring about the objective elements of the crime, he is nonetheless “aware that it (the consequence) will occur in the ordinary course of events” (also known as *dolus directus* of the second degree), as expressed in article 30(2)(b), second part, of the Statute.

531. As previously mentioned, there is no need for the present Decision to discuss whether the concept of *dolus eventualis* has a place within the framework of article 30

⁶⁹¹ ICC-01/04-01/06-803-tEng, paras 315, 352. The mentioned decision included in the footnote 430 the following references: ESER, A., “Mental Elements—Mistakes of Fact and Law”, in CASSESSE, A., GAETA, P. & JONES, J. (Ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford, Oxford University Press, 2002, pp. 899-900.

⁶⁹² ICC-01/04-01/06-315; ICC-01/04-01/06-352. The mentioned decision included the following references in footnotes 431-433: ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeals Judgement, 15 July 1999, paras 219-220; ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 587; PIRAGOFF, D.K., “Article 30: Mental Element”, in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, Nomos, 1999, p. 534; RODRIGUEZ-VILLASANTE & PIETRO J.L., “Los Principios Generales del Derecho Penal en el Estatuto de Roma”, 75 *Revista Española de Derecho Militar* (2000), p. 417; ESER, A., “Mental Elements—Mistakes of Fact and Law”, in CASSESSE, A., GAETA, P. & JONES, J. (Ed.), *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I, Oxford, Oxford University Press, 2002, pp. 905 *et seq.*; STRATENWERTH, G. & KUHLEN, L., *Strafrecht, Allgemeiner Teil I*. § 8/107.

of the Statute because the Chamber will not rely on this concept for the mental element in relation to the crimes charged. Therefore, the Defence for Germain Katanga's contention that the Statute does not include the notion of *dolus eventualis*⁶⁹³ is rendered moot.

532. As provided for in article 30(1) of the Statute, the general subjective element ("intent and knowledge") therein contemplated applies to any crime within the jurisdiction of the Court "[u]nless otherwise provided". In other words, intent and knowledge apply as long as the definition of the relevant crime does not expressly contain a different subjective element. The Chamber has specifically highlighted, within the material elements of the crimes, the existence and scope of the special subjective elements involved in the present Decision.

b. The suspects must be mutually aware and mutually accept that implementing their common plan will result in the realisation of the objective elements of the crimes

533. The Chamber finds that the co-perpetration of a crime requires that both suspects: (a) are mutually aware that implementing their common plan will result in the realisation of the objective elements of the crime; (b) undertake such activities with the specific intent to bring about the objective elements of the crime, or are aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events.

534. The Chamber finds that the co-perpetration of a crime through another person, additionally to the two above mentioned requirements, requires a third subjective element: that the suspects are aware of the factual circumstances enabling them to exercise control over the crime through another person. Regarding this last requirement, the suspects must be aware of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near-automatic compliance with their orders.

⁶⁹³ ICC-01/04-01/07-698, paras 18, 31-32.

535. As explained before, the Chamber will analyse whether the crime of using children under the age of fifteen years to actively participate in the hostilities was committed by the suspects in the modality of plain co-perpetration. Thus, the last requirement does not apply to this specific crime, but to all other crimes included in the Prosecution Amended Charging Document.

536. The Chamber considers that if the evidence supports the Prosecution's assertion that the suspects undertook their activities with the specific intent to bring about the objective elements of the crime, or were aware that the realisation of such objective elements would be a consequence of their acts, Germain Katanga's and Mathieu Ngudjolo Chui's state of mind would justify: (a) their respective contributions being attributed to each of them individually; and (b) their being considered criminally responsible as principals to the crimes committed directly or through culpable executors.

537. Co-perpetration or joint commission through another person is nonetheless not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities.

c. The suspects must be aware of the factual circumstances enabling them to control the crimes jointly

538. The third and final subjective element of the joint commission of a crime through another person is the suspects' awareness of the factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person.⁶⁹⁴

539. This requires that each suspect was aware: (i) of his essential role in the implementation of the common plan; (ii) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence

⁶⁹⁴ In ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 497, the Trial Chamber referred to this element: "Dr. Stakić's awareness of the importance of his own role"

the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.

B. Is there sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible, within the meaning of article 25(3)(a) of the Statute, for the crimes with which they are charged?

1. Germain Katanga and Mathieu Ngudjolo Chui had control over the organisation

540. Firstly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 until his integration into the FARDC,⁶⁹⁵ Germain Katanga:

- i. served as *de jure* supreme commander of the FRPI,⁶⁹⁶ and
- ii. had *de facto* ultimate control over FRPI commanders,⁶⁹⁷ commanders who sought his orders for obtaining or distributing weapons, and

⁶⁹⁵ Germain Katanga was integrated General into the FARDC on 11 December 2004, see *Décret no 04/094/ du 11 déc 2004 portant nomination dans la catégorie des officiers généraux des Forces Armées de la République Démocratique du Congo* at DRC-OTP-0086-0036 at 0037.

⁶⁹⁶ Statement of W-250 at DRC-OTP-1004-0187 at 0208, para. 127: “Germain s’est adressé à tout le monde lors de la parade. Il s’est tout d’abord présenté en disant qu’il était le colonel des FRPI”; Statement of W-132 at DRC-OTP-1016-0156 at 0166-0167, paras 59-60; Statement of W-28 at DRC-OTP-0155-0106 at 0112-0114, paras 36, 41: “Le commandant Germain KATANGA était très respecté par tous parce qu’il était le grand chef du FRPI”; Statement of W-28 at DRC-OTP-0155-0106 at 0112-0114, para. 45: “Germain katanga était le plus grand chef FRPI”; at 0017, para. 63: “Après la mort du Colonel Kandro [...] c’est Germain Katanga qui fut élu chef du mouvement.”; Statement of W-160 at DRC-OTP-0153-0006 at 0011, para. 35: “A [sic] l’époque, Germain KATANGA était clairement le chef des Ngiti et donc du FRPI”; at 0012, para. 37: “Avec Germain Katanga (qui s’est présenté comme le président)”; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0107-0108: “C’est alors que la communauté Ngiti voyant la nécessité d’être représentée sur la scène politique, nomme comme Chef supreme du FRPI Germain KATANGA [...] Il prend alors la direction politique, administrative et militaire du FRPI. On l’appelle désormais « Président du FRPI »”; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227; Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090. In addition, Germain Katanga has signed as a representative of the FRPI the *Accord de cessation des hostilités en Ituri*, 18 March 2003, at DRC-OTP-0043-0201 at 0204.

⁶⁹⁷ Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 38; at 0115, paras 47-48; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109.

ammunitions⁶⁹⁸ and was the person to whom other commanders reported.⁶⁹⁹

541. Secondly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 until he was integrated into the FARDC,⁷⁰⁰ Mathieu Ngudjolo Chui:

- i. served as *de jure* supreme commander of the FNI;⁷⁰¹ and
- ii. had *de facto* ultimate control over FNI commanders,⁷⁰² commanders who sought his orders for obtaining or distributing weapons and

⁶⁹⁸ Statement of W-28 at DRC-OTP-0171-1828 at 1833, para. 24: “Par la suite, ces armes et munitions ont été distribuées dans tous les camps du FRPI. Chaque camp a envoyé une délégation pour aller chercher sa part d’armes et munitions. Au début, le commandant KISORO n’a pas reçu d’armes et de munitions. Il s’est donc déplacé à Aveba et il a vu qu’un avion était là pour faire une livraison. Choqué du fait qu’il ne recevait pas d’armes, il a pris un lance-roquette et alors que l’avion allait décoller, il a menacé de tirer sur l’avion mais ne l’a pas fait. Suite à cet incident, il a reçu des armes de Germain KATANGA.”; Statement of W-28 at DRC-OTP-0171-1828 at 1836 paras 37-38 : “Suite à la réunion, les commandants présents sont retournés dans leur camp militaire respectif. [...] Avant de partir ces commandants ont reçu une part de munitions de Germain KATANGA qu’ils devaient redistribuer aux soldats de leur camp en préparation de l’attaque de Bogoro. [...] Les commandants qui étaient absents ont reçu une lettre leur expliquant les détails du plan pour l’attaque de Bogoro. [...] Ces lettres émanaient de Germain KATANGA.”

⁶⁹⁹ Statement of W-28 at DRC-OTP-0155-0106 at 0114, para. 43: “[REDACTED] commandant Germain Katanga était de [REDACTED] visiter le reste des camps du FRPI positionné dans la collectivité de Walendu Bindi. [...] Apres [sic] que les chefs des camps faisaient rapport de la situation du camp au commandant Germain Katanga en privé, [REDACTED]”; Statement of W-250 at DRC-OTP-1004-0187 at 0207, para. 125.

⁷⁰⁰ Mathieu Ngudjolo Chui was integrated Colonel into the FARDC in October 2006: Statement of W-157 at DRC-OTP-1006-0054 at 0069, para.103; Transcript of statement of W-258 at DRC-OTP-0173-0644 at 0645, lines 9-35; MONUC, “UN panel targets Congo militia over child soldiers”, 8 September 2008 at DRC-OTP-1018-0171 at 0171.

⁷⁰¹ Statement of W-250 at DRC-OTP-1013-0002 at 0005, para. 17: “J’ai appris que NGUDJOLO avait été nommé en tant que Chef d’état major [...] C’est BOBA BOBA [REDACTED] qui nous avait alors informé de la nomination de NGUDJOLO.”; Statement of W-279 at DRC-OTP-1007-1077 at 1079, para. 13: “NGUDJOLO était aussi le grand chef de cette milice”; Statement of W-280 at DRC-OTP-1007-1089 at 1091, para. 10 : “le vieux NGUDJOLO, le véritable chef de tous les combattants, nous a informé que la milice a adopté le nom de FNI”; Statement of W-28 at DRC-OTP-0171-1828 at 1834, para. 27; Statement of W-159 at DRC-OTP-0164-0472 at 0480-0481, paras 52, 56. In addition, Mathieu Ngudjolo signed on behalf of the FNI the *Accord de cessation des hostilités en Ituri*, 18 March 2003 at DRC-OTP-0043-0201 at 0204; *Déclaration conjointe de l’Ituri et le Grand Nord Kivu*, 18 June 2005 at DRC-OTP-00113-0199 at 0201; and he also signed as the “Chef d’Etat Major du Front de Résistance Patriotique de l’Ituri (FRPI)” on the *Communiqué Conjoint*, 18 May 2003 at DRC-OTP-00132-0245 which has also be signed by Floribert Kisembo on behalf of the UPC.

⁷⁰² Statement of W-280 at DRC-OTP-1007-1089 at 1091-1095; Statement of W-250 at DRC-OTP-1004-0187 at 0206, para. 116; Statement of W-159 at DRC-OTP-0164-0472 at 0480-0481, paras 52-53, 56.

ammunitions;⁷⁰³ and was the person to whom other commanders reported.⁷⁰⁴

542. Although some reports and documents were signed by Floribert Ndjabu Ngabu as the President of the FNI, Witnesses 12, 160, 250 and 267 stated that:

- i. Floribert Ndjabu Ngabu acted as President of the political wing of the FNI/FRPI;⁷⁰⁵
- ii. Germain Katanga and Mathieu Ngudjolo Chui acted independently of the President of the FNI;⁷⁰⁶
- iii. even as a coalition, they fought separately and their alliance was short-lived;⁷⁰⁷
- iv. both Germain Katanga and Mathieu Ngudjolo Chui signed official documents, peace agreement and/or decided on the amnesty of their fighters.⁷⁰⁸

⁷⁰³ Statement of W-280 at DRC-OTP-1007-1089 at 1091-1093, para. 23: “Il n’était pas facile d’obtenir des munitions. Pour en obtenir, il fallait s’adresser à KUTE. Ensuite, KUTE téléphonait à NGUDJOLO et NGUDJOLO donnait l’ordre ou non de sortir des munitions. [REDACTED] KUTE appeler NGUDJOLO sur son motorola pour lui demander la permission d’obtenir des armes”.

⁷⁰⁴ Statement of W-250 at DRC-OTP-1004-0187 at 0204, para. 105.

⁷⁰⁵ Statement of W-250 at DRC-OTP-1004-0187 at 0207, paras 122-123; *Cahier de charge de F.N.I à l’intention de la médiation Ougandaise*, 7 March 2003 at DRC-OTP-0106-0476 at 0478 bears the name of Floribert Ndjabu Ngabu as being the President of the FNI; *Propositions de F.N.I pour la mise en place de la commission de pacification de l’Ituri*, 13 March 2003 at DRC-OTP-0106-0479 at 0481 signed by Floribert Ndjabu Ngabu as President of the FNI ;DRC-OTP-00126-478 at 490; Statement of W-12 at DRC-OTP-00105-085 at 125;at 131, para. 216: “Il m’avait dit que Floribert NDJABU était le président du FNI et qu’il avait été élu [...] au mois de décembre 2002”; at 131, para. 250: “C’est au cours de cette réunion que NDJABU va annoncer publiquement que le FRPI représentait la branche armée du FNI. Cela lui permettait de se présenter comme le représentant tant des Lendus que des Ngitis.”

