

1 International Criminal Court

2 Pre-Trial Chamber I

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

4 Confirmation of Charges Hearing - Open Session

5 Monday, 14 July 2008

6 The hearing starts at 9.05 a.m.

7 COURT USHER: All rise. Please be seated.

8 PRESIDING JUDGE KUENYEHIA: Security, could you please bring the
9 suspects in.

10 Court Officer, could you please call the case.

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

14 PRESIDING JUDGE KUENYEHIA: Thank you. Judge Steiner has an
15 announcement.

16 JUDGE STEINER: Thank you, Madam President. I would like to
17 inform the parties and participants of this confirmation hearing that
18 after last Friday's hearing Mr. Olasolo has requested to be temporarily
19 excused from performing any function in the present case until a decision
20 on whether or not to confirm the charges is issued by the Chamber.
21 Mr. Olasolo has made such a request in light of the fact that the
22 observations made by the Defence for Mr. Germain Katanga during the time
23 allocated to discuss the evidence submitted by the Prosecution were, to a
24 very important extent, confined to commenting upon two articles written
25 by him in relation to the trial and appeal judgements of the

1 International Criminal Tribunal for the Former Yugoslavia in the case of
2 the Prosecution versus Milomir Stakic and also allege that he is the only
3 author that has ever supported the application of the very notion that
4 the Defence for Germain Katanga opposed in its 11 July 2008 observations.

5 Under these exceptional circumstances, Mr. Olasolo's request has
6 been granted until the matters raised by the Defence are analysed and
7 decided upon by the Chamber in the decision whether or not to confirm the
8 charges.

9 Thank you, Madam President.

10 PRESIDING JUDGE KUENYEHIA: Thank you. This is a continuation of
11 the confirmation hearing which started on the 27th of June, 2008, and I
12 note that the same parties and participants are present here today.

13 Before moving ahead with the discussion by the Defence for
14 Mr. Ngudjolo Chui of the evidence included in the Prosecution's list of
15 evidence and the Prosecution's additional list of evidence, the Chamber
16 would like it address two -- I think one matter. But before then I'd
17 like to say that Lingala is still available. Lingala interpretation is
18 still available to Mr. Ngudjolo Chui if he so wishes.

19 Firstly, during the hearing of Monday 11th July Mr. Gilissen
20 requested the Chamber to have access to a copy of the documents referred
21 to and handed out by Ms. Paolina Massidda during a discussion of the
22 Prosecution's evidence. The Prosecution had no objection to
23 Mr. Gilissen's request, and I quote from the transcript what
24 Mr. MacDonald said at the time and I quote: "I have looked, your Honour,
25 and the documents provided by Ms. Massidda and they are redacted. There

1 is no identifying information that could lead to the identification of
2 these witnesses. The document -- this document, I have no objection if
3 they provided to the non-anonymous -- sorry, Anonymous Legal
4 Representatives," and this can be found at page 41, lines 3 to 10 of
5 ICC-01/04-01/07-T-44 English, of 7th July.

6 However, Ms. Massidda advised the Chamber that there may in fact
7 be the name of a witness in the documents referred to. Under these
8 circumstances, the Chamber reviewed the relevant documents and determined
9 that there were no names or identifying information of witnesses. The
10 Chamber therefore decides that the Registry shall transmit to the Legal
11 Representatives of Anonymous Victims of the present case a copy of the
12 documents referred to and handed out by Ms. Massidda during the hearing
13 of 2nd -- 7th July, 2008.

14 MR. MacDONALD: Madam President, with your permission, just to
15 clarify one matter that can be clarified by Ms. Massidda. The person in
16 question that was referred to as a witness is not a witness. It's
17 Commander Kute, and Ms. Massidda was wondering if Commander Kute of the
18 FNI, you may recall, if he was a witness. He is not. He's not a victim
19 or a witness in this case.

20 PRESIDING JUDGE KUENYEHIA: Thank you. We can now proceed with
21 the discussion of the Prosecution's evidence by the Defence for
22 Mr. Mathieu Ngudjolo.

23 MR. HOOPER: Sorry to interrupt. Just before we move on, in
24 respect of Dr. Olasolo's position, we in fact very much respect his
25 decision --

1 PRESIDING JUDGE KUENYEHIA: Mr. Hooper, the Judge would rather we
2 didn't even discuss this issue at all, his immediate supervisor.

3 MR. HOOPER: All right. I was merely going to say we have no
4 objection to his continuing to assist the Chamber, albeit that it would
5 be appropriate, perhaps, that he didn't assist in respect of
6 considerations on Article 25. That's all I wanted to say.

7 PRESIDING JUDGE KUENYEHIA: I think we'll leave it at that.
8 Mr. Kilenda, you have the floor.

9 MR. KILENDA (interpretation): Thank you, Madam President, your
10 Honours. Since we began defending Mr. Ngudjolo's interests before this
11 Chamber, we have known the Prosecutor's theory, that is, that there is
12 evidence establishing substantial grounds to believe that Mathieu
13 Ngudjolo committed crimes falling within the jurisdiction of the court on
14 the basis of a common plan concocted by his co-detainee, other
15 unidentified perpetrators, and himself.

16 As you have often recalled, the confirmation hearing is not a
17 mini trial. Its purpose is to enable you to ascertain the existence of
18 these substantial grounds to believe that crimes falling within the
19 jurisdiction of the International Criminal Court were committed. Since
20 the first appearance held on the 11th of February, 2008, this Chamber has
21 organised several status conferences to enable the Prosecution, the Legal
22 Representatives of the Victims, and the Defence teams to prepare
23 adequately for the confirmation hearing.

