

1 International Criminal Court

2 Trial Chamber II

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

4 Status Conference - Open Session

5 Case of Germain Katanga and Mathieu Ngudjolo Chui

6 Tuesday, 3 March 2009

7 The hearing starts at 5.00 p.m.

8 COURT USHER: All rise. The International Criminal Court is now
9 in session.

10 PRESIDING JUDGE COTTE (interpretation): Please be seated. We
11 are in session.

12 Could security please bring Mr. Mathieu Ngudjolo in.

13 (Mr. Ngudjolo entered court)

14 PRESIDING JUDGE COTTE (interpretation): So we are meeting today
15 and during this hearing according to Rule 118(3) of the Rules of
16 Procedure and Evidence. Please forgive me. I always forget to ask all
17 the parties and participants to introduce themselves, but now we know
18 each other quite well, I forget to do so, but we have to ask everybody to
19 introduce themselves in public session. Who is representing the Office
20 of the Prosecutor?

21 MS. DARQUES-LANE (interpretation): Good afternoon, President,
22 Judges. I am Florence Darques-Lane. Next to me I have Mr. Nick Kaufman;
23 and behind me, Sandra Schoeters, our case manager.

24 PRESIDING JUDGE COTTE (interpretation): Thank you very much,
25 Prosecutor.

1 Now as regards the Legal Representatives of Victims, who do we
2 have?

3 MR. DIAKIESE (interpretation): President, Judges, I have
4 Mr. Herve Diakiese and I have a proxy for Mr. Jean Mulamba for this
5 Status Conference:

6 MR. GILISSEN (interpretation): I am Jean Louis Gilissen from the
7 Liege Bar, and with Mr. Keta, I represent victims a/337.

8 PRESIDING JUDGE COTTE (interpretation): Thank you:

9 MR. LUVENGIKA (interpretation): President, Judges, I am Maitre
10 Fidel Nsita Luvengika from Brussels Bar and I am the Legal Representative
11 of victim a/330, and a/331.

12 PRESIDING JUDGE COTTE (interpretation): Thank you. And now for
13 the Defence of Mr. Mathieu Ngudjolo.

14 THE INTERPRETER: Microphone is switched off. Microphone is
15 switched off. The speaker does not have his microphone on.

16 MR. KILENDA (interpretation): Case manager and co-counsel
17 Mr. Jean-Pierre Fofe, and myself Jean-Pierre Kilenda from the Brussels
18 Bar.

19 PRESIDING JUDGE COTTE (interpretation): Thank you very much,
20 Mr. Kilenda. And for the Registry?

21 MR. DUBUISSON (interpretation): Thank you very much, President.
22 With me I have Pieter Vanaverbeke, a coordinator lawyer; and Dahirou
23 Sant-Anna, a lawyer in the section; and myself, Marc Dubuisson,
24 representing the Registrar.

25 PRESIDING JUDGE COTTE (interpretation): Thank you very much. So

1 please forgive me for forgetting to ask you initially to introduce
2 yourself. Now we know who is here at this hearing.

3 So as I had already mentioned, we are meeting pursuant to
4 Rule 118(3), which states that the Chamber must have a hearing at least
5 once a year on detention matters.

6 I would like to recall very briefly the chronology. Mr. Mathieu
7 Ngudjolo was -- an arrest warrant was arrested (as interpreted) against
8 him on the 6th of July, 2007, the date on which the Pre-Trial Chamber
9 issued the arrest warrant against him. He was then transferred in
10 February 2008. On the 11th of February, 2008, he appeared for the first
11 time before the Chamber and an oral request for release was made on that
12 date. On the 13th of February, 2008, this request for release was
13 confirmed in writing. The request for release must be made in writing.
14 And on the 27th of March, 2008, the Single Judge ruling for Pre-Trial
15 Chamber I ruled that Mr. Ngudjolo should remain in detention. On the 9th
16 of June, 2008, this decision was confirmed by the Appeals Chamber. On
17 23rd of July, 2008, the detention of Mr. Ngudjolo was re-examined in
18 accordance with Article 63 of the Statute of the Court, and a decision
19 for the continuance of detention was then issued. On the 18th of
20 November, 2008, this Chamber, which in accordance with Article 60(3), and
21 pursuant to the observations of the parties and participants in the
22 proceedings, reviewed the detention of Mr. Ngudjolo decided to confirm
23 his detention following a request for release.

24 So we are currently at 120 days of detention since the last
25 decision for detention. As you know, that decision on detention must be

1 in accordance with several articles, Article 61(11) and 64(6)(a), among
2 others, concerning the Trial Chamber's exercise of functions of the
3 Pre-Trial Chamber concerning detention, and therefore all issues
4 regarding the detention of Mr. Ngudjolo are under the Trial Chamber II's
5 mandate; and then under Article 58(b) and 60(3) and 60(4), the Chamber
6 may decide on the grounds either in favour of release or continuance of
7 detention. The same applies to the grounds applicable to reasonable
8 deadlines in view of the activities of the Office of the Prosecutor.
9 Article 60(4), and then there's also Rule 118 which we mentioned right at
10 the beginning of hearing. Rule 118 which recalls that detention - and
11 that is point number 2 - must be reviewed every 120 days and which
12 provides that at least once a year a hearing may be held. And therefore
13 it appeared necessary and useful by the drafters of the Rome Statute to
14 hear the respective arguments of those which consider that either
15 detention must be continued or that release must be ordered.