⁷⁰⁶ Statement of W-160 at DRC-OTP-0153-0006 at 0020-0021, paras 82-83, 89, 91; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0106.

⁷⁰⁷ Statement of W-160 at DRC-OTP-0153-0006 at 0014, paras 49, 52; 0022, para. 95; Statement of W-12 at DRC-OTP-00105-085 at 151, para. 361.

⁷⁰⁸ *Accord de cessation des hostilités en Ituri*, 18 March 2003, at DRC-OTP-0043-0201 at 0204; ; *Déclaration conjointe de l’Ituri et le Grand Nord Kivu*, 18 June 2005 at DRC-OTP-00113-0199 at 0201; *Communiqué Conjoint*, 18 May 2003 at DRC-OTP-00132-0245.

2. *Both organisations – FNI and FRPI- were hierarchically organised*

543. There is sufficient evidence to establish substantial grounds to believe that the FRPI, over which Germain Katanga had the command, was a hierarchically organised group. This is shown in particular by the fact that:

- i. the FRPI was organised into camps within the Irumu territory, in the Walendu Bindi *collectivité* and that each of these camps had a commander;⁷⁰⁹
- ii. Germain Katanga was the commander of the Aveba camp which served as the headquarters of the FRPI;⁷¹⁰
- iii. the FRPI was a military structured organisation divided into sectors, battalions and companies;⁷¹¹
- iv. FRPI commanders had the ability to communicate with each other through hand-held short range radios; there was also a *phonie* at Germain Katanga's headquarters in Aveba; Germain Katanga notably used these assets to give his orders;⁷¹²
- v. Germain Katanga, in his powers as a superior leader, had the ability to jail and adjudicate – for instance, he executed 12 FRPI soldiers for

⁷⁰⁹ Statement of W-28 at DRC-OTP-0171-1828 at 1836, para. 37: “Suite à la réunion, les commandants présents sont retournés dans leur camp militaire respectif. Cobra MATATA est retournée à son camp de Bavi, YUDA à Kagaba, BEBY à Bukiringi, ANDROZO à Gethy, ANGULUMA à Alimo, OUDO à Bavi.”

⁷¹⁰ Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3: “D’après le témoin à Aveba, au fief du FRPI Germain Katanga”; Statement of W-28 at DRC-OTP-0155-0106 at 0112, para. 34: “[REDACTED] vers le camp d’Aveba, où le grand chef du FRPI, le Commandant Germain Katanga était basé.”; Statement of W-160 at DRC-OTP-0153-0006 at 0018-0019, para. 7

⁷¹¹ Statement of W-250 at DRC-OTP-1013-0002 at 0005-0007, paras 20-34; Statement of W-28 at DRC-OTP-0155-0106 at 0114-0115, paras 45-53.

⁷¹² Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 45 : “Ils sont venus à pied en laissant leurs soldats sur leurs positions. GERMAIN et YUDA avaient un motorola, mais ils ne pouvaient pas utiliser leur motorola pour parler avec les gens de Zumbe. Ils pouvaient utiliser leur motorola pour parler avec leurs gens, pas avec nous ”; Statement of W-250 at DRC-OTP-1004-0187 at 0207, para. 125: “Lorsque nous sommes arrivés au camp de YUDA, ce dernier a contacté Germain par radio Motorola pour lui annoncer notre arrivée.”; Statement of W-258 at DRC-OTP-0173-0616 at 0633, lines 556-562.

creating troubles at Lake Albert,⁷¹³ And punished an Ngiti soldier for raping an Ngiti woman.⁷¹⁴

544. There is also sufficient evidence to establish substantial grounds to believe that the FNI, over which Mathieu Ngudjolo Chui had the command, was a hierarchically organised group. This is shown in particular by the fact that:

- i. the FNI was organised into camps within the Ezekere *groupement* and that each of these camps had a commander;⁷¹⁵
- ii. Mathieu Ngudjolo Chui was the commander of the Zumbe camp that served as the central camp in the Ezekere *groupement*;⁷¹⁶
- iii. the FNI was a military structured organisation divided into sectors, battalions, companies, platoons and sections;⁷¹⁷

⁷¹³ Statement of W-160 at DRC-OTP-0153-0006 at 0009, para. 21: “[j]’ai décidé de m’engager pour faire quelque chose pour la paix. C’est là que nous avons discuté de politique et que Germain m’a dit sa détermination de mettre fin aux massacres. Il m’a même raconté avoir tué des soldats du FRPI qui étaient responsables de désordres pour bien signifier sa volonté de travailler pour la paix. Je relaterai cet épisode plus tard dans l’audition »; at 0024-0025, paras 109-111: “[REDACTED], Germain KATANGA m’a raconté qu’il a fait une tournée vers le lac Albert pour visiter ses troupes et pour vérifier qui, parmi ses hommes, était [sic] responsables des désordres sur le lac et faire de la discipline. [...] Il m’a raconté qu’il a exécuté douze militaires du FRPI qui était[sic] accusés de semer les désordres sur le lac [...]. Il a dit qu’il a pris son fusil et a tiré une rafale de coups contre les douze militaires qui avaient été arrêtés. Germain disait que ceux qui ont de la chance peuvent survivre, car il passe une seule fois, c’est-à-dire qu’il ne tirait pas une seconde rafale de coups contre les personnes à exécuter. Dans le cas des douze soldats, un seul a survécu, mais il était gravement blessé et les autres sont morts sur le coup. Germain Katanga nous expliquait cela comme son moyen de faire de la discipline. C’était pour montrer sa volonté de faire arrêter les tueries et désordres vers le lac.”

⁷¹⁴ Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090.

⁷¹⁵ For the Lagura camp, commander Kute was in charge; Statement of W-250 at DRC-OTP-1013-0002 at 0004-0006, paras 12, 26. For the Zumbe camp, commander in Chief Boba Boba was in charge; Statement of W-250 at DRC-OTP-1013-0002 at 0005, para. 16. Ngudjolo is the Chief d’État major; Statement of W-250 at DRC-OTP-1013-0002 at 0005, paras 14, 18. Later in his statement, the witness says that Nyunye became the commander in the Zumbe camp; Statement of W-250 at DRC-OTP-1013-0002 at 0005, para. 33. and that for the Ladile camp, commander in Chief was Boba Boba ; Statement of W-250 at DRC-OTP-1013-0002 at 0005-0007, paras 17, 31. In the Kanzi camp: Kpadole was in charge; Statement of W-250 at DRC-OTP-1013-0002 at 0006, paras 28, 38. In the Masu camp, Kiza Dzoli was in charge; Statement of W-250 at DRC-OTP-1013-0002 at 0007, paras 32, 39.

⁷¹⁶ Transcript of statement of W-250 at DRC-OTP-0177-0199 at 0210, lines 359-362; Statement of W-28 at DRC-OTP-0155-0106 at 0124, para. 92: “NGUDJOLO était le chef du FNI à Zumbe. ”

⁷¹⁷ Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 17; Statement of W-280 at DRC-OTP-1007-1089 at 1091-1093; Statement of W-250 at DRC-OTP-1013-0002 at 0008-0009, paras 35-45.

- iv. FNI commanders had the ability to communicate with each other through two way radios (Motorola);⁷¹⁸ Mathieu Ngudjolo Chui used a *phonie* and even appointed a *phonie* operator;⁷¹⁹ and it is notably through these assets that Mathieu Ngudjolo Chui gave his orders;⁷²⁰
- v. Mathieu Ngudjolo Chui, in his power as a superior leader, had the ability to jail and adjudicate. For instance, he punished an FNI soldier for sexually enslaving a Lendu woman.⁷²¹

3. *Compliance with Germain Katanga and Mathieu Ngudjolo Chui's orders was "ensured"*

545. There is sufficient evidence to establish substantial grounds to believe that the FNI and the FRPI were large organisations each providing its leaders with an extensive supply of soldiers. In this regard, the Chamber has taken into consideration the statement of Witness 250 according to which four battalions of the FRPI, hence a total of approximately 1,000 soldiers, took part in the attack against Bogoro village,⁷²² whereas one battalion and half of the FNI, hence a total of approximately 375 soldiers, took part in the attack against Bogoro village.⁷²³

⁷¹⁸ Statement of W-157 at DRC-OTP-1006-0054 at 0063, para. 54 : "Nous utilisons des « Motorola Kenwood » pour la communication. NGUDJOLO, COBRA, KUTE, DARK, OUDO, YUDA et ADJIBALE en avaient normalement une, mais ce jour là [attack on Mandro] ceux [REDACTED] avec la radio étaient COBRA, OUDO et NGUDJOLO "; Statement of W-28 at DRC-OTP-0171-1828 at 1835, para. 32 : "Ils avaient des radios de courte portée avec l'inscription « Cobra » écrite dessus "; Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 21 : "A[sic] ce moment, les gens au camp ne disposaient pas de téléphone. Les chefs parlaient entre eux directement en personne. A[sic] l'exception de NGUDJOLO [REDACTED] au camp de Zumbe avec un motorola ".

⁷¹⁹ Transcript of statement of W-250 at DRC-OTP-0177-0299 at 0308, lines 287-294.

⁷²⁰ Transcript of statement of W-250, DRC-OTP-0177-0262, at 275-276, lines 441-479; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 43; at 1096, paras 44, 48.

⁷²¹ Statement of W-280, DRC-OTP-1007-1089 at 1091-1092; Statement of W-250 at DRC-OTP-1004-0187 at 0204-0205, para. 105; Statement of W-250 at DRC-OTP-1004-0187 at 0209, paras 133-134: "Je suis au courant par contre de deux autres cas où les femmes sont devenues les épouses de combattants par force[...] une femme Lendu qui avait été prise de force par un des combattants de KUTE. NYUNYE va apprendre cela et va en faire le rapport à NGUDJOLO. Ce dernier est alors allé au camp de KUTE pour récupérer cette femme au camp de Lagura. KABWANA a été arête et a été [...] fouetté [...]Je crois qu'il est resté en prison pendant près de trois jours." ; Statement of W-157 at DRC-OTP-1006-0054 at 0070, para. 114: "NGUDJOLO a dit qu'il avait donné l'ordre à ses gardes du corps de tuer DE GAULLE."

⁷²² Transcript of statement of W-250 at DRC-OTP-0177-0299 at 0310-0314.

⁷²³ Transcript of statement of W-250 at DRC-OTP-0177-0299 at 0314, lines 504-515.

546. It must be recalled that, as indicated in the previous section, one of the main characteristics of the militias like the ones led by Germain Katanga and Mathieu Ngudjolo Chui is the interchangeability of the lowest level soldiers, which ensure that the orders given by the highest commanders, if not complied with by one soldier, will be complied with by another one.

547. At the same time, because the soldiers were young, were subjected to a brutal military training regime and had allegiance to the military leaders of their ethnic groups, they were likely to comply with the orders of those leaders almost automatically, without asking any questions. For instance, there is sufficient evidence to establish substantial grounds to believe that in the FNI and FRPI camps:

- i. child soldiers were trained using violent methods,⁷²⁴ they learned how to handle weapons, and at the end of their training received "*armes blanches*" (e.g. machetes and spears) and guns;⁷²⁵
- ii. soldiers were militarily trained under the orders of Germain Katanga and Mathieu Ngudjolo Chui⁷²⁶ and were often paraded in their presence;⁷²⁷

⁷²⁴ Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227, para. 4; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 228-246. Statement of W-28 at DRC-OTP-0155-0106 at 0112, para. 37; Statement of W-250 at DRC-OTP-1004-0187 at 0203, para. 102; Statement of W-279 at DRC-OTP-1007-1077 at 1079, paras 11-14, 16; Statement of W-157 at DRC-OTP-1006-0054 at 0058, para. 20; Statement of W-250 at DRC-OTP-0177-0147 at 0332, lines 157-176; Investigator's note W-280 at DRC-OTP-0150-0144 at 0144, para. 3; Statement of W-250 at DRC-OTP-1013-0002 at 0009, paras 46-48.

⁷²⁵ Statement of W-28 at DRC-OTP-0155-0106 at 0111, paras 28-29; at 0118, para. 68; Statement of W-28 at DRC-OTP-0171-1828 at 1831, para. 14; Statement of W-132 at DRC-OTP-1016-0156 at 0165, para. 49; Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090, para. 6; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0227, para. 4; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 228-246; Statement of W-250 at DRC-OTP-1013-0002 at 0009, paras 46-48; Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 120; Statement of W-268 at DRC-OTP-1007-0061 at 0102, paras 54-55; Statement of W-280 at DRC-OTP-1007-1089 at 1091, para. 13.

⁷²⁶ Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 37.; Statement of W-268 at DRC-OTP-1007-0061 at 0102, paras 54-55 : "En ce qui concerne les enfants, ceux que j'ai vus qui avaient plus de 10 ans portaient des machettes et des lances."; Statement of W-132 at DRC-OTP-1016-0156 at 0165, para. 49.

