

1 International Criminal Court

2 Trial Chamber II - Courtroom 1

3 Before: Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra and Judge
4 Christine Van den Wyngaert

5 Situation: Democratic Republic of Congo - ICC-01/04-01/07

6 In the matter: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

7 Open Session Hearing with the Office of the Prosecutor, Defence and Legal
8 Representatives

9 Friday 2 October 2009

10 (The hearing starts at 9:33 a.m.)

11 THE COURT USHER: All rise. The International Criminal Court is now in
12 session.

13 PRESIDING JUDGE COTTE: (Interpretation) The session commences, and in fact
14 continues. Please be seated. Security guards, would you please show into the
15 courtroom Mr. Germain Katanga and Mr. Mathieu Ngudjolo.

16 (The accused enter the courtroom)

17 PRESIDING JUDGE COTTE: (Interpretation) So we can continue our hearing where
18 we left off yesterday afternoon. I shall now give the floor to the Office of the
19 Prosecution, of the Prosecutor, in order to cover point -- the point 6 agreements
20 as to evidence on the agenda and you will recall that, and it's a decision of 31
21 August, the Chamber was of the opinion that such agreements could be indeed
22 reached.

23 This is not anything new for any of us here, but the Prosecutor did recall in
24 its brief of 17 September 2009 that from as early as February 2009 he had made a
25 proposal of this ilk to the two Defence teams and at that moment in time, however,

1 discussions were not able to continue in a useful manner, and they were not
2 conclusive.

3 The Prosecutor nevertheless informed us recently that he had transmitted to
4 the Defence team a number of proposals for agreement with reference to the
5 commitment of Uganda in the Ituri region during the conflict.

6 It seemed to us, on reading his brief, that other agreements were also
7 possible, and that is what we shall now request that he indicate to us, in view of
8 the fact of course that the Chamber strongly encourages attempts to reach
9 agreements of this sort, in order to expedite proceedings as we were saying
10 yesterday.

11 We would also like to recall that the Defence had not raised any objections
12 on principle to such agreements being reached during our status conference held in
13 November 2008 on 27 and 28 November. So today we would like to know whether the
14 two Defence teams are in the same state of mind, and were this to be the case, and
15 if the Prosecutor is able to make proposals, if the Prosecution would be able to
16 reach with the Defence agreements as to evidence. And once again, we recall that
17 it is never too late for us to agree on facts.

18 Now, Mr. Prosecutor, we would like you to address the Court once again
19 because we were listening to you at the end of the hearing yesterday.

20 MR. DUTERTRE: (Interpretation) Thank you, Mr. President, good morning. Mr.
21 President, would you allow me to remain seated?

22 PRESIDING JUDGE COTTE: (Interpretation) Indeed, counsel, you may remain
23 seated.

24 MR. DUTERTRE: (Interpretation) Mr. President, you gave us a very good
25 summary of our exchanges with the Defence, and I thank you for that. The

1 Prosecution took very good note yesterday of your instructions, and wishes that we
2 go to the crux of the matter concentrating solely on those issues that are
3 important, those issues notably, that are contentious. Now, with the sole
4 objective of making the debates and discussions more expeditious and establishing
5 the truth.

6 For the Office of the Prosecutor agreements as to evidence are a very good
7 way forward in obtaining this objective. We have a number of proposals to put
8 forward and a number of paths to suggest. This might be a bit lengthy. However,
9 it would seem to me that this is a necessary means forward for us today.

10 Two points in my intervention, Mr. President. Today, with reference to the
11 various subjects or issues upon which we might attempt to reach agreements, and
12 then a few issues of methodology. That will be quite a brief point of discussion.

13 Now, with reference to the topic areas where we believe that it is possible
14 for us to reach an agreement, we have a number of proposals to put forward which
15 are not exhaustive in nature but which should suffice to provide us with material
16 for discussion today.

17 These proposals can be divided into three categories or they would allow us
18 to reach three objectives, notably, objective number one which would be to avoid,
19 quite simply, calling some witnesses to testify.

20 The second objective would be to avoid having to discuss with some witnesses
21 in the courtroom salient issues within their testimony. We will of course still
22 call them to testify but we will concentrate on more relevant issues whilst
23 excluding lengthier developments. And the third objective would be to obtain
24 agreement on more specific points or questions, mindful of gaining time, 20 minutes
25 here and there, and in so doing we would be able to save a number of hours.

1 Everyone knows that, of course, some small rivers make larger rivers.

2 Now, Mr. President, your Honours, I would start by saying that those
3 agreements that we might put forward in order to avoid calling to testify some
4 witnesses, quite simply, I am not foreseeing a decision of the Chamber but it might
5 be that the Chamber would admit to include the expert witness amongst the
6 Prosecution witnesses, notably, the expert witness who conducted some genetic
7 analysis and research, and it may be that the Chamber admit the inclusion of this
8 report, the report on genetics which is included in the expert report within the
9 Prosecution evidence. This report, Mr. President, finds the evidence of human
10 blood on samples of wall, wall samples within the classroom of Bogoro and the
11 Prosecution would then suggest to the Defence that it admit to the presence of this
12 human blood on those walls in question.

13 Now, of course this does not establish the time and date at which this blood
14 appeared on the walls. Now, it would seem to me that counsel Hooper is amenable to
15 adopting such a stance. I am not quite clear as to the defence of Mr. Ngudjolo,
16 but Mr. Kilenda might tell us what he thinks of such a proposal.

17 Were we to reach an agreement, according to the wording of this agreement, I
18 believe that it would be useless to call to testify this expert witness.

19 With reference to this point, Mr. President, we can say that we might wonder
20 how it is that the Chamber will deal with these possible agreements. One
21 possibility would be that in a common brief, the Defence and Prosecution submit
22 their agreements to the Chamber.

23 I am mindful of Rule 69 of the Rules of Procedure and Evidence, which gives
24 you the power to determine, and if the expert report has been submitted to the
25 Chamber in its brief, in respect of Regulation 35, it would seem then that the

1 Chamber would have enough elements to register or determine upon such an agreement.
2 But, of course, we would like to receive all your instructions as to the practical
3 way forward with this regard.

4 We could adopt the same approach with the ballistics expert, the expert who
5 conducted a morphological analysis of the blood stains which were visible on the
6 photographs taken at the institute in 2007, and also partially with reference to
7 the exhumation. Of course, with the proviso that the Chamber admits into evidence
8 those expert reports as Prosecution evidence. So some of these experts might then
9 not be called to testify.

10 One point of clarification, I do recall that yesterday we made mention of the
11 fact that the Prosecution was withdrawing experts. It is true with regard to
12 experts 358 and 359, for reasons explained in one of our briefs. However, today,
13 with reference to the other experts, of course, this will be according to an
14 agreement reached.

15 Now, this is the first example with regard to agreements that could be
16 reached, which could put us in a position where we would not have to call to
17 testify certain witnesses.

18 Now, Mr. President, your Honours, I would like to move on to the agreements
19 that would allow us to avoid covering certain subject areas with witnesses, and
20 this is notably with regard to certain important areas of their testimony. Certain
21 topic areas could be covered.

22 First of all, the first topic area which would enable us to eliminate, in
23 fact which would enable us to gain a lot of time, is to do with the existence of an
24 armed conflict in Ituri, in the Ituri region, during the period under review. Now,
25 were we to reach an agreement on this point, the Prosecution would no longer have

1 to prove the contextual elements and the war crimes which would mean that, of
2 course, we would gain considerable time and not waste any energy on the matter.
3 This does not exclude the fact that the Prosecution will, however, pose a number of
4 questions on the subject of certain attacks with a view to illustrating other facts
5 within a file.

6 Now, as you indicated, Mr. President, we have submitted 71 proposals for
7 agreement. Now, were agreement to be reached on a considerable number of those
8 proposals, then the Chamber could conclude that there was the existence of a
9 national and international armed conflict in the Ituri region.

10 We have received an indication from Counsel Hooper, and I am speaking in the
11 sense that he is aware of this. He would be willing to admit that there was an
12 existence of an international conflict in the Ituri region, and I believe that
13 Counsel Fofe and Counsel Kilenda, and they are aware of what I am saying here, will
14 be in a position to adopt the same starts.

15 Now, the Prosecution is indeed ready to reach an agreement on the fact that
16 there was an international armed conflict based on the occupation of Uganda in
17 Ituri. We can then move forward and adopt this path by clarifying and specifying a
18 more specific agreement that we would then submit to the Chamber.

19 Of course, this would allow us to gain a lot of time in court. Still with
20 reference to contextual elements, there are some proposals that could be put
21 forward with regard to crimes against humanity, and in this regard I would like now
22 to ask my colleague, Dianne Luping, who will expose the ideas of the Prosecution on
23 the subject.

24 MS. LUPING: Mr. President, your Honours, I'll be touching briefly on two
25 subject areas for potential further agreement on facts. Thank you, Mr. President,

1 I'll sit, as you've indicated I may do so.

2 First, in relation to the role of Rwanda, the Prosecution has also been
3 finalizing a chart with proposed agreed facts in relation to the role of Rwanda in
4 the armed conflict in Ituri, including Rwandan support towards one of the key
5 relevant parties to that conflict, *Union de Patriote Congolais*, or the UPC.

6 The Prosecution would be in a position to provide the Defence with that chart
7 within the next two weeks if the Chamber considers that this would be of use.
8 Notwithstanding any agreement by the parties in relation to the role of Uganda and
9 the existence of an armed conflict and the characterisation of that conflict, the
10 Chamber may decide that it is necessary to be seized of all relevant facts
11 regarding the role of Rwanda as another major party in the conflict, to make its
12 own determination regarding the existence of the armed conflict, and
13 characterisation of that conflict as either international or non-international.
14 The Prosecution submits that the existing evidence on the role of Rwanda is
15 relevant to these determinations, and it is in a position and ready to follow the
16 Chamber's instructions in this regard.

17 The Prosecution would also observe that the issue of Rwandan support to the
18 UPC, as another key party to the conflict, is expected to arise in the witnesses'
19 testimony, so that having any agreement, prior agreement, on facts on this topic is
20 expected to reduce time that may otherwise be needed at trial to deal with such
21 issues on examination of witnesses.

22 Turning to the second subject, your Honours, and that's the issue of proposed
23 facts on the contextual elements for crimes against humanity, the Prosecution does
24 consider that it is important to propose facts relevant to such contextual elements
25 for crimes against humanity, namely, facts evidencing a widespread or systemic

1 attack directed against the civilian Hema population.