24 Given the circumstances under which our team was formed,
25 circumstances on which we shall not dwell here, we have not been in a

1 position to carry out missions in the field, nor to submit evidence
2 today. However, the Prosecutor, he did so well before the first
3 appearance took place. He has even maintained on several occasions in
4 his opening statement that he would prove that Mathieu Ngudjolo and
5 Germain Katanga had committed crimes falling within the jurisdiction of
6 the ICC.

7 For two days, on the third and fourth day of this month, the
8 Defence of Mathieu Ngudjolo followed the Prosecution's submissions in
9 this regard religiously. The substance of his presentation consisted of
10 various statements, the credibility of which in our view has
11 unfortunately not been established; thus, eroding the factual edifice on
12 which the Prosecutor's theory rests.

13 The fact of the matter is that the Prosecutor's presentation was
14 a narrative and did not in any way provide proof of the admissibility of
15 the evidence.

16 The request for blanket admission of the list of evidence, and
17 here I refer to Annex 2B of document 584 Conf, this request was made by
18 the Prosecutor on the 3rd of July, and this request for blanket admission
19 of the list of evidence supports our view. The Prosecutor failed to
20 address the issue of whether the evidence submitted is reliable prima
21 facie and, therefore, admissible, and yet it is on this evidence that the
22 Prosecutor is relying to infer the existence of substantial grounds to
23 believe that the crimes with which he is charged -- with which our client
24 is charged are indeed attributable to him.

25 Madam President, your Honours, pursuant to Article 61(5) of the

1 Statute, the Prosecutor must buttress the charges with sufficient
2 evidence to establish substantial grounds to believe that the person
3 committed the crime charged. The accounts in question are contradictory
4 and vague, imprecise, sometimes devoid of logic, and often related by
5 people who did not personally experience the events. This obviously
6 raises issues of credibility.

7 Although we have not submitted any evidence at this stage of the
8 proceedings, Mr. Ngudjolo's Defence is within its rights to challenge the
9 admissibility of such testimony. It is the right of our client to do so
10 as stipulated in Article 61(6)(b) of the Statute. He is under no
11 obligation to present his own evidence in order to exercise this right.
12 And so it is that the Defence notes that the Prosecutor presented you
13 with a litany of excerpts from witness statements which he cobbled
14 together without addressing the reliability of their provenance or
15 presenting this Chamber with a clear response as to, one, their degree of
16 relevance; and two, their probative value.

17 The Prosecutor's presentation was a narrative and in no way
18 provided proof of the admissibility of the evidence, but the Prosecutor
19 cannot rely on the basic premise of blanket admissibility of his evidence
20 without establishing how that evidence is legal, relevant, and vested
21 with probative value.

22 The burden of proof rests on the Prosecutor. That is why,
23 Madam President, your Honours, having followed the Prosecutor's
24 presentation of his evidence, we feel entitled to cast doubt on its
25 reliability and probative value and, therefore, on the admissibility of

1 some purported pieces of evidence presented to this Chamber as the basis
2 for requesting the committal of our client for trial.

3 My learned colleague Ms. Maryse Alie will now endeavour to
4 satisfy you of the same.

5 MS. ALIE (interpretation): President, your Honours, members of
6 the Office of the Prosecutor, learned colleagues, the Prosecutor is
7 basing himself mainly on 18 statements of direct and indirect witnesses,
8 as well as on three summaries to establish that there are substantial
9 grounds to believe that Mr. Ngudjolo committed the crimes he is accused
10 of. I think that it is useful at this stage to recall Article 69,
11 paragraph (4) of the Rome Statute that provides that: "The court may
12 rule on the relevance and admissibility of any evidence taken into
13 account, inter alia, the probative value of the evidence and any
14 prejudice that such evidence may cause to a fair trial or to a fair
15 evaluation of the testimony of a witness."

16 Article 69(2) of the Rome Statute recalls, moreover, that "the
17 presentation of written evidence must be neither prejudicial nor
18 inconsistent with the rights of the Defence."

19 Mr. Mathieu Ngudjolo's Defence intends to demonstrate, as
20 underlined by my learned colleague, Mr. Kilenda, that most of the
21 evidence presented by the Prosecution is unreliable because of its nature
22 and/or source, and hence that its probative value is significantly less
23 than the prejudice it may cause to the proceedings even at the pre-trial
24 stage.

25 This presentation contains two parts, the first with nine

1 specific objections concerning the evidence, and the second four general
2 objections. I will start with the presentation of the specific
3 objections.

4 The first one concerns the witness called by the Prosecutor. We
5 note that several of these witnesses weren't present at the time of the
6 attacks on Bogoro, and therefore a lot of evidence is based on hearsay.
7 This is the case of Witness 166, which the Defence would like to use as
8 an example. There are several, but this one is particularly telling.

9 The documents relating to this witness are *DRC-OTP-1007-0002,
10 *DRC-OTP-1007-0026, DRC-OTP-1007-0027, DRC-OTP-1007-0029, and
11 *DRC-OTP-1007-0083. The statement of Witness 166 should be viewed with
12 caution and for several reasons. The first, Defence would like to note that
13 this witness has been given several statuses. On top of being a witness for
14 the Prosecution, he was also questioned as a suspect and was recognised
15 as a victim in the current proceedings. We will deal with this in
16 subsequent objections. So first we have some concerns concerning the
17 status of this witness.

18 Secondly, the list of persons deceased during the attack on
19 Bogoro was drawn up by himself when he wasn't present. The document in
20 question is DRC-OTP-1007-0029.