⁷²⁷ Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090, para. 5: "Le témoin a vu les membres de la milice parader, s'exercer et chanter."; Statement of W-250 at DRC-OTP-1013-0002 at 0009, para. 47 ; at 0016, para. 87: "Cela se passait dans le courant de l'après-midi après la parade

iii. Germain Katanga was the key decision-maker regarding the transfer of children to, from, and within FRPI camps;⁷²⁸

iv. Germain Katanga also used child soldiers in his personal escort because:

“[il] préférait être escortée [sic] par les enfants soldats âgés de moins de 15 ans parce qu’ils exécutaient sans oppositions.”⁷²⁹

v. Mathieu Ngudjolo Chui also used child soldiers in his personal escort.⁷³⁰

According Witness 280, in the FNI camps, a significant number of children were in the Military Police; the Military Police was in charge of arresting soldiers who caused trouble in the camp or in the village (every camp had a Military Police whose size depended on the size of the camp).⁷³¹

[REDACTED] et au moment de la parade [REDACTED]. Mathieu NGUDJOLO [...] étaient également présents lorsque BAHATI de Zumbe a fait cette annonce.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0332, lines 157-176; at 0333, lines 200-205; at 0348, lines 704-723; Statement of W-279 at DRC-OTP-1007-1077 at 1079, paras 13, 15; at 1081, paras 28-29; at 1091, para.14; Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 27: “Nous avons fait une parade et NGUDJOLO nous a dit qu’il partait pour Beni pour se procurer des armes qui nous permettrons d’attaquer Bogoro.”; Statement of W-280 at DRC-OTP-1007-1089 at 1094, para. 30; Investigator’s note W-280 at DRC-OTP-0150-0144 at 0145, para. 11: “Parades would also take place in front of Ngudjolo, who could clearly identify the children in the crowd.”; Statement of W-157 at DRC-OTP-1006-0054 at 0070, para. 114: “NGUDJOLO est venu et il a fait une parade le même jour. Tout le camp était là.”

⁷²⁸ Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 6: “c’est Katanga qui prenait toutes les décisions, par exemple c’est lui qui organisait le transfert des enfants provenant de chacun des 6 bataillons du FRPI.”; Statement of W- 28 at DRC-OTP-0155-0106 at 0113, para. 38 : “les enfants qui venaient volontairement et ceux recrutés par la force au camp d’Aveba étaient formés sur place par le commandant ADOLPHE, qui était le responsable de la formation des nouvelles recrues [...]. Il avait été nommé [sic] instructeur par ordre du commandant Germain KATANGA ”.

⁷²⁹ Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 37.

⁷³⁰ Statement of W-279 at DRC-OTP-1007-1077 at 1080, para. 23: “Il y avait des enfants et des adultes dans la garde de Ngudjolo.”; Statement of W-280 at DRC-OTP-1007-1089 at 1098, para. 59: “Un peu plus tard, Ngudjolo est arrivé à Lagura. [REDACTED].”; Statement of W-287 at DRC-OTP-1013-0205 at 0210, paras 31-32: “Sur la route, j’ai croisé un commandant qui était entouré de gardes, parmi eux, des enfants soldats. [...] J’ai pensé que ce chef devait être Ngudjolo car c’était un chef et que son aspect ressemblait à la description physique que j’avais entendue des gens de Bogoro.”; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 64 : “J’ai vu également des “Kadogos ” autour de Ngudjolo lorsque ce dernier se trouvait dans le camps de l’UPC.”; Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123: “[REDACTED] ”.

⁷³¹ Statement of W-280 at DRC-OTP-1007-1089 at 1091-1092, paras 16-17.

4. *Germain Katanga and Mathieu Ngudjolo Chui agreed on common plans*

548. There is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to “wipe out” Bogoro:

- i. since their creation in late 2002, because of the traditional links between Lendu and Ngiti ethnic groups, the FNI and FRPI, fought together;⁷³²
- ii. in early 2003, there was an agreement or common plan between Germain Katanga, leader of the FRPI, and Mathieu Ngudjolo Chui, leader of the FNI, to attack the village of Bogoro by “wiping out” the village of its UPC military elements and of the Hema civilians;⁷³³
- iii. Germain Katanga, and Mathieu Ngudjolo Chui, through Commander Boba Boba and others under his command, met in Aveba in early 2003 and planned the attack against the village of Bogoro;⁷³⁴

⁷³² Statement of W-250 at DRC-OTP-1004-0187 at 0208, paras 126-127: “Lorsque nous sommes arrivés à Aveba, Germain KATANGA a fait une annonce publique [...] En nous désignant, Germain a dit à ses officiers que nous étions des soldats du FNI et qu’ils devaient nous considérer comme des frères”; Statement of W-28 at DRC-OTP-0171-1828 at 1834, para. 28: « Les combattants du FNI ont été très bien accueillis par le FRPI [...] Germain KATANGA [...] les a présenté aux soldats du FRPI en disant: “ceux là sont nos frères de Zumbe » ; at 1841, paras 62, 66; Statement of W-28 at DRC-OTP-0155-0106 at 0124, para. 92; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0106; Statement of W-157 at DRC-OTP-1006-0054 at 0059, para. 22; at 0062, paras 48-49.

⁷³³ Statement of W-28 at DRC-OTP-0171-1828 at 1834-1835, paras 27, 30-31; at 1836, paras 36-38: “Le commandant BAHATI [...] le commandant KUTE ainsi qu’un autre commandant [...] sont venus à Aveba [...] le but de leur visite était de discuter de Bogoro [...] ont présenté cette idée à Germain KATANGA. Les deux commandants se sont rencontrés dans la maison de Germain [...] Ils ont terminé leur entretien [...] et une fois dehors, nous avons entendu que leur plan était de chasser l’UPC de Bogoro [...] Le plan était d’unir le FRPI et le FNI pour aller attaquer Bogoro [...] avant de partir, ces commandants [FRPI] ont reçu une part de munitions de Germain KATANGA qu’ils devaient redistribuer aux soldats de leur camp en préparation de l’attaque de Bogoro [...] Les commandants qui étaient absents ont reçu une lettre leur expliquant les détails du plan pour l’attaque de Bogoro. Ces lettres leur donnaient aussi l’ordre de venir au camp d’Aveba pour recevoir leur part de munitions en préparation de l’attaque. Ces lettres émanaient de Germain KATANGA” ; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0243, lines 427-428: “le but était qu’on puisse se mettre ensemble pour attaquer BOGORO. On voulait effacer BOGORO. ”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0279, line 571.

⁷³⁴ Statement of W-250 at DRC-OTP-1004-0187 at 0206, para. 120; Statement of W-250 at DRC-OTP-1013-0002 at 0011-0012, paras 59-60; Statement of W-28 at DRC-OTP-0171-1828 at 1834-1835, paras 27, 30-33; at 1836, paras 36-38.

- iv. after the meeting in Aveba, a written plan was handed over to Mathieu Ngudjolo Chui.⁷³⁵ The plan was distributed to commanders by both Germain Katanga and Mathieu Ngudjolo Chui;⁷³⁶
- v. a few days before the attack against the village of Bogoro, Germain Katanga and other commanders visited Mathieu Ngudjolo Chui at the Zumbe Camp.⁷³⁷ The day after Germain Katanga's visit to the Zumbe camp, Mathieu Ngudjolo Chui informed the soldiers that they were going to attack Bogoro;⁷³⁸ and
- vi. the day before the attack, Germain Katanga, Mathieu Ngudjolo Chui and other commanders met at Cobra Matata's camp in Bavi and from there, on the eve of the attack against the Bogoro village, moved to implement the common plan as they took their respective positions in Medhu and Kagaba.⁷³⁹

549. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that there was a plan to "wipe out" Bogoro village by directing the attack against the civilian population, killing and murdering the predominantly Hema population and destroying their properties.⁷⁴⁰

⁷³⁵ Statement of W-250 at DRC-OTP-1013-0002 at 0012, para. 66; Statement of W-28 at DRC-OTP-0171-1828 at 1835, para. 31.

⁷³⁶ Statement of W-279 at DRC-OTP-1007-1077 at 1081, para. 31: "NGUDJOLO a donné le plan de guerre à BOBA BOBA. Le plan de guerre était représenté sur une feuille de papier. Ensuite, BOBA BOBA l'a montré aux soldats du camp. [REDACTED] "; Statement of W-28 at DRC-OTP-0171-1828 at 1836, para. 38: "Les commandants qui étaient absents ont reçu une lettre leur expliquant les détails du plan pour l'attaque de Bogoro".

⁷³⁷ Statement of W-279 at DRC-OTP-1007-1077 at 1080-1081, paras 26-27: "Trois jours avant l'attaque de Bogoro [...] j'ai croisé GERMAIN, COBRA MATATA, NDARGUE et OUDO [...] Mes amis m'ont raconté que le vieux NGUDJOLO, BOBA BOBA [...] les avaient accueilli. [...] ils ont discuté de l'attaque de Bogoro".

⁷³⁸ Statement of W-279 at DRC-OTP-1007-1077 at 1081, paras 28-29: "[REDACTED], NGUDJOLO nous a parlé. Il nous a dit: « D'ici peu, on va attaquer Bogoro [...] »".

⁷³⁹ Statement of W-28 at DRC-OTP-0155-0106 at 0121, paras 81-83: "Comme convenu, vers 19h00, les troupes du FRPI du côté de Kagaba et celles de Gety et Aveba, se sont regroupées à Kagaba"; Statement of W-157 at DRC-OTP- 0164-0534 at 0540, paras 37-38: "[REDACTED]. Avant de nous parler, les chefs se sont rencontrés à Bavi [...] [REDACTED] groupe [REDACTED] est arrivé à 16h00 à Medhu [...] [REDACTED], partis vers 02h00 ou 03h00 du matin pour arriver à Bogoro à 05h00 pour commencer le combat".

⁷⁴⁰ Statement of W-280 at DRC-OTP-1007-1089 at 1096, paras 44, 48, 52: "NGUDJOLO nous a alors donné l'ordre de prendre le village en commençant par les maisons qui se trouvent à l'extrémité du village [REDACTED]. [...] Ce village est petit. Nous avons commencé directement à [REDACTED]

550. Although the evidence tendered by the Prosecution is not sufficient to establish substantial grounds to believe that the agreement or common plan specifically instructed the soldiers to pillage the village of Bogoro, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, in the ordinary course of events, the implementation of the common plan would inevitably result in the pillaging of the Bogoro village.⁷⁴¹

551. In relation to the crimes of rape and sexual slavery, the majority of the Chamber, Judge Anita Ušacka dissenting, also finds that although the evidence tendered by the Prosecution is not sufficient to establish substantial grounds to believe that the agreement or common plan specifically instructed the soldiers to rape or sexually enslave the civilian women there, the majority of the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, in the ordinary course of events, the implementation of the common plan would inevitably result in the rape or sexual enslavement of civilian women there.⁷⁴²

et nous sommes montés jusqu'au centre. [...] L'ordre de NGUDJOLO, transmis par KUTE, était le suivant: « Vous prenez vos couteaux et machettes, vous cassez la porte des maisons et vous tuez tous le monde ». C'était un ordre. Je n'avais pas de choix. Nous avons tous fait la même chose. Durant une heure, nous sommes rentrés dans les maisons et nous avons tués les civils [...] Une fois que nous avons terminé avec les maisons, nous nous sommes dirigés vers le camp des soldats UPC.”; Statement of W-250 at DRC-OTP-0177-0230 at 0243, lines 427-431 : “Oui. Bon, le but était qu'on puisse se mettre ensemble pour attaquer Bogoro. On voulait effacer BOGORO. [...] Pour attaquer que BOGORO n'existe pas.”

⁷⁴¹ Statement of W-250 at DRC-OTP-1004-0187 at 0209, para. 131: “En règle générale, il ne fallait pas commettre du pillage lors des attaques. Cela arrivait cependant après les combats.”; Statement of W-287 at DRC-OTP-1013-0205 at 0210, para. 27: “ C'était l'habitude des attaquants de prendre des femmes et les amener jusque chez eux. [...] ils leur faisaient transporter des choses jusque chez eux.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0359, lines 1102-1103: “Terminer d'abord avec la guerre et après si vous voulez piller, vous pouvez piller.”; Statement of W-159 at DRC-OTP-0164-0472 at 0482, para. 64: “J'ai également vu des '*kadogos*' autour de Ngudjolo lorsque ce dernier trouvait dans le camp UPC. Ces enfants avaient aussi des armes et des tenues militaires. [...] Je les ai vus piller et tuer lorsqu'ils se trouvaient avec Ngudjolo dans le camp de l'UPC.”; Statement of W-280 at DRC-OTP-1007-1089 at 1098, para. 60: “Ngudjolo avait l'habitude de visiter le lieu de l'attaque pour vérifier lui-même le travail. Ngudjolo nous a dit : “Je vous félicite pour votre travail.” Il a aussi dit qu'il aurait fallu ne pas brûler les maisons, ca désormais il n'était plus possible de les utiliser ou d'emporter les toits.”