2 The Prosecution submits that irrespective of whether the parties could reach
3 complete agreement on all such proposed facts, any agreement on any facts relevant
4 to these contextual elements should help to reduce time required at trial in
5 examination of witnesses on any such agreed matters.

6 The Prosecution does consider that there should be, and will be, proposed
7 facts upon which the Defence should be in a position to agree upon prior to trial.

8 I'll briefly outline four topics that the Prosecution proposes be covered by
9 way of such agreed facts, and for which it submits that there is ample
10 incriminatory evidence as illustrated by the table of incriminatory evidence as
11 provided. First, dates and locations of key relevant attacks, namely, attacks
12 occurring both before and after the attack at Bogoro of February 2003.

13 Secondly -- yes, Mr. President.

14 PRESIDING JUDGE COTTE: (Interpretation) Could you repeat? I was a bit
15 distracted because I was trying to look through my document. Could you just repeat
16 what you just said, please? Thank you.

17 MS. LUPING: Yes, Mr. President. As I explained, there are four topics that
18 the Prosecution believes could be covered by way of agreed facts in relation to the
19 contextual elements for crimes against humanity for which the Prosecution submits
20 there is ample incriminatory evidence, as illustrated by the table of incriminatory
21 evidence already provided. First -- thank you, your Honours.

22 The first topic that the Prosecution would propose be covered in relation to
23 proposed facts on contextual elements for crimes against humanity is that of the
24 dates and locations of key relevant attacks, namely, attacks occurring both before
25 and after the attack at Bogoro of February 2003.

1 Secondly, the Prosecution would propose facts regarding the categories of
2 victimisation arising during the course of these attacks. For example, be they
3 killings, destruction of property, and so forth.

4 Thirdly, the Prosecution would propose facts regarding the targeting of the
5 civilian population during the course of such attacks. And finally, would be
6 proposing facts in relation to the armed groups involved in those attacks.

7 Those are my submissions, Mr. President, your Honours. If you have any
8 questions on this, I'm ready to answer them.

9 MR. DUTERTRE: (Interpretation) I would like to continue, your Honour, with
10 your permission, and I will try to speak as fast as I can.

11 PRESIDING JUDGE COTTE: (Interpretation) It's absolutely important for us to
12 hear your proposals. We did not expect the Defence to share its viewpoints,
13 proposal-by-proposal, but I think that it would not be proper for you to speak in
14 terms as you are doing. We would like to ask the Defence to share its proposals as
15 a whole, that is, you will respond to what you've just said, and it is certain that
16 it is not today that we are going to make a final determination on the agreements
17 that you are discussing.

18 The most important thing here during this hearing is for us to see at what
19 level you have attained with respect to reaching such agreements, and the Chamber
20 is then going to give you time to agree on the essentials. I give the floor back
21 to you, Mr. Prosecutor.

22 MR. DUTERTRE: (Interpretation) Thank you, your Honour. It is exactly within
23 that spirit that we are speaking today. Of course, we are talking about an armed
24 conflict, and we have to be dealing with concrete contextual elements here.

25 We are also talking about the points on which we have to agree on, such that

1 we will be able to deal with essential elements which are already treated in some
2 of the witness statements.

3 One final example of a proposal that I can give to that effect has to do with
4 Witness 418. If you do so authorise, that witness is going to talk about
5 exhumations in Bogoro. Even if we reach an agreement on exhumations, it is highly
6 probable that that witness will still give testimony in order to clarify a few
7 points, points on which we may not reach agreement.

8 JUDGE VAN DEN WYNGAERT: (Interpretation) I do not understand. You are still
9 -- are you talking about the first category or the second category because the
10 first category had to do with the experts, expert witnesses.

11 MR. DUTERTRE: (Interpretation) Thank you for asking the question. The first
12 category has to do with reaching point that will enable us not to call certain
13 witnesses. The second category has to do with points, with essential points, and
14 the third category will make it possible for us to gain time, if I can use that
15 expression, to gain time. That's for all parties. And I think that if we follow
16 all these proposals we are going to gain a lot of time. I'm still talking about a
17 second category here. If you authorise Witness 418 to give testimony on
18 exhumations, then bear in mind, your Honours, that he has already submitted three
19 reports on injuries sustained by victims. And I think that we could also reach
20 agreement on the three victims I'm talking about with respect to injuries
21 sustained, such that Witness 418 will not then have to raise these aspects in his
22 or her testimony. That way we are going to gain a lot of time.

23 I will now move on to the last point which still relates to the second
24 category. We are preparing agreements on the creation, the composition of the FNI
25 and the FRPI. On that point as well, we are going to be dealing with certain

1 aspects which could then not be touched upon in witness examination.

2 I would now like to move on to the third category, your Honours, and I will
3 provide two very brief examples. Witness 373 took a certain number of photographs
4 in Ituri in the year 2003. He could authenticate those photographs, confirm the
5 dates on which those photographs were taken. Some of these photographs were
6 published in well-known newspapers. And I think that we could gain about 30 to
7 40 minutes in the examination-in-chief if we reach an agreement with the Defence
8 that all these photographs were indeed taken in 2003 in Ituri. In that case, we
9 would then just examine the content of those photographs, what they represent, for
10 example.

11 Now, I move on to my second example. Witness 419, with your permission, your
12 Honours, will give a wide, or wide-ranging presentation of the Bogoro institute.
13 His background or its background.

14 The CV of that witness shows that he has a lot of expertise on this topic.
15 And I don't think that it would be useful for us to dwell on the background of this
16 witness, dwell on his expertise during the examination of this witness, and I think
17 that we could reach agreement on that with the Defence. In that case we would just
18 submit the curriculum vitae and the report; that is, we introduce it into the case
19 file and then we will then only focus on the evidence which is going to be given by
20 that witness. This is going to enable us to gain about 30 minutes if we reach
21 agreement on these points. That is the strategy of the Prosecution team. We wish
22 to gain as much time as possible, gain as much trial time as possible.

23 I would now like to move to the second part of my presentation, Your Honours,
24 relating to the best manner of proceeding. We have sent a certain number of
25 proposals relating to the involvement in Uganda. We are preparing other proposals,

1 and those proposals are going to be communicated to the Defence within the shortest
2 time possible. I would like to inform the Chamber that preparing these draft
3 proposals require a lot of precise detail and a lot of time.

4 Once the agreements have been sent, the reality is that it can be an exercise
5 which is quite time consuming and can be quite a fastidious exercise. In any case,
6 the Prosecution remains available and ready to facilitate this process with direct
7 contact with the two Defence teams. This is going to help us gain time and avoid a
8 lengthy exchange of correspondence.

9 The proposals we are going to send to them are presented in various columns.
10 The first column has a number for each proposal. In future, for subsequent
11 proposals we are going to continue carrying on using this system. For example, if
12 we entered 70, in subsequent proposals we are going to carrying on with 71, 72, 73.
13 The second column, your Honours, contains the proposal.

14 The third column contains the source. In any case, our interest is not the
15 source, it's rather the proposal that we are making, but we believe that the
16 Defence could use the source to determine the exact relevance of the proposal. And
17 under the sources, we propose only material which you will find in the witness
18 statements; that is, just material which the Defence can actually rely on and prove
19 in court. And of course there are two other columns which are reserved for each of
20 the Defence teams. The proposals we make are also based on the incriminating and
21 exculpatory material. So the Defence has a lot of information to go on in order to
22 give its agreement to the proposals that we are making.

23 I wanted to give these few clarifications with respect to the way we present
24 our material in order to clarify things, and unless Your Honours have a question
25 for me, I would like to stop here in order to allow others to speak after me.

1 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Prosecutor, for your
2 positive contributions.

3 I will give the floor to the two Defence teams. I will give the floor, first
4 of all, to the Legal Representative of Victims. I would wish to get your response
5 to what you have said and hear something about their methodology.

6 You have told us that this exercise is time consuming. Now, what are the
7 deadlines that you have in mind, considering that we are just a few weeks away from
8 the beginning of the trial and considering that this case record is well known to
9 the OTP and well known to the two Defence teams, considering that you are going to
10 meet, that is, you, the parties, what is your tentative schedule?

11 MR. DUTERTRE: (Interpretation) That is a relevant question, your Honour.
12 First of all, it is true that we are doing this together with various instructions
13 that were issued to us yesterday, instructions relating to the table which we have
14 to comply with. And, of course, this could then end up taking more time than
15 expected, for example, the proposal relating to Rwanda. If the Chamber wishes us
16 to give those proposals, then we would need about 15 days.

17 Now, with respect to the medical and legal aspects, the reports of
18 Witness 418 and 419 can easily be addressed within the time period of 15 days.
19 With respect to the other documents, there's the ballistics expert, the genetics
20 expert, we are waiting for a decision that will be taken by the Chamber. With
21 respect to the genetics expert, we can quickly make proposals. And with respect to
22 the nature of the conflict, I think we have already gained much ground there on
23 that point. And then you also have the precise proposals which we have to make
24 with respect to the identification of photographs, expertise. This can be done
25 later on. And, of course, some of these points may not be very crucial to address

1 before the trial but we are going to prioritise and handle the most important
2 points first.

3 PRESIDING JUDGE COTTE: (Interpretation) Very well. We shall return to this
4 point of time scale once we have heard from the Defence teams.

5 Victims and Representatives, would you like to address the Court on the
6 subject?

7 MR. GILISSEN: (Interpretation) Yes, thank you, your Honour. Good morning.
8 I think I shall be extremely brief on the subject. Of course, we shall invite all
9 the parties, encourage them to reach such agreement and we shall do so in a very
10 vigilant manner for reasons you shall understand, because of course, while one
11 shall -- we have to make sure that in order to -- in going fast, we do not avoid
12 anything. But I do not believe that this is the case in what I have heard this
13 morning.

14 I believe that it is not the case that agreements would be to the detriment
15 of others. This is not the case at all. I have full confidence in the aim of the
16 parties to proceed in the correct manner, and I am sure that the Court will control
17 the situation as regards to the agreements to be reached.

18 PRESIDING JUDGE COTTE: (Interpretation) Yes. Thank you, Counsel Gilissen.

19 Now, Counsel Hooper, having heard the various proposals, the way forward
20 suggested by the Prosecution, could you please provide us with your observations,
21 general in terms, that is, and tell us what might be an agreement that you have in
22 mind, of course, specifying the fact that these agreements will have to be reached
23 in another manner, but today we are here to exchange ideas and to flesh out what
24 might be the possibilities. You have the floor.