21 Although hearsay evidence is not automatically dismissed in
22 international criminal law, the Prosecution should demonstrate its
23 relevance and probative value. In this case, the sources Witness 166
24 bases himself on are unknown. So we have a list of persons deceased, but
25 we don't know how it was drawn up, and as such we have a whole series of

1 evidence that cannot be considered admissible by the Defence. As such,
2 the Defence notes that according to the Prosecution, at least 200 people
3 were killed during the attack on Bogoro. The Prosecution also states
4 that the UPC camp in Bogoro had approximately 150 soldiers, but the
5 Defence would like further details concerning the number of civilians
6 killed, which would amount to about 50 according to the Prosecution's
7 calculations, but I would like to refer to what Ms. Massidda was
8 mentioning concerning these victims when she mentioned there were at
9 least 51 victims.

10 Likewise, the Defence still doesn't know whether some of the
11 civilians in Bogoro were actually combatants, either in the UPC or in
12 other armed groups. So we would like precise information on this point
13 to give the Chamber a full understanding of the nature of the attack on
14 Bogoro.

15 Moreover, and this is our third observation, in his presentation
16 concerning the charges relating to the destruction of property and
17 pillaging, the Prosecutor's factual basis is mainly based on Witness 166.
18 The said basis is actually a description given by Witness 166.

19 Mr. Mathieu Ngudjolo's Defence notes that the Prosecutor has
20 omitted to give the background underpinning his statement. Witness 166
21 emphasises in paragraph 93 of document DRC-OTP-1007-0002, I quote: "I
22 heard about the destruction in Bogoro through what the survivors
23 recounted and took stock of it myself upon returning to Bogoro in August
24 2005."

25 We note that the list of what was destroyed is based on hearsay

1 evidence and that one or more sources remain unidentified. This very
2 witness, 166, himself adds that he did not return to Bogoro before August
3 2005, which is more than half -- a year and a half after the events.
4 Moreover, a number of witnesses recounted that there were several attacks
5 on Bogoro respectively in 2001, 2002, and 2003. I refer you, for
6 instance, to Witness's -- Witness 233's statements, DRC-OTP-1007-0061,
7 paragraphs 26 on.

8 The lack of background information given for Witness 166 is, in
9 the view of the Defence, a misrepresentation of the truth. The
10 Prosecution is putting words into somebody's mouth about events they did
11 not witness. They don't have the sources to draw up a list of persons
12 deceased and of property destroyed and pillaged.

13 Based on these observations, the Defence is of the opinion that
14 your Chamber cannot deem the documents related to Witness 166 admissible
15 upon assessing substantial grounds.

16 A second objection: Your Honour, Judge Steiner, here I'm coming
17 back to an issue which has already been debated, but we would like to
18 come back to it as we have not done so up until now. This objection
19 concerns the deceased witnesses, Witness 258 and 167. As they are
20 deceased, it is impossible to assess the credibility of these witness
21 statements through cross-examination.

22 For the reasons presented hereafter, Mr. Ngudjolo's Defence
23 considers that the evidence related to both witnesses must be deemed
24 inadmissible pursuant to Article 64 and Rule 122(9) of the Rules of
25 Procedure and Evidence.

1 Now I would like to now talk about the similarity between Witness
2 258 167. Concerning Witness 258, this witness was also questioned as a
3 suspect, see transcripts that start with DRC-OTP-0173-0560 onwards.

4 Concerning this witness several problems were already raised by
5 Mr. Katanga's Defence on the 2nd of July, 2008, when he talks about his
6 written submission of the 24 June 2008, 640 -- document 641. We agree
7 with the legal arguments in paragraphs 31, 38, and 41 to 49 of this
8 document which address the lack of credibility of a witness which could
9 be considered as being a co-perpetrator or participant in the common plan
10 as well as the problems related to the right of a suspect to the
11 assistance of counsel and the right to remain silent.

12 We believe that as the confirmation hearing should not be giving
13 a reduced status, there is no reason to undeservedly consider evidence to
14 be admissible which would not be so at trial should be there a trial.
15 Moreover, the Defence notes that no explanation was given by the
16 Prosecution concerning the death of this witness, and as we don't have
17 anything, these elements are, in our opinion, additional elements or
18 additional points that raise doubts concerning the reliability of the
19 statement which far from meet the basic requirements for admissibility
20 even at the current stage in the proceedings.

21 Concerning Witness 167, here again the Defence agrees with some
22 of the points already raised by Mr. Germain Katanga's Defence, and in
23 particularly paragraphs 60 to 66 of confidential document 641, which was
24 addressed in the hearing of 2 July 2008 on procedural matters. We agree
25 with the legal arguments raised concerning the lack of the signature and

1 date and lack of clarity concerning the source of said manuscript, which
2 in our mind do not allow for a reliable authentication.

3 We believe that these points should lead to the inadmissibility
4 of the statement.

5 We also would like to emphasise some issues of significant
6 importance which will no doubt be revealing to your Chamber and will not
7 just be a duplicate of what Mr. Katanga's Defence has been mentioning.

8 Witness 167 provides a narration of over 400 pages which could be
9 viewed more as memoirs than diary. We would like to draw your attention
10 to the fact that initially the document was clearly intended to be
11 marketed and not be presented to a court or tribunal. In support of
12 this, we refer to letter DRC-OTP-0140-522.

13 We must keep this objective, lucrative objective, in mind. The
14 narration lacks continuity, is rather contradictory and unrelated to the
15 facts that Mr. Ngudjolo is accused of. Some paragraphs actually bear no
16 relation with the DRC's actual history. See, for instance, the elements
17 referenced under numbers *DRC-OTP-0140-553, pages 554, 556, and
18 558; and document DRC-OTP-0140-577, page 578 and 580; and document
19 DRC-OTP-0140-604, page 605.