⁷⁴² Statement of W-249 at DRC-OTP-1004-0115 at 0118-0119, paras 22-31; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110, paras 4-6: “Selon les connaissances du témoin, les femmes qui étaient dans le FRPI étaient enlevées par les miliciens. On les enlevait pour être les femmes des combattants. Souvent elles étaient Ngitis et provenaient des localités proches des camps. [...] Selon le témoin, dans le camp de Germain KATANGA il n'y a avait beaucoup de filles. Par contre, dans le camp de Gety il y avait beaucoup de filles qui étaient femmes de miliciens ou encore femmes soldats. [...] Germain KATANGA savait qu'il y avait des femmes de miliciens prises de force dans le FRPI”;

552. In the view of the Chamber, there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui knew each other and had worked together since the creation of the FNI and FRPI. They were each involved in some way in the attacks against the village of Nyankunde, together with the APC, at the end of 2002,⁷⁴³ the attacks against the villages of Mandro,⁷⁴⁴ Kilo⁷⁴⁵ and Drodoro⁷⁴⁶ in March/April 2003 and the attack against Bunia/Nyakasanza

Statement of W-132 at DRC-OTP-1016-0156 at 0162, para. 31; at 0164, para. 40; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 61: “Lors de la quatrième attaque sur Bogoro, les combattants ont fait des prisonniers et les ont utilisés comme porteurs pour aller à Gety et Zumbe. Nous avons appris qu’ils les ont ensuite éliminés; certains ont réussi à s’enfuir. La plupart des prisonniers étaient des femmes et des jeunes filles et certaines ont été gardées par les miliciens pour en faire leurs épouses”; Statement of W-233 at DRC-OTP-1007-0061 at 0081, paras 133-136: “Pendant l’attaque de Bogoro, il y a eu des femmes qui ont été violées. [...] D’autres ont été capturées et emportées pour être ensuite violées et tuées.”; Statement of W-249 at DRC-OTP-1004-0115 at 0119, para. 17; Statement of W-249 at DRC-OTP-1015-0833 at 0836-837, paras 16-21 ; at 0837-0838, paras 23-29: “Les soldats qui venaient dans le camp m’ont également soumise à des violences sexuelles lorsqu’ils venaient et partaient pour du travail. [...] Ils me forçaient à avoir des relations sexuelles avec eux.”; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110, para. 4; Statement of W-287 at DRC-OTP-1013-0205 at 0210, para. 27: “C’était l’habitude des attaquants de prendre des femmes et les amener jusque chez eux. J’entendais dire que quand ils prenaient des femmes, ils leur enlevaient leurs habits, ils leur faisaient transporter des choses jusque chez eux. Arrivé chez eux, ils gardaient ces femmes prisonnières [...] Il est possible qu’elles étaient aussi violées.”

⁷⁴³ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-0129-0267 at 285-287, paras 52-61; Statement of W-28 at DRC-OTP-0155-0106 at 0117, para. 63; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0106-0107.

⁷⁴⁴ MONUC, *Special Investigations on Human Rights Situation in Ituri*, June 2003 at DRC-0152-0286 0288, para. 8; United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 290, para. 72; Transcript of Statement of W-250 at DRC-OTP-0177-0147 at 0422, lines 831-837. On the attack on Mandro; Transcript of Statement of W-250 at DRC-OTP-0177-0262 at 0296, lines 1152-1162; Statement of W-250 at DRC-OTP-1013-0002 at 0019, para. 106 ; Statement of W-28 at DRC-OTP-0155-0106 at 0124, paras 92-95; “Juste quelques jours après la bataille de Bogoro, j’ai participé au combat de Mandro qui était un petit centre commercial Hema où il y avait une base de l’UPC. Cette fois, FNI a planifié l’attaque et a demandé un refort du côté du FRPI. Ainsi un petit groupe du FRPI, [REDACTED], mélangé à des membres du FNI. [...] [REDACTED] [...] on est parti ensemble vers Mandro. [...] Le lendemain, vers 5h00, on a commencé l’attaque sur Mandro.”; Statement of W-157 at DRC-OTP-1006-0054 at 0058-0059, para. 20: “Quand j’étais [REDACTED] avec le FNI j’ai participé aux grandes batailles de Bogoro, Mandro et Bunia (le 6 mars 2003) [...] Entre la bataille de Bogoro et celle de Bunia il y a eu la bataille de Mandro.”; at 0062-0071, paras 47-119; Statement of W-280 at DRC-OTP-1007-1089 at 1099, para. 64: “Quelques jours après l’attaque de Bogoro, j’ai participé à une attaque contre Mandro.”; United Nations General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l’homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 0283, para. 41; Human Rights Watch, *Ituri: “Covered in Blood” – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRT-OTP-0074-0797 at 851, para. 6.

⁷⁴⁵ Human Rights Watch, *Le Fléau de l’Or*, June 2005 at DRC-OTP-0163-0357 at 0406-0407, para. 5: “Ugandan and Lendu forces attacked Kilo [...] according to local sources, they killed at least 100.”

⁷⁴⁶ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004), at DRC-OTP-00129-267 at 291, para. 75

on May 2003.⁷⁴⁷ According to the evidence previously referred to, children under the age of fifteen years actively participated in these attacks during which pillaging occurred.

553. There is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui agreed upon the use of children under the age of fifteen years to actively participate in the attack on Bogoro village. This conclusion is not only substantiated by the fact that they themselves used child soldiers as their bodyguards but also by the fact that their militias were largely made up of child soldiers. Moreover, there is sufficient evidence to establish substantial grounds to believe that the suspects sent their own bodyguards, many of them being children under the age of fifteen, to participate in the attack on Bogoro village.

554. In reaching its findings on the roles of Germain Katanga and Mathieu Ngudjolo Chui, the Chamber has taken into particular account the evidence referred to when analysing the war crime of using children under the age of fifteen to take active part in hostilities, mainly in the statements of witnesses 28, 157, 280 and 279.⁷⁴⁸

5. Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

555. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from the meeting in Aveba to the day of the attack against the village of Bogoro on 24 February 2003:

- i. after agreeing on the plan, Germain Katanga and Mathieu Ngudjolo Chui had direct responsibility for its implementation, which includes:

⁷⁴⁷ United Nations Security Council, *Special report on the events in Ituri, January 2002-December 2003*, United Nations Document S/2004/573 (16 July 2004) at DRC-OTP-00129-267 at 291, paras 77-79; Statement of W-28 at DRC-OTP-0155-0106 at 0124, para. 92.

⁷⁴⁸ See evidence referred to in War Crimes section of the use of children under the age of fifteen years to actively participate in the hostilities. See also Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRT-OTP-0074-0797 at 849.

- a. ordering the militias to “wipe out” Bogoro village;⁷⁴⁹
 - b. the distribution of the plan of the attack to FRPI and FNI commanders;⁷⁵⁰ and
 - c. the distribution of weapons and ammunitions.⁷⁵¹
- ii. Germain Katanga played an overall coordinating role in the implementation of the common plan, in particular, by:
 - a. having direct and ongoing contacts with the other participants in the implementation of the common plan;⁷⁵²
 - b. personally travelling to Beri to obtain weapons and ammunitions;⁷⁵³
 - c. distributing the weapons and ammunitions not only to the FRPI commanders⁷⁵⁴ but also to the FNI;⁷⁵⁵ and
 - d. organising the meeting at his Aveba camp where the attack against Bogoro village was planned.⁷⁵⁶
 - iii. Germain Katanga personally performed other tasks in the implementation of the common plan, in particular, by encouraging the soldiers under his

⁷⁴⁹ Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37; Statement of W-157 at DRC-OTP-1006-0054 at 0071-0072, paras 123-125; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0243, lines 427-428; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0279, line 571.

⁷⁵⁰ Statement of W-28 at DRC-OTP-0171-1828 at 1836, para. 38; Statement of W-279 at DRC-OTP-1007-1077 at 1081, para. 31.

⁷⁵¹ Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 29 ; at 1094, paras 30, 32-34 ; at 1095, para. 38; Statement of W-28 at DRC-OTP-0171-1828 at 1836, para. 38.

⁷⁵² Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 45.

⁷⁵³ Statement of W-28 at DRC-OTP-0171-1828 at 1832, paras 18-20: “Germain KATANGA, le professeur SIPA (un politicien) et le professeur Emile MUHITO (aussi un politicien) se sont rendus à Beni pour s’entretenir avec les soldats de l’APC au sujet d’un ravitaillement en armes et munitions [...] Une fois le groupe parti, une rumeur courait à Aveba et aussi dans d’autres camps du FRPI que Germain KATANGA était parti obtenir des armes et des munitions [...] Germain KATANGA a dû s’entendre avec des gens de l’APC car nous avons reçu par avion des munitions, des armes et des bombes. L’avion venait de Beni et a atterri à Aveba avec à son bord Germain KATANGA, MUHITO, SIPA, MOVE et quelques soldats qui faisaient partis de l’escorte.”; at 1833, para. 22 : “[REDACTED]”; Statement of W-250 at DRC-OTP-1013-0002 at 0013-0014, para.72; Statement of W-250 at DRC-OTP-1013-0002 at 0014, para.73.

⁷⁵⁴ Statement of W-28 at DRC-OTP-0171-1828 at 1833, para. 24.

⁷⁵⁵ Transcript of statement of W-250 at DRC-OTP-0177-0230 at 0243, lines 448-453.

⁷⁵⁶ Statement of W-28 at DRC-OTP-0171-1828 at 1834-1836, paras 28-30, 36 ; Statement of W-250, DRC-OTP-1004-0187 at 0208, paras 126-127.

command through military parades in his presence,⁷⁵⁷ during which songs with hate-filled lyrics were sung.⁷⁵⁸

- iv. Mathieu Ngudjolo Chui played an overall coordinating role in the implementation of the common plan, in particular, by:
 - a. having direct and ongoing contacts with the other participants in the implementation of the common plan;⁷⁵⁹
 - b. travelling to Beni to obtain weapons and ammunitions;⁷⁶⁰
 - c. sending Commander Boba Boba on his behalf to the meeting at Aveba Camp,⁷⁶¹ and staying in contact with him through a *phonie*;⁷⁶²
 - d. obtaining weapons and ammunitions as part of the outcome of the meeting at Aveba camp;⁷⁶³ and
 - e. distributing the weapons and ammunitions to FNI camps.⁷⁶⁴
- v. Mathieu Ngudjolo Chui personally performed other tasks in the implementation of the common plan, in particular, by encouraging the soldiers under his command through military parades in his presence during which songs with hate-filled lyrics were sung.⁷⁶⁵

⁷⁵⁷ Statement of W-250 at DRC-OTP-1004-0187 at 0208, paras 126-127.

⁷⁵⁸ Statement of W-28 at DRC-OTP-0171-1828 at 1842, para. 68; Statement of W-250 at DRC-OTP-1013-0002 at 0021, para. 121;

⁷⁵⁹ Statement of W-280 at DRC-OTP-1007-1089 at 1095-1096, paras 43-44: “NGUDJOLO nous alors donné l’ordre de prendre le village en commençant par les maisons qui se trouvent à l’extrémité du village [REDACTED]. Quand [REDACTED] recevait l’ordre de NGUDJOLO, nous étions tous rassemblés autour de lui avec son motorola. [REDACTED] nous a dit : « Ecoutez bien c’est l’ordre du supérieur. » J’ai moi-même entendu les mots de NGUDJOLO.”

⁷⁶⁰ Statement of W-280 at DRC-OTP-1007-1089 at 1093, paras 27-28 : “La veille du retour de NGUDJOLO, KUTE nous a dit: « NGUDJOLO est parti pour Beni. Quand il revient, nous allons frapper Bogoro ».

⁷⁶¹ Statement of W-250 at DRC-OTP-1013-0002 at 0003, para. 6: “Je tiens à apporter une précision concernant [REDACTED] qui ont fait le voyage de Zumbe à Aveba. Je confirme que c’était le colonel BOBA BOBA qui était en charge de ce voyage en tant qu’officier militaire”; Transcript of statement of W-250 at DRC-OTP-0177-0230 at 0248, lines 611-627 : “Dans notre. c’était NGUDJOLO qui avait délégué le colonel BOBA BOBA ”; Statement of W-250 at DRC-OTP-0177-0262 at 280-285.

⁷⁶² Transcript of statement of W-250 at DRC-OTP-0177-0262, at 275-276, lines 441-479.

⁷⁶³ Statement of W-250 at DRC-OTP-1013-0002 at 0003, paras 62-64.

⁷⁶⁴ Statement of W-280 at DRC-OTP-1007-1089 at 1093-1094, paras 29, 34.

⁷⁶⁵ Statement of W-250 at DRC-OTP-1013-0002 at 0015, para. 83 ; at 0021, para. 121.

556. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the attack was planned in early 2003 and that the implementation of the common plan started on the eve of the attack on Bogoro village. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the day before the attack, Germain Katanga and Mathieu Ngudjolo Chui, followed by their respective battalion commanders:

- i. met in specific camps for parades, briefing, and singing, notably in Ladile⁷⁶⁶ and Lagura;⁷⁶⁷
- ii. deployed to different points around the village of Bogoro and prepared for the attack;⁷⁶⁸ and
- iii. at around 5 a.m. on 24 February 2003, the battalion commanders and soldiers under Germain Katanga and Mathieu Ngudjolo Chui entered the village of Bogoro and attacked the inhabitants.⁷⁶⁹

⁷⁶⁶ Statement of W-250 at DRC-OTP-1013-0002 at 0015, para. 83 ; Statement of W-250 at DRC-OTP-1013-0002 at 0014, para. 84.