25 MR. HOOPER: Well, the Defence clearly recognises it has an obligation to the

1 Chamber to try and save time, and admissions is one area where time can be saved.
2 And where appropriate admissions are sought to be made, then the Defence, as it has
3 already indicated to the Prosecution, and now indicates to the Chamber, is more
4 than willing to consider those proposed admissions and will admit them if it's
5 appropriate to do so, if they conform with instructions, if they are believed to be
6 true.

7 The Prosecution, a few weeks ago, served the Defence with a table containing
8 75 proposed admissions. In the Defence submission, they could have been perhaps --
9 and I hope I am not being over fastidious, perhaps better drafted, more
10 specifically drafted. And it means that going through those admissions and
11 checking their sources, that there was perhaps an overreach, if I can put it like
12 that, in terms of some of the submissions that we felt were being sought. I have
13 indicated to the Prosecution that we were, and are, if necessary, currently
14 reviewing those admissions, going to the sources, and we are willing to make
15 appropriate admissions. But I have indicated -- or more than indicated, I've told
16 the Prosecution that this Defence accepts that there was a state of international
17 armed conflict existing in Ituri from at least 2001 until at least May 2003, which
18 I know will be a satisfactory admission for the Prosecution.

19 And my understanding is that the 75 admissions that were sought relating to
20 the Ugandan participation, we've really been -- we have stepped over that in making
21 that admission, because the 75 admissions were merely examples or proposed examples
22 of interference by Uganda in the state or in the province of Ituri.

23 So in admitting what they were aimed to demonstrate - that is, international
24 armed conflict through occupation - it would seem to us, and I think this might be
25 the view of the Prosecution too, that it is no longer necessary for us to dwell and

1 take the time that's necessary, perhaps extensive time necessary, to review each
2 and every one of 75 individual proposed admissions.

3 So that's our position. We have made that clear. It's already been
4 referred, as you know -- I'm sorry, Madam Judge.

5 PRESIDING JUDGE COTTE: (Interpretation) Yes, thank you, Counsel Hooper.
6 Judge Van den Wyngaert..

7 JUDGE VAN DEN WYNGAERT: I am trying to understand and link it back to the
8 discussion we had yesterday, yesterday, on the facts and the elements adduced to --
9 in evidence to prove the facts, is what you are saying something to the effect that
10 you would prefer to consider the existence or not of an armed conflict as a fact to
11 -- about which you could have an agreement as such, the general fact; whereas, in
12 the table of the Prosecutor we find the items of evidence that you would wish to
13 adduce to productive the fact? So couldn't it be easier then if your agreement
14 would be on the general fact, wouldn't we save time doing this?

15 MR. HOOPER: Yes.

16 JUDGE VAN DEN WYNGAERT: That's my question.

17 MR. HOOPER: My understanding is that that table was aimed at perhaps
18 providing the Court with the basis upon which it would be assisted in reaching a
19 conclusion there was an international armed conflict. But we can overstep that.
20 We, for our part, accept as a fact that there was an international armed conflict
21 in Ituri. And that makes the -- it unnecessary to go further.

22 The Rule 69, of course, leaves the ultimate discretion, of course, to you,
23 the Judges. The Chamber may consider such alleged fact and admitted fact as being
24 proven, unless you are of the opinion that you should hear more about it,
25 basically. So -- and of course here, we are, of course, aware of the position in

1 terms of the confirmation Chamber and the position, of course, in the confirmation
2 Chamber in the Lubanga case, and in the Lubanga case itself. So we are on fairly
3 solid ground, at least with respect to this area.

4 I speak solely, of course, on behalf of Mr. Katanga. I mean, there are some
5 other matters to consider, but that's my position in respect to that. Now, I don't
6 dwell on that particular admission, merely to say it demonstrates that this Defence
7 is willing to admit an appropriate admission and that we consider -- in terms of
8 our particular case is -- is won.

9 I am willing to consider further proposed admissions. We would have liked
10 them by now, frankly. I am rather concerned that as we yet again move towards the
11 inevitable bottleneck that precedes the start of any trial, we are going to be
12 inflicted with further matters such as this which are going to clog up the works,
13 as it were, and make demands on us which perhaps could have been made earlier.
14 That's all I'd say. But we are willing to consider what is proposed, you know, to
15 use a cricketing term, if they ball them, we will bat, but we need to know what
16 they want. And two weeks is certainly, is our expectation, we will be getting
17 further demands from the Prosecution. I don't know exactly how many. It seems to,
18 from what we have heard this morning from Ms. Luping, it is going to involve
19 possible areas relating to the contextual elements of crimes against humanity. So
20 we will await for those.

21 If I can move on to the other matters, I indicated --I'm sorry.

22 The next area, in fact, we touched on yesterday, but I will revisit it, and
23 that relates to scientific evidence. Now, the Court would be aware that in
24 respect of, I think, four particular areas of scientific evidence, the Defence have
25 responded in respect of two of the Prosecution motions for admissions by not

1 opposing the admission and in respect to two of the other remaining motions by the
2 Prosecution opposing the submission of scientific evidence.

3 I can say now orally that we withdraw our opposition to the Prosecution's
4 seeking admission of their scientific evidence in those motions, which is all a
5 scientific material that is -- the Prosecution have asked the Court to accept. So
6 we don't stand in the way. We accept service, as it were, of that material.

7 Our opposition was based on the time when we received it, because there was
8 substantial material. We have had the opportunity of looking at that material and
9 asking ourselves: Does it require us to make further investigations and are those
10 of a nature and extent that makes it difficult for us to prepare the case? And our
11 view is that that is not the position here. We are content to admit the scientific
12 material. The way in which it is admitted may be still subject to discussion
13 because, as I think we said yesterday, this is the kind of material that the
14 Prosecution can compose a proposed admission.

15 There was a bullet found in the wall. There was some blood found on the
16 wall, whatever it might be. And we could admit the simple facts that they wish to
17 glean, to obtain from this material, which is quite extensive.

18 On the other hand, it may be that this is the kind -- or some of this
19 material is such that the Defence would prefer the Court to have the complete
20 statement relating to, perhaps, the exhumation or relating to the ballistics,
21 because if you look at that material, it doesn't come to a clear and certain
22 conclusion. And so it doesn't really lend itself to a clear statement of fact to
23 be admitted.

24 So where there were clear statements of fact that we can admit based on that
25 scientific evidence, we are very happy to do so. Where we feel that the Court

1 would be better assisted by seeing the totality of the scientific evidence, the ifs
2 and the buts of that evidence, then it would be more appropriate, in our
3 submission, for us to admit the statement, whatever it is. 50 page, 100 page
4 statement. We will admit that as fact. So that's -- I think we can indicate
5 there -- that we see, therefore, no obstruction to that material coming before the
6 Court in a direct and speedy manner.

7 It may be the Prosecution would still prefer to call an expert or more than
8 one expert to clarify some matters. That's entirely a matter for them. There may
9 be, from our point of view, perhaps a desire to have some matters clarified. We
10 can ask the Prosecution if their experts can clarify them. That clarification can
11 be made an admission, and we can deal with it that way. Or they might decide to
12 call the expert for the half an hour or so that such clarification might require.
13 So I think that's an ongoing process, but I don't see a problem with the scientific
14 evidence.

15 Photographs. I think recently we received quite a number of photographs.
16 Photographs essentially often prove themselves. We don't stand in the way of
17 admitting photographs as long as they have a clear provenance and as long as the
18 subject matter is clear. So if they are sufficiently supported in that way there
19 can, from our point of view, be no objection to their admission.

20 It may be, though, that the Prosecution might wish to consider whether as far
21 as practicalities of the trial are concerned if, for example, you have got 250
22 photographs taken of the Bogoro institute, do we need all those? They can be put
23 on the file. But might it not be better if the Prosecution identified the 10 or 12
24 or 20, whatever it might be, of their photographs that they want to use, as it
25 were, for a Court bundle, and we can look at those. And if we feel that we want

1 others added, we can do that. And then we have, perhaps, a permanent resource
2 relating to pictures of the Bogoro institute, pictures of Bogoro, and that perhaps
3 will save time. It will certainly perhaps be easier for witnesses, then, who will
4 be referred to bundles. So those are our submissions. Thank you.

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much, Counsel Hooper,
6 for your contribution. Mr. Kilenda, you may address the Court.

7 MR. KILENDA: (Interpretation) Would you enable me to remain seated?

8 PRESIDING JUDGE COTTE: (Interpretation) Indeed.

9 MR. KILENDA: (Interpretation) Thank you, Mr. President. Mr. President,
10 your Honours, there is one sentence that I like very much and that I drew from the
11 filing of the Office of the Prosecutor; that is, filing 1480 of 18 September. And
12 in his finding on page 15, I read in paragraph 45, that is, I read that the
13 Prosecution and the Defence have a role to play in order to streamline debates.

14 Only the accused can indicate what is contested in this instant case. And
15 the case of the Prosecution has virtually all Prosecution evidence in hand in the
16 sense that they can take a position and concentrate debates on what is really at
17 stake here in this instant case. And also, they are in a position to be able to
18 adapt the duration of the trial.

19 Now, I have listened with interest to what the Office of the Prosecutor had
20 to say, and of course you are expecting me to provide a response. They, as a
21 Pre-Trial comment, if you like, have given us a number of comments, and I shall
22 give you a number of comments myself.

23 Now, as a preliminary comment, I thank you for constantly be mindful of the
24 fact that the client that I am defending -- unless there is a last minute
25 happening, I have not had the opportunity of talking to him this morning.

1 Now, since 29 November, since the very first Pre-Trial conference, he has -
2 status conference - he has decided to plead not guilty. This does not mean,
3 however, that we cannot -- that is to say, the Office of the Prosecutor and the
4 Defence reach points of agreement. There are certain elements where we can reach
5 an agreement. I can say this already.

6 However, there are other areas where we cannot at all reach an agreement, so
7 I would like now to cover the various proposals.

8 I have noted under point 1 that there are some proposals that would, then,
9 avoid us calling -- or avoid certain witnesses being called to testify. Now, the
10 Office of the Prosecutor said that there has been an expert who has conducted
11 genetic analysis of evidence.

12 Now, were the expert report for this witness to be admitted into the
13 Prosecution evidence, then this would attest to the presence of human blood on the
14 walls of the institute of Bogoro.

