

1 International Criminal Court

2 Trial Chamber II - Courtroom 1

3 Situation: Democratic Republic of the Congo

4 In the case of The Prosecutor v. Germain Katanga

5 and Mathieu Ngudjolo Chui - ICC-01/04-01/07

6 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra

7 and Judge Christine Van den Wyngaert

8 Closing Statements

9 Tuesday, 22 May 2012

10 (The hearing starts in open session at 9.03 a.m.)

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

12 PRESIDING JUDGE COTTE: (Interpretation) Please be seated.

13 Good morning to everybody. Good morning to the accused. At today's hearing,

14 which will last three-and-a-half hours, we shall hear the final submissions of

15 Mr Mathieu Ngudjolo's Defence team. Going by the document in our possession,

16 Maître Kilenda will start off with a brief introduction, then Professor Fofé will take

17 the floor and then you will take the floor again. So, Mr Kilenda, you have the floor.

18 MR KILENDA: (Interpretation) Thank you, Mr President. Thank you, your

19 Honours. Thank you for giving us the floor.

20 From all the statements and arguments put forth by all parties and participants, one

21 thing is obvious: The Bogoro attack was not an isolated event. It did not happen ex

22 nihilo, according to all parties, but that is the point at which our consensus stops

23 because thereafter, our positions differ as to the origins and the causes of this attack.

24 Without going to the deluge, Mr Mathieu Ngudjolo's team for obvious reasons would

25 like to put the facts - the real facts - in their historical context.

1 In the mid-90s, western powers, for reasons that we do not need to mention here,  
2 decided to get rid of Mobutu and to place the political and military leadership of the  
3 Great Lakes region in the hands of Uganda. Consequently, the military arsenal that  
4 had been used in Somalia was handed over to that country. It is that arsenal that  
5 made it possible for the powers in Rwanda to be toppled and for the ensuing events  
6 that we all know to unfold, but that is another kettle of fish.

7 This reminder is extremely useful, because Uganda and Rwanda became the military  
8 powers of the region and went into a coalition of seven countries involving some local  
9 groups to overthrow the powers that were in the Republic of Congo, that is then  
10 known as Zaire.

11 In a few months, they were able to cover 2,345,000 kilometres and to place in power  
12 the person of their choice. The new master of the DRC, when he came to power, had  
13 to deal with his new western masters without whom he would not have been able to  
14 take power. However, these western powers were so desirous of getting the wealth  
15 of this region and they became so greedy, so to speak, that their own -- the local  
16 inhabitants ended up having to ask them to leave.

17 Having become used to the wealth of the DRC, and because they were asked to leave,  
18 the two countries split later on and each of them went on to create rebel groups that  
19 were involved, or that became involved, in perpetrating this illegal exploitation.

20 Uganda would occupy the eastern part of the country and will be its master, and  
21 without the moral authority that it needed to have it was unable to deal with the  
22 resurgence of interethnic conflicts that the national powers had more or less tried to  
23 manage.

24 Uganda offered protection to the highest bidder. After supporting the RCD-K/ML it  
25 then went on to the UPC and in August 2002, that is on 9 August 2002, all this

1 culminated in the defection of the APC. With its UPDF allies it supported the UPDF  
2 and then helped in the battles of Nyankunde, Mahagi, Mongbwalu and all these bear  
3 testimony to this new alliance.

4 Quite brutally in 2003, things fell apart as the UPC gained grounds and began to seek  
5 to achieve independence and then went on to ally with another party, or with other  
6 parties, namely the RCD-Goma and Rwanda. Uganda was then disappointed and  
7 then linked up with the Kinshasa government and once again with the APC creating  
8 the FIPI with the clear objective of annihilating the UPC, and for that reason it had to  
9 strike at the very heart of the UPC in Bunia.

10 The problem, however, is that from Beni, where the plans were being made, it was  
11 impossible and actually it would have amounted to a strategic mistake or error to try  
12 to reach Bunia without going through Bogoro and Mandro. The destruction of the  
13 UPC is a win/win operation, as someone would put it, for all the parties of this new  
14 coalition; namely, the Government of Kinshasa, Uganda, the APC and the local  
15 groups, FIPI and FRPI.

16 For the government of Kinshasa, first of all it would be a legitimate act to reconquer  
17 its territorial integrity. For Uganda, the operation would be both vindictive and  
18 preventive to the extent that it would enable Uganda, on the one hand, to be spared  
19 any further aggression from Rwanda which was accused of hosting Ugandan rebels  
20 and on the other hand from -- or provide Uganda with a danger-free withdrawal from  
21 the Kasenyi border post.

22 For the APC, it would have been an opportunity to return to the rich Ituri district, and  
23 finally for the FIPI it was an opportunity to overthrow the UPC from its position of  
24 leadership.

25 That is the only reason for which EMOI, État Major Opérationnel Intégré, a military

1 structure that was set up by the Presidency of the Democratic Republic of Congo, it is  
2 for that reason alone that the EMOI was in Beni, and the government of Kinshasa,  
3 through its Minister of Human Rights, said that the Bogoro operation was a  
4 military-to-military fight, or war. That is why Uganda created and funded FIPI and  
5 then linked them up with the Government of Congo. It is also for this reason that  
6 the APC made its territory available to the Congolese government and went on to  
7 arm some Ngiti groups.

8 The Prosecution has an entirely different view of the facts, which is contrary to what  
9 is obvious. On 24 November 2009, in his opening statement of this trial, the  
10 Prosecution concluded with the following words, and I quote, "The Prosecution will  
11 demonstrate that between the end of 2002 and the joint attack by the FNI and the  
12 FRPI against Bogoro, at that time Ngudjolo was the leader of the FNI of all Lendu  
13 combatants who were in the military camps in the Zombe region."

14 The Prosecution went on to state that it will also demonstrate that in the fall of 2002  
15 Katanga became the supreme commander of all FRPI forces. Katanga and Ngudjolo  
16 were the supreme commanders of their respective forces in the planning phase.  
17 This solemn commitment, Mr President, your Honours, was taken before the entire  
18 world, before the entire community, on behalf of whom these proceedings were  
19 undertaken.

20 Then the legal representative of child soldier victims took the floor and went on to say  
21 that the Office of the Prosecution had demonstrated or will demonstrate all the  
22 atrocities that the victims had suffered before stating, and I quote, that "The victims  
23 are convinced that these acts were committed by the FNI and the FRPI and maybe  
24 some other parties. It expects that the Chamber would then establish who was  
25 responsible and make the guilty parties responsible for their actions," end of quote.

1 The joint legal representatives of the main groups of victims in Bogoro got mandate to  
2 represent them and two of their clients, V-2 and V-4, testified before this Court that  
3 they were victims of crimes committed in Bogoro in Ituri in the Democratic Republic  
4 of Congo in February during the attacks that were jointly prosecuted by the FRPI and  
5 the FNI against the local people. They pointed at Katanga and Ngudjolo as being  
6 the only people responsible for it.

7 Since then, Mr President, your Honours, the Defence has waited in vain for the  
8 Prosecution to establish the evidence beyond a reasonable doubt as follows: That  
9 the FNI existed in the Bedu-Ezekere groupement at that particular time; that  
10 Mathieu Ngudjolo was the supreme commander of the FNI; (3) that there was an  
11 alliance between the FNI and the FRPI at the time and that there was a joint criminal  
12 undertaking to wipe out Bogoro from the map on 24 February 2003. No such fact  
13 was ever established to this day.

14 That is why the Defence today is in the process of clearly pointing out that the  
15 Prosecution has failed to provide the least element of evidence that is credible and  
16 reliable to point to factual material that points to Mathieu Ngudjolo's responsibility.  
17 In our submissions, we shall be making two presentations: The first by Professor  
18 Fofé, which will deal with the crimes for which Mathieu Ngudjolo has been charged  
19 in terms of its evaluation. The second part of our presentation shall focus on the  
20 personal criminal responsibility of Mathieu Ngudjolo and shall be dealt with by  
21 Maître Kilenda.

22 Mr President, with your leave, let me give the floor to Professor Fofé.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Maître Kilenda.

24 Professor Fofé, please take your time, set up properly and then you will have the  
25 floor.

1 MR FOFÉ: (Interpretation) Good morning, Mr President, your Honours. I thank  
2 you for giving me the floor.

3 I am going to proceed with an evaluation, or assessment, of the Prosecution's  
4 evidence on the crimes for which Mathieu Ngudjolo has been charged. I've listened  
5 to the other parties and I would like to start provisionally, or should I say  
6 conclusively, to set aside the issue of the context of the armed conflict in which the  
7 Bogoro attack of 24 February 2003 took place and the purpose of that attack; namely,  
8 its target.

9 Mr President, your Honours, these matters have already been dealt with at length in  
10 our written submissions, intangible written submissions, to the extent that neither the  
11 Prosecutor nor the legal representative of victims have been able to demonstrate the  
12 contrary. The Bogoro attack of 23 February 2003 was not part of an interethnic  
13 armed conflict between the Hema and the Lendu, not at all.

14 Maître Kilenda has just established that this attack was part of a complex, dense  
15 conflict that was not an interethnic conflict, but one that pitted high level foreign  
16 international parties against each other within a context of military, economic and  
17 strategic as well as territorial considerations. Several Prosecution and Defence  
18 witnesses have already established this historical context, and I am referring here to  
19 P-30, Floribert Ndjabu, Germain Katanga and even P-12 all testified to that effect.  
20 I therefore call on the Chamber to refer to our detailed submissions on this issue in  
21 our written submissions at paragraphs 39 to paragraphs 138 which deal with the  
22 context - the prior context - which is required for the qualification or characterisation  
23 of war crimes in view of their armed nature, armed conflict nature.

24 This was not an interethnic conflict. It took place in Bogoro on 24 February 2003.

25 What was the target? The target on that day was the UPC military camp. It was

1 not the civilian population of Bogoro. This was not a widespread or systematic  
2 attack targeting the civilian population of Bogoro, not at all. It was a military action  
3 which targeted the UPC military camp.

4 Prosecution witnesses, particularly P-161, P-233, P-323, an ex-soldier of the UPC who  
5 was part of the war, who was part of the UPC and who participated in the fighting,  
6 these witnesses all came to that very position.

7 Some Defence witnesses as well, including Germain Katanga and Floribert Ndjabu  
8 testified to this very effect, stating in essence, Mr President, your Honours, that there  
9 were no longer any civilians settled or installed in Bogoro at the time of the fighting.

10 They testified that some of the civilians who were present had sought refuge at the  
11 UPC military camp upon the advice of UPC soldiers. They testified that some  
12 civilians, some of the civilians who had remained in Bogoro, were armed and that  
13 they wanted to participate in the hostilities. As I have already stated, the target on  
14 that day was not the civilian population. It was indeed the UPC military camp.