⁷⁶⁷ Statement of W-250 at DRC-OTP-1013-0002 at 0014, para. 85 ; Statement of W-250 at DRC-OTP-1013-0002 at 0015, para. 86; Statement of W-250 at DRC-OTP-1013-0002 at 0016-0017, paras 87, 90; Statement of W-250 at DRC-OTP-1013-0002 at 0016-0021, para.121.

⁷⁶⁸ Statement of W-250, DRC-OTP-1013-0002 at 0017, paras 92-96: “KUTE quant à lui avait pris une direction différente avec ses hommes. Il avait pris un chemin allant vers Kasenyi et la rivière Basandje et c’est de là qu’ils étaient supposés attaquer Bogoro [...] Le groupe de DARK est venu par la route de Diguna. Diguna était un peu reculé par rapport au centre de Bogoro [...] Le groupe de YUDA est venu par la route principale. Il s’agit en fait de la route venant de Gety. Le troisième groupe était celui de l’opérateur OUDO et il est entré par un endroit qui est appelé “SEI”, c’est là où se trouve le bureau de la collectivité. Le bureau de la collectivité se trouve le long de la route qui mène vers Medhu [...] J’étais avec les soldats [REDACTED] et nous sommes entrés par deux endroits différents. Le premier groupe est arrivé par la route [REDACTED] en se dirigeant vers le camp de l’UPC et c’est [REDACTED] qui commandait ce groupe. Le deuxième groupe est arrivé par la route de [REDACTED] et était commandé par [REDACTED]. Là aussi ce groupe se dirigeait vers le camp de l’UPC [...] Je me trouvais dans le groupe de [REDACTED]. [REDACTED]”; Statement of W-157 at DRC-OTP-0164-0534 at 0542, paras 46-47: “[REDACTED] placé à l’ouest de Bogoro (FNI et FRPI) a barré la route de Bunia, pour que l’aide de l’UPC ne puisse pas venir. Ceux de l’UPC qui était à l’entrée de Bogoro ne pouvaient pas s’en sortir non plus. À la fin, c’était l’échec total pour l’UPC, car ils ne pouvaient pas recevoir du renfort et ils étaient complètement encerclés.”; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 41: “Les groupes de YUDA et de GERMAIN avaient pris leurs positions. Le groupe de YUDA se trouvait à l’entrée de Bogoro sur le chemin de Kasenyi. Le groupe de Germain se trouvait à l’entrée de Bogoro sur le chemin de Kasenyi. [REDACTED]. La stratégie était de boucher toutes les sorties du village pour empêcher les ennemis de s’échapper.”

⁷⁶⁹ Statement of W-280 at DRC-OTP-1007-1089 at 1096, paras 44, 48, 52: “NGUDJOLO nous a alors donné l’ordre de prendre le village en commençant par les maisons qui se trouvent à l’extrémité du village [REDACTED]”.

557. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that just before or during the attack:

- i. Germain Katanga was present in the surroundings of the village of Bogoro and gave his last instructions to the soldiers before they entered Bogoro;⁷⁷⁰
- ii. Mathieu Ngudjolo Chui was on *phonie*/Motorola communication with Commander KUTE and was giving instructions throughout the attack;⁷⁷¹

558. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that soon after the attack against the village of Bogoro, Germain Katanga and Mathieu Ngudjolo Chui celebrated the common plan's having been carried out, in particular, by:

- i. meeting at the centre of the village, near the institute/UPC barracks;⁷⁷² and
- ii. congratulating other commanders.⁷⁷³

559. Although Witness 279⁷⁷⁴ mentioned that during a parade on the eve of the attack, Mathieu Ngudjolo Chui said that civilians should be spared and that Witness

⁷⁷⁰ Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 45: "Peu après avoir entendu NGUDJOLO donner cet ordre, GERMAIN et YUDA sont arrivés à l'école. Ils sont venus à pied de leur position pour nous dire qu'ils étaient prêts et pour nous demander si nous l'étions. Ils sont venus à pied en laissant leurs soldats sur leurs positions. GERMAIN et YUDA avaient un motorola, mais ils ne pouvaient pas utiliser leur motorola pour parler avec les gens de Zumbe. Ils pouvaient utiliser leur motorola pour parler avec leurs gens, pas avec nous"; Statement of W-28 at DRC-OTP-0171-1828 at 1837, paras 42-43: "Germain Katanga ne s'est pas adressé aux troupes mais il a donné l'ordre à Yuda et Dark de le faire. [...] Nous avons quitté [REDACTED] à 23h00 pour nous rendre vers Bogoro. [...] Vers 5h00 ou quelques minutes passés [sic] 5h00, nous avons avancé en direction du centre de Bogoro et le camp militaire de l'UPC. C'est alors que nous nous dirigeons vers le centre de Bogoro, que l'UPC a commencé à nous tirer dessus. Germain Katanga était avec nous à ce moment là. La bataille a commencé et j'ai perdu Germain Katanga de vue."

⁷⁷¹ Statement of W-280 at DRC-OTP-1007-1089 at 1095-1096, paras 43-44.

⁷⁷² Statement of W-250 at DRC-OTP-1013-0002 at 0020, para.113: "Le jour même de la bataille de Bogoro, lorsque je sortais du camp de l'UPC que nous venions de prendre, j'ai trouvé Mathieu NGUDJOLO qui se trouvait avec Germain KATANGA au pied des manguiers qui se trouvaient au rond point principal de Bogoro".

⁷⁷³ Transcript of statement of W-250. DRC-OTP-0177-0327 at 0361, lines 1161-1168: " Parce que les officiers, ils y étaient installés. [...]Et là, ils étaient même en train de féliciter le commandant qui avait dirigé l'opération"; at 0362, lines 1161-1168; at 0368, lines 141-165; Statement of W-280 at DRC-OTP-1007-1089, para.60: "NGUDJOLO avait l'habitude de visiter le lieu de l'attaque pour verifier lui-même le travail. NGUDJOLO nous a dit: « Je vous félicite pour votre travail. »". Statement of W-28 at DRC-OTP-0171-1828 at 1838, para.46.

⁷⁷⁴ Statement of W-279 at DRC-OTP-1007-1077 at 1081, para.29.

250⁷⁷⁵ mentioned that Germain Katanga and Mathieu Ngudjolo Chui were surprised to learn of the number of civilians killed during the attack, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui:

- i. took no punitive action against the other commanders or soldiers under their command for the killings;⁷⁷⁶
- ii. in any event congratulated the other commanders around them;⁷⁷⁷
- iii. ordered the burial of the bodies of the civilians, in order to hide the number of victims.⁷⁷⁸

560. In the view of the Chamber, there is sufficient evidence to establish substantial grounds to believe that FRPI soldiers would obey only orders issued by FRPI commanders and that, similarly, FNI soldiers would obey only orders issued by FNI commanders.⁷⁷⁹ Therefore, the fact that Germain Katanga and Mathieu Ngudjolo Chui were the highest commanders of the Ngiti and Lendu combatants, respectively, corroborates the finding that without their agreement on the common plan and their participation in its the implementation, the crimes would not have been committed as planned.

561. In conclusion and based on the evidence referred to in this section, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui implemented the common plan in a coordinated manner and that Germain Katanga and Mathieu

⁷⁷⁵ Transcript of statement of W-250, DRC-OTP-0177-0327 at 0360-0361, lines 1131-1158; at 366-367, lines 102-137.

⁷⁷⁶ Statement of W-280 at DRC-OTP-1007-1089 at 1098, para.61: "NGUDJOLO n'a rien dit au sujet des cadavres de civils"; Statement of W-279 at DRC-OTP-1007-1077 at 1083, para. 44 : "Commandant [REDACTED] nous a demandé qui a tué les civils. [REDACTED] a dit que c'est NGUDJOLO qui voulait savoir cela."; at 1083, para. 45: "NGUDJOLO nous a dit aussi en parlant des civils : « La guerre c'est comme ça. » NGUDJOLO n'a puni aucun soldat. "

⁷⁷⁷ Statement of W-280 at DRC-OTP-1007-1089 at 1098, para. 60; Transcript of statement of W-250 at DRC-OTP-0177-0327 at 0361, lines 1161-1168; at 0368, lines 141-165.

⁷⁷⁸ Statement of W-279 at DRC-OTP-1007-1077 at 1082, para. 38: "NGUDJOLO nous a ordonné d'enterrer les civils. [REDACTED] et d'autres commandants dont je ne me rappelle plus les noms nous ont ordonné de creuser les trous. "

⁷⁷⁹ Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 45; Statement of W-160 at DRC-OTP-0153-0006 at 0020-0021, paras 82-83, 89, 91, 95; Statement of W-12 at DRC-OTP-0105-0085 at 0146, para.328.

Ngudjolo Chui had joint control over the implementation of the plan, insofar as their essential overall coordinating roles gave to them, and only to them, the power to frustrate the implementation of the plan.

6. *The suspects were aware of the factual circumstances enabling them to exercise joint control over the crimes or joint control over the crimes through another person*

562. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, Germain Katanga and Mathieu Ngudjolo Chui:

- i. as the highest commanders of the organisations, were aware of the specific role that they played within the FRPI and FNI, respectively;⁷⁸⁰
- ii. were aware of the hierarchically organised character of their respective organisations;⁷⁸¹
- iii. were aware of the circumstances allowing automatic compliance with the orders due to:
 - a. the size of the organisations, composed mainly of low level and interchangeable soldiers;
 - b. the brutal training undergone by the soldiers, specially children under the age of fifteen years; and
 - c. the allegiance of the soldiers to the military leaders of their ethnic groups.

563. The Chamber further finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui:

- i. intentionally agreed on the plan to “wipe out” Bogoro and commanded their respective troops to attack Bogoro village;

⁷⁸⁰ See evidence referred to in the present section; Statement of W-160 at DRC-OTP-0153-0006 at 0011-0012, paras 35, 37; *Accord de cessation des hostilités en Ituri*, 18 March 2003, at DRC-OTP-0043-0201 at 0204; Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 38; at 0115, paras 47-48; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109; DRC-OTP-00113-0199 at 0201; *Communiqué Conjoint*, 18 May 2003 at DRC-OTP-00132-0245; Statement of W-250 at DRC-OTP-1004-0187 at 0206, para. 116; Statement of W-280 at DRC-OTP-1007-1089 at 1091-1095.

⁷⁸¹ See evidence referred to in the present section.

- ii. were aware of their coordinating role in the implementation of the common plan;⁷⁸²
- iii. were aware of the essential nature of their coordinating role in the implementation of the common plan and their ability to frustrate the implementation of the plan by refusing to activate a mechanism leading to the soldiers' almost automatic compliance with the orders.⁷⁸³

7. The suspects were mutually aware and mutually accepted that the implementation of the common plans would result in the realisation of the crimes

564. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui used children under the age of fifteen years as bodyguards and to participate actively in military operations.

565. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui, as part of the common plan to "wipe out" Bogoro, intended:

- a. to carry out the attack against the civilian population of the Bogoro village;
- b. to carry out the killings or murder of the civilian population of Bogoro village; and
- c. to destroy properties.

566. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui knew that, as a

⁷⁸² Statement of W-28 at DRC-OTP-0171-1828 at 1834-1835, paras 27, 30-31 ; at 1836, para. 36; Statement of W-279 at DRC-OTP-1007-1077 at 1081, para. 31; Statement of W-28 at DRC-OTP-0171-1828 at 1836, para. 38; Statement of W-280 at DRC-OTP-1007-1089 at 1091-1093, para. 23; Statement of W-279 at DRC-OTP-1007-1077 at 1081, paras 28-29; Statement of W-157 at DRC-OTP-0164-0534 at 0540, para. 37.

⁷⁸³ In reaching the finding, the Chamber has taken into consideration, among other evidence, the evidence referred to in the preceding footnote.

consequence of the common plan, pillaging would occur in the ordinary course of the events.

567. The majority of the Chamber, Judge Anita Ušacka dissenting, finds that there is sufficient evidence to establish substantial grounds to believe that from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui knew that, as a consequence of the common plan, rape and sexual slavery of women and girls would occur in the ordinary course of the events.

568. Accordingly, in the view of the majority of the Chamber, this conclusion, in relation to the crimes against humanity of rape and sexual slavery of women and girls, is also substantiated by the fact that:

- (i) rape and sexual slavery against of women and girls constituted a common practice in the region of Ituri throughout the protracted armed conflict;⁷⁸⁴
- (ii) such common practice was widely acknowledged amongst the soldiers and the commanders;⁷⁸⁵
- (iii) in previous and subsequent attacks against the civilian population, the militias led and used by the suspects to perpetrate attacks repeatedly committed rape and sexual slavery against women and girls living in Ituri;⁷⁸⁶

⁷⁸⁴ Statement of W-28 at DRC-OTP-0171-1828 at 1842-1843, paras 72, 74; Statement of W-249 at DRC-OTP-1015-0833 at 0837, para. 23; Transcript of statement of W-258 at DRC-OTP-0173-0846 at 0853, lines 259-260; at 0854, lines 261-263; Statement of W-161 at DRC-OTP-0164-0488 at 0499, para. 61; United Nations Security Council, *Troisième rapport spécial du Secrétaire Général sur la Mission de l'Organisation des Nations Unies en République démocratique du Congo*, United Nations Document S/2004/640 (16 August 2004) at DRC-OTP-0129-0437 at 0469-0470; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848.