15 Now, were we to recognise the presence of this human blood on the walls would
16 therefore be the subject of an agreement.

17 Now, the Defence for Mathieu Ngudjolo cannot reach such an agreement. We
18 are talking here of an expert report, and the legal officers we are, that we are,
19 do not know whether our legal assistants have any knowledge in the areas of
20 genetics or ballistics. But we believe that this is a report that is technical in
21 nature. And in order to streamline debates, as the Prosecutor is seeking to do, we
22 have to, however, discuss these elements in order to establish the truth, together
23 with you, the Chamber.

24 So on the basis of what provision can we then come to an agreement with the
25 Office of the Prosecutor on the subject of this specific expert? The expert in

1 ballistics who conducted a morpho analysis and also who worked on the exhumations.

2 Now, this expert, says the Prosecutor, might not be called to testify. We
3 cannot, however, conclude on -- or find on the conclusions of this expert, because
4 we believe that there is matter to discuss and contest and challenge in his report,
5 especially with reference to somebody who has decided to plead not guilty.

6 JUDGE DIARRA: (Interpretation) Before I let you continue, Maître Kilenda, I
7 wish you to understand one thing: With respect to the expert report regarding
8 human blood on the walls, you say you cannot reach agreement on that point because
9 you intend to challenge that point. Are you talking about contrary expertise to
10 produce before the Court, or you have other material to challenge that report?

11 MR. KILENDA: (Interpretation) To challenge that report, we may call another
12 expert to challenge the expertise of this expert.

13 The second category mentioned by the Office of the Prosecutor has to do with
14 agreements that will make it possible to avoid calling certain Prosecution
15 witnesses on issues which may be time consuming, as the Prosecutor said. And here
16 the primary objective of the Prosecutor, well, has to be -- the first point is the
17 existence of an international conflict, armed conflict in Ituri.

18 According to paragraph 227 of the decision -- 237 of the confirmation
19 decision, it is stated that the Defence teams did not say anything during the
20 pre-trial phase with respect to the international character of the conflict. And
21 today we have been given an opportunity to revisit this point.

22 The Defence team of Mathieu Ngudjolo does not challenge the international
23 character of the conflict. However, the Defence team of Mathieu Ngudjolo thinks
24 that in order to prove the presence of Uganda on the national territory of the DRC,
25 Uganda -- this must be said -- was an occupying power. We do not need 71 proposals

1 as formulated for the -- by the Prosecutor to establish that point.

2 The first point which has to do with the ruling of the International Court of
3 Justice of December 2005 is proof enough that Uganda was an occupying power in the
4 Democratic Republic of the Congo and that it was Uganda which created and
5 manipulated the various armed groups. This judgment it suffices to establish the
6 presence of Uganda in the Democratic Republic of the Congo during that period in
7 question.

8 We don't need Witness 12. We don't need Witness 250. We don't need all the
9 other material which is Prosecution evidence as mentioned in the table which has
10 been proposed by the OTP. We agree on the international character of the conflict
11 in Ituri. We agree on the presence of Uganda, on the national territory of the
12 Democratic Republic of the Congo at that time. But we feel -- and that is our
13 position, and the Chamber can take a contrary view for us, only the ruling of the
14 International Court of Justice of 19 September -- December 2005 is proof enough of
15 the presence of Uganda on the national territory of the DRC.

16 The OTP also made a proposal -- proposals relating to crimes against
17 humanity. We heard that the Prosecutor could provide us in the days ahead with a
18 table on the role played by Rwanda during the period of the conflict or the period
19 in question. On this point, I can tell you that the Defence team of Mathieu
20 Ngudjolo knows, recognizes, that Rwanda played a non-negligible role in the events
21 of Ituri. In the days ahead, we are waiting to cede the content of this table
22 which will be provided by the OTP and we see what points we are going to agree on
23 and what points we may not agree with. So this issue of Rwanda and the issue of
24 Uganda is not a problematic issue for us.

25 For Uganda, the sources which have been quoted to substantiate the presence

1 of Uganda are not serious sources. With respect to Rwanda we are waiting for
2 concrete and relevant proposals which should be provided by the OTP. We also noted
3 that the Prosecutor wishes to propose certain events or certain points relating to
4 the contextual elements for crimes against humanity, points on which the parties
5 could reach agreement. With respect to this point, we are talking about dates and
6 locations, the events that occurred before and after 24 February 2003.

7 The position of the Defence team of Mathieu Ngudjolo is that we are not
8 going to agree to any agreement which relates to attacks other than those attacks
9 which are the subject of our discussions here; yet, on that point, we are waiting
10 to see what the OTP is going to propose. It is never too late to do better. Maybe
11 we are going to change our minds, but we are waiting to see those proposals before
12 we can make up our minds.

13 We also noted that there would be points relating to a certain category of
14 victims. We talked about killings, destruction of property, systematic attacks
15 directed against the civilian population during these attacks. Mr. Ngudjolo, who
16 pleads not guilty, is not ready. In any case, his Defence team is not ready to
17 reach any agreement on such points.

18 We also listened very attentively to the OTP talk about Witness 418 who
19 carried out some work on exhumations in Bogoro. He has already submitted three
20 reports relating to injuries sustained by victims. This witness has not yet been
21 admitted. But if he were admitted, I don't see how we can reach any agreement on
22 such witnesses, especially as Mr. Ngudjolo was not responsible for any injuries
23 sustained or any killings which resulted from the attack of 24 February 2003.

24 With respect to agreements on the creation, functioning, of the FNI and the
25 FRPI, from 11 February 2008, your Honour, when I was assisting Mr. Ngudjolo here at

1 the pre-trial hearings, he said that he was not the highest-ranking commander of
2 the FNI during the attacks on Bogoro.

3 And given the current status of the case file, we think that there is enough
4 material in the case file. In any case, we are going to rise to the occasion at
5 the right time to tell you that Mr. Ngudjolo was not the founder of the FNI and
6 that he did not play any role during the period which is targeted by the
7 confirmation of charges decision.

8 Witness 373, who allegedly, apparently, is a photographer, I don't want to
9 dwell at length on that witness because Professor Fofé, who is going to take the
10 floor very soon when we move on to the next point -- that is point number 8 on
11 admissibility -- is going to say more on that witness. But if I can say a few
12 words with respect to that witness, I would like to say we are not going to reach
13 any agreement on that witness.

14 With respect to your question relating to a tentative schedule, I would like
15 to say that even though I have mentioned a good number of points on which we are
16 not going to reach agreement with the Office of the Prosecutor, we think that it
17 will be interesting for us to get to see all the proposals that the OTP is going to
18 produce or bring to us. I think this is going to help in streamlining the
19 proceedings.

20 I don't know whether 15 days is enough time for them to carry out this
21 activity. In any case, if they can do this within that timeframe, then it is going
22 to help us all to prepare against the date of the 24 November, which is the start
23 of the hearing. Thank you.

24 PRESIDING JUDGE COTTE: (Interpretation) The Chamber thanks you, Mr. Kilenda.
25 Even though you say that you are not going to reach agreement on certain points

1 with the OTP, the Chamber notes that you say that you are ready to entertain any
2 proposals which will be submitted by the OTP. We hope that when you receive those
3 proposals, you may change your mind.

4 Court Officer, I think we should adjourn now, in order to reflect on all
5 these points. Do you think we can adjourn now and resume at 11:00 or 11:25? That
6 is, we will resume for about an hour, 45 minutes?

7 MR. MACDONALD: (Interpretation) Before we adjourn, your Honour, I would
8 like to say that during the break the Chamber should reflect on the point which we
9 have -- which we mentioned.

10 What would be the weight that the Chamber is going to give to the agreements
11 that are going to be reached by the parties? Those agreements will be admitted
12 into evidence and then the parties will not have to revisit these issues anymore,
13 because Rule 69 gives you that option or gives us that option.

14 With respect to certain agreements relating to the existence of a national or
15 international or non-international conflict, I think it's going to be easy to
16 accept the position of the parties up in issue. Of course, the annexes and the
17 material in the E-Court -- that is, Prosecution evidence in the E-Court -- is
18 available to you and you can look at that material in order to give you a
19 determination with respect to admission of these agreements or not.

20 And maybe other agreements which are easier for the Chamber to admit -- and
21 here I am thinking about photographs, about 260 photographs of -- or 260 degree --
22 or aerial photographs of Bogoro taken. These are, in any case, exhibits which
23 cannot be contested by the Defence. I think these are factual elements on which
24 agreement can easily be reached. These are not legal elements such as the
25 existence of -- or existence or otherwise of an international conflict.

1 I would like to say a few words with respect to what Mr. Kilenda said. We
2 understand that they still keep an open door with respect to the proposals that may
3 be issued by the OTP, but I wish to mention one thing:

4 Maître Kilenda, given his legal background, is perhaps less familiar with
5 regard to agreements as to evidence, maybe less familiar than Mr. Hooper maybe, but
6 I wish to reassure the Defence team that just because we admit a document, a
7 photograph or an event, does not mean that we cannot subsequently challenge such
8 material or such evidence.

9 If we agree that a photograph was taken in 2009, and we agree that the
10 photograph is, indeed, that of the institute of Bogoro as it appeared in 2009, then
11 it does not mean that Maître Kilenda cannot subsequently challenge what is seen on
12 the photograph or indeed recruit another expert to give a contrary opinion.

13 So an exhibit can be admitted into evidence, but this does not mean that such
14 material cannot be challenged, because we are talking here about the probative
15 value of evidence here. That is one aspect which is probably different than what
16 is provided for in rule 69.

17 So there may be certain techniques in order to speed up things, to avoid
18 bringing certain -- or calling certain witnesses, such as experts. We could admit
19 their reports, and such reports may be challenged subsequently. I think that's
20 what Mr. Hooper tried to touch on.

21 I also wish to touch on one small point, and that has to do with the question
22 -- or the issue of Rwanda. If the Chamber accepts that there was an international
23 conflict with respect to the involvement of Uganda in that conflict, would it then
24 be necessary to start discussing Rwanda and its involvement when we are discussing
25 the characterization of the conflict? I am putting these questions to the Chamber

1 so that we can take them on board and focus on the essentials.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you. Maître Kilenda?

3 MR. KILENDA: (Interpretation) I don't know exactly what the Prosecutor was
4 trying to say when he says that Mr. Kilenda is not familiar with agreements as to
5 evidence.