15 Mr President, your Honours, this matter has been dealt with at length in our written  
16 submissions at paragraphs 268 to 292, and in those written submissions we clearly  
17 demonstrate that this element of intentional homicide as an element of a war crime is  
18 absent; namely to the extent that the persons or the person who may have been  
19 victims should fall under the protection of one or the other of the 1949 Geneva  
20 Conventions. There is no such evidence in this particular case.

21 At paragraphs 301 to 312 of our written submissions, we do indicate that the  
22 contextual element, or the element of context, required to be demonstrated for all  
23 crimes against humanity does not exist, and I'm referring here to the requirement that  
24 this element of context must demonstrate that there was a widespread and systematic  
25 attack against the civilian population of Bogoro. This element does not exist in this

1 case and has not been established in this case.

2 Mr President, your Honours, the first consequence that flows from these  
3 considerations is the following: That the crimes of murder, sexual enslavement and  
4 rape as described in the decision on the confirmation of charges are not characterised  
5 as crimes against humanity. The second consequence is that one of the constituent  
6 elements of the crime of intentional homicide relating to war crimes does not exist.  
7 And thirdly, the crime of attacks against a civilian population, or that element, really  
8 does not exist in this case. So we shall not belabour these points which, as I have  
9 stated, have already been dealt with at length in our written submissions.

10 In fact, we intend to focus our attention on other aspects of this case which were dealt  
11 with in oral submissions before this Chamber. In so doing, we shall be complying  
12 with paragraph 12 of ordinance 3274, or decision 3274, of the Chamber which  
13 requests that the parties deal with the most significant aspects of the evidence before  
14 the Court.

15 Now, regarding the evidence before this Court as adduced by the Prosecutor, we  
16 have listened to all the parties and it is our firm opinion that we shall assess all the  
17 allegations put forth by the Prosecution which we referred to as the judicial slippages  
18 not only of the Prosecution, but also of the joint legal representatives of the main  
19 group of victims.

20 In fact, Mr President, your Honour, all the crimes contained in the decision on the  
21 confirmation of charges require that it be established that there was a perpetrator of  
22 such a crime. The perpetrator needs to be determined.

23 The question that has not been dealt with, and which I would like to patiently and  
24 slowly tackle, because it is a very technical issue, is the following: This is the  
25 question that we need to tackle. Who is the perpetrator of the acts that were

1 committed in Bogoro on 23 February 2004? The Defence argues that it is not  
2 Mathieu Ngudjolo. Rather, of 24 February 2003. We submit that it was not  
3 Mathieu Ngudjolo. Mathieu Ngudjolo was not involved in this attack, neither  
4 directly or indirectly. There is no link between him and the crimes that allegedly  
5 were committed in Bogoro, and we are of the opinion that the Prosecutor must seek  
6 out and find the perpetrators and he should look amongst the members of the EMOI,  
7 the APC, the Congolese authorities, the Ugandan authorities. They were the ones  
8 who were running the show, so to speak, in Ituri during the time of the events.  
9 Both the Prosecution witnesses and the Defence witnesses gave names; names that the  
10 Prosecution should have heard with a view to showing their responsibility, names  
11 that were given in particular by both Prosecution and Defence witnesses. The  
12 President of Uganda, the President of the Congo, Joseph Kabila, Kale Kayihura, the  
13 Ugandan general, the head of Mbusa Nyamwisi, the colonels of EMOI, Colonel  
14 Aguru, Kilebele, Duku, UPC captains, Blaise Koka, Mutombo, Yuda, Dark.  
15 Your Honours, why did the Prosecution not listen to those people? Why? Why did  
16 they choose to focus on this man, Mathieu Ngudjolo, the scapegoat? They were so  
17 keen to go after him that this led to a number of very unfortunate judicial excesses,  
18 and I will give a few examples thereof.  
19 Now, before I turn to the Prosecution and their role, I would like to focus on what we  
20 have observed, the sort of excesses that we have observed on the part of our learned  
21 friends opposite, the common legal representatives of victims, and I extend warm  
22 greetings to them of course. I wish to reassure them that the fact that we must reveal  
23 these judicial excesses is in no way a calling into question of the participation of the  
24 victims in this trial.  
25 Now, if I were to tell you, your Honours, that I myself, I am a great defender of the

1 rights of victims. I strongly believe in defending the rights of the victims. You only  
2 have to read human justice to realise that, but the rights of victims must be exercised  
3 within certain parameters, parameters set by rules; rules that were set to ensure  
4 fairness and a certain balance within the trial. In this particular case, our learned  
5 friend, the legal representative, went well beyond those parameters.  
6 The Defence has adduced evidence showing that on 24 February 2003 Mr Ngudjolo  
7 was working at the Kambutso health centre. He was working there as a nurse. He  
8 did not go to Bogoro and he had no reason and no ability, no capacity, to go there.  
9 At the time, Mr Ngudjolo did not have any soldiers or combatants under his  
10 command. In no way was he able to send anyone anywhere to go fight, be it in  
11 Bogoro on 24 February 2003.  
12 Mr Ngudjolo is not the perpetrator of the criminal acts that may have been committed  
13 in Bogoro on 24 February 2003 in any way. In his final brief, the Prosecutor  
14 attempted - and this is his right to do so - attempted to attack the credibility of the  
15 Defence, but you can imagine just how surprised we were to see that the legal  
16 representatives of victims also chose to take the same approach. Naturally, this was  
17 in vain, fortunately.  
18 Both parties have criticised the Defence for only calling only co-workers of  
19 Mr Ngudjolo as witnesses, people who knew him. These criticisms from our learned  
20 friends opposite can be summed up by the words of the legal representative and I  
21 quote, "In light of the links between this witness and the accused person, and amongst  
22 the links amongst these witnesses, their testimony must be dismissed," end of quote.  
23 This conclusion, hastily arrived at, shows the lack of objectivity and the shallow  
24 analysis conducted.  
25 In actual fact, your Honours, the fundamental issues at stake here, the questions to be

1 asked, are as follows: Now, Mr Ngudjolo, a nurse working at the Kambutso health  
2 centre during this period of time in 2003, what other people can he call as witnesses to  
3 establish his innocence? During this time, he had only lived in Kambutso and he  
4 only worked at the Kambutso health centre. Where else could he go to find  
5 witnesses to come before this Chamber and allow the Chamber to establish the truth?  
6 At paragraph 468, the Prosecutor speaks of apparent contradictions between  
7 witnesses, D03-55, 953 and 965, and we wish to respond at paragraphs 259 to 261 of  
8 our written conclusions that there is no contradiction here amongst these witnesses.  
9 In turn, the legal representatives of victims - of the main group of victims - went so far  
10 as to attack the credibility of Witnesses 203 and 463, saying that they did not  
11 remember other details such as the date on which the health centre was opened and  
12 the number of children who were born there, even though they had worked there  
13 since 2001," end of quote.

14 Your Honours, the legal representative is being awfully harsh to speak of a lack of  
15 objectivity and neutrality. They are showing a lack of neutrality and objectivity.  
16 At paragraph 5 of their conclusions they show sympathy towards V-4, and at the  
17 same time they are extremely harsh when it comes to our particular witness D03-9  
18 et cetera whose vulnerability was apparent when he testified. 963 was impressed by  
19 the courtroom itself. Rather than questioning the testimony of this witness, I think  
20 we have to really appreciate his courage. This vulnerable person, whose health was  
21 extremely poor, agreed to make a long trip all the way to The Hague to come and tell  
22 the truth before the Chamber.

23 The Defence really wonders about the final conclusions of the legal representative of  
24 the victims, the main group of victims; in particular, paragraphs 17 to 46 of the final  
25 conclusions. Is it the role of the legal representative to attack the credibility of

1 Defence witnesses? By doing this, did he not take on the role of the Prosecutor, or  
2 rather did he not become sort of a second Prosecutor violating the principle that says  
3 that victims are not parties to the trial and certainly do not have the role of supporting  
4 the Prosecution's case?

5 The Defence is of the opinion that this principle, which has served to guide the  
6 examination of witnesses during the trial, and which is found in paragraph 82 of  
7 instructions 1665, must be respected during all stages up to and including the final  
8 conclusions and the Defence would remind the Bench that during the trial paragraph  
9 90(c) of your instruction 1665 prohibit the legal representatives from asking questions  
10 about the credibility of Defence witnesses. The spirit of this provision must also be  
11 followed when preparing final conclusions.

12 Now, let us move on, your Honours, to a number of examples of the excesses that the  
13 Prosecution have engaged in. We have chosen three: First of all, the lack of a  
14 critical or rigorous approach; secondly, a poor choice of witnesses; and, third,  
15 harassment of Mathieu Ngudjolo in an attempt to amend the decision confirming the  
16 charges in a unilateral manner.

17 First of all, the lack of a critical or analytical approach. Your Honours, the  
18 Prosecutor absolutely wanted to pin guilt upon Mathieu Ngudjolo and consequently  
19 the Prosecutor showed an utter lack of critical thought or rigour when it came to his  
20 witnesses and this lack of rigour is quite flagrant in relation to what the Prosecution  
21 has termed Mr Ngudjolo's admissions; admissions that he is alleged to have made to  
22 P-317 and P-12.

23 As you know, your Honours, here we are dealing with criminal matters and  
24 investigations and analysis of the remarks made by one's own witnesses must be  
25 conducted in a rigorous manner, in an in-depth way. When it comes to criminal

1 matters, the Prosecutor has an obligation to conduct oversight; that is to say to carry  
2 out a critical analysis of admissions, even if he receives them directly from the  
3 accused persons, even if such admissions come directly from the accused. This  
4 being the case, he must be even more rigorous in the case of a so-called admission  
5 made to third parties as he alleges in this particular case.

6 So there is an obligation, an obligation to provide proper oversight, and this stems  
7 from Regulation 62 of the regulations of the Office of the Prosecutor and also stems  
8 from Article 65(1) of the Statute. P-317 claims that Ngudjolo apparently confessed to  
9 him that he had organised the Bogoro and Mandro attacks and that the Hema had to  
10 be killed and so on and so forth.

11 In response to this deceitful allegation, Mr Ngudjolo said that he has never met P-317  
12 and all the meetings that were organised at the time were held at MONUC  
13 headquarters with MONUC soldiers in attendance. P-317 himself said that the town  
14 of Bunia was ranked at danger level 3, 3 out of 4, and these are rankings that come  
15 from the United Nations, their ranking of danger. With a danger ranking of 3, P-317  
16 could not go and meet Ngudjolo late in the evening in a house in Bunia. When the  
17 Chamber travelled to Bunia, you were able to see the security measures that are put in  
18 place to protect UN staff. You saw that for yourselves, your Honours.

19 So I think the fundamental question at stake is this: Did the Prosecutor take any  
20 kind of critical view of these so-called admissions? Did he conduct any analysis? If  
21 so, how did he do this? Why would Mr Ngudjolo have made such a confession to  
22 P-317? To obtain what? If the Prosecutor had asked such questions, if he had  
23 looked at this allegation from P-317 rigorously, he would have realised that this  
24 allegation was a lie.