16 So that is the objective of this hearing, to enable all to make
17 submissions and develop the arguments which are already in the written
18 submissions we have received. We would like you to focus on what is
19 essential and avoid any redundancies which are not necessary, or just to
20 refer to these, and to only develop what needs to be so.

21 And I would also like to recall that the current activities of
22 the International Criminal Court and lack of courtrooms does not allow us
23 to continue for too long. We have to stop at 6.30, whatever happens, but
24 I think that is enough time for us to have an exchange of views because
25 the Chamber must be informed of what is going on, but also we need to

1 have your points of view to enable us to make an enlightened decision.

2 So I would like to order this hearing as follows: First, the Office of
3 the Prosecutor will speak out, and then the Legal Representatives of
4 Victims and you, Ms. Massidda, if you have anything specific you would
5 like to mention before the Chamber, and then Mr. Mathieu Ngudjolo's
6 Defence will intervene last.

7 If the Registry feels it needs to intervene to provide
8 clarifications, additional details or additional information, it may, of
9 course, do so at any time.

10 So, Prosecutor, if you may, you have the floor to explain or
11 insist on any particular point of your contribution.

12 MS. DARQUES-LANE (interpretation): Thank you, President. The
13 Prosecution would like to note that the written submissions by
14 Mr. Ngudjolo are a rebuttal of the arguments of the Legal
15 Representatives. As regards the legal arguments advanced by the Defence,
16 it only refers to the previous submissions without dealing with the
17 merits thereof. The Defence does not either advance any arguments
18 concerning the pre-trial release of the accused other than those in its
19 application 746 of 12 November 2008. So it appears prima facie that
20 there is no change in the circumstances since that date which would
21 justify the Chamber's amendment of its former decision on the release of
22 the accused in accordance with the provisions of Article 63 of the
23 Statute. And in particular, as concerns the details of Article 51(1)(b)
24 of the Statute, the Defence did not raise any new arguments which would
25 contradict the conclusion of the Chamber which is justified. That is,

1 that detention of Mr. Ngudjolo is necessary to ensure, first, that the
2 accused will appear at trial; and second, will not obstruct the
3 proceedings in court.

4 As regards the first of these two criteria, generally that is a
5 logical conclusion based on the gravity of the crimes the accused has
6 been -- or are held against the accused. Moreover, the graver the crime
7 is, the more grounds there are to believe the accused may want to escape
8 justice, and this applies to Mr. Ngudjolo for two reasons. First, he is
9 accused of the murder of several hundreds of civilians and also because
10 he has already in the past escaped whilst he was detained.

11 On this matter I would like -- and I'll give you -- I'll refer to
12 the decision on application for interim release which was issued by
13 Judge Kuenyehia on 27 March 2008, document 345, which was supported by
14 the Appeals Chamber in its judgement of 9 July 2008, document 572.

15 In Judge Kuenyehia's decision, the Judge considered not only that
16 the gravity of the crimes and length of the sentence would be a factor in
17 determining whether or not there was a risk of the accused absconding,
18 and on top of that, considered that Mr. Ngudjolo escaped from Makala
19 prison in the DRC when he was accused of war crimes allegedly committed
20 in Tchomia village in May 2003.

21 Moreover, the Prosecution recognises that the facts concerning
22 this incident which were reported by a NGO were challenged by the
23 Defence. However, they were considered relevant to a certain extent by
24 the Pre-Trial Chamber.

25 The Appeals Chamber also recognised the relevance of these facts

1 and at paragraph 24 of its judgement mentioned above.

2 As regards the second criteria and as the concern that
3 Mr. Ngudjolo could obstruct the investigations or proceedings before the
4 court, the -- the Appeals Chamber in the same decision did not consider
5 the -- to only maintain Mr. Ngudjolo for these reasons, but this was
6 considered irrelevant by the Pre-Trial Chamber in its decision 345 and in
7 the Chamber's decision of 19 November 2008, document number 750.

8 In these decisions it was noted that the identity of the
9 incriminated -- incriminating witnesses had been disclosed to the Defence
10 and that the situation in the DRC remained volatile. So in those
11 circumstances it was considered that the release of the accused would
12 increase the risk of harm done to the witness and victims. This argument
13 was not challenged by the Defence in its writings of 29 March 2009 (as
14 interpreted) in any substantial way.

15 Also, as the situation that led to this decision remains
16 unchanged, indeed the situation in Ituri remains precarious, and as we
17 are approaching the trial date, the Chamber will be even less prepared to
18 do so in view of the disclosure of the identities of the -- the identity
19 of the witnesses.

20 The risk of absconded would make victims and witnesses even more
21 vulnerable to pressures by the accused's supporters which would be even
22 more so the case if the accused was repatriated to the Congo as mentioned
23 by his counsel Mr. Kilenda. And in this Chamber's decision of
24 2 November 2008, which considered that in view of the political situation
25 it would not be appropriate to repatriate Mr. Ngudjolo to the DRC,

1 Mr. Kilenda, however, in his writings reiterated this request of
2 repatriation to the DRC in the same way as it had been made previously.