6 I have always been of the opinion that in life there is always a beginning to
7 everything. I started at the ICC on 11 February 2008. I am not ashamed of that.
8 It is an experience for me. And since I have been here, I have learned a lot of
9 things. There were things I didn't know about. And even this morning, I can say
10 I keep on learning.

11 And in the future, I would like the Office of the Prosecutor to avoid, to
12 refrain from such statements which to me are sort of insulting to my personality.
13 I don't need to operate in the Anglo-Saxon world to understand such agreements. I
14 know what an agreement is as a lawyer and I know what we are talking about here.

15 That is what I said. What I said was said in the interest of my client who
16 is an accused here and who may face life imprisonment and who may be separated from
17 his family for many years to come. And so his interests have to be defended
18 earnestly. And I think everything has to be done in due respect of all the parties
19 in the hearing. I think we have to bear this in mind.

20 I do agree that for us to speed up things we are going to continue looking at
21 the proposals that are going to be submitted by the OTP. I told you here very
22 respectfully what we are not going to reach agreement on. However, if the Chamber
23 wishes us to provide written submissions to explain our position further, then we
24 are going to do that.

25 That is what I have to say in response to what the Prosecutor said.

1 PRESIDING JUDGE COTTE: (Interpretation) Mr. Kilenda, the Chamber listened to
2 you very attentively. We understood you, and we were expecting your reaction.
3 However, we do not think that the Prosecutor meant to be discourteous towards you.
4 So far, our proceedings have been very courteous, and you have the right to say
5 that we learn every day.

6 And it is not only the Defence team of Mathieu Ngudjolo which is the learning
7 process. I think that the Defence team of Germain Katanga and the Prosecution
8 team -- everyone is learning.

9 We come from different backgrounds. We come from different legal traditions
10 and systems. And we are meeting here from different backgrounds and we are trying
11 in our respective ways to establish the truth all in the interest of the accused
12 persons here present.

13 I don't think it was irrelevant for you to react. I think you are right to
14 do so. But then we should bear in mind that this is an International Criminal
15 Court. We come from different legal traditions and systems. And so we have to
16 find common ground in our quest to establish the truth here. But I believe that we
17 are going to remain courteous here and try to be as constructive as we have been so
18 far.

19 We are going to adjourn and resume at 11:30. We stand adjourned.

20 (Mid-morning recess taken at 10:58 a.m.)

21 (The hearing recommences at 11:39 a.m.)

22 THE COURT USHER: All rise.

23 PRESIDING JUDGE COTTE: (Interpretation) Court is in session. Please be
24 seated. Would the security office please show Mr. Germain Katanga and Mr. Mathieu
25 Ngudjolo into the courtroom, please?

1 (Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui enter the courtroom)

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much. I would like
3 to ask Madam Judge Van den Wyngaert to address the Court briefly in order to come
4 back to what we were saying previously in the hearing.

5 JUDGE VAN DEN WYNGAERT: (Interpretation) Yes, thank you, Mr. President. I
6 would like to hark back briefly to the discussion held between Mr. Macdonald and
7 Mr. Kilenda as to the way in which we might understand the terminology and the
8 difference between the legal traditions and I wanted to share with you an issue of
9 terminology that I had in the past.

10 In attempting to understand the notion of admission in the English language,
11 which when translated into French renders as a term that really is not quite the
12 same as the meaning underlying that in the English language, so this indeed
13 reflects what was being said this morning. That is that in admitting facts, in
14 undertaking an admission as such, this is not really paramount to accepting
15 respecting guilt. It's not really a confession as such.

16 I am a former teacher of criminal law in Belgium and, having been ensconced
17 in Belgian legal terminology, it took me quite some time to sort of understand the
18 various nuances of common law and its languages, and now I believe that what we
19 need to do is to reach an understanding on facts, but not on the implications that
20 these factual matters can have as to the guilt or responsibility or liability of
21 the accused. This we will of course be addressing at a later stage in the
22 proceedings, but not at this stage.

23 What I wanted to do was to share with you the varied difficulties that I have
24 encountered personally. Even though I am a bilingual person and I know the
25 terminology in the two languages only too well, they did not correspond to my mind

1 to something that I was acquainted with in my own Belgo-French system, or legal
2 tradition. That is what I wanted to share with you.

3 PRESIDING JUDGE COTTE: (Interpretation) I believe that it was indeed
4 important and interesting for Judge Van den Wyngaert to show to us all that we do
5 indeed have our limitations, each and every one of us, and we are conscious of them
6 and that we have to make great efforts to adapt and understand constantly.

7 Now the issue at hand this morning for an hour-and-a-half which gave rise to
8 observations - constructive observations - on both parts and which the Chamber
9 welcomes with a great deal of pleasure. Now we agree that it is indeed Rule 69 and
10 that, with a view to being as efficient and useful and expeditious as possible, I
11 believe that we have to reach an agreement on a certain number of facts.

12 We therefore requested that Mr. Prosecutor, of whom much has been requested,
13 but of course the Defence has to also rise to the occasion, we asked him to set
14 down as rapidly as possible the greatest number of proposals for agreements. And
15 what was then heard from the Defence, well, is that we could - we could possibly
16 reach a number of proposals for agreements with reference notably to the existence
17 of an armed conflict in Ituri and for the defence of Germain Katanga and Mathieu
18 Ngudjolo it might be that it is not necessary for us to use as many sources as you
19 stated, as were transmitted or disclosed a few days ago.

20 Now, Mr. Prosecutor, we would request that as rapidly as possible you submit
21 to us your proposals for possible agreements and that you submit them to us and to
22 the Defence, and we invite you all to meet as often as possible with a view to
23 reaching agreements. The Chamber cannot of course oblige you to reach any
24 agreements, we must be very clear on this matter, but as we have understood your
25 state of mind is the same as ours; notably that everything that we can do in order

1 to reach agreements of this ilk will be obviously very well received by the
2 Chamber.

3 Now, Mr. Prosecutor, what we would also request of you is that subsequent to
4 these meetings you file in writing a document that would be divided into two parts.
5 The first part would set out the facts upon which an agreement has reached; that is
6 to say the substance underlying this agreement. The second part will set out in an
7 equally clear manner the facts upon which an agreement might have been reached, but
8 that you did not manage to reach an agreement upon because, for example, one or
9 both of the two Defence teams decided that they could not reach an agreement to
10 your proposal.

11 This document we would like to receive -- we've understood, of course, that
12 you are all very busy. We would like to receive this on 23 October, that is to say
13 in three weeks' time, which of course will require that you certainly undertake a
14 good deal of work, but I believe that it is important for us to establish this now.

15 Mr. Prosecutor, we are requesting therefore that you submit this document by
16 23 October and it goes without saying that the amendments, the simplifications and
17 the possible improvements that we asked you yesterday to bring to the table would
18 then be filed subsequently, because of course these agreements might give rise to a
19 new presentation entirely of the table. This might enable you to better prepare
20 your own schedule and this is why we are establishing this time frame of two -- of
21 three weeks, which would allow you to undertake these two tasks concomitantly,
22 which of course is a lot of work to undertake. Are we in agreement as to this
23 schedule?

24 MR. MACDONALD: (Interpretation) Yes, indeed, Mr. President. What I wanted to
25 say was that we might need to add some evidence to this table, the table which was

1 accepted by the Trial Chamber on 25 May, and we are also expecting certain
2 admissions, whether it be that -- with reference to the Witness 419, or the genetic
3 aspects of Bogoro. So it would be desirable that the second table that we shall
4 produce, in line with the suggestions of the Chamber, that they also -- that this
5 table also include the new information and we shall also withdraw from the table
6 the documents that we are no longer referring to and we will inform the Chamber and
7 the parties of those documents we have withdrawn.

8 PRESIDING JUDGE COTTE: (Interpretation) Yes, very well. So we shall
9 undertake to respond to your various motions next week, whether it be with
10 reference to forensic, ballistics, genetics et cetera associated with the Bogoro
11 Institute.

12 So we would now like to wrap up this point on the agenda which proved a
13 little bit more lengthy, nevertheless interesting, but it is totally in line with
14 our discussions as planned.

15 Now, the next point on the agenda was incorporated on the request of Counsel
16 Kilenda, notably with reference to the consequences - the legal consequences - that
17 the Prosecution would like to draw from the presence of Uganda in Ituri. It seemed
18 to us that this issue might be incorporated into the discussion. Nevertheless, we
19 would like you to discuss the Court on the matter.

20 MR. KILENDA: (Interpretation) Yes, thank you, Mr. President, your Honours.
21 Now underpinning this very question is that, during the confirmation of charges
22 hearing, when you read the decision arising from that hearing you will note that
23 the Prosecution attempted to have admitted by the Pre-Trial Chamber the fact that
24 Uganda -- well, no, he managed to have the Pre-Trial Chamber admit to the fact that
25 there was a conflict in Ituri, but it was not mentioned whether it was national or

1 international. This is what I have managed to glean from reading the decision of
2 the confirmation of charges.

3 Now when we today are asked to reach an agreement on the character of the
4 conflict, I would come back to the fact that the Judge said on the occasion of the
5 confirmation of charges that neither Defence team had raised this issue, which is
6 true. Now today we see that the Prosecutor, who has already managed to raise the
7 fact that there was an armed conflict and he did not mention whether it was
8 international or national, we wanted to submit -- he wanted us to reach an
9 agreement on the presence of Uganda.

10 Now, we found this somewhat difficult to cope with because we wanted to know
11 whether he wanted us to bring to bear any consequences on this and this is why we
12 asked you to incorporate this in the agenda. We don't see why it is that, in view
13 of the fact that it was admitted that there was an armed conflict and it did not
14 seem to matter whether it was national or international, he now today comes before
15 you and asks us to reach an agreement as to the international character of this
16 conflict. This is what underlies my question.

17 PRESIDING JUDGE COTTE: (Interpretation) Counsel Kilenda, it is not our place
18 to answer in the place of the Prosecutor. It may be that you are at the centre of
19 this question, notably the existence of an armed international conflict with the
20 presence of Uganda or not.

21 Mr. Prosecutor, please, if you would like please to respond to what
22 Mr. Kilenda has just said, and maybe this discussion might be continued at a later
23 stage during your meetings in order for you to really finalise the agreement that
24 we were thinking about at an earlier stage, whether it be Mr. Dutertre or Mr.
25 Macdonald who takes the floor.