25 Once again, relating to this issue of so-called admissions, the Prosecutor called

1 Witness P-12 who claimed that Mr Ngudjolo confessed the following to him, and I  
2 quote, "I made many mistakes by killing the Hema by mistake. I was mixed up  
3 between biological belonging and ideological belonging. Really I'm very sorry, but  
4 I'd killed many Hema people and I think that's over now. We now must work  
5 together to rebuild our region," end of quote.

6 Your Honours, according to P-12 Mr Ngudjolo allegedly said those words, made that  
7 admission, in front of Daniel Litcha, Louis Beiza, Avoci, Justin Lobho in Kampala in  
8 May or June 2004. Once again, we must ask ourselves the same questions: Did the  
9 Prosecution look at these so-called admissions with a critical eye? If so, how did he  
10 go about this? Did he hear from Mr Litcha, Louis Beiza, Avoci, Justin Lobho?  
11 Obviously, he did not, because if he had interviewed them he would have disclosed  
12 the statements of these interviews. So the Prosecutor did not conduct any sort of  
13 rigorous analysis of P-12's remarks, because if he had done so he would have easily  
14 seen that these remarks are not only unlikely, but also actually false.

15 First of all, these remarks are rather unlikely, because in no way was P-12 some kind  
16 of priest, or judge, or arbitrator. He did not play any such role that would  
17 have -- that would allow Mr Ngudjolo to make a confession to him. He was not a  
18 priest or anything like that, so why would Mr Ngudjolo have repented in such a way  
19 and said such a thing to P-12? Did the Prosecutor ask himself that question?

20 The remarks are false, and why? Because in May and June of 2004 Mr Ngudjolo  
21 could not have been in Kampala because he was in prison. Mr Ngudjolo said so  
22 under oath before you, your Honours, and the Prosecutor going about things in his  
23 usual manner stated that P-12 must have been mistaken. He must have made a  
24 mistake.

25 No, your Honours. The Prosecutor is not entitled to change a witness's testimony

1 after the fact. He cannot make changes to a statement given by someone after the  
2 fact. He had all the time in the world and all the resources to check these remarks,  
3 conduct some sort of analysis of these remarks. He had all the resources to do so,  
4 and Mr Ngudjolo has said that he has never met P-12. He said that he was in prison  
5 during that period of time, and Mr Ngudjolo's words are corroborated by two  
6 authentic elements, two legal documents; namely, exhibits EVD-D03-00134 and  
7 EVD-D03-00135. These are documents that show that Mr Ngudjolo was in prison  
8 during that period of time, and I would like to stress, your Honours, that these  
9 exhibits came from the Prosecution. The Prosecutor had those documents and those  
10 documents had reference numbers DRC-OTP-0039-0403 and DRC-OTP-0039-0409.  
11 Oddly enough, the Prosecutor who had these documents, which are authentic, did  
12 not show them to his witness, P-12, when interviewing him. They could have done  
13 so, but they did not. So here we see a lack of a critical approach, or a lack of rigour, a  
14 lack of rigorous and objective analysis.

15 Given this lack of critical analysis -- well, not only was there a lack of critical analysis,  
16 the witnesses themselves were poorly chosen. In actual fact, the charges against  
17 Mr Ngudjolo are based on an allegation, an allegation that serves as the main pillar of  
18 the Prosecutor's arguments; namely that Mr Ngudjolo allegedly was the highest  
19 ranked commander of the FNI in Zombe at the time of the events, namely from  
20 August 2002 to March 2003, and in particular on 24 February 2003, the day of the  
21 attack on Bogoro, which the Chamber has been seized with, and as such it is alleged  
22 that Mr Ngudjolo perpetrated the ten crimes that he has been accused of either  
23 individually or in co-operation with others.

24 To support this huge allegation that led to considerable debate about the FNI, the  
25 FRPI, the situation in Zombe, the forces at conflict in Ituri, most particularly in Bunia

1 and Bogoro, the political, military, economic and strategic issues at play, oddly  
2 enough the Prosecutor chose and called before the Chamber witnesses such as P-250,  
3 P-279, P-280, recruited under unusual circumstances, I don't want to be unpleasant,  
4 but let us say rather recruited in a rather unorthodox manner, to put it kindly.  
5 Your Honours, those choices - those choices - are the problem here, these choices of  
6 witnesses.  
7 Let us begin with P-250 because I believe that it is our role to assess the Prosecution  
8 evidence. P-250 unquestionably is the key Prosecution witness on whom the  
9 Prosecutor relies to defend his case, or to build his case against Mathieu Ngudjolo.  
10 This witness covers practically all the themes in the Prosecutor's case against  
11 Mathieu Ngudjolo, particularly the FNI, the alleged existence at the Zumbe camp of  
12 soldiers and a headquarters of the FNI under Mathieu Ngudjolo, recruitment and  
13 training of combatants, including child soldiers, means of communication and  
14 auto-defence in Zumbe, the planning of the attack on Bogoro on 24 February 2003,  
15 participation in this alleged trip to Zumbe and Aveba, the pillaging, dead bodies and  
16 how they were buried, the attack on Mandro and what have you.  
17 Witness P-250 touched basically on all the charges that the Prosecutor brings against  
18 Mathieu Ngudjolo. The other witnesses only come in to support the main elements  
19 of evidence provided in P-250's statements and testimony.  
20 Even in his testimony before this Court, particularly on Tuesday, 16 May, the  
21 Prosecutor referred to P-250 at length and extensively. Unfortunately, Mr President,  
22 unfortunately for the Prosecutor, Witness 250, P-250, lied, lied to this Court. He lied  
23 to this Court. P-250's testimony is full of lies, lies about the FNI. When he stated  
24 that the FNI existed in Zumbe before the Bogoro attack, that is a lie. He lied when he  
25 talked about his parents. In his testimony, or rather in his statement, he said that his

1 parents had died, or were dead. He lied about his age. He lied about being a  
2 soldier, or a combatant. He lied when he said that he was present in Bedu-Ezekere  
3 at the time of the events, because he was not there. He was not in Bedu-Ezekere.  
4 P-250 was in Kagaba in school, attending school normally.  
5 Defence has adduced authentic documents such as EVD-D03-0005 to EVD-D03-0009.  
6 These authentic documents clearly prove that P-250 was attending school in a regular  
7 and uninterrupted manner from 2001 to 2004. Never did he record a day of absence  
8 in school, not even one.

9 Mr President, your Honours, at paragraph 776 of his brief, the Prosecutor argues that  
10 P-250 may have at the same time been a student and a combatant, but he makes that  
11 statement without adducing any evidence to support it. It is only a possibility, by  
12 the way, and we shall be dealing with the issue of possibilities in the course of our  
13 arguments. The Prosecutor does not provide any evidence, but the documentary  
14 evidence we submitted proves that there was no break in P-250's attendance of school.  
15 Witness D03-100 confirmed that fact before this Court. P-250 was in Kagaba. P-250  
16 never went to Zumbe during the time in question. P-250 was never a combatant in  
17 Zumbe. He was not even a combatant anywhere else, according to the testimony of  
18 D03-100.

19 P-250 himself ended up confessing that he had never been a soldier, that he had never  
20 received any military training, but that when he was living with the DSP he received  
21 some small training. So in the end he acknowledged this fact himself.

22 You read the written submissions and the oral arguments of the Prosecutor, who  
23 attempted to challenge the credibility of D03-100 by alleging that D03-100 may have  
24 come to the Court following a tense situation that may have existed between him and  
25 Ngudjolo's family, but this is completely false, Mr President. D03-100 told the truth

1 to this Court. D03-100's testimony was truthful. They are -- the testimony of  
2 D03-100 has no bearing whatsoever on the lies of P-250.  
3 Now, we are in open session here and I cannot go further than that, Mr President.  
4 You do understand what I mean. In any event, D03-100 told the whole truth here  
5 regarding P-250.  
6 Let me underscore one point; namely, that it was during the examination-in-chief that  
7 D03-100 spontaneously talked about this issue of tension between his family and  
8 Mathieu Ngudjolo's family. He talked about it spontaneously in  
9 examination-in-chief. This indeed speaks to that witness's credibility and to the fact  
10 that he told the whole truth.  
11 If the Prosecution had delved deeper into this matter, he would have understood -- he  
12 would have understood that these issues of tension can be easily understood within  
13 the sociological context in which these people live. As a court officer, whom my  
14 learned colleague opposite is, I believe that he also needs to look into these  
15 sociological aspects to be able to understand the full breadth and length of the judicial  
16 file before the Court.  
17 We all heard D03-100 explain to the Court the nature of the manipulation of P-250.  
18 Let me check how much time I have. I know I have a lot to say, but let me speed it  
19 up a little as I proceed in these arguments.  
20 The issue of intermediaries, those stakeholders, Mr President, your Honours, they  
21 played a deleterious role in the quest for the truth. Their role was absolutely  
22 negative. Whether it be P-250, P-279 or P-280, the intermediaries played a very  
23 negative role. They played a role that amounted to corruption.  
24 Why do I say so? They recruited these children, promising to send them to school,  
25 all the three, and I deal with all of them together because I need to move on to the

1 next point. Intermediaries promised to send these children to school, and we know,  
2 Mr President, your Honours, that in Africa there are entire families in which children  
3 are only able to attend school one year and then skip another because the parents  
4 have to manage it that way for lack of resources and send one child in this year and  
5 the next the year after. That is a sociological reality arising from the poverty that  
6 prevails. You see, when you undertake to pay the school fees of a child, you are  
7 actually committing yourself to the child, and in so doing the child is willing to do  
8 anything that you ask him or her to do, and that is how I refer to this aspect of  
9 corrupting the mind of the children, and it has had a bearing on the entire process  
10 and there is a way of putting this in French, which I cannot remember immediately,  
11 because corruption tends to be pervasive, so to speak. Wherever there is corruption,  
12 in a file or in any issue, the whole issue is tainted by that corruption. You cannot say  
13 that corruption has affected only this aspect of the case and the other aspects have not  
14 been affected, and whenever corruption or such interference has been established,  
15 then the entire scenario is corrupted.

16 As for P-279, the argument is the same. P-279 lied about the FNI, about the claim to  
17 have been abducted by Bobo Boba and even about his life -- his age, and my learned  
18 colleague, Mr Hooper, talked about it yesterday, and the same holds for P-280 when it  
19 comes to these lies. P-279 and P-280, your Honours, were to our mind witnesses that  
20 were called by the witness -- by the Prosecution to prove the existence or presence of  
21 child soldiers. That was the purpose for which those two witnesses were called, but  
22 it emerged that these children were never -- or, by the way, they did not meet the  
23 criterion of age, meaning that they were not children, and over and above everything  
24 else they were not part of the militia and they were not in Zumbe.