3 Before I conclude, I would like to ask the Chamber for the
4 authorisation to submit additional arguments which I believe reinforce
5 the Prosecution's argument according to which Mr. Ngudjolo should remain
6 in detention.

7 First, when the parties jointly proposed during the first Status
8 Conference on the 27th of November, 2008, for the trial to start on the
9 first week of June, this implicitly would mean that the Defence on that
10 occasion would consider the time in detention as being reasonable.

11 Secondly, the Prosecution submits that it acted promptly and
12 diligently in dealing with a number of complex issues whilst striking a
13 balance between various interests, including the security of witnesses,
14 protection of sources, on the one hand, and the obligation of disclosure
15 towards the Defence on the other. The Prosecution has done what it could
16 to respect the deadlines that were given by this Chamber for the
17 disclosure of evidence to the Defence in the framework set by the Chamber
18 concerning redactions.

19 Now, we also note with concern Mr. Kilenda's submission
20 concerning progressive or rolling disclosure for incriminating witnesses.
21 In this Defence document number 907, Mr. Kilenda asked the Chamber to
22 order the Prosecution to disclose without any redactions all its
23 incriminating evidence five or six months before the beginning of the
24 trial. If the Chamber would authorise this and order for disclosure now,
25 the trial would not start before August or September.

1 Thirdly and lastly, we should recall the decision of
2 26 February 2009 by the Chamber, document 931. This decision orders the
3 Prosecutor to disclose to the Chamber by Thursday all the material
4 obtained under Article 54(3)(e) which has already been disclosed to the
5 Defence. When it will have this material, the Chamber will be able to
6 examine it before the date convened by the parties for the beginning of
7 trial.

8 This shows the attention given by the Prosecution to the
9 deadlines to be able to start the trial as soon as possible.

10 Hence, as regards documents subject to confidentiality
11 restrictions pursuant to article 54(3)(e), as of yesterday, only seven items
12 of incriminating material and five items under rule 77 were still subject to
13 such restrictions. *

14 Your Honours, President, a periodic review of the decision we are
15 dealing with today is to guarantee the fundamental rights of the Defence,
16 and I would like to draw the Chamber's attention to paragraph 14 of the
17 appeal judgement -- Appeals Chamber's judgement, which already dealt with
18 the merits of the question of Mr. Ngudjolo's decision. Please forgive me
19 for quoting in English:

20 (In English) "... make sure the detention is not extended beyond
21 what is necessary to secure the ends of justice."

22 (Interpretation) The Prosecution worked acted as soon as possible
23 to fulfill those requirements and the conditions under Article 58(1)
24 remain fulfilled. So the Prosecution respectfully requests the Chamber
25 to reject the application for provisional release submitted by

1 Mr. Ngudjolo and to confirm his detention.

2 Sorry, my voice is horse.

3 PRESIDING JUDGE COTTE (interpretation): Thank you very much,
4 Prosecutor, and all the more because you don't have much of a voice
5 today.

6 Now I would like to ask the Legal Representatives of Victims in
7 what order they would like to intervene. Mr. Keta, you first?

8 MR. DIAKIESE (interpretation): Mr. Diakiese.

9 PRESIDING JUDGE COTTE (interpretation): Sorry, please forgive
10 me. Mr. Diakiese, the floor is yours.

11 MR. DIAKIESE (interpretation): Your Honours, President, we will
12 intervene along two main arguments. First, the background or the context
13 we are addressing the release of Mr. Ngudjolo in; and secondly, I would
14 like to very rapidly and succinctly respond to two concerns raised by
15 Mr. Ngudjolo's Defence concerning, in particular, the legal
16 representatives.

17 PRESIDING JUDGE COTTE (interpretation): You've seen it's now
18 5.25, and we only have 65 minutes ahead so we have make sure everybody
19 has enough time to talk.

20 MR. DIAKIESE (interpretation): I will try to stick to 15 of
21 those 65 minutes. So I was saying, President, concerning my first point
22 concerning the background that -- and I'm also speaking on behalf of
23 Mr. Jean Mulenda, that we are representing non-anonymous victims so
24 people who lifted their anonymity towards Mr. Ngudjolo's Defence, people
25 who only depend on the goodwill of Mr. Ngudjolo's Defence, and

1 Mr. President Ngudjolo himself if he is released, concerning their
2 security and any reprisals they could be exposed to.

3 Secondly, President, it is true to say that the security
4 situation in the DRC is precarious and deteriorating. There are no
5 effective guarantees that the DRC will be able to ensure permanent
6 supervision of Mr. Ngudjolo and bring him back before this court if he
7 decides to abscond from the supervision of the DRC. This will not be
8 possible in the context we are operating in.

9 Thirdly, President, we are talking here about a person against
10 whom serious charges have been confirmed, and we are the day -- we are
11 very close to the beginning of trial, a trial which will rule on his
12 responsibility for the charges against him. That is the context we are
13 operating in and against which -- in which we are considering a possible
14 release, even if it is only provisional, of Mr. Ngudjolo.