1 MR. DUTERTRE: (Interpretation) I thank you, Mr. President, your Honours.

2 Now very briefly the Pre-Trial Chamber took a position with reference to the
3 international nature of the conflict, but now we are reaching the stage of the
4 trial and we will have to prove all the constituent elements of the charges during
5 our discussions. We have put forward a number of proposals, which are factual in
6 nature, and we thought that if they gave rise to sufficient number of agreements
7 the Chamber could then determine the nature of the conflict, whether it be national
8 or international; the conflict in Ituri notably. So we clearly indicated in our
9 brief that the objective of these proposals was to supply the Chamber with enough
10 material for it to determine or rule on this issue before the commencement of
11 trial.

12 Now, we have heard the positions of the Defence parties who -- and we welcome
13 their positions, notably that they are ready to accept the existence of an
14 international conflict in Ituri and I believe that it is now the multilateral
15 discussions that we will undertake with the two Defence teams which will enable us
16 to establish an agreement that we can then submit to the Chamber. That is what I
17 had to say on the subject, Mr. President.

18 PRESIDING JUDGE COTTE: (Interpretation) Now, Counsel Kilenda, is this an
19 answer that satisfies you?

20 MR. KILENDA: (Interpretation) Well, I take note of the answer. It does not
21 satisfy me as such, but I can't expect any more of him. I cannot exclude the fact
22 that we might, in the days to come, come back before the Chamber with another that
23 we might submit to the Chamber. Nevertheless, whatever the case may be we have
24 some first answers to that question.

25 PRESIDING JUDGE COTTE: (Interpretation) So we shall now broach point 8 on

1 the agenda, which was broached in a roundabout way yesterday afternoon, and it is
2 with reference to the admissibility and relevance of evidence. The Chamber would
3 quite simply like to recall that it has been seized of a brief filed on 14 August
4 2009 by the Defence for Mathieu Ngudjolo requesting the exclusion in the table of
5 more than 290 items of evidence.

6 Now, in this motion the Defence of Mathieu Ngudjolo has requested the
7 exclusion from the table of 290 items of evidence that the Prosecution included in
8 the third column. This is what we referred to yesterday as items of evidence. The
9 Prosecutor responded to this application in a very general manner, without
10 expressing an opinion for each item of evidence challenge.

11 Now, Mr. Kilenda, we are not going to rule on this application here in a
12 hearing, but we would like Mr. Kilenda to tell us precisely what the substance of
13 his application was. We, of course, will not review all this evidence today in
14 this hearing because we do not have enough time at hand, but generally speaking the
15 Chamber would like to recall that in its decision of 31 August, relative to the
16 postponement of the commencement of trial, it was indispensable that the Defence
17 teams submit their requests in matters of admissibility and relevance of evidence.

18 Counsel Hooper and Counsel Kilenda, you have in your possession a table in
19 its current form which provides you with a snapshot of all the evidence the
20 Prosecution intends to base its case and it would seem to us that the exercise that
21 we are suggesting is possible.

22 Now we should not forget that already last March we requested a reaction on
23 your point on this issue and that you expressed considerable reserves on the
24 matter, saying to you that it was difficult for you to rule or to reach a
25 conclusion on this matter, whether it be generally speaking or not.

1 Of course, we are not asking you to flesh out these challenges before we
2 commence trial. However, we believe that the Chamber -- that you will agree with
3 the Chamber that it would be a good administration of justice to raise these levels
4 and also try and reach agreement on these difficulties before the commencement of
5 trial, but of course this means that you will also be able to raise such issues at
6 a later date.

7 It would seem to us that from now, or henceforth, you should be able - both
8 parties should be able - to express your objections in principle for the exclusion
9 of certain categories of evidence and also you should be able to express your
10 objections in substance on -- with reference to certain types of evidence.

11 Now, yesterday we talked about the notion of witnesses which are deceased.
12 Of course we might be able to embark upon our discussions from that point, but I
13 believe that we have one hour in front of us in order to reach the end of our
14 agenda. I believe it is quite possible.

15 Now, maybe Counsel Kilenda's team could expose the scope of the application
16 filed on 14 August and then we will request a response on the part of the
17 Prosecution, notably to the effect of any other challenges that you might like to
18 raise in terms of admissibility that you believe that you could submit immediately
19 to the Chamber and the victims and the representatives of victims could also submit
20 their observations and we might see what kind of consequences this could have upon
21 the bearing and the unfolding of the rest of the trial process.

22 Thank you. Counsel Kilenda.

23 MR. FOFÉ: (Interpretation) Thank you very much, Mr. President, your Honours.
24 It's true that we have dealt with the issue or rather several issues with regards
25 to the table of the Prosecutor yesterday when we examined point 3 of the agenda.

1 This table was exhaustively discussed and commented on.

2 So at the moment I would like in a few words, as was asked of me, to present
3 to you the substance of our application. Well, perhaps it's not an application.
4 It's rather observations that we have expressed with regards to examining the table
5 of the Prosecutor. 1375 is the number allocated to it.

6 Now with regards to examining this table it has made it possible for us to
7 make several comments but, with regards to the essential aspects at the stage where
8 we are with regards to this status conference, this can be summarised in two parts.
9 The first is that the Defence were surprised by the fact that the Prosecutor made a
10 reference to a document, namely DRC-OTP-0129-267, and it is very important -- and
11 this report referred to supposed confessions that Ngudjolo would have made before
12 certain individuals, apparently, which were provided by a certain source.

13 With regards to these assertions, there is a question of principle here. Is
14 it possible for the Prosecutor to, at the current stage of the proceedings, to put
15 an item of evidence which was rejected in a decision of the Pre-Trial Chamber?

16 That is the reason why we have raised this particular issue. And you can see
17 clearly that this takes us back to the discussion that we had yesterday with
18 regards to the issue of the evidence before the Chamber in the Ngudjolo case. This
19 is an essential point because here, what we see is that the Prosecutor uses an item
20 of evidence, refers to an item of evidence which he has used in the document to
21 notify the charges while subsequently, in the presentation of this document, the
22 Pre-Trial Chamber, in its decision 648 rejected this item of evidence. Is that
23 possible?

24 The second point: In the Prosecutor's table they take up facts, allegations,
25 factual allegations. I'm not talking about evidence here. I'm talking about

1 factual allegations. The Prosecutor takes up these facts which have nothing to do
2 with the facts relating to the Bogoro attack on 24 February 2003.

3 So the question that arises here is also an issue of principle. Your Chamber
4 is seized with precise facts; namely, the facts or the acts allegedly perpetrated
5 in Bogoro on 24 February, 2003. Is it possible for the Prosecutor to produce or to
6 try to establish facts which have nothing to do with this attack on Bogoro of 24
7 February, 2003? The Defence replies "no" to this question. And it can refer to
8 several decisions, many decisions, which support the fact that your Chamber only is
9 seized of acts related to Bogoro on 24 February 2003. Your Honour, Judges, this is
10 just an example.

11 In public hearing which took place on 1 June 2009 with regards to the
12 application on admissibility -- or inadmissibility presented by the sister team,
13 the Defence team of Germain Katanga.

14 With regard -- at the time of this hearing, the discussion took us, or led us
15 to understand further, particularly after the statements that were made on the part
16 of the Democratic Republic of Congo, to understand at a greater level that the only
17 facts of which you were seized are those facts related to Bogoro on 24
18 February 2003.

19 The Defence has understood that the Prosecutor is referring to what we would
20 call the theory of similar facts. According to this theory, what do I mean by
21 this? The theory of similar facts consists, as far as the Prosecutor is concerned,
22 who is trying to establish evidence within a specific and a limited field, is
23 mentioning other facts committed in other places to try to prove the facts in
24 another case -- in another area of which the Chamber is seized.

25 The Defence of Mathieu Ngudjolo cannot accept such a theory because it

1 considers that this is a theory which is not based on a rigorous legal logic. Here
2 we are in the criminal field. We can't try to prove precise facts committed in a
3 particular place by referring to other acts, and here the Prosecutor is mentioning
4 subsequent acts, most of them, most of the ones he mentioned are ones which
5 occurred after the acts in Bogoro of 24 February 2003.

6 The Defence considers that this theory is not only illogical but it's also
7 dangerous because it tends to turn over, it tends to put on a wrong footing the
8 presumption of innocence, it tends to jeopardise this which is nevertheless --
9 figures in the Rome Statute.

10 The Defence has also noted that the Prosecutor refers to certain acts to
11 demonstrate the context, to try and show the context in which the attack on Bogoro
12 is situated on 24 February 2003. It would seem, in order to establish a context of
13 crimes against humanity, because we know where it concerns crimes against humanity,
14 the attack has to be widespread or systemic.

15 So the Prosecutor, through this mechanism or means, by mentioning other
16 attacks which occurred subsequently to Bogoro, the Prosecutor would like to
17 demonstrate a widespread or systemic nature of the attack. The Defence cannot
18 follow the Prosecutor's logic in this regard. Quite simply, because to demonstrate
19 the widespread nature it is not necessary to speak about other attacks committed in
20 other places after Bogoro.

21 The attack on Bogoro, the attack which occurred in itself, if the Prosecutor
22 has evidence in this regard, the Prosecutor, if the Prosecutor has evidence in this
23 regard, it can constitute a widespread attack against the civil population.

24 With regards to the Prosecutor, it is a matter of demonstrating that this
25 attack which occurred on Bogoro is a generalised or systematic attack against the

1 civil population. And in this demonstration, particularly in its response 21
2 August 2009, the Prosecutor mentions the decision 802 in the Lubanga case to be
3 able to support the context, the historic context of the Bogoro attack.

4 The Defence observes that in this decision number 803, the Trial Chamber I
5 states that nothing prevents the Prosecution from mentioning any acts occurring
6 before or during the commission of acts of which the suspect is accused of.

7 Now, in our case, the Prosecutor spends too much time on acts subsequent to
8 Bogoro. The relevant acts prior to that, which the Prosecutor has to prove are,
9 for example, the supposed meeting in Aveba. The Defence cannot be opposed, for
10 example, to the Prosecutor trying to prove the alleged planning in using, for
11 example, the evidence DRC-OTP-0029-00892. The Defence therefore considers that the
12 debate on this evidence took place before the presentation of the Prosecutor of
13 this item of evidence during the proceedings.

14 Having said this, it is unacceptable for the Prosecutor to refer to evidence
15 which is relating to events which occurred after Bogoro and which have nothing to
16 do with this. That, Mr. President, is the substance of our comments.