25 You may recall regarding P-279 that D02-236 testified on this matter. Mr President,

1 your Honours, you may want to recall also that for P-280 our witness D03-236 also  
2 testified, but maybe I'm mistaken, but those are the relevant testimonies to bear in  
3 mind, but let me focus on a blatant lie by P-280.

4 Mr President, your Honours, you do recall that P-280 testified before you and drew a  
5 diagram on which he indicated that there was an airport in Zumbe. An airport,  
6 Mr President, your Honours. You travelled to that area. Did you see an airport?  
7 There is no airport in Zumbe.

8 Zumbe is a poor locality and Germain Katanga himself, Germain Katanga himself,  
9 testified that he at the time did not even know where Zumbe was. He said that  
10 himself. Zumbe is a small locality, which only became significant when people fled  
11 from Bunia and sought refuge there because of the geographical lay-out of that area  
12 and the presence of those large stones that Chef Manu talked to us about here.

13 Zumbe is not -- Mr President, by the way, you saw Zumbe for yourself, and Mr -- the  
14 Prosecutor tried to talk about the presence of an airport in Zumbe in order to give  
15 some importance to Mathieu Ngudjolo who is alleged to have had an airport in  
16 Zumbe at which he would receive weapons and ammunitions. Mr President, that is  
17 false.

18 Now, about P-280, Mr President, let us recall that D03-340 also testified before you.  
19 And that having been said, let me now move on. Before I do so, before I leave that  
20 point on the three witnesses I have been dealing with, let me say that these are the  
21 three witnesses whom the Prosecutor called to establish Mathieu Ngudjolo's  
22 responsibility. Those three witnesses all lied to this Court, and that completely  
23 shatters any iota of evidence that may have been adduced against Mathieu Ngudjolo.  
24 No evidence whatsoever.

25 In his final written submissions and final arguments, the Prosecution argued that

1 Defence is bent on dealing with these three witnesses because of course they are  
2 credible, but that is not correct. Defence is simply responding to the Prosecution's  
3 arguments, because it is the Prosecutor who chose to commit the last part, the entire  
4 last part.

5 Mr President, your Honours, an entire -- the entire last part of his final brief, the  
6 Prosecutor in that part tried to defend the credibility of those witnesses. That entire  
7 part was designed for that purpose, and all Defence is doing is react -- respond to the  
8 Prosecution case by underscoring the lies that are replete in the testimonies of these  
9 witnesses.

10 Let me quickly - quite quickly - speak to the issue of the choice of witnesses before I  
11 revert to the Prosecutor's allegations here before the Court. In a nutshell,

12 Mr President, the Prosecutor intended -- or rather interviewed Chef Manu at length,  
13 the chief of the Bedu-Ezekere groupement. Chef Manu -- Chef Manu's interviews  
14 appear on 448 pages and he was interviewed from 19 to 21 March 2009. Chef Manu  
15 is the person who is authorised to speak about the Bedu-Ezekere people.

16 Well, you heard Chef Manu here yourself, Mr President. When we noticed that, we  
17 called Chef Manu. Why did the Prosecutor abandon Chef Manu? It is because  
18 when they interviewed Chef Manu they noticed that he was providing exculpatory  
19 material, exculpatory in regard of Mathieu Ngudjolo, and it is for that reason that the  
20 Prosecutor abandoned Chef Manu, and yet this is the official person who could have  
21 spoken validly about Mathieu Ngudjolo and in relation to what happened at that  
22 time.

23 Mr President, your Honours, that was the same position taken by the Prosecutor  
24 when it came to Ndjabu. The Prosecution interviewed Floribert Ndjabu at length,  
25 and I have the statistics in that connection. Their discussions lasted extended

1 periods, but quite oddly the Prosecutor decided to abandon him, but these are good  
2 witnesses, Mr President. If you compare these witnesses to 279, 250 and 280, really  
3 there is nothing to compare between those witnesses; I mean, against such competent  
4 witnesses as Ndjabu and Manu.

5 Why did the Prosecutor abandon them or drop them? He dropped them because  
6 they had exculpatory evidence regarding Mathieu Ngudjolo. This, Mr President,  
7 was a blatant violation of Article 45(a) of the Statute, a blatant violation of  
8 Article 54(a), which makes it mandatory on the Prosecutor to investigate both  
9 exculpatory and inculpatory materials.

10 Now, your Honours, this is a matter that speaks to the powers and duties of the  
11 Prosecutor in matters of investigation. This article actually makes it a duty on the  
12 Prosecutor to investigate both parts, the powers with respect to investigations, such  
13 that he must assess exculpatory and inculpatory material. This is not an option.  
14 The Prosecution does not have an option. It is a mandatory duty. It is a power and  
15 a duty, and this has all its significance, Mr President.

16 Mr President, your Honours, I have 35 more minutes. I will be speaking 'til 11 a.m.  
17 My learned colleague has granted me leave to speak 'til 11 a.m., because I speak much  
18 more slowly than he does.

19 Having noticed that he had failed to establish that Ngudjolo was the highest ranking  
20 commander of the FNI in Zombe, the Prosecutor therefore decided to introduce  
21 another strategy against Mathieu Ngudjolo when he started to harp on a number of  
22 issues, harping on issues which began by a dramatic attempt to amend the Statute.  
23 They went on to say that reference was no longer being made to the FNI, but to  
24 Lendu militia. The Prosecutor then referred to all this as a simple matter of  
25 nomenclature.

1 No, Mr President, this cannot be. It can't be so, because in the description of the  
2 charges the word "nomenclature," or naming, has no significance. There are two  
3 main elements at play and a third, if you wish, when we want to define the charges;  
4 the facts on the one hand and then the characterisation, the legal qualification on the  
5 other hand. These are the two aspects that describe what can be referred to as a  
6 charge, the fact and then the legal qualification or characterisation.

7 The question that follows, therefore, is the following: Was the FNI a fact or a legal  
8 characterisation? The FNI is a fact. When you talk about a political party in Africa,  
9 it is a fact. The FNI is a fact. It is a given. The Lendu militia would be also a fact if  
10 it existed as such, but you cannot replace one fact by another. So this is what we  
11 mean by an attempt to amend or change the Statute. This is not allowable. This is  
12 not possible, Mr President.

13 We talked about the FNI here as a fact at length and we never talked about the Lendu  
14 militia. What is the Lendu militia? What is it? Who created the Lendu militia?  
15 What is its structure? What is its organisational set-up? How does it operate?  
16 What is its ideology? We never talked about these things, Mr President, your  
17 Honours.

18 We talked about the FNI, and the Prosecutor was dealing there with a fact; namely  
19 that the FNI does not exist and he cannot -- he cannot modify the status that way and  
20 Maître Kilenda will revisit this point. I simply wanted to highlight this point,  
21 Mr President, because there are two components to the definition of a charge: First  
22 the fact and then the legal characterisation. The FNI was not a qualification,  
23 therefore it is a fact, and that is established, isn't it?

24 This aspect of harping of Mathieu Ngudjolo, or -- was also noticed when the  
25 Prosecutor examined Defence witness D02-176. You do recall that witness, who was

1 called by Germain Katanga. When the Prosecutor cross-examined this witness, he  
2 put the witness under such pressure that he virtually breached the very principles  
3 that you outlined in your oral decision of 7 September 2011.

4 Mr President, your Honours, you do remember that decision. When the Prosecutor  
5 cross-examines a witness of a co-accused person, he must behave as if it were in  
6 examination-in-chief if he were intending to use that witness against the other  
7 co-accused.

8 Now, the Prosecutor wanted to use D02-176 against Mathieu Ngudjolo. According  
9 to your decision the Prosecutor should have stopped at neutral questions, but then  
10 the Prosecutor went on to put pressure to bear on the witness and asked leading  
11 questions and even called for closed session hearings in order to force the witness to  
12 bring charges against Ngudjolo in spite of the objections raised by the Defence.

13 You saw that for yourselves, your Honours, and we have the details actually of that  
14 particular situation in our final written brief and we also have a number of transcript  
15 references, and that's just not right, your Honours, proceeding in that manner.

16 Information gained by flagrantly disregarding a principle cannot be used as evidence  
17 and, what's more, our learned friend, the legal representative of victims, representing  
18 the common group of victims, not to mention any names, also attacked that witness,  
19 saying that he was an opportunist, and that was the word used.

20 Another sign of this harassment or this harping upon Mr Ngudjolo was the incident  
21 that occurred during the video conference of the testimony of P-323, Witness 323, a  
22 former UPC soldier; P-323, your Honours, a former UPC soldier who had taken part  
23 on the attack on Bogoro of 24 February 2003. He was a member of the UPC, and  
24 when he gave testimony in March 2010 he never said Mr Ngudjolo was responsible  
25 for anything.

1 On the day of the video conference, the witness said that it was Mathieu Ngudjolo  
2 who had taken him there to wage war, that it was Mr Ngudjolo, but how can that be?  
3 Imagine you are a UPC soldier fighting on that side and it was Mathieu Ngudjolo  
4 who took you to Bogoro? The Defence counsel rose and attempted to point out that  
5 this was absolutely ridiculous. Defence counsel tried to make that point, but to our  
6 astonishment the Prosecution objected and said "No." The Prosecution protested  
7 when we tried to shed light on this particular statement, which really is scandalous,  
8 this statement made by this witness. So the Prosecution doesn't want clarity. He  
9 prefers the darkness. He prefers to keep us all in the dark.

10 Your Honours, the shallow analysis of the Prosecution was clear to all when  
11 arguments were made, and I will give you a number of examples of this shallow  
12 analysis.

13 First of all, in reference to transcript 336, 15 May, page 22, lines 1 to 8, I think you  
14 heard for yourselves, your Honours, how in our closing arguments the Prosecutor  
15 hinted, or rather stated, that he did not have any videos prior to that date showing  
16 Mr Ngudjolo as a soldier because - and this is the point I am making here - he had  
17 only just started to deal with several videos as of 6 March 2003.

18 That is utterly false, your Honour. Remember Witness P-30, who appeared before  
19 the Chamber and explained various aspects of the video, the video of the meeting  
20 with Thomas Lubanga on 11 January -- the 23rd, 23 January at the stadium in Bunia,  
21 January 2003, the UPC meeting with General Salim Saleh. Once again January.  
22 This was in January 2003, the UPC meeting with MONUC on 24 February 2003.  
23 24 February, the day of the attack. So it is false to say that the Prosecution had  
24 videos only as of 6 March. That is false.

25 What's true is that all the videos that the Prosecution has from before 6 March 2003,

1 all those videos, none of those videos prior to that date show Mathieu Ngudjolo.  
2 None of them. That's what the actual truth is, and I would challenge the Prosecution  
3 to provide even written evidence, anything dating back before that date, anything  
4 signed by Mathieu Ngudjolo. There is no such written evidence that shows that  
5 Mr Ngudjolo was merely a nurse in Kambutso. He was not. Before 6 March he  
6 was not playing any kind of role in the political and military life of the region. That's  
7 quite clear. Mr Ngudjolo was only a nurse working in Kambutso, and I think that's a  
8 very important point.