20 Some parts are, moreover, illegible. See in particular document
21 DRC-OTP-0140-664, page 677; and document DRC-OTP-0140-678, pages 682 and
22 686.

23 Moreover, the documents contain several different handwritings,
24 and although we do not claim to be graphologists, we have no guarantee as
25 regards the author of the narration, and no research was carried out to

1 identify the origin of the documents.

2 Following careful viewing by the Defence, we note two different
3 handwritings in the document. See, for instance, DRC-OTP-0140-561, page
4 571; and document DRC-OTP-0 -- 0140-698, pages 700, 703, 705, 707, 708,
5 719, 720, 723, and 724; as well as document DRC-OTP-0140-839 at pages 842
6 to 844.

7 These pages containing two different handwritings which seem to
8 point to two different authors. A thirdhand writing is to be found in
9 document DRC-OTP-0140-867, page 881, and a fourth in document
10 DRC-OTP-0140-900, page 924.

11 So that is an instance of what Mr. Kilenda was mentioning earlier
12 on. The Prosecution presented this as a group, but if you look at each
13 document individually you'll see there are a lot of problems for the
14 admissibility of these documents.

15 Moreover, the Defence notes that according to document *DRC-OTP-0150-032,
16 dated 17 January 2006, initially transmitted under Rule 77 of the
17 Rules of Procedure and Evidence and admitted under number 0104-0107HNE6,
18 the witness which was injured or ill should have been sent to hospital as
19 is appropriate in this case. And the Defence, as your Chamber cannot
20 know in the end whether this person was or not in full possession of
21 their faculties when writing this narration, and this concern is
22 corroborated through the text's ramblings and contradictions.

23 One very obvious example to any clear-minded person lies in the
24 contradictions concerning the date the province of Ituri was created and
25 the nomination of the governor. So the witness does not seem to have all

1 his faculties, and we refer to document DRC-OTP-0140-678, page 680; and
2 to document DRC-OTP-0140-698, page 700.

3 Moreover, there are other problems concerning these narrations.
4 They were not written at the time the events took place, and therefore
5 their probative value is greatly reduced, and they seem to only concern
6 vaguely -- events that are only vaguely related to the events that we are
7 looking into.

8 Moreover, in international courts and tribunals, the
9 contemporaneous nature of evidence, which should be drafted at the time
10 the events took place, is decisive when assessing the admissibility of
11 the evidence. In his book entitled "Theory and practice of international
12 and internationalised criminal proceedings," Knoop, page 21, states that
13 "the ICTY seem to have the" -- Knoop seems to have established four
14 criteria to determine whether or not a document, such as a wartime diary,
15 can be admissible as evidence in international criminal proceedings.

16 I tried to summarise these four criteria in French, but I think
17 that it would be appropriate to look at page 21 of the book also, but
18 the -- basically the criteria are: One, the fact that the document
19 produced was contemporaneous, and I already mentioned this; secondly, the
20 verification of its authenticity, for instance through its handwriting;
21 three, the document's authentication by establishing the absence of
22 falsification or alterations; and fourth criteria, the relevance of its
23 content on the procedure establishing the truth concerning the charges.

24 Hence in light of this criteria which is rather clear and of the
25 arguments mentioned above, the Defence requests that in Mr. Ngudjolo's

1 case that documents concerning Witness 167 be excluded from the
2 discussion on the confirmation of charges as they are clearly
3 inadmissible.

4 The third objection which I would like to present to you concerns
5 the interviewing of minors. The interviewing of minors and/or the
6 consent of a guardian to the interview is equally problematic in our
7 view. In our domestic systems we probably all have examples of this. It
8 is very -- it is an area which is very regulated, but the -- we have some
9 objectives -- objections because we note that Witness 28 was interviewed
10 without prior consent of a guardian, and here we refer to document
11 DRC-OTP-0155-0106.

12 Witness 157 --

13 (Announcement made)

14 MS. ALIE: Can I proceed?

15 PRESIDING JUDGE KUENYEHIA: Just a minute. Court services is
16 checking what the problem is and we'll let you know in a minute.

17 MS. ALIE: Thank you.

18 PRESIDING JUDGE KUENYEHIA: You can go on. The problem does not
19 concern us immediately.

20 MS. ALIE: Thank you very much.

21 (Interpretation) I would like to come back to Witness 157. The
22 document relating to this witness is document DRC-OTP-0164-0534, and I
23 refer in particular to paragraph 9 of the statement, and I quote: "I
24 currently live with," and the name is redacted, and I'm quoting the --
25 I'm not quoting confidential name, as that's a procedure, so, "I

1 currently live with redacted, and he gave his consent to me taking part
2 in this interview. However, I do not need him to be present during the
3 meeting."

4 We -- we have no evidence that there was consent and that there
5 was anybody to accompany the minor. Moreover, the Witness 279, a minor,
6 was interviewed following someone's consent to the interview. We don't
7 know who this person was. The document is redacted for the Defence, but
8 you may be able to check what it is about.

9 We are referring to document DRC-OTP-1007-1077. The witness, a
10 minor, says, and I quote: "X," the name is redacted, "gave his consent
11 to me giving evidence in the absence of my father who could not come with
12 me to," and the name is redacted, "for the interview."

13 The Defence is unaware in which capacity this adult was acting
14 for the witness and does not know whether they stayed during the
15 interview or not as there are no strict rules in international criminal
16 law on this; however, it is nothing new that minors are vulnerable. A
17 minimum requirement in the view of the Defence is for them to be
18 interviewed with the consent and in the presence of a guardian to
19 guarantee the credibility of what they are saying.