⁷⁸⁵ Statement of W-160 at DRC-OTP-0153-0006 at 0024, para. 106; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110, paras 4-6; Statement of W-132 at DRC-OTP-1016-0156 at 0186-0187, para. 187; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848; Statement of W-249 at DRC-OTP-1004-0115 at 0118-0119, paras 22-31.

⁷⁸⁶ Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110; Statement of W-132 at DRC-OTP-1016-0156 at 0162, paras 31-35; United Nations Security Council, *Troisième rapport spécial du Secrétaire Général sur la Mission de l'Organisation des Nations Unies en République démocratique du Congo*, United Nations Document S/2004/640 (16 August 2004) at DRC-OTP-0129-0437 at 0469-0470; Statement of W-12 at DRC-OTP-0105-0085 at 0154, para. 375; United Nations Security

- (iv) the soldiers and child soldiers were trained (and grew up) in camps in which women and girls were constantly raped and kept in conditions to ease sexual slavery;⁷⁸⁷
- (v) Germain Katanga, Mathieu Ngudjolo Chui and their commanders visited the camps under their control, frequently received reports of the activities of the camps by the camps commanders under their command, and were in permanent contact with the combatants during the attacks, including the attack on Bogoro;⁷⁸⁸
- (vi) the fate reserved to captured women and girls was widely known amongst combatants;⁷⁸⁹ and
- (vii) the suspects and the combatants were aware, for example, which camps and which commanders more frequently engaged in this practice.⁷⁹⁰

569. Therefore, the majority of the Chamber, Judge Anita Ušacka dissenting, finds that there is sufficient evidence to establish substantial grounds to believe that when they planned, ordered and monitored the attack on Bogoro and on other villages

Council, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, United Nations Document A/58/534 (24 October 2003) at DRC-OTP-0130-0273 at 0283, para. 40.

⁷⁸⁷ Statement of W-249 at DRC-OTP-1015-0833 at 0837, para. 29 ; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110; Statement of W-132 at DRC-OTP-1016-0156 at 0165, para. 49; Statement of W-28 at DRC-OTP-0171-1828 at 1842-1843, paras 72, 74.

⁷⁸⁸ Statement of W-280 at DRC-OTP-1007-1089 at 1093, para. 25; at 1098, para. 59; at 1100, para. 75; Summary of statement of W-267 at DRC-OTP-1016-0106 at 0109, para. 3; Statement of W-157 at DRC-OTP-1006-0054 at 0071, para. 123 ; Statement of W-280 at DRC-OTP-1007-1089 at 1096, para. 45; Statement of W-250 at DRC-OTP-1013-0002 at 0020, para. 113; Statement of W-250 at DRC-OTP-1004-0187 at 0204, para. 105; at 0207, para. 125; Statement of W-157 at DRC-OTP-1006-0054 at 0069, para. 102 ; Transcript of statement of W-258 at DRC-OTP-0173-616 at 0628 ; Statement of W-28 at DRC-OTP-0155-0106 at 0114, para. 43: “[REDACTED] commandant Germain Katanga était de [REDACTED] visiter le reste des camps du FRPI positionné dans la collectivité de Walendu Bindi. [...] Apres [sic] que les chefs des camps faisaient rapport de la situation du camp au commandant Germain Katanga en privé, [REDACTED] ”.

⁷⁸⁹ Statement of W-160 at DRC-OTP-0153-0006 at 0024, para. 106; Statement of W-28 at DRC-OTP-0171-1828 at 1843, para. 73 ; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence In Notheastern DR Congo*, vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848.

⁷⁹⁰ Summary of statement of W-267 at DRC-OTP-1016-0106 at 0110, paras 4-6; Summary of statement of W-271 at DRC-OTP-1019-0223 at 0225, para. 3; at 0225, para. 4; Statement of W-132 at DRC-OTP-1016-0156 at 0186-0187, para. 187.

inhabited mainly by Hema population, the suspects knew that rape and sexual slavery would be committed in the ordinary course of the events.

570. Although the evidence is sufficient to establish substantial grounds to believe that FNI/FRPI members committed the war crimes of inhuman treatment, including against Witness 268, and outrages upon personal dignity, including against Witness 287, in the view of the Chamber, the Prosecution brought no evidence showing that the commission of such crimes was intended by the Germain Katanga and Mathieu Ngudjolo Chui as part of the common plan to “wipe out” Bogoro village.

571. Moreover, in the view of the Chamber, the Prosecution has not brought sufficient evidence to establish substantial grounds to believe that, as a result or part of the implementation of the common plan, these facts would occur in the ordinary course of events. Instead, they appear to be crimes intended and committed incidentally by the soldiers, during and in the aftermath of the attack on Bogoro village, without a link to the suspects’ mental element.

572. In conclusion, having thoroughly reviewed the Prosecution’s evidence, the Chamber finds that there is not sufficient evidence to establish substantial grounds to believe that, from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui jointly committed through other persons crimes of inhuman treatment, as provided for in article 8(a)(ii) of the Statute, and outrages upon personal dignity, as provided for in article 8(b)(xxi) of the Statute, with the relevant mental element provided for in article 30 of the Statute.

C. Conclusion

573. For the reasons provided in the present Decision, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that:

- a. from August 2002 to May 2003, Germain Katanga and Mathieu Ngudjolo Chui were aware of the factual circumstances that

established the existence of an armed conflict of an international character;

- b. from August 2002 to May 2003 Germain Katanga and Mathieu Ngudjolo Chui were aware of the existence of a nexus between the common plan to “wipe out” the Bogoro village and the armed conflict taking place in Ituri.

574. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that on 24 February 2003 Germain Katanga and Mathieu Ngudjolo Chui jointly committed, within the meaning of article 25(3)(a) of the Statute, the war crime of using children under the age of fifteen years to participate actively in the hostilities, as set out in article 8(b) (xxvi) of the Statute.

575. The Chamber further finds that there is sufficient evidence to establish substantial grounds to believe that on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the war crimes of:

- (i) With intent to commit the crimes (*dolus directus* of the first degree):
 - a. directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) of the Statute;
 - b. wilful killings under article 8(2)(a)(i) of the Statute; and
 - c. destruction of property under article 8(2) (b) (xiii) of the Statute.
- (ii) With the knowledge that the following crimes would occur in the ordinary course of events (*dolus directus* of the second degree):
 - a. Pillaging under article 8(2)(b)(xvi) of the Statute.

576. The majority of the Chamber, Judge Anita Ušacka dissenting, finds that there is sufficient evidence to establish substantial grounds to believe that on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the war crimes of sexual slavery and rape, under article 8(2)(b)(xxii) of the Statute, with knowledge

that the following crimes would occur in the ordinary course of events (*dolus directus* of the second degree)

577. The Chamber finds that there is not sufficient evidence to establish substantial grounds to believe that, from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui jointly committed through another person the crimes of inhuman treatment, as provided for in article 8(a)(ii) of the Statute, and outrages upon personal dignity, as provided for in article 8(b)(xxi) of the Statute, with the relevant mental element provided for in article 30 of the Statute.

578. In addition, the Chamber finds that, in accordance with the evidence presented in the section in relation to the contextual elements of crimes against humanity, there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui were aware that the crimes committed during and in the aftermath of the 24 February 2003 attack on Bogoro village were part of a widespread and systematic attack against the civilian population, which encompassed villages in the Ituri region among them Bunia, Nyankunde, Mandro, Kilo, Dodro and others which were predominantly occupied by Hemas.

579. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, under article 7(1)(a) of the Statute, with intent (*dolus directus* of the first degree).

580. The majority of the Chamber, Judge Anita Ušacka dissenting, finds that there is sufficient evidence to establish substantial grounds to believe that on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of rape and sexual slavery, under article 7(1)(g) of the Statute, with knowledge that these crimes would occur in the ordinary course of events (*dolus directus* of the second degree), under article 7(1)(g).

581. However, in the view of the majority of the Chamber, Judge Anita Ušacka dissenting, the evidence presented by the Prosecution is insufficient to establish substantial grounds to believe that crime against humanity of other inhumane acts, under article 7(1)(k) of the Statute, was committed during the attack on Bogoro village.

582. The Chamber reminds the parties and participants that it is still seized of three requests for leave to appeals which “shall be dealt with after the confirmation hearing, along with any request for leave to appeal the Chamber’s decision confirming or not the charges”.⁷⁹¹ The Chamber therefore will remain seized of the case and suggests to the Presidency, that the Presidency transmit the decision of the Pre-Trial Chamber and the record of the case, pursuant to rule 130 of the Rules, only when the present Decision is definitive.

FOR THESE REASONS,

THE CHAMBER, UNANIMOUSLY:

DENIES the general challenge made by the Defence for Mathieu Ngudjolo Chui to the admissibility of all of the evidence in the record, on the grounds of the legality, regularity, and probative value of the evidence as a whole;

DENIES the request of the Defence for Germain Katanga to render inadmissible the *procès verbal*;

DENIES both Defence teams’ requests to render inadmissible the manuscript provided by the deceased Prosecution source, but **DECIDES** that some of the issues contained in such challenges could affect the probative value of the manuscript;

⁷⁹¹ ICC-01/04-01/07-601. Pending requests for leave to appeal are: ICC-01/04-01/07-544; ICC-01/04-01/07-545 and ICC-01/04-01/07-688.

DECIDES that the video entitled: “Brig Kale with the Lendu Commandant and UPC Commandant” is inadmissible as evidence for the purposes of the Confirmation Hearing;

DECIDES that both Defence teams’ challenges to hearsay information within the evidence do not affect the admissibility of the evidence; that it may affect the probative value of the portions of the evidence which contain information based only on anonymous hearsay; that anonymous hearsay evidence may still be probative to the extent that it (i) corroborates other evidence in the record, or (ii) is corroborated by other evidence in the record; and that the probative value of the hearsay information from a known source is to be analysed on a case by case basis taking into account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the source and the possibility for the Defence to challenge the source.

DECIDES that, concerning the statements of Witnesses 28 (first statement), 157 and 279, who were minors at the time their statements were taken, none of the challenges raised by the Defence teams affect the probative value of these statements; and that, in relation to the second statement of Witness 28, the arguments raised by the Defence could affect its probative value;

DENIES the requests of both Defence teams to declare inadmissible the anonymous summaries of the statements of Witnesses 243, 267 and 271, but **DECIDES** that the challenges raised by both Defence teams do not affect the probative value of the summaries of their statements;

DENIES the request of the Defence for Mathieu Ngudjolo Chui to render inadmissible as evidence photographs depicting the wounds of witnesses and the photographs of Bogoro Institute; but **DECIDES** that the photographs will be

accorded probative value in proportion to (i) the level of authentication provided by the witness who introduces the evidence, and (ii) the reliability of the accompanying witness statement;

DECIDES that the preventive relocations of Witnesses 28, 132, 287 and 250 by the Prosecution do not affect the probative value accorded to their statements;

DECIDES that the Prosecution's contacts with Witnesses 28, 157 and 161 prior to their interviews do not affect the probative value accorded to their statements;

DECIDES that both Defence teams' challenges to the statements of Witnesses 238, 250 and 258 and to the related documents, on the basis that the witnesses had a "dual status" of both witness and suspect, do not affect the probative value accorded to their statements;

DECIDES, in relation to Witness 258, that the challenges raised by both Defence teams could affect the probative value of his statement;

DENIES the requests of both Defence teams to render inadmissible the statement of Witness 166, and **DECIDES** that the challenges to Witness 166's statements and related documents do not affect their probative value;

DENIES the request of the Defence for Mathieu Ngudjolo Chui to render inadmissible any evidence related to other attacks in the region of Ituri in the DRC, before or after the 24 February 2003 attack on Bogoro village;

CONFIRMS that victims' applications are not evidence in the case;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial

grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of murder constituting a crime against humanity within the meaning of article 7(1)(a) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of wilful killing as a war crime within the meaning of article 8(2)(a)(i) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of using children to participate actively in hostilities, as a war crime within the meaning of article 8(2)(b)(xxvi) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of intentionally directing attacks against the civilian population of Bogoro village, constituting a war crime within the meaning of article 8(2)(b)(i) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of pillaging constituting a war crime within the meaning of article 8(2)(b)(xvi) of the Statute;

CONFIRMS on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of destruction of property constituting a war crime within the meaning of article 8(2)(b)(xiii) of the Statute;

DECLINES to confirm the charge of inhuman treatment as a war crime within the meaning of article 8(2)(a)(ii), on the basis of article 61(7)(b) of the Statute;

DECLINES to confirm the charge of outrages upon personal dignity as a war crime within the meaning of article 8(2)(b)(xxxi) of the Statute, on the basis of article 61(7)(b) of the Statute;

THE CHAMBER, BY MAJORITY:

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of sexual slavery as a crime against humanity within the meaning of article 7(1)(g) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of sexual slavery as a war crime within the meaning of article 8(2)(b)(xxii) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of rape as a crime against humanity within the meaning of article 7(1)(g) of the Statute;

CONFIRMS, on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are responsible, under article 25(3)(a) of the Statute, for the charge of rape as a war crime within the meaning of article 8(2)(b)(xxii) of the Statute;

DECLINES to confirm the charge of other inhumane acts as a crime against humanity within the meaning of article 7(1)(k) of the Statute, on the basis of article 61(7)(b) of the Statute;

|

THE CHAMBER, UNANIMOUSLY:

|

COMMITTS Germain Katanga and Mathieu Ngudjolo Chui to a Trial Chamber for trial on the charges as confirmed, pursuant to article 61(7)(a) of the Statute;

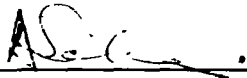
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REMAINS seized of the case until the present Decision is definitive.