15 Having regard to some of the points raised by the Defence,
16 because concerning this context, and we don't want to repeat anything, we
17 have talked sufficiently about our griefs, our complaints concerning the
18 context and I don't think the Chamber wants me to repeat these -- these
19 points which I have developed sufficiently already so I will refrain from
20 doing so, but I would like to emphasise the context in which we are
21 expressing these fears and griefs concerning his release.

22 Now, the Defence had raised two concerns under paragraph 8 and 9
23 of their latest submission, page 5. My understanding of paragraph 8 of
24 this solution is that according to Mr. Ngudjolo's Defence, the Registry
25 had already given a sufficiently wordly (as interpreted) report which

1 proved that Mr. Ngudjolo didn't have any influence in Ituri which we
2 could complain about or concerning which we could demonstrate that it
3 could have an influence on victim security.

4 Our understanding of the Registry's report is not as peremptory.
5 We believe that the Registry had asserted that as things currently stand,
6 it did not have any confirmed information concerning a possible influence
7 Mr. Ngudjolo may have in Ituri. There is, however, a nuance here. If
8 the Registry says it does not have any confirmed elements concerning a
9 possible influence of Mr. Ngudjolo in Ituri, it does not mean he does not
10 have any influence. It just means that the Registry does not have
11 sufficient information to be assertive categorical and peremptory. So if
12 there are sufficient fears that independently of the Registry's position
13 Mr. Ngudjolo might wield influence that the Registry would deny any
14 opinion to the contrary.

15 In its paragraph number 9 of the submission of Mr. Ngudjolo's
16 Defence, they address the Legal Representatives of Victims and consider
17 that they remain silent, which was very eloquent, and it showed the
18 nature of their complaints or fears concerning their security or their
19 victims' security.

20 We believe that the fact that the deadline fixed for our filing
21 had not been respected was only to -- was what made Mr. Ngudjolo's
22 Defence come to this conclusion, but during some hearings, we have
23 recalled that the Chamber had issued orders that had already paved a way
24 and that a response to this issue was premature as long as we hadn't yet
25 fulfilled this -- this requirement and until we had talked with the

1 Registry about the examination of the security situation. And it is for
2 those reasons that we have withhold our observations on the conclusions
3 of Mr. Ngudjolo's Defence, that we have refrained from responding, but
4 you cannot claim that this is because we have a fantasy thesis about this
5 matter.

6 Now, this is where I'd like to conclude. My learned colleagues
7 can come back on this if they so wish.

8 PRESIDING JUDGE COTTE (interpretation): Thank you very much,
9 Mr. Diakiese. Mr. Jean Gilissen, the floor is yours.

10 MR. GILISSEN (interpretation): Thank you very much. With your
11 leave, I'll try and be as brief as possible, your Honour. I believe that
12 I just have to insist on the way Article 61(4) and Rule 118 were
13 interpreted. The elements that concern the complexity of the case and
14 concern the grave charges involved and also concern the smooth unfolding
15 of the proceedings. These issues seem simple to me. I read the good
16 work of the Defence with much attention. The question seems simple to
17 me. Has there been excessive extension of the detention period, that is,
18 the result of the Prosecution's errors.

19 The first criteria has to do with the complexity of the case,
20 your Honour. We are aware of that. I think that the first part, the
21 first interventions, the first participants in the complexity of the case
22 are the Defence, and they are involved in proceedings that are extremely
23 complex, in an extremely serious case. The information is also very
24 complex. No one can doubt the complexity of the case. No one can doubt
25 the seriousness of the charges. That is a kind of violation of the

1 principal rights recognised by the community, by the international
2 community.

3 Mr. President, your Honours, I have to deal with the proceedings
4 before the Court. I have the honour of pleading here since -- I haven't
5 been able to plead here since the confirmation of the charges, but it's
6 with much happiness that I've been able to notice how these proceedings
7 have been evolving. They have been evolving with diligence, and I'm
8 happy for the Defence because the rights of the Defence have also been
9 guaranteed.

10 Mr. President, your Honours, if I should go into greater detail
11 you might think that I'm just a chatterbox. So that would be very
12 disagreeable. Therefore, I thank you.

13 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Gilissen.
14 We are listening to what you have to say, sir.

15 MR. GILISSEN (interpretation): Thank you, Mr. President, for
16 giving me the floor. Your Honours, I'm not going to dwell on everything
17 that has already been said, because as the President has already said,
18 this hearing isn't the first one to be held. It concerns maintaining the
19 detention for the accused and these issues have already been debated
20 before the Pre-Trial Chamber I -- or, rather, II, and since then, when we
21 follow how the case has been proceeding and when we follow the context in
22 the DRC and the arguments put forward by all the parties involved in the
23 case, we can easily conclude that the circumstances have not changed.
24 The last decision rendered by the Chamber were in November 2008, and we
25 all know that since that time there have been many things that have

1 changed in the case after we have had Status Conferences. So there are
2 new changes. Perhaps not that new, but they just reinforce arguments
3 that have already been presented with regard to the detention of the
4 Mathieu Ngudjolo.