20 The Defence raises a number of issues concerning the ways in
21 which the interviews take place and to what extent these vulnerable
22 witnesses were or not influenced by the investigators of the
23 International Criminal Court. Actually, this problem is also related to
24 the fact that often statements, when they are not done within the realm
25 of Article 55, are continuous statements, and we don't have the questions

1 for them.

2 So in view of these -- these points mentioned above, the Defence
3 requests for the Chamber only to give limited weight to the declarations
4 of the minors mentioned above.

5 (Announcement made)

6 PRESIDING JUDGE KUENYEHIA: It is the same statement, so I
7 presume that it doesn't effect us for the time being. So you can
8 proceed.

9 MS. ALIE: Thank you. (Interpretation) So our forth objection,
10 and perhaps this one is a little bit more political, so to speak, relates
11 to non-corroborated summaries.

12 I'd like to say at the outset that the Defence is aware of
13 Article 61(5) of the Statute and that that paragraph authorises the use
14 of summaries for the purposes of the confirmation hearing. We recognise
15 that the use of summaries has previously been allowed.

16 The Defence notes that in application of the ex parte decision of
17 the 3 of April, 2008, re-classified by decisions 643 and 644 of the 25th
18 of June, 2008, that the use of summaries for witnesses 243 and 267 have
19 been allowed by the Pre-Trial Chamber. We are speaking in particular
20 about documents DRC-OTP-1016-0089, and document DRC-OTP-1016-0106.

21 The summary of Witness 271, I refer to DRC-OTP-1019-0223, has
22 also been allowed by decision 428 of the 25th of April, 2008.

23 I'm returning you now to the discussion which took place at the
24 opening of the confirmation hearing. The Defence does not object on
25 points of law to the decision of the 3rd of April and to its late

1 notification because, as you know, we did not submit a request for leave
2 to appeal the said decision. However, as we emphasised at the hearing on
3 procedural matters of the 2nd of July last, we would like to refer to one
4 of the preambular paragraphs in that paragraph, a paragraph on page 6 of
5 the decision of the 3rd of April, which has since been reclassified, and
6 I would quote: "Considering that in the current case (in English)
7 redacted at this stage of the proceedings the Single Judge is of the view
8 that the use of summaries that corroborates all the evidence is not
9 prejudicial to or inconsistent with the rights of the suspects."

10 (Interpretation) End of quote. In light of that preambular
11 paragraph, we are of the opinion that use of summaries for facts or
12 statements which are not corroborated is inadmissible if and to the
13 extent that that use is prejudicial to the rights of the Defence.

14 Now, the Defence of Mr. Ngudjolo, in the wake of the submissions
15 made by the Office of the Prosecutor, in particular with two specific
16 summaries, those which relate to anonymous witnesses 243 and 271, the
17 Defence is obliged to challenge the admissibility of those summaries of
18 anonymous witnesses.

19 The Prosecutor has failed to demonstrate the what and the how of
20 the majority of the allegations made by Witnesses 243 and 271. This is
21 the problem of the litany of statements and the blanket admission of
22 evidence requested by the Prosecutor.

23 In relation to Witness 243, for example, the only reference to
24 that witness is at page 25 of the transcript of the hearing of the 4th of
25 July, 2008. In this reference, the Prosecutor submits facts which have

1 been advanced by this anonymous witness in a summary, but we see that no
2 corroboration of the facts described by the witness in the summary has
3 either been proven or attempted by the Prosecution. So here we have the
4 Prosecution presenting something which should be subject to very strict
5 conditions.

6 As regards the events described in the summary of Witness 271,
7 these events are also not corroborated. Indeed, a similar experience or
8 analogous events experienced by another person is not corroboration of
9 events experienced by the first person. We would refer here to pages 20
10 to 31 of the transcript of the hearing of the 4th of July.

11 Corroboration of the conclusion which the Prosecutor wants to
12 arrive at is not the type of corroboration we are speaking of. We are
13 referring to corroboration which is intrinsic to the statement of a
14 witness, of facts put forward by that witness.

15 The absence of corroboration of the incidents described in these
16 summaries of the evidence is thus prejudicial to the rights of the
17 Defence in that these descriptions affect the criminal responsibility of
18 Mr. Ngudjolo directly. The Defence is therefore of the view that these
19 witness summaries, because of their summary nature, should be declared
20 inadmissible in application of the decision of the 3rd of April, 2008.
21 Thus summaries are defective.

22 Furthermore, the Defence does not know whether these people have
23 a judicial record, whether they are considered to be suspects, whether
24 they were interviewed pursuant to Article 55 of the Statute or not. We
25 do not know whether these people have been relocated, et cetera.

1 Consequently, and in the alternative, even if you were to declare
2 these summaries admissible, the Defence believes that only low probative
3 value should be accorded to them.

4 Our fifth objection is in relation to photos presented by the
5 Prosecution. You will remember that in presenting its case the
6 Prosecution displayed a number of photos of scars. These photos
7 concerned Witnesses 132 and 287 in particular.

8 For Witness 132, we refer to the following items:
9 DRC-OTP-1016-0216, DRC-OTP-1016-0217, DRC-OTP-1016-0218,
10 DRC-OTP-1016-0219, and DRC-OTP-1016-0220.

11 I know it's a bit fastidious listing these numbers, but these are
12 the numbers of the photos related to the individual witness.