9 Your Honours, you also saw how the Prosecution had tremendous difficulty  
10 answering your questions with any degree of accuracy. I have only 20 minutes left,  
11 so I will restrict myself to an analysis of his reply to your question, question number  
12 10 it was, question 10; question 10 from the Chamber, which took us to the crucial  
13 issue of the definition of what he calls a Lendu militia that identified itself as such,  
14 identified with the FRPI based in the collectivity of Walendu-Bindi.

15 We expected the Prosecution to seize that opportunity to provide us with some  
16 evidence on the record that would allow us to define these facts, to come to some sort  
17 of definition of this Lendu militia, to see its organisation, its structure and so on and  
18 so forth, but instead, your Honours, the Prosecutor left us all in utter darkness,  
19 darkness, concealing his utter inability to make his case beyond all reasonable doubt.

20 In response to question 10, the Prosecutor said the following, and I quote, transcript  
21 327, French version of course, page 31, lines 18 to 23. Transcript 337, French version,  
22 page 31, lines 18 to 23, and I shall quote, your Honour: "In December we were in  
23 Beni in order to set up a movement to create a coalition; that is to say to bring under  
24 the same umbrella, so to speak, a very -- a certain denomination, bring together all the  
25 Lendus of the north and of the south. Dr Adirodu in his manifesto shows this.

1 Also in the north you have the discussions in Aru about the establishment of the FNI,  
2 so there was -- the situation was somewhat hazy in the field," end of quote.  
3 Your Honours, how can we clear this up? Why did he not call Dr Adirodu as a  
4 witness to clear this up, to shed light on this rather hazy explanation?  
5 The Prosecutor went on on the same page, lines 24/25 of the same transcript, page 18  
6 and I quote, "What information related to the combatants? The evidence is not  
7 simple. It is difficult," end of quote.  
8 Your Honours, whose task is it to shed light on this matter, this question put by the  
9 Prosecutor? "The evidence is not simple. It is difficult." Who is to take on this  
10 task for him? The evidence is difficult. There's a reason why we speak of the  
11 burden of proof, your Honours. The evidence is not simple, nor is it simple, easy for  
12 Mr Ngudjolo to spend years in prison. It's not a simple thing. It's not an easy thing  
13 for him. Evidence is difficult and the proof must be established. There's a burden  
14 and who -- on whose shoulders does the burden fall? On the shoulders of the  
15 Prosecution.  
16 Moving on to the next page of this transcript -- correction, page 32, and I quote, "So  
17 this whole issue of the FRPI has not been clearly delineated," end of quote, page 32,  
18 line 9.  
19 Your Honours, who has to set the parameters relating to this issue? Who has to  
20 clarify this issue? Whose job is it to do this? Is it not the Prosecutor's?  
21 Also on page 32, lines 13 to 15, the Prosecutor went on to say, and I quote, "We want  
22 to help the Chamber as much as possible, but some answers are not simple because  
23 the evidence itself is not simple because the situation in the field -- well, the situation  
24 was fluid."  
25 Your Honours, who must shed light on the evidence? Who must clarify the situation

1 in the field for us? He speaks of the -- of things shifting, of a fluid situation, but  
2 whose job was it to do this? The Prosecutor is not -- is -- does not understand the  
3 situation and speaks of a fluid situation and this truly is evidence. This is an  
4 admission of failure, an admission of failure.

5 The situation in Ituri was complex, yes, but his task was to shed light on the situation  
6 and we, the Defence team, have provided clear information about the background  
7 using the Prosecution's witnesses. If they had analysed the statements made by their  
8 own witnesses, they would not have not made the mistake in saying that the conflict  
9 was a conflict between ethnic groups.

10 How can you say so when you have an Ndjabu person within one group who is  
11 Lendu and a Kahwa person who's Hema? How can you speak of an interethnic  
12 group when the UPC had had people like Thomas -- there were Ngiti people, Hema  
13 people, within this group, and in contrast in the RDC, in the APC, there were  
14 commanders, commanders who were Hema. There were Hema people within those  
15 groups.

16 If you read -- if you read our conclusions, your Honour, you shall see this. You shall  
17 see so. This is proof. When the Prosecutor speaks of a fluid situation and shifting,  
18 it shows that he is not up to the task. He does not understand the situation.

19 And that's not all. I have not concluded, your Honour. Also on page 32, line 16 to  
20 21, the Prosecutor reveals his thoughts in all their depths. Line 16 to 21, and I quote,  
21 "But the important thing to draw from this, your Honour, is that the stamp shows that  
22 there was an organised structure in Bedu-Ezekere. It is possible that on that date,  
23 4 January, perhaps at that time in light of our contacts with Aveba there was a  
24 willingness to be identified with this group which now wanted to become the FRPI  
25 because being a Lendu person from the south of Bunia we were close to the Ngiti and

1 we want to be part of this common movement facing this common enemy. Perhaps  
2 we might want to replicate the order, the organisational level that the UPC had with  
3 the FPLC, the mirror effect," end of quote.

4 Your Honours, you may have noticed that I changed the stress of my voice in order to  
5 focus on two particular parts of these quotes. "It is possible," "Perhaps there is a  
6 desire or a willingness." No, your Honours, one cannot find a person guilty on the  
7 basis of a possibility, or a likelihood of some kind. Evidence is effective, or  
8 convincing, only if it rules out any other possibility.

9 I do wish to stress that the evidence provided by the Prosecution is not clear, not just  
10 when it came to that important question asked by the Chamber, but also in relation to  
11 other critical points. For example, the Prosecution's evidence is not clear, to repeat  
12 the Prosecutor's expression, regarding the following issue; namely, who conducted  
13 this attack on Bogoro on 24 February 2003? The accusation -- the Prosecution's  
14 evidence is not clear on this central issue. The evidence is not clear.

15 We, the Defence counsel, state that this attack was conducted by FAC soldiers and  
16 APC soldiers and UPDF soldiers, that is to say soldiers of the Ugandan army, and our  
17 evidence can be found in the very statements taken by witnesses of the Prosecution,  
18 in particular Witness P-323 who was a UPF -- correction, UPC soldier and who had  
19 taken part in this attack and who saw that the soldiers who had attacked them were  
20 wearing the uniforms of the FAC and the APC. It was P-323 who said so.

21 In response, the Prosecutor said, and I will quote from his concluding remarks,  
22 transcript 337, page 26, line 28, to page 27, line 19. I quote the Prosecutor. It's a  
23 rather long passage, but it bears mentioning. This is very important, because this  
24 really strikes to the very heart of the matter, and quote, I quote, "Your Honour, the  
25 Prosecution is also aware that some victims who appeared as witnesses say that they

1 saw APC soldiers. Witness 0028 testified, et cetera, et cetera, that there were civilian  
2 witnesses who said that they saw soldiers, combatants with the APC, or were  
3 they -- or were they uniforms?" No, allow me to repeat, "Were they really APC  
4 combatants, or had uniforms been provided? Were they APC deserters who had left  
5 the APC movement once Bunia had fallen? Were those uniforms picked up on the  
6 battle-field? You have 317. Your Honour, there are all kinds of possible  
7 explanations why the UPC combatants, I believe it was a bit of a miss -- a problem  
8 here, including Witness P-0028. So the answer is that it is certainly plausible that  
9 there may have been some. The number on record that we think would be more  
10 reasonable would be rather low, between 20 and 25," end of quote.  
11 Your Honours, I have only four minutes, and I think you've seen -- you are  
12 professional Judges. You are Judges specialising in criminal matters. I think who  
13 was supposed to answer these questions? Whose duty was it? It was his duty.  
14 He publicly acknowledged that at least there was a doubt, at least there was doubt,  
15 because there was these possibilities. It was possible that the FAC and/or the APC  
16 were present. He added that there weren't many, 20 or 25, that's all.  
17 First of all, he advances these figures without conducting any sort of inquiry to  
18 determine that there actually were 20 or 25, and even if that were the case, well, that is  
19 a significant fact. You know, your Honour, you know the strength of an army is not  
20 based on troop levels. No, the strength of an army depends on the strength of the  
21 training provided. A group of 20 or 25 can defeat another army with hundreds if it  
22 is -- a group of well-trained soldiers, heavily armed, can utterly defeat an army made  
23 up of hundreds. You know that. You know that, your Honours.  
24 So, there you have it. There are other points I could make, other passages I could  
25 read out, transcript 337, page 27, line 23 to -- to page 28, line 4. This is also a very

1 important passage from the Prosecution's final arguments. This, your Honours,  
2 clearly establishes that the Prosecutor has failed, failed to provide evidence beyond all  
3 reasonable doubt.

4 Does the Prosecutor believe that if a little bit of doubt remains that that doubt should  
5 be turned to the benefit of the Prosecution? Does he believe that if there's some sort  
6 of doubt that that will be to the Prosecution's advantage? No, we know what the  
7 principle is. When there is doubt, the doubt really must go in favour of the accused,  
8 in dubio pro reo, and when it comes to Mr Ngudjolo there is no doubt. There is  
9 certainty. Certainty of innocence.

10 Mr Ngudjolo was not there. Mr Katanga, who was there, said that Mr Ngudjolo was  
11 not, so I think we really have to congratulate Mr Katanga. He was honest enough  
12 and brave enough to come and give testimony under oath to provide -- and provided  
13 information, intelligence, because he was there. He saw -- he saw how the plans had  
14 been drawn up and implemented the presence of combatants, the arrival of Adirodu,  
15 Blaise Koka, and so on and so forth, and Germain Katanga said that Mr Ngudjolo had  
16 nothing do with that. He said so. He had nothing to do with that.

17 Your Honours, there you have it. I have not concluded, but I thank you. I believe  
18 you have heard what I needed to say. I thank you.

19 PRESIDING JUDGE COTTE: (Interpretation) The Chamber thanks you, Professor  
20 Fofé. We shall now suspend until 11.30, and I think you will be -- will come to a  
21 determination with your colleague whether you shall continue or Mr Kilenda shall  
22 resume. You will have an hour-and-a-half. The hearing is now suspended.

23 THE COURT USHER: All rise.

24 (Recess taken at 11.02 a.m.)

25 (Upon resuming in open session at 11.32 a.m.)

1 THE COURT USHER: All rise.

2 PRESIDING JUDGE COTTE: (Interpretation) Please be seated.

3 The accused are with us. We can therefore continue with our discussions.

4 Counsel Kilenda, you have the floor. We are listening to you.

5 MR KILENDA: (Interpretation) Thank you very much, your Honours. I am

6 going to speak about the individual criminal responsibility of Mathieu Ngudjolo with

7 regards to the crimes and the charges set out by the Prosecutor.

8 As you know, the decision confirming the charges held individual criminal

9 responsibility of Mathieu Ngudjolo on the basis of Article 25(3)(a) of the Statute.