17 I would like to thank you.

18 PRESIDING JUDGE COTTE: (Interpretation) The Chamber would like to thank you.
19 It is true that through the application that you have made, you open up a path to
20 us, therefore, does lead us to asking you if there aren't perhaps other challenges
21 which would perhaps be mentioned.

22 Now, I will of course give the floor to the Prosecutor, such that the
23 Prosecutor can respond to that. Once again, it is not in the intention of the
24 Chamber to regulate this or decide on this question during this hearing. However,
25 given that a path has been opened up by the Defence of Mathieu Ngudjolo, it is

1 important to seize this opportunity to make it possible to have clarifications with
2 regards to what the issue is.

3 Would you like to respond to that? If you do, then please try to do so
4 within reasonable time constraint. The floor is over to you.

5 MR. DUTERTRE: Thank you.

6 MR. HOOPER: For you to receive a brief submission on behalf of Mr. Katanga
7 relating to this particular issue. In other words, can I interpose before the
8 Prosecution react to the Defence submission? That's the request.

9 Thank you.

10 PRESIDING JUDGE COTTE: (Interpretation) I think that the Prosecution would
11 accept that, so we are listening to you.

12 MR. HOOPER: There has plainly been a challenge to that motion to the
13 admissibility of various items. On the basis of the relevance of those items and,
14 on behalf of Mr. Katanga, we too have an interest in learning more about the basis
15 upon which the Prosecution maintain these individual items taken one by one that do
16 not relate directly to the events of 24 February at Bogoro are said to be relevant.

17 They may be relevant, for example, and Mr. Fofe has just suggested two issues
18 relating to the general background. They may be relevant for other reasons. It's
19 my submission the matter having been raised, it would be appropriate for the
20 Prosecution to respond in detail - probably not today and not orally but in
21 writing - as to the essential basis why those matters that do not relate directly
22 to 24 February are said by the Prosecution to be relevant and therefore admissible
23 as relevant. And the basis on which they're relevant, and those for example that
24 are contextual, or those that go to the proof of another element, there may be a
25 group of, a class of such items, those could be subject to a general argument then

1 by the Prosecution as to why they're relevant to, for example, context. For
2 example, if they relate to attacks after 24 February, the basis upon which those
3 become relevant for proof of the matters relating to the specific charges here.

4 Thank you.

5 PRESIDING JUDGE COTTE: (Interpretation) The Chamber would like to thank you,
6 Counsel Hooper. It is clear that the Chamber has the response to Mr. Kilenda and
7 one which will be in common. But are you expecting a response before the opening
8 of the substantive debate or could we do it once the discussion has been opened?

9 MR. HOOPER: First of all, the subject of admissibility generally is a very
10 difficult and complex one, if I can say that. And I was going to say, make some
11 further submissions. I can do those now, very briefly, and they certainly would
12 suit the context. These are very brief.

13 We favour, as you know, dealing with particular items of admissibility,
14 particular issues of admissibility in relation to items as and when those matters
15 arise because then the specific context of the material could be better appreciated
16 by the Chamber when it comes to make its decision. It will be better placed to see
17 the general layout and geography of the case and how that particular item fits in
18 to the story, as it were.

19 But there are some areas that can be addressed because they fall within a
20 general class and for example we raised yesterday the issue of dead witnesses and
21 the status of their evidence; witnesses 250 and 167. That's an issue which maybe
22 we feel should be dealt with before the -- we move on to the evidence itself in
23 trial.

24 And we've indicated that we are of course ready to make a submission in that
25 respect and we would have thought within a period of three weeks, if that would be

1 acceptable to the Chamber.

2 But there are other issues as well, and they're difficult issues. I notice
3 in the Prosecution motion they refer to what they call bar table motions, which
4 essentially is the introduction of evidence directly, as it were, through the hands
5 of counsel, without a witness providing them, without a witness explaining their
6 context or what they are. And that relates largely to documents.

7 For example, a MONUC report. We are still in the early days of the
8 International Criminal Court and there's so much which is uncertain, and this is
9 one area which is clearly very uncertain. What kind of material can go in? What
10 is the difference between a statement that states the accused was using child
11 soldiers, for example, found in a MONUC or an NGO report?

12 What is the difference between a statement found in that context and a
13 statement that comes from the lips of a witness in court here who says exactly the
14 same thing, the accused used child soldiers? What is the difference between the
15 two? Is it appropriate to limit material that comes to the Court in documents? Is
16 it, or would it be, appropriate to limit that, for example, to the acts and conduct
17 of the accused, a phrase that will be, of course, very familiar to those from the
18 ad hoc tribunals. And those are matters that perhaps certainly can be raised, if
19 not necessarily dealt with, by way of a submission between now and the start of the
20 hearing of the evidence in November. So I hope I'm not going to fall into
21 difficulties here with my team, as I have done in the past, when I suggest that
22 perhaps we can have a motion before the Court that deals with those matters by the
23 end of this month. We had hoped to do it in three weeks. I've added another week
24 to what I was going to suggest so that I do stay friends with those in the team.
25 But we hope, in other words, to get that motion before the Court within the three

1 weeks, and if we overrun that by a week, I hope you'll see the difficulties.

2 It is a big area and I think we all agree, and we were discussing this with
3 Mr. Kilenda and Mr. Fofé just the other day, it is a huge area and a very difficult
4 one. But it's quite important for us, the Defence, to know exactly where we're
5 going on this, and it may be that, though we might not get all the answers, at
6 least we can get a better idea of the general direction and viewpoint of you, the
7 Judges, and a better appreciation, accordingly, of the weight and nature of the
8 evidence that we're being confronted with in this case. So it's in that context
9 that I suggest it may be helpful at this stage in respect of the particular matter
10 that's just been raised in the submissions by Maître Fofé that we, in fact, have a
11 response from the Prosecution initially in respect of those particular matters,
12 relevance in respect of facts that don't relate to Bogoro. And perhaps we can
13 then, by the time we get that, we can respond in our motion as well. We can deal
14 with that at the same time, because it seems to me these are all linked in various
15 ways, whether we're talking about similar fact evidence, if that exists. Some
16 dispute about that at this Court. Whether there's a relevance to general
17 contextual matters, whether that is applicable after the date of the allegations
18 themselves, the nature, indeed, of those matters, which I know the Prosecution were
19 hopeful of getting some agreement about but which are, for evidential reasons,
20 difficult, relating to, for example, widespread or systemic conflict. These are
21 all matters that seem to us to be very linked.

22 Thank you, Mr. President.

23 PRESIDING JUDGE COTTE: (Interpretation) Very well. This part of the hearing
24 is very difficult to control because the Office of the Prosecutor wanted to respond
25 but has not yet been able to do so. We do not forget that they wish to intervene.

1 Of course, Counsel Hooper intervened, quite rightly so, in order to respond to the
2 request of the Chamber.

3 We would request that you grant us five minutes to confer with the Bench
4 here. Thank you.

5 (Trial Chamber confers)

6 PRESIDING JUDGE COTTE: (Interpretation) This is quite a heavy hearing.

7 Mr. Dutertre, the representative of the OTP, could you respond to Maître
8 Fofé, namely, the Defence for Mr. Ngudjolo. And we certainly aren't ruling out,
9 and since -- these are applications, not just observations. Apparently, you have
10 filed an application in a very official and a forthful way, so we will have to
11 respond to the application but we may be asking the Prosecutor to add some written
12 comments after his observations that he's about to make, his immediate response to
13 your remarks. So I think we're in agreement, we are not ruling out the possibility
14 of a written response, but for the time being we await your oral submissions, sir.

15 MR. DUTERTRE: (Interpretation) Thank you. I am in the hands of the Court.
16 And various observations were made by the Defence, by Mr. Hooper - the Defence of
17 Mr. Katanga and the Defence of Mr. Ngudjolo - and I would like to initially focus
18 on this application briefly I hope, but a number of things do need to be said and
19 that will take a minimum amount of time, even though for each point I will limit
20 myself to one example.

21 PRESIDING JUDGE COTTE: (Interpretation) You are entitled to a reasonable
22 amount of time to make your remarks, but please, as much as possible, allow the
23 last ten minutes of this hearing at least - more time would be even better, but
24 please ten minutes - so that we can hear a response from Mr. Hooper and perhaps
25 from the other Defence team. This will be all very quick, very -- I think we need

1 to continue until this is all cleared up.

2 Sir, you now have the floor.

3 MR. DUTERTRE: (Interpretation) Thank you, your Honours. Five points:

4 The application from the Defence is not sufficiently specific.

5 Secondly, it would appear to us that the Defence is trying to exclude
6 documents that have already been deemed to be admissible by the Pre-Trial Chamber.

7 Third, and contrary to what the Defence alleges, a good number of documents
8 that they listed in their brief, in 11375, are directly related to the attack into
9 Bogoro, but without necessarily mentioning that place or the date. The other
10 documents are relevant and often crucial to demonstrate the Prosecution's arguments
11 and I would take my hat off to Mr. Fofé for his decision to withdraw the letter
12 from the delegation.

13 Fifth point: We have the impression that we are -- find ourselves dealing
14 with these remarks from the Defence having to do with admission and we are now
15 turning to the weight granted to the documents and that's an entirely different
16 kettle of fish.

17 Allow me to return to my first point. His application is not specific
18 enough. The Defence says that they want all the documents excluded that may not
19 deal with the attack on Bogoro which they had requested of the Pre-Trial Chamber
20 and that was dismissed. It was -- that request was refused. And then they say for
21 information purposes they review Annex N. All in all, we don't know what this
22 complete list is all about that is being contested - challenged.

23 With regard to this list, what do we see? Well, it's more than four pages
24 with various laconic remarks or observations. Documents are mentioned numerous
25 times, 14 times, and the number of documents challenged when you do the calculation

1 it's about 115 documents that are being challenged. We also see that sometimes
2 *aucun* ERN is mentioned, but the Defence challenges all the documents for example
3 that are contained from 195 to 197 in the annex. That leads to a more general
4 observation; namely, the Prosecution is of the opinion that none of these documents
5 is being discussed in concrete terms and they are not presented -- the content is
6 not present and they are not truly being challenged by the Defence.

7 All in all, there are a number of general considerations regarding the fact
8 that we cannot use documents that are not related to the Prosecution -- to the
9 attack, rather, and apparently they are alleging that various documents are not
10 related to the attack.