13 In the case of Witness 287 the photos bear the following
14 reference numbers, and I'd like to cite them for the record:
15 DRC-OTP-1013-0252, DRC-OTP-1013-0253, DRC-OTP-1013-0254, and
16 DRC-OTP-1013-0255.

17 The Defence notes that these photos are contemporary. Based on
18 the information disclosed by the Prosecutor, they are respectively dated
19 14th of January and 29th of July, 2007. Consequently, and this seems to
20 us to be a tenet of the rules of evidence, the causal link between these
21 photos and wounds alleged to have been inflicted by combatants has not
22 been established at all. We do not know at what date the wounds were
23 inflicted, the origin of the wounds, or their nature. The Prosecutor,
24 who bears the burden of evidence, has not adduced evidence -- the
25 evidence necessary for this Chamber to enable you to appraise the

1 probative value of these photos.

2 The same applies to the photos taken inside and outside the
3 school in Bogoro. Those photos were taken on the 28th of February, 2007,
4 and the 1st of March, 2007, if I am not mistaken.

5 Once again, it is repetitive but I would like to cite the
6 reference numbers of these photos. They are DRC-OTP-1012-0011. And now
7 I will go on just to cite the final numbers: 0014, 0020, 0024, 0033,
8 0035, 0036, 0038, 0098, 0099, 0102, 0105, and *DRC-OTP-1018-0202,
9 and the same ending with 0203, 0204, 0205, 0206, and 0207.

10 Let us remember that the Prosecution is itself referred to three
11 attacks on Bogoro. I referred a moment ago to witnesses referring to
12 these, but the Prosecution also refers to three attacks on Bogoro in
13 2001, 2002, and 2003. The Prosecution also refers to a murky situation
14 which reigned in Ituri both before and after the third attack on Bogoro,
15 the attack of the 24th of February, 2003.

16 Now, I don't want to be simplistic, but here we are before the
17 International Criminal Court, and insofar as the Prosecution has been
18 unable to demonstrate that these photos are indisputably linked to the
19 attack on Bogoro on the 24th of February, 2003, Mr. Ngudjolo's Defence
20 submits that there is no reason to accord to them any probative value
21 whatsoever. This -- what we have here is information which emerged in
22 2007. Consequently, we believe that they should be excluded from
23 discussions on the confirmation of charges.

24 Our sixth objection is quite sensitive. It relates to the
25 preventive relocation of witnesses by the Office of the Prosecutor. As

1 we all know, this matter is currently pending before the Appeals Chamber.

2 Five witnesses were preventively relocated by the Prosecution.

3 Based on the information provided by the Office of the Prosecutor, we are
4 talking about witnesses -- five different witnesses.

5 The Defence notes that two of these witnesses were relocated --
6 have been relocated for quite some time. For instance, Witness 28 was
7 preventively relocated on the 21st of April, 2006, until he was taken up
8 by the ICC Protection Programme on the 2nd of March, 2007.

9 Witness 150 -- 250 was preventively relocated on the 2nd -- on
10 the 19th of March, 2007, and on the 20th of Sember (as interpreted), 2007
11 he was taken up by the ICC Protection Programme.

12 Given that the credibility of those witnesses can be formally
13 challenged based on the promises which must have been made to these
14 witnesses by the Prosecution, their statements must be declared
15 inadmissible. This is the view of the Defence.

16 We believe that this preventative relocation of witnesses is
17 suspect in law. I would like to refer to an instrument which is
18 currently pending before the Appeals Chamber, a notice of appeal
19 currently before the Appeals Chamber.

20 In its response to the Victims and Witnesses Unit, in
21 particularly paragraphs 12 and 13, that is document 664 of the 7th of
22 July, 2008, the Prosecution states that its investigators have ongoing
23 contact with witnesses in the field and that it can call upon staff in
24 the field to conduct investigations if necessary. These comments by the
25 Office of the Prosecutor are, to our mind, particularly worrying and

1 highly contestable. There may well be persons who are in danger, but
2 this is not the process which should be followed to ensure their
3 protection.

4 These victims know that they are entirely dependent on the Office
5 of the Prosecutor for their security and therefore are obviously
6 influenced by this link of dependency.

7 Manifestly the preventative measures which have been taken and
8 the impact which they have had for victims 28, 250, 132, and 287 can only
9 be prejudicial to the right of Mr. Mathieu Ngudjolo to a fair trial as
10 required by Article 67 of the Statute. At the very least, and in the
11 alternative, if it must, their statements should only be given very
12 limited probative value.

13 Our seventh objection is also a sensitive one. It relates to
14 contacts prior to interviews.

15 Several witnesses in their statements refer to priors -- to
16 contacts prior to interview. This is in particular the case of Witnesses
17 28, 157, 161, and 166, if I'm not mistaken.

18 In the case of Witness 161, the persons and/or institutions who
19 interviewed him have been redacted. The Defence therefore has no means
20 to check to what extent these witnesses may have been influenced or even
21 prepared to make the statements which they have given.

22 Witness 28, who was a minor at the time of his interview, also
23 had prior contacts with the investigators.

24 The Defence notes that the Prosecution has provided no
25 information on the way in which these interviews or these meetings and/or

1 preliminary contacts have been conducted, on their content or the
2 institutions which may have conducted them. In any case, we believe that
3 the reliability and therefore the credibility of these witnesses is
4 vitiated.

5 The Prosecution would have you accept all statements under -- as
6 a blanket batch. We believe that it would be only proper to be vigilant
7 in examining this evidence.