10 Under this decision, Mathieu Ngudjolo is the direct co-perpetrator for having made

11 children of under 15 years participate in hostilities.

12 He is, on the other hand, the indirect co-perpetrator for the following crimes: The

13 fact of intentionally directing an attack against the civilian population as such, or

14 against civilians not taking part in hostilities; wilful killing; destruction of property;

15 pillaging; sexual slavery; rape; murder; and sexual enslavement.

16 According to the Pre-Trial Chamber, the two forms of co-perpetration suppose

17 control over the crimes; that is the so-called theory of the perpetrator behind the

18 perpetrator of the act.

19 Taking into account this mode of responsibility, the Prosecutor took the undertaking

20 on 24 November 2009, when the trial opened, to demonstrate beyond reasonable

21 doubt that Mathieu Ngudjolo was the commander of the FNI for the Lendu

22 combatants, who were in the military camps, of the region of Zumbe, and that with

23 others he had planned and executed the attack on Bogoro; an attack which led to

24 supposedly more than 200 deaths of civilians who were not participating directly in

25 the hostilities.

1 The lack of success of the Prosecutor to this day is total. He has not been able to  
2 prove with certitude the cumulative objective and subjective elements of direct  
3 co-perpetration and indirect co-perpetration by Mathieu Ngudjolo.

4 Some of these elements are common to two types of co-perpetration, such as the  
5 existence of an organisation, common plan and control over the crime. Where it  
6 concerns more specifically indirect coercion, the Defence expected from the

7 Prosecutor also to prove beyond reasonable doubt the existence firstly of an  
8 organisation; secondly, of hierarchical relations between the commander and the  
9 members of his organisation; thirdly, a sufficient number of members of the group  
10 showing that the orders of the commander would be obeyed and automatically and  
11 systematically executed.

12 It has to be noted at the end of his presentation of the evidence and his pleadings, the  
13 Prosecutor has not been able to do so. Contrary to what he has stated, his final brief  
14 as well as his pleadings are all the more eloquent with regards to his incapacity or  
15 inability to demonstrate that Mathieu Ngudjolo was indeed the head of a hierarchical  
16 group entitled the FNI, which allegedly perpetrated the massacre of civilians in  
17 Bogoro on 24 February 2003.

18 At this level of reflection, the Defence denounces what it considers to be a substantial  
19 modification of the decision confirming the charges, which is contrary to the letter  
20 and to the spirit of Article 74(2) of the Statute.

21 Indeed in its final brief, and even in its pleadings of 15 May before the Chamber and  
22 in its answers to the questions of the Chamber of 16 May 2012, the Prosecutor  
23 developed a new theory, introducing a new element which consists in presenting  
24 Ngudjolo as the chief of the Lendu militia of Bedu-Ezekere.

25 He is no longer the highest commander of the FNI, and your Honours this is the new

1 theory of the retrospective use of the name "FNI" by his witnesses. This theory is in  
2 reality his own construction, faced with his inability to demonstrate the existence of  
3 the FNI in Bedu-Ezekere and the commander of -- and the command of it by  
4 Mathieu Ngudjolo during the relevant period.

5 The Defence submits that the Prosecutor cannot substitute his construction for the  
6 testimony of his witnesses. They told the Chamber, under oath, that  
7 Mathieu Ngudjolo was the highest commander of the FNI. They pointed out the  
8 existence of the FNI in Bedu-Ezekere at the relevant time. None of them, but none of  
9 them, your Honour, testified on the retrospective use of the name "FNI," whether  
10 during investigations or during the hearings before the Chamber.

11 The Defence takes example from key witnesses: P-250, excuse me, "In general, it  
12 wasn't the Lendu. It was rather members of the FNI and the FRPI," transcript  
13 number 93, page 42, lines 21 to 22. P-279, "Well, with regards to the question of the  
14 attack, there were two groups. There was the group of the FNI and FRPI," transcript  
15 145, page 22, lines 22 and 23. P-280, your Honour, "I don't know with precision the  
16 groups, but where as far as I'm concerned it is the FNI and the FRPI who attacked  
17 Bogoro," transcript 516, page 19, lines 16 and 17. And during the submissions before  
18 the Chamber, the Prosecutor did not ask any question to any of his witnesses to prove  
19 the retrospective use of the name "FNI."

20 Now, he is trying to have the Chamber consider his construction in place of evidence.  
21 Under what statutory provision, or what legal principle, can the Prosecutor contradict  
22 at the end of the trial his own witnesses and the means that they have introduced into  
23 evidence?

24 This theoretical construction, which is out of line with his own evidence, reveals the  
25 inability and the -- of the Prosecutor and the predicament in which he is when it

1 comes to proving of the capacity of the highest commander of the FNI, that that was  
2 indeed Mathieu Ngudjolo.

3 And it is here, for example, that he talks of errors which supposedly P-279 and 280  
4 committed, who lied with regards to their age, and he is unable to explain rationally  
5 to the Chamber the reasons why on the one hand the error is committed by the two  
6 witnesses before the International Criminal Court, when they must testify in the  
7 present case against the two accused, and on the other hand these same witnesses  
8 indicate their date of birth - their exact date of birth - to the independent electoral  
9 commission in order to obtain the electoral card, or voting card, with a view to  
10 participating in the presidential and legislative elections in 2006.

11 The Defence feels, or has felt for a long time, the predicament in which today still the  
12 Prosecutor is in when it comes to demonstrating that Mathieu Ngudjolo had the  
13 capacity of the highest commander in the FNI.

14 The Defence recalls that everything started with the exercise which your -- which was  
15 imposed by the Chamber, which consisted of providing a summary of the charges as  
16 conferred by the Pre-Trial Chamber. On this occasion, the Prosecutor started to take  
17 offence. With regards to the note from page 112 of submissions 1588, he presented  
18 Mathieu Ngudjolo as the commander of the FNI at Bedu-Ezekere and not clarified as  
19 the supreme commander of the FNI.

20 So one would understand straightaway that the FNI had a supreme commander, who  
21 was perfectly known by the Prosecutor. However, he kept himself from revealing  
22 this name and -- however, he had until that point affirmed the contrary, and it is in  
23 this capacity as the highest commander of the FNI that Mathieu Ngudjolo was  
24 referred to trial before the Court.

25 To the great satisfaction of the Prosecutor, the Chamber -- the Pre-Trial Chamber

1 based its decision on the agreement on the cessation of hostilities, which according to  
2 the Prosecutor had been signed by Ngudjolo in his capacity as the highest  
3 commander of the FNI and on the testimony of P-250. Nothing could be less correct.  
4 During the entire presentation of his evidence before the Chamber, the Prosecutor  
5 identified, thanks to his witnesses, Mathieu Ngudjolo as the commander of the FNI.  
6 Also during the presentation of the Defence evidence, through cross-examination of  
7 the witnesses of the Defence, the Prosecutor tried to convince the Chamber that  
8 Mathieu Ngudjolo was the person responsible for the FNI who had planned, executed  
9 and controlled the attack at Bogoro on 24 February 2003.

10 When the questions for clarifications were put to the witness, the Chamber itself tried  
11 to obtain from the witness Floribert Ndjabu useful clarification with regards to  
12 Ngudjolo's membership of the FNI; that is to say, that in the eyes of the Chamber,  
13 whose intentions the Defence won't describe, but this issue of the membership of  
14 Ngudjolo in the FNI was one of great importance and it had even more importance  
15 given that the Prosecutor himself was trying to have this fact come out by bringing  
16 out elements of the testimony of different witnesses, both his own and those of the  
17 Defence, with regards to the membership of Mathieu Ngudjolo in the FNI and also  
18 with regard to an alliance between FNI and FRPI before 24 February 2003.

19 However disoriented by the exonerating evidence, also given that during the relevant  
20 period Mathieu Ngudjolo was completely disconnected from politico-military  
21 activities, and that he was only carrying out his occupations of a nurse in Kambutso,  
22 the Prosecutor in his final brief turns around, makes a pirouette, and rather labels  
23 Mathieu Ngudjolo as a chief of the Lendu militia of Bedu-Ezekere.

24 Such a ratings agency, the Prosecutor literally degrades Mathieu Ngudjolo as a  
25 ratings agency would do from his P, H and his C, but the Chamber has always been

1 able to ensure the fairness of the proceedings and shall not allow that to be harmed.

2 In accordance with Article 74(2) of the Statute, it will only take into account the facts  
3 and circumstances as described in the charges.

4 In its pleading of 15 May 2012, the Prosecutor attempted to minimise the importance  
5 of this problem of the name or labelling of the FNI. He said also in his brief that this  
6 name was of little importance. He presented his argument in two points,  
7 respectively concerning the legal aspect and also the factual aspect.

8 With regards to the legal aspect, the Prosecutor stated that the issue of the  
9 membership of Mathieu Ngudjolo in the FNI as a pure question of nomenclature.

10 The Defence submits that this question is not a simple question of nomenclature, but  
11 it is decisive when it comes to determining the mode of responsibility.

12 The Prosecution has the duty to inform the accused under Article 67 in the shortest  
13 dead-line and in a detailed way of the nature of the cause and of the substance of the  
14 charges. Mathieu Ngudjolo should know in a precise, detailed and in advance that  
15 way of what he is accused of and how.

16 The Defence invites the Chamber to draw its conclusions from this obscurity with  
17 regards to the definition of the relations between Mathieu Ngudjolo and the FNI with  
18 regards to the Prosecution on the one hand and the constant elements of proof --

19 THE INTERPRETER: "Evidence," corrects the interpreter.

20 MR KILENDA: (Interpretation) -- introduced by Prosecution witness. The Defence  
21 recalls the words of P-250, P-279 and P-280 which it has just quoted.

22 The Chamber will understand in its vigilance the game that the Prosecutor is now  
23 carrying out. He is classifying Ngudjolo as the leader of the militia of Bedu-Ezekere  
24 because, quite simply, he has not succeeded (1) to demonstrate the extent of the FNI  
25 in Bedu-Ezekere at the relevant time; (2) to prove that Mathieu Ngudjolo had the

1 capacity of the highest commander and the commander of the FNI; (3) to prove an  
2 alliance between the FNI and the FRPI at the relevant time and the planning by these  
3 two organisations of an attack on Bogoro on 24 February 2003.

4 The Chamber will not lose sight of what Floribert Ndjabu said, with the Prosecutor,  
5 when he tried to make him admit the existence of an alliance between the FNI and the  
6 FRPI before the attack on Bogoro.

7 It is also important, your Honour, your Honours, to note the different documents  
8 introduced by the Prosecutor himself; namely, EVD-OTP-00217, EVD-OTP-00218, and  
9 the same 22 -- EVD-OTP-00221, EVD-OTP-00222, EVD-OTP-00232, 00234, 00235,  
10 00240, 00241 and 00244 through which, your Honours, the Prosecutor tried to deduce  
11 the existence of an alliance between the FNI and the FRPI and the conclusion of a plan  
12 of attack by the two organisations to wipe out Bogoro. You can also consult  
13 paragraphs 744 to 748 of our final submissions.