5 What I would like to emphasise concerns the argument put forward
6 by the victims' Legal Representatives. It's a/033007, and a/033107, and
7 this concerns the events that recently took place in the DRC. It
8 concerns the movement, you might say, of rebellion, and I concede that
9 Mathieu Ngudjolo had nothing to do with it. It also concerned
10 Laurent Nkunda and Bosco Ntaganda, obviously, or in fact, these were the
11 individuals concerned. But we are interested in the following part of
12 the argument: The fact that the solution envisaged, the process has not
13 yet been concluded though, but the solution envisaged in the DRC concerns
14 all the armed groups that are active in the DRC. And we have come to the
15 conclusion through the media that when the Sendepere (phoen) movement put
16 down its arms or joined the Rwandan army or the Congolese army, other
17 rebellious movements reached out to the President of the republic. They
18 put down their arms, and this I would say completely changed, perhaps not
19 decisively, but it changed the situation in Ituri and in the east of the
20 DRC.

21 But although the situation has changed, the progress has been
22 made, we note that there is no single individual who had carried weapons
23 regardless of the level of responsibility that the person may have had in
24 this rebellious movement, but not a single person of that kind was
25 concerned, was worried.

1 The Defence says that the individual was never a rebellion -- a
2 leader of a rebellion, so what we are concerned about are the
3 repercussions these negotiations might have, the negotiations between
4 President Kabila and the international community. There is the risk of
5 repercussions, and this might just spread out and there might be total
6 impunity for all those who committed atrocious acts in the DRC.

7 The accused here, we all know, is being prosecuted for facts or
8 various crimes committed in Ituri. It's not someone who is not known in
9 political circles of the region. Even if he was not at the head of a
10 rebellion movement, he is nevertheless someone who left his mark on
11 politics or on the security situation.

12 JUDGE DIARRA (interpretation): With the President's permission,
13 I would like to remind you that our Chamber doesn't usually interrupt
14 counsel or the Victims' Legal Representatives, but I admit that we'd be
15 very grateful if you strove to not go into detailed examination of the
16 accused. Go straight to what you have to say about this request for
17 provisional release.

18 PRESIDING JUDGE COTTE (interpretation): I think that it would
19 perhaps be necessary to focus on the matter you are concerned with,
20 because you started dealing with a very general context. Try to focus on
21 the matter as much as possible in order to demonstrate what the arguments
22 are to maintain detention if that's your position, or perhaps you have
23 arguments for something else. But try to focus. I think that's what
24 Judge Diarra was requesting that you do.

25 MR. LUVENGIKA (interpretation): I thank you, Mr. President, your

1 Honours. What you have said is extremely relevant.

2 What I wanted to say is the following: Today if the accused were
3 to go back to the DRC, nothing guarantees in the light of the various
4 possibilities that there are serious concerns, serious fears that the
5 accused might engage in negotiations with the authorities in the DRC so
6 that he might be able to abscond from the court's jurisdiction. Also,
7 that he might find the means of having no longer to appear before this
8 court. That is what I wanted to say.

9 I think that not without grounds given that one knows the
10 alliances that are often established in the political context in the
11 region of the Great Lakes district.

12 Thank you.

13 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you.

14 Ms. Massidda, Counsel Massidda, would you like to take the floor,
15 if so, we are listening to you.

16 MS. MASSIDDA (interpretation): Thank you. The office of counsel
17 for the victims wouldn't like to make any other submissions. I would
18 just like to repeat the arguments presented by the Prosecution and by the
19 other representatives of victims. So I share their position. Thank you.

20 PRESIDING JUDGE COTTE (interpretation): Thank you.

21 Mr. Kilenda, would you like to take the floor or someone from
22 your team? We are listening to what you have to say.

23 MR. KILENDA (interpretation): Thank you. Our team is convinced
24 that you have the power to order that our client be provisionally
25 released. Don't count on us to take advantage of you, to waste your

1 time. We'll try and be as brief as possible, as brief as our colleagues
2 who have already taken the floor.

3 I've noted certain things that are repeated in all the arguments
4 that have so far been presented. The arguments concern the grave nature
5 of the crimes committed by Mr. Ngudjolo as a result of which he should
6 remain in detention. It's said that there is a security problem, and if
7 Mr. Ngudjolo were released, this would endanger certain victims, certain
8 individuals or witnesses whose identity has already been disclosed.

9 I have also noted that the Prosecutor acted in a correct manner.
10 The proceedings are unfolding in a normal way. No time is being wasted,
11 and therefore our team, if I have understood things correctly, cannot say
12 that there has been an unreasonable delay and that the proceedings are
13 not progressing normally.

14 I listened to the OTP when they took the floor, and I noted that
15 according to the OTP -- well, we just forwarded our previous submissions,
16 and the arguments were not substantially developed in order to support
17 our claim, our demand for the release of our client, your Honours.