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Judge Anita Ušacka appends her partly dissenting opinion to the present Decision.

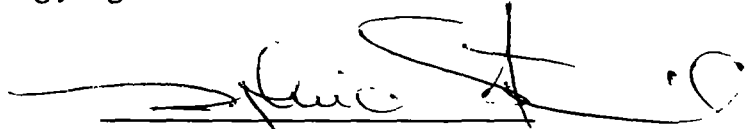
Done in English and French , the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka
Judge



Judge Sylvia Steiner
Judge

Dated this Wednesday 30 September 2008

At The Hague, The Netherlands

Partly Dissenting Opinion of Judge Anita Ušacka

I. The standard for confirming the charges

1. As stated in Section II(A) of the *Decision on the Confirmation of Charges* (“the Decision”), the standard under article 61(7) of the Statute requires the Chamber, on the basis of the evidence presented for the purposes of the confirmation hearing, to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. In the *Lubanga* Decision, the Chamber held that in order for the Prosecution to meet its evidentiary burden, it must present concrete and tangible evidence which “demonstrate[s] a clear line of reasoning underpinning its specific allegations.”¹ The Chamber explained that the purpose of the Decision was, *inter alia*, for the Chamber to “determine whether it is thoroughly satisfied that the Prosecution’s allegations are sufficiently strong to commit [the suspect] for trial.”²

2. It is clear from the Statute and Rules that the proceedings leading to and including the confirmation hearing are distinguished from proceedings leading to the trial and the trial itself. During the confirmation phase, the Prosecution’s evidentiary burden is lowered: the Prosecution may rely on summaries of witness statements rather than being required to disclose the statements in their entirety; the Prosecution may rely entirely on documentary evidence without producing live witnesses who will be “tested” by the parties; and the Prosecution’s burden is only to provide enough evidence to establish substantial grounds to believe that the crimes were committed by the suspect, rather than evidence to prove the accused’s culpability beyond a reasonable doubt. However, the differences between the Pre-Trial and Trial phases do not relieve the Prosecution of its duty in the Pre-Trial phase to provide sufficiently solid evidence concerning both the subjective and objective elements of each of the

¹ ICC-01/04-01/06-803-tEN, paras. 38-39.

² ICC-01/04-01/06-803-tEN, para.39.

crimes charged and the mode of liability chosen by the Prosecutor. In each phase, it is the duty of the Chamber to determine whether it is thoroughly satisfied that the evidence presented on each element meets the requisite legal standard.

II. Counts 6, 7, 8 and 9

3. In counts 6, 7, 8 and 9 of the Amended Charging Document, the Prosecution charges the suspects with criminal responsibility under article 25(3)(a) or (b) of the Statute for rape and sexual slavery as both war crimes and crimes against humanity.

4. In relation to these charges, the Chamber found that there were substantial grounds to believe that members of the FRPI/FNI militia committed rape and sexual slavery in the aftermath of the attack on Bogoro village on 24 February 2003. In confirming the charges, the majority found that there was sufficient evidence to establish substantial grounds to believe that German Katanga and Mathieu Ngudjolo Chui were criminally responsible for the commission of these crimes.

a. Article 30 of the Statute and criminal responsibility

5. Article 30(1) of the Statute provides as follows:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

6. Article 30(2) and (3) of the Statute set out the definitions of intent and knowledge, respectively. Pursuant to article 30(2) of the Statute, a person has intent when:

- (a) In relation to a conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

7. Accordingly, if intent is established pursuant to article 30(2)(b) of the Statute, the requirement of knowledge, within the meaning of article 30(3) will also be satisfied:

‘[K]nowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

8. In the view of the Chamber, article 30 of the Statute therefore encompasses at least two forms of *dolus*, found in articles 30(2)(a) and 30(2)(b) of the Statute, respectively:

- (1) *Dolus directus* in the first degree, according to which the perpetrator:
 - a. knows that his or her actions or omissions will bring about the objective elements of the crime; and
 - b. undertakes such actions or omissions with the express intent to bring about the objective elements of the crime.
- (2) *Dolus directus* in the second degree, according to which, although the suspect does not have the express intent to bring about the objective elements of the crime, he or she is nonetheless aware that the consequence will occur in the ordinary course of events.³

9. For either form of *dolus*, the suspects’ knowledge or awareness of the conduct is linked to the commission of the objective elements of the crime.⁴ *Dolus directus* in the second degree, rather than encompassing a volitional element as in *dolus directus* in the first degree, is explained as the perpetrator’s cognitive awareness that the action will result, with certainty, in the commission of the crime “in the

³ *Decision on the Confirmation of Charges*, para. 528.

⁴ The following example highlights the difference between these two forms of intent: *dolus directus* in the first degree can be established, for example, when the perpetrator says, “I intend to kill”; *dolus directus* in the second degree can be established, for example, when the perpetrator aims a gun at another person at a close enough range that if he pulls the trigger death will certainly occur, and the perpetrator subsequently pulls the trigger. For *dolus directus* in the second degree, although the perpetrator has not expressed his intent to kill, this intent is inferred from his or her knowledge or awareness that once the he or she pulls the trigger, death of person will occur “in the ordinary course of events.”

ordinary course of events.”⁵ The parameters of article 30(2)(b) have also been explained as follows:

[I]n the perpetrator’s perception at the time of the act, carrying out the conduct would cause the consequence, unless extraordinary circumstances intervened. Thus it is not enough for the perpetrator to merely anticipate the possibility that his or her conduct would cause the consequence. This follows from the words “will occur” [...].⁶

10. By contrast, the concept of *dolus eventualis* has been understood as a form of *mens rea* in which the perpetrator has “[an] awareness that undertaking a course of conduct carries with it an unjustifiable risk of producing harmful consequences.”⁷ In the *Lubanga* Decision, the Chamber defined *dolus eventualis* as follows:

situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.⁸

11. In accordance with the *Lubanga* Decision, the Prosecution argued at the confirmation hearing:

This Chamber has determined that article 30 encompass[es] the mental element of *dolus eventualis* for crimes committed through co-perpetration as long as the co-perpetrators had, if required, the *dolus specialis* or ulterior intent for the type of crimes involved. It is our submission that the co-perpetrators satisfied at least the mental element of *dolus eventualis* for each and every charge in the document containing the charges.⁹

12. In respect of counts 6, 7, 8 and 9, the Prosecution argues that the Chamber may attribute criminal responsibility for these crimes because the suspects acted with *dolus directus* or, at the very least, with *dolus eventualis*. However, in the Decision, the Chamber states that it will not rely on *dolus eventualis* in relation to the crimes charged.¹⁰ Thus, this dissent will only address whether there is

⁵ See CASSESE, et. al. *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 915: “Whatever may be meant by ‘ordinary course of events’, with regard to the awareness thereof this clause obviously meant to cover *dolus directus in the second degree* in which the volitional component of intention seems to be substituted by the cognitive component in terms of the perpetrators being aware that action will result in the prohibited consequence (though not desired) with certainty.”

⁶ WERLE, G., *Principles of International Criminal Law*, Cambridge, Cambridge University Press, 2005, p.104.

⁷ See e.g., CASSESE, A., *International Criminal Law*, Oxford, Oxford University Press, 2003, p. 161.

⁸ ICC-01/04-01/06-803-tEN, para. 352.

⁹ ICC-01/04-01/07-T-43, 59:9-59:15.

¹⁰ Decision, fn. 329: “The definition of the concept of *dolus directus* of the first and second degrees, and of *dolus eventualis*, can be found in ICC-01/04-01/06-803-tEn, para. 351. In the *Lubanga*

sufficient evidence to establish substantial grounds to believe that in respect of counts 6, 7, 8, and 9, the suspects acted with *dolus directus* in the first or second degree.

b. Whether the evidence presented by the Prosecution is sufficient to establish the suspects' criminal responsibility

13. In the Decision, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the objective elements of the war crimes and crimes against humanity of rape and sexual slavery, as described in counts 6, 7, 8, and 9, were committed.

14. While I agree with this conclusion, I am not "thoroughly satisfied" that the Prosecution's allegations are sufficiently strong to establish substantial grounds to believe that the suspects were criminally responsible for the commission of those crimes. In particular, I do not find that the evidence presented is sufficient to establish substantial grounds to believe that the suspects intended for rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events.

15. In the Amended Charging Document, the Prosecution alleged that:

The crimes against humanity and the war crimes allegedly committed during and in the aftermath of the joint attack by the FRPI and the FNI upon the village of Bogoro were either encompassed by the common plan, or at the very least, a likely consequence of the implementation of this common plan, which was mutually accepted by KATANGA, NGUDJOLO and other FRPI and FNI commanders.

16. However, in relation to the suspects' criminal responsibility for counts 6, 7, 8 and 9, the Prosecution alleged that:

[F]rom [the Prosecution's] presentation on the commission of sexual offences of the Bogoro attack, it was clear that prior to Bogoro there was a widespread practice of

decision, the Chamber found that article 30(1) of the Statute encompasses also *dolus eventualis*. In its current composition, the majority of the Chamber endorses this previous finding. For the purpose of the present charge, it is not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence. Judge Anita Ušacka disagrees with the position of the majority with respect to the application of *dolus eventualis*"; and Decision, para. 531.

abducting, humiliating, raping, and sexual enslaving of women by Ngiti forces. It was the case in the Nyakunde attack of September 2002 where women were kidnapped, raped, and sexually enslaved. [...] It was a common practice that the women who were abducted during attacks or following attacks were raped and were often forced to marry the rapist or to be used as sex slaves by several combatants. Some FRPI commanders such as Lobho Tshamangare, Garimbaya, who is a commander of Germain Katanga's residence, and Yuda had numerous sex slaves living in their quarters.¹¹

17. In relation to Germain Katanga specifically, the Prosecution argued that:

Germain Katanga himself, while visiting Songokoi camp [saw] Witness 132 in a hole dug in the ground which is used as a prison. Her clothes [were] ripped, and she [was] in a cell with male prisoners. Germain Katanga [took] no remedial measures.¹²

18. In relation to Mathieu Ngudjolo Chui specifically, the Prosecution argued that:

Upon finding out that women are kidnapped and used as sex slaves, Mathieu Ngudjolo only took action, albeit not sufficiently severe to be reasonable, against soldiers who had abducted Lendu women. Kidnappings and sexual enslavement of women of other ethnicity went unpunished.¹³

19. At the outset I should note that as indicated by the Prosecution's submissions on these counts, the Prosecution did not provide any direct evidence that Germain Katanga and Mathieu Ngudjolo Chui intended the common plan to attack Bogoro village to include rape or sexual slavery. For example, the Prosecution did not present evidence that either Germain Katanga or Mathieu Ngudjolo Chui directly ordered, suggested or induced members of the FNI/FRPI to commit rape or sexual slavery. Neither did the Prosecution present evidence that the suspects expressly agreed that rape and sexual slavery would be committed during the attack on Bogoro village, or even that in the aftermath of the Bogoro attack, the suspects were present when the crimes of rape and/or sexual slavery were committed.

20. Although the Prosecution alleges that Germain Katanga saw Witness 132 – who testifies to having been raped in the aftermath of the attack on Bogoro village and to having been sexually enslaved at Songokoi camp – the witness's statement indicates only that Germain Katanga saw her and the other prisoners

¹¹ ICC-01/04-01/07-T-43, 64:2-64:14.

¹² ICC-01/04-01/07-T-43, 64:17-64:20.

¹³ ICC-01/04-01/07-T-43, 65:2-65:5.

in the prison of the camp.¹⁴ In my view, this information is simply insufficient for the Chamber to infer that since Witness 132 was seen in a prison, Germain Katanga knew that she was sexually enslaved or that she had been raped in the aftermath of the Bogoro attack.

21. The Prosecution's presentation on these charges requires the Chamber to make a number of inferences in order to find that the suspects are criminally responsible for these crimes. Lacking direct evidence that the suspects intended that for these crimes to be committed during the implementation of the common plan, the Prosecution alleges that (i) there was a widespread practice of sexually enslaving and raping women in the Ituri region; (ii) in at least one attack prior to the attack on Bogoro, in Nyakunde in September 2002, rape and sexual slavery occurred; and (iii) FNI/FRPI combatants and commanders raped and sexually enslaved women. On this basis alone, according to the Prosecution, the Chamber can determine that there are substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible for jointly committing, through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes of rape and sexual slavery pursuant to articles 8(2)(b)(xxii) and 7(1)(g) of the Statute during the attack on Bogoro village.