8 Our eighth objection relates to witness suspects. Here I refer
9 largely to Witnesses 258, 166, 238, and 250.

10 Witness 250 is a key person in the theory put forward by the
11 Prosecution. He was initially a suspect. At the opening of his first
12 interview he clearly requests the assistance of a lawyer. Then the
13 investigators quite rapidly realise that he was a minor at the time of
14 the events, and at the end of the day the interview continues in a normal
15 fashion. I believe that the witness returned with a document at later
16 stage, but one can well imagine that this interviewee was quite troubled
17 by the whole experience.

18 In any case, the Prosecution has not explained how persons who
19 had been approached as suspects could provide a credible and reliable
20 account whilst under a considerable -- under considerable pressure and
21 whilst quite naturally having a tendency to minimise their role and
22 exaggerate that of other persons.

23 The Defence is very surprised that persons questioned as suspects
24 suddenly find themselves granted the status of privileged witness without
25 the Prosecution providing explanations to the Chamber regarding the

1 reliability of these witnesses. The Defence would therefore seek from
2 the Chamber that it only grant limited probative value to evidence
3 related to these witnesses.

4 I move on to my ninth objection, which relates to a troubling
5 status, the status of witness victim.

6 In many national systems dual status, dual victim-witness status
7 is not allowed. The European Court of Human Rights has specified clearly
8 the limits of the role of victims in criminal proceedings, and I believe
9 that this Chamber could legitimately take inspiration from that.

10 In its decision of the 17th of January, 2006, regarding the
11 situation in the Democratic Republic of the Congo, at paragraph 51 the
12 Pre-Trial Chamber -- by the way, this is decision 51. Paragraph 51
13 strikes me as particularly important. I quote: "In the Chamber's
14 opinion, the statute grants victims an independent voice and role in
15 proceedings before the court. It should be possible to exercise this
16 independence in particular vis-a-vis the Prosecutor of the International
17 Criminal Court so that victims can present their interests. As the
18 European Court has affirmed on numerous occasions, victims participating
19 in criminal proceedings cannot be regarded as either the opponent or, for
20 that matter, the ally of the Prosecution, their roles and objectives
21 being clearly different."

22 THE INTERPRETER: This is decision 101. The interpreter corrects
23 herself.

24 MS. ALIE (interpretation): The Defence has difficulty
25 understanding how the self-same person, and I will take as an example,

1 Witness 166 which I have examined in detail. This, for instance, is --
2 illustrates the case of how ambiguous it is for a person to be granted
3 both victim status and to be considered a Prosecution witness and even a
4 key witness. Should you allowed the said testimony and consider it
5 admissible, and I hope that you will not in light of the developments
6 which we made under our first objection which already discredited that
7 testimony, only reduced weight should be given to its probative value
8 bringing it to nil if possible.

9 I have spoken now to my nine specific objections and will turn
10 now to my four objections of general nature.

11 My first general objection is evidence, hearsay evidence, and
12 I've already referred to it briefly. I think that it is useful to return
13 to the issue of hearsay evidence, a matter which we have already touched
14 upon, in particular in relation to Witness 166.

15 We note that the Prosecution quotes extensively from various
16 reports from -- or produced by the United Nations and NGOs. I will refer
17 to one example here, but we could be more extensive in our written
18 submissions. I would refer to the Prosecutor versus Milutinovic, Trial
19 Chamber, judgement of the 1st of September, 2006. This ICTY evidence is
20 illuminating. It states that: "The admissibility of reports emanating
21 from UN bodies and NGOs is contingent upon demonstrating whether those
22 reports are reliable prime facie; that is to say, it must be demonstrated
23 that the methodology used to compile the information contained in the
24 said reports is reliable given the inherent nature of these reports.
25 That is to say that by their nature these reports consist of hearsay."

1 The Defence notes that the Prosecution has failed to prove the
2 reliability of the methodology used insofar as the sources cited in the
3 reports are not identified or identifiable. All that is said by UN
4 bodies is not necessarily gospel. It is important that sources be either
5 identified or at least identifiable.

6 I would just like to give you a very illuminating example. The
7 position advanced by the Prosecutor regarding the alleged admissions, and
8 you will remember this, you asked that paragraph 92 -- that paragraph 92
9 of the document containing the charges be deleted, the position advanced
10 by the Prosecutor regarding alleged admissions by Mr. Mathieu Ngudjolo is
11 based on hearsay and unidentified sources. The Prosecutor returned to
12 the matter in its oral submissions and referred to document
13 DRC-OTP-0129-0267 at page 288, but when we examine the document we see no
14 footnotes, no dates at which the purported admissions were made, nothing.

15 The same applies to the other document on which the Prosecution
16 bases itself regarding alleged admissions by Mr. Mathieu Ngudjolo. This
17 is document DRC-OTP-0152-0286, page 0152-0304, paragraph 67.

18 I think it is important to specify that Mr. Mathieu Ngudjolo's
19 name does not even appear in that document.

20 My second general observation concerns the theory of similar
21 events.

22 The Defence team notes that on several occasions the Prosecutor
23 has tried to outweigh the weakness of the evidence presented by
24 demonstrating events that are unrelated to the charges against
25 Mr. Ngudjolo. This approach will probably bring to mind Article 93 of

1 the Rules of Procedure and Evidence of the international tribunals, and I
2 insist on the fact that it was not included in the legal texts
3 underpinning the ICC.