14 THE INTERPRETER: "758," corrects the interpreter.

15 MR KILENDA: (Interpretation) The Prosecutor says that Ngudjolo was the chief of  
16 the Lendu militia at Bedu-Ezekere but that doesn't explain why Chef Manu went to  
17 Beni in December 2002 instead of Ngudjolo. Neither does the Prosecutor explain,  
18 while he supports the reality of an interethnic war between Hema, Lendu and Ngiti,  
19 why Ngudjolo signs no letter where you have the extermination of the Lendu is  
20 denounced, such as EVD-D03-0098, the Prosecutor does not explain at all why it is  
21 Chef Manu, and D03-66 who signed these documents.

22 The Prosecutor, your Honour, your Honours, does not prove and does not even offer  
23 to prove that it is Ngudjolo who had mandated Chef Manu in order to go to Beni and  
24 sign these documents. All this shows how serious Chef Manu was, responsible for  
25 the groupement of Bedu-Ezekere, who said that the nurse Ngudjolo had no orders to

1 give him.

2 If the name FNI in reality didn't have any importance, as the Prosecutor now claims,  
3 why did he not continue to keep it? His attitude is all the more inexplicable that 29  
4 times, 29 times, he stated the word "FNI" in his submissions of 24 November 2009. It  
5 follows, therefrom, manifestly that the Prosecutor is not able even today, even at this  
6 moment where I am pleading before your Chamber, to prove that Mathieu Ngudjolo  
7 was the head of a hierarchical group entitled the FNI. This material element, in fact,  
8 is lacking. As such, his criminal responsibility cannot be retained on that basis.

9 That is all the more true given that in his final submissions the Prosecutor accepted  
10 what the Defence has always alleged, alleged since the very start, namely the lack of  
11 an existence of the FNI in Bedu-Ezekere at the relevant time, the alliance between the  
12 FNI and FRPI after 22 March 2003 only, and the membership of Mathieu Ngudjolo in  
13 this alliance after that date. Paragraph 745 of its -- of the brief of the Prosecutor,  
14 3251.

15 From this moment, the Defence considers that the theoretical edifice of the Prosecutor  
16 is melting. His theory is falling into pieces. The testimonial and documentary  
17 evidence that he's produced to support the planning of the attack on Bogoro has no  
18 factual basis.

19 Furthermore, one point: The Prosecutor puts forward that Mathieu Ngudjolo was a  
20 commander of the FNI and that he had sent Boba Boba to Aveba with a view to  
21 negotiating the plan of attack on Bogoro with Germain Katanga, a negotiation which  
22 he was following by phonie.

23 Furthermore, it's been demonstrated by the Defence that P-250, the perpetrator --

24 THE INTERPRETER: Or "the source of this allegation," corrects the interpreter.

25 MR KILENDA: (Interpretation) -- never had been a combatant and was never

1 in -- even in Bedu-Ezekere at the relevant time. D03-100.

2 My colleague, Professor Fofé, has also said this, denied the capacity of a combatant of  
3 P-250 and his presence in Bedu-Ezekere during the relevant period. D03-66 confirms  
4 that P-250 was studying at this time in Walendu-Bindi.

5 Is it necessary to remind you, your Honour, your Honours, that P-250 upon whom the  
6 Prosecutor bases himself with a view to proving the crimes in the common plan, this  
7 person is a witness that the Prosecutor had not been able to cross-examine while he  
8 said that he was hostile. Furthermore, there was no phone in Bedu-Ezekere at this  
9 time, even less any type of modern communication device. The evidence goes in this  
10 direction.

11 Thirdly, Mathieu Ngudjolo and Germain Katanga didn't -- or only got to know each  
12 other on 8 March 2003 in Dele. The Prosecutor did not go into this important fact to  
13 demonstrate that this was of no importance. During the relevant period,  
14 Mathieu Ngudjolo had not professionally had contact -- or had only had contact with  
15 the members of the staff of Kambutso.

16 The letter of 4 January 2003 that the Prosecutor exhibited in order to support the plan  
17 of attack of Bogoro would not have the conviction of your Chamber with regards to  
18 the existence of a plan made by Mathieu Ngudjolo, because firstly Mathieu Ngudjolo  
19 did not sign this letter. Its author, D03-66, indicated that this letter was  
20 relatively -- was quite simply a request for aid with a view to purchasing soap and  
21 other first aid items.

22 It was the intention of the Prosecutor, using a coded language -- according to the  
23 Prosecutor, it was like a little language to signify arms, ammunitions. Here, too, the  
24 Prosecutor does not give the keys to this code or state who its author is. It's  
25 insinuations in fact don't constitute a certain fact, even less serious presumption,

1 precise one as well, in order to prove the, or demonstrate the, planning of the attack of  
2 Bogoro by Ngudjolo and Katanga.

3 If this letter was not so important, and if so it was not understood according to him as  
4 arms/ammunitions, why did he submit it to debate before the Chamber? Should we  
5 understand, your Honour, if in the spirit of the Prosecutor soap was only soap and  
6 that the soap could also deal with the heavy weapons that the UPC had in Bogoro,  
7 that is the reason why the Defence deduces the interest that the Prosecutor had in this  
8 letter of stating the existence of a code which, according to him, would hide the  
9 purchase of arms and munitions.

10 If in the eyes of the Prosecutor this letter only was meant to prove that a delegation  
11 from Zumbe led by Boba Boba went to Walendu-Bindi to negotiate the attack on  
12 Bogoro, then the Prosecutor is mistaken. He is seriously mistaken.

13 Furthermore, Mr President, the Prosecutor doesn't establish any link of subordination  
14 between the author of the soap letter and Mathieu Ngudjolo. In any event, the  
15 Chamber shall disregard this letter from the file.

16 In the Lubanga judgment of 14 March 2012, Defence recalls that your learned  
17 colleagues of Trial Chamber I dismissed EVD-OTP-0086, a letter of 6 June 2002, on  
18 which the Prosecutor relied to establish the intention by Thomas Lubanga to create an  
19 independent State in Ituri. The Chamber found the circumstances in which the letter  
20 was obtained by the Prosecutor to be unclear. See paragraph 1085 and 1087 of the  
21 Lubanga judgment.

22 The same happens to be the case here, where the manner in which the letter of  
23 4 January 2003 was seized have never been established. Unable to prove beyond  
24 reasonable doubt the activities that Mathieu Ngudjolo may have undertaken within  
25 the FNI/FRPI alliance at the pertinent period, the Prosecutor decided to rely on the

1 visibility of the accused person in Bunia on 6 March 2003 in his capacity as colonel to  
2 sign the Cessation of Hostilities Agreement on 18 March; and on his statements,  
3 according to which he is a well-trained soldier and by which he was not the first -- it  
4 was not the first time he was fighting a war; and the interruption by Dark, who took  
5 the floor after having spoken about the role that he had played in the planning of the  
6 attack on Bogoro; and the authority that he is alleged to have represented.

7 Mr President, your Honours, neither Ngudjolo's visibility in Ngudjolo (sic), nor his  
8 rapid ascension within the FR -- FARDC and the fact that he stopped Dark when he  
9 was speaking, none of those rationally determine that he was the commander of the  
10 FNI, nor does it infer that he participated in the planning and execution of the attack  
11 on Bogoro on 24 February 2003.

12 Connecting Mathieu Ngudjolo to political and military activities goes back to 6  
13 March 2003. Ngudjolo himself provided the explanation. The Prosecutor did not  
14 cross-check those statements with the Ugandan general, Kale Kayihura, simply  
15 relying on plausible reasons. The connection of Mathieu Ngudjolo with military  
16 activities at that date has no established link with the attack on Bogoro.

17 Talking about factual matters, the Prosecution then displayed some speculations as  
18 Defence will now quote:

19 One: Mathieu Ngudjolo is not a novice in military matters. He was part of the  
20 garde civile. He was trained in handling light weapons and in the rules of  
21 governing the infantry and other military activities. This -- can this be said to be  
22 proof beyond reasonable doubt that Mathieu Ngudjolo planned, organised and  
23 executed the attack on Bogoro?

24 Two: That Mathieu Ngudjolo declared on a video that this was not the first time he  
25 was fighting a war; that he had been at war in Goma. When Mathieu Ngudjolo says

1 that it was not the first time, he was referring to his participation in the Bunia attack  
2 and he said that he had also fought in Goma. Why then did he not talk about  
3 Bogoro if he had had fought there, because he was describing his military functions  
4 and at that time did not know that he was going to appear before the ICC in  
5 connection with the Bogoro attacks?

6 Mathieu Ngudjolo has been consistent, both in the videos and before the Prosecution  
7 at the Bunia court, and even under oath here in this Court, Mr President, he testified  
8 that he participated in the attack on Bunia on 6 March 2003 and the attack on Goma in  
9 1996.

10 Third argument: Mathieu Ngudjolo escaped death in Bunia. What does that prove?  
11 Does it prove that when he got to Kamutso he no longer dedicated his life to his  
12 work as a nurse?

13 Fourth: Mathieu Ngudjolo is a member of a family of notables. How many  
14 notables did we have in Bedu-Ezekere? All members of his family, did they end up  
15 becoming militia leaders? This is mixing up issues, and the Chamber clearly will  
16 note that this falls short of the Statute provision relating to proof beyond reasonable  
17 doubt. So which of these elements stands in the charges against Mathieu Ngudjolo?

18 Fifth: The Prosecution believes that the certificate issued by Lipka Ngure is not  
19 credible, because he was not at the Kamutso post at the time Mathieu Ngudjolo was  
20 working there. Defence, once again, simply puts the following question: If the  
21 Prosecutor needed a birth certificate for any reason whatsoever, would he have gone  
22 to the authority in his council at the time of his birth?

23 Sixth point, Mr President: The Prosecution blames Defence for using archives which  
24 are not in evidence. What about EVD-D03-00106, EVD-D03-0011, EVD-D03-00116  
25 and many more? Seventh: It is the Prosecution's position that Mathieu Ngudjolo's

1 version on his conversion from a nurse to a colonel is not credible, because within  
2 three weeks it is not possible to rise to such heights. Yet the Prosecutor  
3 acknowledges that this very Mathieu Ngudjolo arrived in Zombe on 14 August 2002,  
4 but erroneously places on him command over the Nyankunde attack which took  
5 place on 5 December 2002. Between 14 August 2002 and September 5, 2002, that is  
6 only three weeks, but the Prosecutor does not explain how Mathieu Ngudjolo within  
7 that time-frame could have risen to such similar heights.

8 It is for these reasons, Mr President, your Honours, that Defence challenges the  
9 Prosecution to present or adduce before this Court a single documentary evidence  
10 that establishes the military capacity, or the status as combatant, of Mathieu Ngudjolo  
11 before 6 March 2003.