11 My second point is a great deal of these documents were deemed to be
12 admissible by the Pre-Trial Chamber I. I don't want to spend a lot of time
13 speaking to our filings, but indeed the Defence of Mr. Ngudjolo had already argued
14 before the Pre-Trial Chamber that a number of pieces of evidence relating to the
15 charges and that they said we were proceeding by way of analogy in the 2008
16 decision. The Pre-Trial Chamber dismissed those arguments for the following
17 grounds:

18 The adduction of evidence that could help define the general context in which
19 the crimes were allegedly committed improve the understanding of the evidence and
20 the charge and are very useful and probative, providing context to these crimes
21 that were allegedly committed pursuant to Article 7 and 8 of the Statute.

22 And I would also refer you to paragraph 34 of your ruling of 13 March 2009 in
23 which you stated, and I will quote from the English:

24 (In English) "The Chamber is not bound by any evidentiary rulings made by
25 the Pre-Trial Chamber. The Chamber will only depart from a previous ruling on a

1 challenge to the admissibility of a particular item of evidence where there are
2 compelling reasons to do so."

3 (Interpretation) With all due respect, we would argue that there is not any
4 additional or different elements provided by the Defence of Mr. Ngudjolo regarding
5 the documents in question. Thus, this application should be dismissed.

6 But there is even more. This leads me to my third point, your Honour.
7 Contrary to what the Defence of Mr. Ngudjolo is alleging, some elements are
8 directly related to the attack on Bogoro. I have several examples that I can
9 provide, but I will limit myself to a single example; one of numerous examples.

10 In the application 1375, page 20, the Defence asks for exclusion of the
11 document found on 266 of Annex N found within the table of charge and this has to
12 do with OTP-1015-0300. Apparently they are saying that it bears no date, but
13 actually this is an article from *Le Soir*, a Belgian newspaper that was posted on
14 the Internet, and it was dated on 4 March 2003. This article deals with the attack
15 on Bogoro on 24 and 25 of February 2003. That's very much focussing on that attack
16 and so that is an example of a document that does deal with Bogoro.

17 Another example, there was a request to exclude document -- apparently it's a
18 document mentioned on page 276 of the annex as well and that's the list of victims
19 of Bogoro as provided by a witness. That's also on page 20 of the application
20 1375.

21 My fourth point - and I will try to make it quick so as to save some time -
22 some documents do not mention Bogoro and do not bear the date of some time in
23 February 2003 and so the Defence is asking for exclusion of such documents, but
24 these documents are very much relevant to the arguments of the Prosecution.

25 Once again, I reiterate my dissatisfaction that the Defence withdraw --

1 withdrew its opposition to document 0092, but other documents of such nature,
2 application 1375, page 19, the Defence asked for exclusion for the document found
3 on page 191 within the table of charges, and DRC-OTP-0106-0479, a document from the
4 FNI dated 13 March entitled "A proposal from the FNA for the implementation of the
5 Ituri pacification commission" in which it is indicated that the FRNE -- that would
6 be extremely relevant for the arguments of the Prosecution.

7 More generally speaking, the issue of circumstantial evidence. We made a
8 number of observations in our written submission and I would say that it's
9 generally established that the Prosecution can use circumstantial evidence having
10 to do with events before or after the charges to prove its facts and it is not
11 necessarily a matter of reasoning by analogy, rather or trying to establish guilt
12 by analogy.

13 I would further add - given that we have very little time I will try to keep
14 it very quick - it is also established that elements can emerge and be relevant
15 regarding the circumstances surrounding the facts or the events. That is paragraph
16 29 of our brief 1416.

17 Very quickly my fifth point, sometimes people misunderstand or people don't
18 quite understand the distinction between admissibility and reliability. The
19 Prosecution on the basis of best evidence available sometimes, yes, evidence can be
20 admitted and then you have to determine its relative weight. Your Honours, after
21 these brief observations, each document needs to be discussed. The Defence should
22 make it known exactly why they want each document to be excluded and we will
23 respond.

24 Turning now to 0129-0277 relating to the admissions of Mr. Ngudjolo, my first
25 point is that it is up to the Chamber to determine whether an item of evidence is

1 admissible or not on the basis of Article 69 and with the criteria of reliability
2 and relevance. With all due respect, we would argue that the document in question
3 is entirely relevant and reliable.

4 Secondly, in our opinion the Pre-Trial Chamber did not exclude the document
5 and that if we do some research and look at the decision regarding the confirmation
6 of charges -- and I have the confidential version here on the screen, but if we
7 look at this document 01-04/01-07-716 we see that it is cited 49 -- 89 times by the
8 Pre-Trial Chamber.

9 Indeed, in fact perhaps there was a misunderstanding, but it is possible that
10 the Pre-Trial Chamber decided that it shouldn't be in an annex, but it is not
11 excluded from the list of items of evidence and should not be found in the document
12 of notification of charges because it is not an allegation, but rather it's
13 evidence. You have the relevant provisions in our brief, 1416, paragraph 29 in the
14 French version.

15 More generally speaking - and now I return to a few issues that were raised
16 by Mr. Hooper that are more technical - the deceased witnesses may lead to a number
17 of written submissions. I believe that we have a limited amount of time and we
18 really can't touch upon this issue, but we perhaps could discuss it later.

19 I would now like to conclude my remarks. I would have liked to have added a
20 few points, but I don't think we have an opportunity to do so now.

21 PRESIDING JUDGE COTTE: (Interpretation) The Chamber thanks you, sir, for
22 your presentation, your remarks rather, and the deadline that you managed to stick
23 to and I realise that the price you paid was a great deal of frustration. We have
24 listened to the various sides and we, as legal professionals, can see the
25 usefulness of these contrary visions.

1 Now, sir, you raised a number of important issues. You mentioned in more
2 generally -- in a general document of 14 August was in response to a request from
3 the Chamber. In light of justified criticisms, you made some suggestions to
4 improve the table. It is absolutely necessary to disassociate this challenge from
5 the general document in question and to have a distinct and proper application, an
6 application contesting the admissibility and relevance of certain items of
7 evidence.

8 And thus, paragraphs 24 to 44, unless I am mistaken, of your production of 14
9 August last, should be detached or -- I am speaking as someone who is trying to
10 ensure the proper smooth administration of justice.

11 Now, listening to representatives from the OTP, we were following the same
12 line of argument as him. And the importance of this issue is such that, indeed,
13 you could be -- you could go document-by-document, perhaps 100 in number, to
14 indicate to the Chamber in your application without this necessarily leading to a
15 very long development. And a number of these developments could be common to these
16 challenges. You could explain why these items should be deemed not relevant.

17 It goes without saying that if you want all of this to be dealt with before
18 the trial, we need to receive this document quickly. And one week would be a
19 proper deadline to favour a proper response. So I think the issue really deserves
20 this.

21 So we are asking you to disassociate these two issues and to provide a
22 separate application analysing document-by-document -- or perhaps you could put
23 some documents in various categories, but basically explanations why you believe
24 these documents are not relevant. And I think you should pay close attention to
25 the remarks made by your colleagues.

1 With regard to the more general problem, because we have very little time
2 remaining, the more general issue of challenges, of the admissibility or relevance
3 of evidence.

4 I would now turn to Mr. Hooper, Mr. Kilenda, to all of you, really. In the
5 document last March we were perhaps somewhat directive. In any event, I think you
6 saw our request as being somewhat too directive and you said that you could not --
7 you spoke of all these challenges and you said that they could not be dealt with
8 before the beginning. You said that a hearing was necessary. You needed the
9 proper context of a hearing, the statements of witnesses, the production of
10 documents to better assess whether or not a challenge was necessary. And we
11 understood your point.

12 It seemed to us that this is not a matter of being directive, but rather this
13 is really more of a suggestion that was well understood by the two Defence teams.
14 And it should be possible before the commencement of the trial to deal with a
15 number of challenges having to do with the admissibility and relevance of various
16 items of evidence. This is what I said a few moments ago under these two
17 headings, providing principles -- or challenges based on principle and then
18 substantive objections having to do with specific difficulties relating to items of
19 evidence.

20 We also spoke of witnesses who are deceased. And certainly I think both
21 Defence teams will have other challenges that may deal with -- not in concrete
22 terms, but more generally and more specifically with this issue.

23 And Mr. Hooper, Mr. Kilenda, that is why we are asking you to submit by way
24 of a written application, with grounds, very specific grounds within a deadline of
25 three weeks, no longer than three weeks, so that insofar as possible these matters

1 can be dealt with before the commencement of the trial. And that way, the trial
2 will not be contaminated by such difficulties.

3 Mr. Hooper, upon reception of this written submission -- well, you could also
4 make a number of observations more general in nature, more general than your
5 earlier observations, and we would be most grateful if you could do that.

6 I do hope that my message has been understood. We do have to respect our
7 schedule, which is a little bit beyond our control. And we have a number of more
8 practical concerns, such as the cassettes that are used to tape the proceedings.
9 So we only have two minutes. I would only point out that the agenda -- I think
10 this has been very productive and I think we are coming to the end of this agenda.

11 There was point 8 that will be dealt with in 30 seconds. And I believe you
12 said, sir, in your brief that you had asked for the Defence teams to inform you of
13 their positions regarding the invocation or presentation of possible alibi or
14 causes for exoneration of liability. And I believe that the two teams did receive
15 that request. And the Chamber would ask you, quite simply, to respond as quickly
16 as possible so that, once again, the trial can be prepared for under the best
17 possible conditions.

18 Now, Mr. Prosecutor, you wanted to speak something about rule 78 and --

19 MR. GARCIA: (Interpretation) your Honour, your Honours, I believe that is
20 not necessary at this particular point to discuss the matter considering the lack
21 of time. And we will deal with these matters -- or discuss these matters with our
22 counterparts.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you for that. And we would
24 have liked to have, as is the case of any meeting, deal with other matters. I
25 don't believe we will be able to do that. Please accept our apologies for that.

1 Before we go our separate ways, please note that we will be meeting again on
2 20 October at 9:30. The 20 October, 9:30. Have I made a mistake, Judge Diarra?
3 No. The 20 October. And if that hearing could not be held for whatever reason, we
4 will inform you as quickly as possible so that you will be able to add just your
5 agendas accordingly.

6 We would also like to thank staff members who helped us conduct this long
7 status conference. There will be other status conferences following. The 24
8 November will be short, but I think they will be useful and we will deal with
9 various matters. We have asked you to prepare a number of rather demanding
10 written substances.

11 We thank you for your cooperation, and Court is now adjourned.

12 (The hearing ends at 1:00 p.m.)