18 When you read through all the previous submissions, the
19 submissions of the OTP, of the Legal Representatives of Victims and our
20 submissions, when you do this you'll see that no progress has mean -- has
21 been made in terms of quality, in terms of the quality of the reasons
22 provided in support of the request for the release of our client or for
23 maintaining our client in detention, and that is why since November we
24 have wanted to tell you that we're not going to repeat everything that
25 we've already said in our claims, in our requests for release since

1 February of last year. So I'll abide by the rules I've set myself at the
2 beginning of this hearing. You said it wasn't necessary to repeat things
3 that we were already familiar with. We just had to focus on certain
4 points that should be responded to perhaps. Therefore, I'll start with
5 what the Prosecutor first said to try to convince you to maintain
6 detention for Mr. Ngudjolo.

7 And she says you have to be careful when it comes to this
8 gentleman, Mr. Ngudjolo, and I quote: "... fled from the Makala prison;
9 whereas he was being prosecuted for crimes of a serious nature. If
10 released, he would be an obstacle to proceedings."

11 We challenge this position of the Prosecution, and they should
12 prove to us that Mr. Ngudjolo fled from the prison. Mr. Ngudjolo never
13 fled from the Makala prison. He never escaped from that prison. When he
14 was acquitted by the Tribunal, the Tribunal de Grand Instance in Bunia,
15 as it is called there, well, when that was done he wasn't released
16 immediately. He was transferred to the Bakala central prison which is a
17 penitentiary centre in Makala and he was transferred there for unknown
18 reasons, and he was detained there for several months until the date of
19 his release. A Congolese lawyer, Mr. Mabanga, who is assisting us, was
20 involved or charged with Mr. Ngudjolo's case. Mr. Ngudjolo never
21 escaped, never fled from the Makala prison.

22 And in addition, escape is a violation, a crime according to the
23 law in that country so it's difficult to understand that this gentleman
24 who escaped continued with his military training in the military centre,
25 this higher military centre in Kinshasa. Do you think that a general in

1 the armed forces would have allowed him to continue with his training if
2 he had really fled from the Makala prison? This escape -- or escape is a
3 crime in the DRC, contrary to what is the case in Belgium. So I can't
4 see how an escapee could continue with his training.

5 And when Mr. Ngudjolo was arrested or he went to the centre of
6 the Congolese forces to receive his salary. It's when he entered there
7 he was asked to go to the office of the director of the centre, and
8 that's when he was arrested and handed over to the court. That was the
9 case until he came to detention centre in The Hague.

10 So Mr. Ngudjolo never escaped. You will never be provided with
11 such proof. There is no such proof. He never fled.

12 So as an argument to maintain our client in detention, well, this
13 argument just doesn't hold water. The gravity of the charges against our
14 client would apparently also be an obstacle to his interim release.

15 Mr. President, the seriousness of the charges is not a criteria
16 to refuse provisional release for a detainee. In addition and in one of
17 our submissions, we emphasise the fact, I think it's the submission that
18 precedes yesterday's submission, we pointed out that at the ICTY,
19 provisional release was also granted for high-ranking civilian and
20 military individuals who were being prosecuted for very serious crimes,
21 the same kind of crimes that Mr. Ngudjolo is charged with, genocide,
22 crimes against humanity, and this was not an obstacle to being granted
23 provisional release.

24 It was also said that there was a security problem. In our team
25 we have the fortune to have a member who is from Ituri, and this person

1 swears that the restrictions that were in force for certain movements
2 have been lifted. You are a criminal Judge. You're very active. You
3 can consult MONUC and they will confirm what has been alleged here. We
4 cannot continue to mention the security risks posed by Mr. Ngudjolo with
5 regard to certain individuals if we have no concrete evidence to show
6 that certain -- to show that if this person were released he would
7 endanger the security of certain individuals whose identity has already
8 been revealed through disclosure.

9 As for the length of the proceedings, the time taken up by the
10 proceedings, if we are to be frank you will see that in our previous
11 submissions we didn't really dwell on this fact, but we believe that this
12 problem that concerns releasing our client or maintaining his detention
13 should not be a problem analysed in view of the length of the detention
14 period. It's true, as my colleagues have pointed out, the proceedings
15 are running smoothly. The deadlines are being respected. Everyone is
16 doing their utmost to ensure that the proceedings run smoothly. But
17 detention is the exception. We must bear that in mind. Detention is the
18 exception. We really don't see why one would deprive someone of their
19 liberty, someone who was already aware of the charges against him,
20 someone who knew that at some point in time he might be arrested and
21 transferred to the ICC.

22 This gentleman continued with his training in the high military
23 centre. He respected the orders of his superiors, and on the day that he
24 was arrested he offered no resistance. You can see for yourself. Since
25 he has been before the ICC, he has always acted with respect for the

1 Court. He has cooperated, and he tries to cooperate to the best of his
2 ability and to ensure that the proceedings run smoothly. We do not
3 believe this is an individual is one whose request for provisional
4 release should categorically be denied.

5 In another submission, there were additional arguments referred
6 to. On the one hand, it was said by the Legal Representatives of Victims
7 that our client had fanatics, and once released, they would cry out about
8 their victory, and once they had -- once he had contact with these
9 fanatics again, these fanatics would be in a position to pose a risk to
10 the security of those individuals in the DRC who are concerned.