22. The General Introduction of the *Elements of Crimes* provides that "[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances." In my view, the allegations of the Prosecution as presented are insufficient for one to infer the existence of the suspects' intent and knowledge that these crimes would be committed. While the Prosecution presents evidence that the crimes of rape and sexual slavery were committed throughout the region of Ituri,¹⁵ in my view such a general allegation is insufficient for the Chamber to infer that the suspects were aware that rape and sexual slavery would occur in the ordinary course of events during or in the aftermath of the attack on Bogoro. In my view,

¹⁴ Statement of Witness 132 at DRC-OTP-1016-0156 at 0186-0187, paras 184-191.

¹⁵ United Nations General Assembly, *Troisième rapport spécial du Secrétaire Général sur la Mission de l'Organisation des Nations Unies en République démocratique du Congo* at DRC OTP-0129-0437 at 0469-0470; Human Rights Watch, *Ituri: "Covered in Blood" – Ethnically Targeted Violence in Northeastern DR Congo*, Vol. 15, No. 11 (A), New York, July 2003 at DRC-OTP-0074-0797 at 0848.

the evidence highlights the fundamental difference between the perpetrator's cognitive awareness that the action will result with certainty and an awareness that undertaking a course of conduct carries with it an unjustifiable risk of producing harmful consequences.

23. However, even if the Chamber could infer from the Prosecution's presentation that there are substantial grounds to believe that the suspects intended to jointly and through another commit the crimes of rape and sexual slavery under articles 8(2)(b)(xxii) and 7(1)(g) of the Statute, in my view, the evidence presented is also insufficient to support the allegations in the presentation or to link the suspects to the commission of the crimes. Although the Prosecution's witnesses include a number of "insiders",¹⁶ none states that the suspects were personally aware of the widespread occurrence of these crimes, or that such widespread occurrence was reported to them. Even though the Prosecution presents a summary of a statement from one anonymous witness who states that Germain Katanga knew rapes occurred, it is unclear from the witness's position or role or from the summary of his statement how he could have had personal knowledge of this alleged fact.¹⁷

24. In my view, there is also insufficient evidence to establish that if rape or sexual slavery were committed in the aftermath of an attack perpetrated by the FNI/FRPI or at one of the FNI/FRPI camps, this information was reported to Germain Katanga and Mathieu Ngudjolo Chui. The Prosecution presents evidence *via* Witness 258 that daily reports were made to Germain Katanga by other commanders if there were problems at the camps, evidence which would suggest a regular reporting structure, at least within the FRPI. However, the Chamber determined that the challenges raised by Counsel for the Defence in relation to Witness 258 affected the probative value that would be accorded to the transcript of his statement, and therefore indicated that the Chamber would

¹⁶ See, e.g., transcripts of statements of Witness 258 at DRC-OTP-0173-0560, DRC-OTP-0173-0589, and DRC-OTP-0173-0616; Statement of Witness 160 at DRC-OTP-0153-0006; and Statements of Witness 28 at DRC-OTP-0155-0106 and DRC-OTP-0171-1828.

¹⁷ Summary of statement of Witness 267 at DRC-OTP-1016-0106 at 0110.

exercise caution in using such evidence in order to accept or reject any assertion made by the Prosecution.¹⁸ On this basis, the evidence presented by Witness 258 alone is insufficient to establish that a regular reporting structure existed. In addition, even if the Chamber could fully rely on this evidence, it would still be insufficient to establish the inference that the commanders would have reported to Germain Katanga that crimes such as rape or sexual enslavement were occurring at the camps or in the aftermath of the attacks, because the Witness does not describe the content of the reports.

25. Furthermore, while the Prosecution presents evidence that Germain Katanga and Mathieu Ngudjolo Chui visited other camps¹⁹ or communicated with each other and other commanders by “Cobra” or Motorola radios,²⁰ none of the evidence actually indicates that if the war crimes or crimes against humanity of rape or sexual slavery under articles 8(2)(b)(xxii) and 7(1)(g) of the Statute were committed by the combatants either during the attacks or at the camps, this would have been regularly reported to the suspects. In my view, the evidence as presented also does not provide a basis for the Chamber to infer that this type of information was reported.

26. By contrast, there is evidence to establish substantial grounds to believe that on isolated occasions, when Germain Katanga and Mathieu Ngudjolo Chui became aware that women had been abducted and made “wives” of combatants, they each took steps to punish offenders.²¹ While the Prosecution presents testimony from one witness that Mathieu Ngudjolo Chui punished combatants for “grave breaches” such as abducting Lendu women, but did not punish combatants for similar breaches if the victims were Bira or Hema women,²² the Prosecution does not present evidence that Mathieu Ngudjolo Chui was ever

¹⁸ *Decision on the Confirmation of Charges*, para.195.

¹⁹ Statement of Witness 132 at DRC-OTP-1016-0156 at 0166-0168, paras 59-67; Statement of Witness 280 at DRC-OTP-1007-1089 at 1093, paras. 45 and 59.

²⁰ Statement of Witness 250 at DRC-OTP-1004-0187 at 0207, para. 125; Statement of Witness 250 at DRC-OTP-0177-0299 at 0307, lines 251-253; Statement of Witness 28, DRC-OTP-0155-0106 at 0118, para. 67; Transcript of statement of Witness 258 at DRC-OTP-0173-0616, at 0628.

²¹ First statement of Witness 250 at DRC-OTP-1004-0187 at 0209, paras 134-138; Statement of Witness 243 at DRC-OTP-1016-0089 at 0090.

²² Statement of Witness 280 at DRC-OTP-1007-1089 at 1092, para. 18.

personally made aware that such breaches against Bira or Hema women actually or regularly occurred. However, even if one could infer from the witness's statement that such breaches against Hema or Bira were reported to Mathieu Ngudjolo Chui, the Chamber could not directly infer from this information that Mathieu Ngudjolo Chui therefore intended for rape and sexual slavery to be committed during the attack on Bogoro.

27. Thus, while I am thoroughly satisfied that the Prosecution has provided sufficient evidence to establish substantial grounds to believe that members of the FRPI/FNI militia committed rape and sexual slavery in the aftermath of the Bogoro attack, it is my view that the evidence is insufficient to link Germain Katanga and Mathieu Ngudjolo Chui with the commission of these crimes.

28. I appreciate the difficulty the Prosecution must face in acquiring evidence which would directly link a suspect to these types of crimes when criminal responsibility is alleged under article 25(3)(a) of the Statute on the basis of the existence of a common plan.²³ I also appreciate that the Prosecution has a substantial burden under article 30 of the Statute in presenting evidence that the suspects either intended for rapes and sexual slavery to occur when it is not alleged that they were the direct perpetrators, or were aware that rapes and sexual slavery would occur in the ordinary course of events, when the basis for criminal responsibility is that they jointly committed the crimes through other persons, within the meaning of article 25(3)(a) of the Statute. However, in my view, it is not the duty of the Chamber to lessen the Prosecution's burden, but rather to assess the evidence presented and to decide whether such evidence is sufficient to establish substantial grounds to believe that each element of each of the crimes has been committed. On the basis of the evidence presented, I am not "thoroughly satisfied" that there are substantial grounds to believe that the suspects intended for rape and sexual slavery to be included in the common plan

²³ See, for example, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment (16 Nov. 2001); *The Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment (22 Jan. 2004); *The Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Judgment and Sentence, para. 1079 (3 Dec. 2003); *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence (1 Dec. 2003).

to attack Bogoro village on 24 February 2003. In my view, the evidence presented is insufficient to directly or closely link Germain Katanga and Mathieu Ngudjolo Chui to these crimes.

29. Therefore, it is on this basis that I dissent from the majority's decision to confirm the charges under counts 6, 7, 8, and 9. In my view, a better course of action would have been for the Chamber to adjourn the hearing on these charges pursuant to article 61(7)(c)(i) of the Statute and request the Prosecutor to provide further evidence which links the suspects with the crimes charged under counts 6, 7, 8, and 9.

III. Count 3

30. In count 3 of the Amended Charging Document, the Prosecution charges the suspects with inhumane acts at Bogoro village constituting a crime against humanity.

31. In addition to establishing the contextual elements common to all of the crimes against humanity set out in the Statute, article 7(1)(k) of the *Elements of Crimes* also states that:

1. The perpetrator inflicted great suffering, or serious injury to body or mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.

32. The purpose of including this crime in the Statute was to provide article 7 with the flexibility to cover serious violations of human rights not specifically enumerated, on the condition that such "inhumane acts" would be of comparable gravity to the other crimes enumerated in article 7(1) of the Statute.²⁴ In this respect, the *ad hoc* Tribunals have found that infliction of severe bodily injury is one of the types of acts which meet the requisite criteria of an act which is of a

²⁴ SCHABAS, William A. *An Introduction to the International Criminal Court*, 3rd ed., Cambridge, Cambridge University Press, 2007, p. 109.

character similar to other prohibited acts.²⁵ This finding is also consistent with the objective element set out in article 7(1)(k) of the Statute that the perpetrator inflicted “serious injury to body.”

33. The Prosecutor provided the Chamber with sufficient evidence to establish substantial grounds to believe that members of the FRPI and the FNI inflicted serious injuries upon civilians, notably as a result of gunfire²⁶ or machete blows²⁷ including two of the Prosecution witnesses who were present during the Bogoro attack, Witness 132²⁸ and Witness 287.²⁹

34. In my view, when the evidence presented establishes substantial grounds to believe that combatants deliberately, but indiscriminately, shot at civilians with their firearms, as presented by the Prosecution in the cases of Witnesses 287 and 132, such evidence satisfies, for the purpose of the decision, *dolus directus* in the second degree, or awareness that the consequence of the shootings in the ordinary course of events will be severe bodily injury to another person.

35. The Chamber found that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to send the FRPI/FNI combatants to Bogoro³⁰ armed with guns

²⁵ ICTY Statute, article 5(i) does not contain the “qualifier element” found in *Elements of Crimes* 7(1)(k)(2)). However, the Judges have similarly restricted the parameters of “inhumane acts” to the set of basic rights pertaining to human beings, drawn from the norms of international human rights law, many of which were incorporated into the Rome Statute. See ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 117; ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, paras 563-566; ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, paras 719-722; ICTY, *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 625.

²⁶ Statement of Witness 268 at DRC-OTP-1007-0095 at 0110, para. 113: “ Par exemple, un enfant [REDACTED] m’a dit qu’il reçu une balle à une fesse. Il m’a montré sa blessure .”; See also evidence referred to in “Existence of the offences under 8(2)(a)(i), 8(2)(a)(ii), 8(2)(b)(i), 8(2)(b)(xvi), 8(2)(b)(xxii), 8(2)(b)(xxvi), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute.”

²⁷ See also evidence referred to in “Existence of the offences under 8(2)(a)(i), 8(2)(a)(ii), 8(2)(b)(i), 8(2)(b)(xvi), 8(2)(b)(xxii), 8(2)(b)(xxvi), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute”.

²⁸ Statement of Witness 132 at DRC-OTP-1016-0156 at 0160, para. 23; DRC-OTP-1016-0216, photograph of the wound of Witness 132.

²⁹ Statement of Witness 287 at DRC-OTP-1013-0205 at 0209, para. 23; DRC-OTP-1013-0255, photograph of the wound of Witness 287.

³⁰ *Decision on the Confirmation of the Charges*, para. 548.

and machetes³¹ to attack the civilian population, and to kill, maim, and/or control the population of Bogoro in order to secure control of the road to Bunia for the Lendus and Ngitis.³² I am therefore thoroughly satisfied that the Prosecution presented sufficient evidence that, in addition to murder, the suspects were aware that by taking such actions to execute the common plan, in addition to willful killing and murder, severe bodily injury to civilians would occur in the ordinary course of events.

36. Finally, even if there was insufficient evidence to establish substantial grounds to believe that the combatants intended to severely injure Witnesses 132 and 287, if the evidence appeared to establish a different crime within the jurisdiction of the Court than the one charged by the Prosecutor, such as attempted murder pursuant to article 7(1)(a) and 25(3)(f) of the Statute as suggested by the majority, it is my view that a better course of action would have been for the Chamber, pursuant to article 61(7)(c)(ii) of the Statute, to adjourn the hearing and request the Prosecutor to consider amending the charge.

37. Accordingly, I respectfully dissent from the majority's decision not to confirm the charge as set out in count 3.

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka

Dated this Wednesday 30 September 2008

At The Hague, The Netherlands

³¹ Statement of Witness 280 at DRC-OTP-1007-1089 at 1093, paras 27; Statement of Witness 28 at DRC-OTP-0171-1828 at 1833, para. 24; Transcript of statement of Witness 250 at DRC-OTP-0177-0230 at 0243, lines 448-453 and at DRC-OTP-1007-1089 at 1093-1094, paras 29, 34.

³² Statement of Witness 159 at DRC-OTP-0164-0472 at 0476, para. 27; Statement of Witness 166 at DRC-OTP-1007-0002 at 0011, para. 55.