4 The example of what I am mentioning is quite telling in the case
5 of the attack on Mandro, Tchomia, or Bunia. The Defence observes that
6 the Prosecutor, by tending to introduce a mode of proof by analogy is
7 causing Mr. Ngudjolo a prejudice which is by far greater than the
8 probative value with the allegations made by the Prosecution. Indeed, it
9 is particularly at odds with a fair trial to submit that facts covered by
10 the presumption of evidence and to argue in favour of these -- for facts
11 that aren't actually referred to your Chamber. We therefore submit that
12 the probative value of the allegations of the Prosecutor are unrelated to
13 the charges and are not part of the document containing the charges or
14 charges held against him. And therefore, to force Mr. Ngudjolo to
15 distinguish the charges against him from the crimes that were
16 systematically committed in Ituri is -- goes against -- is at odds with
17 the rights of the Defence.

18 Our third general observation concerns the amendment of the
19 detailed document containing the charges that was requested by the
20 Prosecution on the 4th of July, 2008, and here I refer to the transcript
21 in French, page 56, lines 1 to 6.

22 The Defence notes that it is not a substantive error and that
23 hence it is not contrary to what the Prosecution claims as simple
24 amendment to be made to the document containing the charges. Thus, we
25 consider that pursuant to Article 61(4) of the Statute and Rule 121(4) of

1 the Rules of Procedure and Evidence, that the Prosecutor had until the
2 12th of June to amend the document containing the charges and that hence
3 the amendment requested by the Prosecution, as it should have been
4 requested through an amendment in accordance with the provisions
5 mentioned above, should be rejected outright.

6 My fourth and last general observation relates to the statements
7 made by the Legal Representatives of Victims. The first observation
8 touches upon the request for participation made by some of our learned
9 colleagues. I -- this observation is what you recalled on the 7th of
10 July, 2008, because these forms do not constitute evidence. And the
11 second observation relates to the observation made by my learned
12 colleague, Ms. Massidda, by recalling the evidence adduced by the
13 Prosecutor and by giving the requests made by the victims she represents
14 as corroborating material. She, in our opinion, is indirectly presenting
15 evidence.

16 Mr. Ngudjolo's Defence would like your Chamber not to draw any
17 conclusions from the said evidence in establishing the existence or not
18 of substantial grounds if you were to do so.

19 To conclude, and I will only take few more minutes of your time,
20 I will be brief, Mr. Ngudjolo's Defence would like to draw the attention
21 of the parties to the fact that the -- the presentation of objections at
22 this stage are not limitative. Challenges or subsequent challenges to
23 the admissibility of evidence and to the theory and record presented by
24 the Prosecutor, the case Prosecutor -- represented by the Prosecutor, can
25 be made should your Chamber decide to refer the case to the Trial

1 Chamber, and the Defence hence states clearly that it reserves itself the
2 right to challenge the charges, the common -- on the common plan and the
3 involvement of Mr. Ngudjolo on the Bogoro attack.

4 President, your Honours, learned colleagues, I would like to
5 thank you on behalf of Mr. Ngudjolo's Defence team for listening
6 carefully, and this draws my conclusion to an end at this stage. Thank
7 you.

8 PRESIDING JUDGE KUENYEHIA: Thank you very much, team Ngudjolo
9 Defence.

10 That concludes our presentation for today, because we had slated
11 today for Mr. Kilenda and his team to present their evidence. Tomorrow
12 morning we will start with the Office of the Prosecutor making their
13 final closing statements. So the hearing is adjourned until 9.00
14 tomorrow morning. Thank you very much.

15 MS. MASSIDDA: President, with your leave. Thank you,
16 Madam President.

17 As you know, tomorrow morning also the legal representative of --

18 PRESIDING JUDGE KUENYEHIA: Ms. Massidda, the Chamber is very
19 much aware of that fact and will deliver a decision today.

20 MS. MASSIDDA: Thank you, your Honour. This means that I need to
21 be ready tomorrow for the closing statements?

22 PRESIDING JUDGE KUENYEHIA: The Chamber will issue a decision.

23 MS. MASSIDDA: Okay. Thank you.

24 COURT USHER: All rise.

25 The hearing ends at 10.33 a.m.

1 CORRECTION REPORT

2 After review by STIC and approval of the Pre-Trial Chamber I, the following
3 propositions of corrections have been brought in the transcript:

4

5 1)page 8 lines 9-11:

6 "The documents relating to this witness are *DRC-OTP-1007-0002,

7 *DRC-OTP-1007-0026, DRC-OTP-1007-0027, DRC-OTP-1007-0029, and

8 *DRC-OTP-1007-0083."

9 replaces

10 page 8 lines 9-10,

11 "The documents relating to this witness are DRC-OTP-1007-002, DRC-OTP-0026,

12 DRC-OTP-1007-0027, DRC-OTP-1007-0029, and DRC-OTP-007-0083."

13

14 2) English transcript, page 12 lines 16-17

15 "See, for instance, the elements referenced under numbers *DRC-OTP-0140-553,

16 pages 554,"

17 replaces

18 "See, for instance, the elements referenced under numbers

19 DRC-OTP-0140-530 -- 553, pages 554,"

20

21 3) English transcript, page 13 lines 15-17:

22 "Moreover, the Defence notes that according to document *DRC-OTP-0150-032,

23 dated 17 January 2006, initially transmitted under Rule 77 of the Rules of

24 Procedure and Evidence "

25 replaces

1 “Moreover, the Defence notes that according to document DRC-OTP-0050-032,
2 dated 7 -- 17 January, that concerning Rule 737 of the Rules of Procedure
3 and Evidence “

4

5 4) English transcript, page 21 lines 8-9:

6 “and *DRC-OTP-1018-0202, and the same ending with 0203, 0204, 0205, 0206,
7 and 0207.”

8 replaces

9 “and DRC-OTP-1018-01 -- sorry, 2 -- 0202, 0203, 0204, 0205, 0206, and 0207.”