11 There's another argument which says there's a new political
12 situation if Mr. Ngudjolo were released, well, then naturally he would
13 take advantage of the head of state who would not hand over individuals
14 for whom warrants of arrest have been issued by the ICC. We believe that
15 these arguments don't hold water. First of all, because as far as
16 fanaticism is regard, our client doesn't have any fanatics. You know
17 what a fanatic is. You're following all the precarious situations in the
18 universe. I don't have to refer to them. You know that fanatics are
19 people who are prepared to die for the cause that they are fighting for.
20 Mr. Ngudjolo's supporters were never fanatics. In the DRC we never heard
21 about them pillaging a building. If there are any fanatics, if he had
22 any fanatics, they would have reacted and given the actual or the present
23 situation in the Congo, in DRC, our client, as far as I know, has never
24 any had any personal relations or privileged relations with the
25 authorities in the DRC. He is excluded from the political negotiations

1 that are ongoing today. It's the Security Council that asked the former
2 Nigerian friend to negotiate with Nkundabatware rebels so as to establish
3 peace in Tivu.

4 Our client has nothing to do with this situation and we don't
5 think that this turnabout of the head of state in Congo should be an
6 obstacle to his provisional release.

7 You are a Judge. We're glad that you have convened this hearing
8 today. You have certainly understood that apart from the written
9 submissions that we continue to file oral submissions, additional
10 elements. You can see how we have been conducting ourselves, our client
11 has been conducting himself, and you will consider whether you can grant
12 him provisional release. But we believe that this is possible, and you
13 can do so without fear. Why? Because Mr. Ngudjolo, as we have already
14 said, was a student in the high military centre. He was pursuing his
15 military training there. But you shouldn't forget the position that he
16 held. You shouldn't forget the fact that your Chamber has the right to
17 set conditions for provisional release and to -- so that you can
18 guarantee that he will be represented before the Court. Don't forget that
19 our client was a nurse, as I have said. And if he were granted
20 provisional release, you can always establish some conditions for such
21 provisional release. You might decide that he could be repatriated to
22 the DRC in case you would assign him to a residence in the military
23 centre. You will ask him to obey all your orders or your decisions, and
24 the Congolese authorities, who have been cooperative, I believe that they
25 would accomplish their mission and ensure that Mr. Ngudjolo abides by all

1 the decisions and orders rendered by your Chamber.

2 One should also not forget that he is a nurse. We have a
3 military hospital in Kinshasa. He could offer his services there and
4 earn a bit of money to provide for his family. But if you believe that
5 Mr. Ngudjolo cannot be repatriated to the DRC, because one of my
6 colleagues mentioned the fact that we only reached an agreement on the
7 beginning of the trial in June, well, perhaps the other parties are
8 afraid of this, but we could also ask Ngudjolo to -- to be granted this
9 release and the Registry would then ensure that he has accommodation in
10 The Hague. We could also request that he be granted release in
11 The Hague. Thank you.

12 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Kilenda.
13 And I would like to thank everyone who has taken the floor and expressed
14 a position on this matter. Mr. Gilissen mentioned certain professional
15 constraints as a result of which he might have to leave us a little
16 early. You may leave if you so desire.

17 Mr. Kilenda, you are right in that this -- what is stated in the
18 text according to which we have to have a one-year hearing to discuss
19 detention, it's good to have oral discussions. The Chamber can express
20 its position orally. So can you. We have all listened to everything
21 with attention. These are additional elements, additional facts that
22 allow us to prepare to render our decision.

23 However, before we adjourn -- yes. Would anyone else like to
24 take the floor, anyone else from the team?

25 Would the Registry like to take the floor?

1 Before we adjourn, the Chamber would just like to hear the
2 following: It wasn't on the agenda. Perhaps you haven't prepared
3 yourselves, but we'd like to hear what the Defence has to say and what
4 the Legal Representatives have to say about the trial date. Many of you
5 have mentioned the suggestion made by the parties, the OTP and the
6 Defence teams at the Status Conference on the 27th and 28th of November.
7 At the time you suggested the date of the 8th of June, 2009. At an
8 ex parte hearing that we had last week with the Defence for Mr. Katanga,
9 the Chamber mentioned some constraints that Katanga's Defence mentioned,
10 and the Chamber mentioned a possible date for the trial, and that would
11 be at the very beginning of July.

12 This date, the very beginning of July, we would have opening
13 discussions for 15 or 30 days in July, and then we would resume the
14 debates when the court is functioning with reduced capacity because some
15 of the personnel, some of the Defence teams might not be available at
16 that time, but this date, the beginning of July, is it something you
17 would like to comment on?

18 MR. KILENDA (interpretation): Your Honour, could I have a minute
19 to confer with my team?

20 PRESIDING JUDGE COTTE (interpretation): Yes. And perhaps the
21 Legal Representatives for Victims would also like to confer.

22 (Defence counsel confer)

23 PRESIDING JUDGE COTTE (interpretation): Mr. Kilenda, the floor
24 is yours.

25 MR. KILENDA (interpretation): Your Honours, President, we

1 believe that it could be better after the judicial recess, because as you
2 know, we have only had one exploratory mission in the field and our legal
3 assistant has just come back. We have a number of documents to peruse
4 and decide on. So, in view of the investigations we still have to carry
5 out in the field and subject to the disclosure of some evidence which the
6 Prosecutor still has, we believe that it would be reasonable -- what you
7 have suggested is not unreasonable, but it would be even better if it was
8 after the judicial recess, but you have the final word of course.

9 PRESIDING JUDGE COTTE (interpretation): Thank you very much,
10 Mr. Kilenda. Anybody wants to take the floor? Ms. Massidda.

11 MS. MASSIDDA (interpretation): President, I was chosen by the
12 Legal Representatives. Normally, in principle, the Legal Representatives
13 of Victims which were already authorised to participate, for them the
14 beginning of July would be a good date, but I would like to flag to the
15 Chamber the problem of Legal Representatives of Victims which aren't yet
16 authorised to participate in the trial.

17 According to your decision of the 26th of February, 2009, the
18 Victims Participation and Reparations Section must submit at the latest
19 on the 4th of May, 2009, to the Chamber any new applications for
20 participation; and thereafter, the Chamber will of course assess the
21 requests and rule on the participation and grant the status of victim for
22 those who can participate in the trial or not.

23 I believe that this will take some time, maybe even one month,
24 and here I am forecasting what might happen. Thereafter, the victims
25 will be either represented by the office or choose another legal

1 representative or grouped with the other Legal Representatives. That
2 would mean that if the trial was to start in July, the Legal
3 Representatives of the new victims will not be able to contact their
4 client and identify any procedural or factual problem which could be
5 important to defend the victims' personal interests, victims which will
6 still be allowed to participate in the trial. So only for those
7 categories of people, the victims who haven't yet been granted the status
8 of participant in the proceedings, the date the beginning of July could
9 be problematic.

10 I would also like to flag with the Chamber that once the Chamber
11 will have decided on the participation, the Chamber will also have to
12 give the modalities of victims' participation, and this might also be
13 problematic, because only when the Chamber will have decided on the
14 modalities for participation will the Legal Representatives be able to
15 decide on a common strategy or a strategy specific to each team and
16 possibly decide on procedural issues such as, for instance, the
17 presentation of evidence or other issues which could affect the legal --
18 the Legal Representatives of Victims.

19 PRESIDING JUDGE COTTE (interpretation): Thank you. So I think
20 you've all understood that the Chamber here is mindful of your concerns,
21 wants to listen to you and wants to conduct the proceedings diligently
22 but not hastily. You are also all aware that, subject to the decision we
23 will take in a couple of days on the detention of Mr. Ngudjolo, any
24 trial, the date of which is postponed, could have consequences on
25 detention. You will all have noticed that the -- the Office of the

1 Prosecutor is subject to a rather stringent calendar for disclosure. We
2 will, therefore, try to take into account all the submissions you have
3 made and observations you have made. However, I would like to note that
4 to postpone the trial until after the judicial recess is to postpone it
5 quite far. We have underlined the difficulties that we could have along
6 the lines of what Ms. Massidda has just mentioned, but, Mr. Kilenda, you
7 talked about a new mission to the Congo. That's of course your work to
8 carry out such investigations. However, the Chamber would like to know
9 if the missions are carried out under good conditions, if you have the
10 authorisation of Congolese authorities for the proper conduct of these
11 missions on the dates you want. So is all of this unfolding in a
12 situation that is satisfactory for your team?

13 MR. KILENDA (interpretation): Well, President, up until now we
14 can't complain. We don't have everything, but everybody is trying to
15 find solutions.

16 PRESIDING JUDGE COTTE (interpretation): Thank you. The Defence
17 will have the floor last, of course, but Registrar, would you like to
18 take the floor on any specific point? The Chamber is aware of your
19 presence even if you are silent. It is comforting for all the
20 participants to know you are there because they can turn to you.

21 MR. DUBUISSON (interpretation): Well, the Registry will remain
22 silent.

23 PRESIDING JUDGE COTTE (interpretation): Well, Mr. Kilenda, the
24 last word is yours. Do you have anything more to add?

25 MR. KILENDA (interpretation): Well, it is in your hands. We

1 will await the decision you will take and as this will be a decision
2 issued for interests of justice, we will respect it.

3 PRESIDING JUDGE COTTE (interpretation): Thank you very much. I
4 would like to thank all the court reporters and interpreters which
5 supported us. And did -- Mr. Ngudjolo like to take the floor? No. His
6 counsel represented him, and did so correctly.

7 So thank you to the interpretation teams and court reporters.
8 The hearing is adjourned.

9 The hearing ends at 6.10 p.m.

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1 CORRECTION REPORT

2 The Section of Interpretation and Interpretation of the Court has corrected
3 the following interpreted sentence:

4 * page 9 lines 10-13 "As regards the documents, that is

5 (indiscernible) the provisions concerning confidentiality under 54(3)(e).

6 Yesterday, seven incriminating pieces of material and another 77 are still

7 -- under Rule 77 are -- are still not revealed, disclosed.

8 Is corrected by * page 9 lines 10-13:

9 "Hence, as regards documents subject to confidentiality restrictions

10 pursuant to article 54(3)(e), as of yesterday, only seven items of

11 incriminating material and five items under rule 77 were still subject to

12 such restrictions."