12 Defence calls on the Chamber to look at the document in which General Kale  
13 Kayihura refers to Mathieu Ngudjolo as "doctor," and not as a colonel as would be the  
14 case in the army. According to the general, "We do not want to go back to the  
15 experience of the UPC war. Therefore I ask, doctor, that you please show proof of  
16 discipline, remain in your territories. As for matters of security, see if you need any  
17 reinforcements. If people attack you, please ask for security assistance. We shall  
18 come. As you can see, the soldiers are here and others are on the way. The mission  
19 of these soldiers is to protect Ituri. Let us set aside any issues of confusion. People  
20 have been attacked in some areas and elsewhere, even in Lipri. They went there and  
21 people were killed in Songolo," transcript 185, page 68, line 25, page 69, line 6,  
22 EVD-OTP-00166, EVD-OTP-00167 and EVD-OTP-00168.

23 Mr President, Defence challenges the Prosecution to produce one single documentary  
24 evidence that can establish contact between Mathieu Ngudjolo and Germain Katanga  
25 before 8 March 2008.

1 Mr President, the Defence challenges the Prosecution to produce to this Chamber a  
2 single documentary evidence that establishes the participation of Mathieu Ngudjolo  
3 at any attack whatsoever before 6 March 2003.

4 Mr President, your Honours, the Defence challenges the Prosecution to place before  
5 this Court the slightest link between EVD-OTP-0025 and Mathieu Ngudjolo, apart  
6 from the statements or testimony of P-250 which is without any credibility  
7 whatsoever.

8 Mr President, your Honours, Defence challenges the Prosecution to present to this  
9 Court one single element of evidence even, posterior to the participation of the  
10 inhabitants of Bedu-Ezekere in the Bogoro attacks, and we mean presence or  
11 management of these people or involvement of these people in the management of  
12 these issues.

13 Eight: Prosecution believes that the argument by Ngudjolo to substantiate his  
14 presence in Bogoro on 24 February 2003 for a delivery is not credible. It believes that  
15 witnesses D03-963 and D03-965 are not credible.

16 Well, these were serious witnesses, as was clearly indicated in paragraphs 886 and 888  
17 of our final brief. Defence described the circumstances in which he met those two  
18 witnesses, and referred to various legal exchanges between parties in order to call  
19 these two witnesses at the very last minute.

20 From the very beginning, Defence had indicated that Defence witness D03-044 would  
21 come to The Hague to testify that on 24 February 2003 he had left Ngudjolo at the  
22 Kambutso health post, involved in his duties as a nurse. Is the delivery of a child not  
23 part of those duties?

24 Mr President, we believe that it is timely at this juncture to draw the Court's attention  
25 to the fact that the person who triggered these proceedings at the ICC, President

1 Joseph Kabila, never filed any complaint against Mathieu Ngudjolo. His letter of 3  
2 March 2004, EVD-D03-00139, referring the situation in his country to the Prosecutor,  
3 never referred to the village of Bogoro. That letter was brief, but it does not amount  
4 to a disclosure or intelligence substantiated in relation to crimes under the jurisdiction  
5 of the Court pursuant to Article 42(1) of the Statute.

6 It is clearly for this reason that President Kabila wrote to the Prosecutor stating as  
7 follows, "However, the authorities of my country ...", and I am quoting, "... are ready  
8 to co-operate with the Court - the ICC - in all matters relating to its activities that will  
9 flow from this request."

10 Regardless of the positive state of mind of the Congolese Head of State, the  
11 Prosecutor rather ignored him. To this very day, President Joseph Kabila was and  
12 is -- was fully aware of the details of the situation in his country and, therefore, in a  
13 position to provide factual details as to what happened in his country at the time. It  
14 is for this reason, according to Defence, that the Prosecutor failed to obtain important  
15 information on the attack on Bogoro.

16 Defence, however, went on to conduct an exhaustive investigation in Congo and in  
17 other areas of the world and came to the conclusion that the picture painted by the  
18 Prosecutor is incorrect.

19 Mr President, your Honours, the attack on Bogoro was planned by the president of  
20 the Democratic Republic of the Congo himself, because he sought to guarantee the  
21 integrity of the Congolese territory as well as the unity of the country which had  
22 come under threat because of the cessationist inclinations of the UPC. That, even in  
23 the context of the time, was pursuant to the constitution of his country which confers  
24 on the president, as the constitutional guarantor, the integrity of the territory; that is,  
25 of the country. Reference EVD-D03-00137.

1 Mr President, your Honours, you will recall that in his opening statement on  
2 24 November 2009, in that statement, Defence was of the opinion that something had  
3 indeed happened in Bogoro on 24 February 2005. Defence wondered whether  
4 responsibility for that attack should not be sought somewhere between Congo and  
5 Uganda. At the time, Defence promised to demonstrate that Mathieu Ngudjolo was  
6 not guilty either in law or in fact of the crimes charged against him by the Prosecutor,  
7 even if the Statute makes it an obligation. Today, Defence has been able to do so by  
8 its testimonies and documentary evidence that is now before this Court.

9 As for the Defence testimonies, Mr President, your Honours, some of the Defence  
10 testimonies, which were not -- were not challenged seriously by the Prosecutor, stated  
11 under oath that Uganda and Congo were the States responsible for that attack (1) to  
12 recover territory from the UPC and, (2) to secure its borders and its regime in power,  
13 evicting Thomas Lubanga's UPC which was accused of conniving with Ugandan  
14 rebels who were hostile to the Ugandan President Yoweri Kaguta Museveni had  
15 become something that was unavoidable.

16 Floribert Ndjabu, president of the FNI, explained to this Chamber that the FNI was  
17 not existent in Bedu-Ezekere at the time of the events and that Mathieu Ngudjolo was  
18 not the commander. He was not even a member of the association. This witness  
19 testified that it was the EMOI that was responsible for the attack, a structure that  
20 came under the authority of Mr Joseph Kabila Kabange, Head of State of the Congo.

21 Evidence and reference EVD-OTP-00234, which points to the involvement of the  
22 EMOI in the Bogoro attack, that document corroborates EVD-D03-0038 which is  
23 posterior to the attack. Therefore, for Ndjabu, this attack was conducted by FAC and  
24 the APC as seen in transcript 243, page 27, lines 12 to 7. Witness Pichou made  
25 similar testimony. Sharif Ndadza also confirmed that the Bogoro attack was

1 conducted by APC Mbusa Nyamwisi of the EMOI.

2 Germain Katanga, testifying in his own very case and who had attended several  
3 preparatory meetings to the Bogoro attack in Beni, described in great detail the plan  
4 that was put together by EMOI and the two-phased attack that took place on 10 and  
5 24 February 2003. Germain Katanga went on to state that after the failure of  
6 10 February 2003, the plan had been brought to Aveba by Adirodu and that it had  
7 been handed over to Blaise Koka in his capacity as commander of operations in  
8 Bogoro.

9 Katanga explained that the plan to attack Bogoro was set up in Beni by EMOI.

10 Transcript 317, page 12, 112 to 115. Katanga even said that no delegation came from  
11 Zombe before 24 February 2003. Transcript 318, page 16, lines 13 to 9.

12 Some Prosecution witnesses also came to the same position. Witness P-12 asserted  
13 before this Court that Ngudjolo only got to know the FNI on 18 March 2003 in Bunia  
14 at the time of the signing of the cessation of hostilities agreement. P-219 also testified  
15 that at the time of the attack on Bogoro Mathieu Ngudjolo was not even a member of  
16 the FNI.

17 The question then arises as to whether Ngudjolo, who only got to know the FNI and  
18 the FRPI on 18 March 2003, how could he have been the commander at the relevant  
19 time, to the extent that with Germain Katanga, who only got to know the FNI on 22  
20 March 2003, how could they have concocted a plan to attack Bogoro on  
21 24 February 2003?

22 Mr President, your Honours, we are dealing here with a perfect case of an impossible  
23 crime. Aware of this material and moral impossibility for Ngudjolo to commit the  
24 crimes charged against him, the Prosecution continued to build on this assumption  
25 and developed a new theory; that is, one whereby Ngudjolo becomes the head of the

1 Lendu Bedu-Ezekere militia.

2 This theory doesn't hold because Chef Manu, chief of the Bedu-Ezekere groupement,  
3 who appeared before this Court, explained how the self-defence committee was set  
4 up in order to make up for the shortcomings of the Balkanized Congolese state which  
5 was occupied by Congo at this very difficult time.

6 Mathieu Ngudjolo, who according to the Prosecutor was the leader of the militia of  
7 the Bedu-Ezekere, never went to Beni where the Bogoro attack was planned. He  
8 never went to Aveba where there was an airport and the BCA camp, where the FAC  
9 and the APC soldiers were staying, and who then defeated the UPC on 24 February  
10 2003.

11 Testifying in his own case, Mathieu Ngudjolo said that the attack was carried out by  
12 the Congolese and Ugandan government who had an interest in kicking out the UPC  
13 from Bogoro. So let us understand, Mr President your Honours, what happened in  
14 Ngudjolo's testimony, particularly the time at which he appeared to testify.

15 The Prosecution argues that he took the last position in order to be able to adapt his  
16 testimony to all that had been said by previous testimonies. We are rather surprised  
17 at this approach because the position or the order in which Ngudjolo appeared can  
18 have no bearing on his responsibility. He is a witness when he testifies before this  
19 Court and he is a witness in that capacity only.

20 Should we remind the Prosecution that the Defence motion of 20 July 2011, number  
21 379, was the subject of discussion whereby we sought to argue that Ngudjolo should  
22 not be incriminated by his own testimony. This can be seen in filing 3100 of the  
23 Prosecution, 11 August 2011, but your Chamber refused to provide such assurances to  
24 Mr Ngudjolo, pursuant to Article 932 of the Regulations.

25 From that point on, Ngudjolo becomes an ordinary witness who is under oath to tell

1 the truth and nothing but the truth to this Court, and that, Mr President, your  
2 Honours, is what he did. The onus therefore was on the Prosecutor, if he felt that  
3 Ngudjolo had breached his oath, to revert to the instruments governing the ICC on  
4 such matters.

5 What about the Prosecution witnesses, who heard testimony by other witnesses  
6 before coming to testify here before you, your Honours? P-28 testified a long time  
7 after his friend P-250 had testified. P-166 testified after his son P-233, and P-160  
8 testified after her husband P-12.

9 Mathieu Ngudjolo produced the letter of 24 November 2002 written by late Samba  
10 Kaputo, may his soul rest in peace, deputy director of the chief of cabinet of the Head  
11 of State Mr Joseph Kabila Kabange. That letter was addressed to Lieutenant-General  
12 Liwanga, Chief of Staff of the joint forces of the FARC.

13 In Bunia in 2003 Ngudjolo learned from General Kisempia what the role of EMOI was,  
14 as well as the activities that were co-ordinated by the deputy director of the Head of  
15 State's office in Congo relating to the targeted operations in Bogoro, Mandro and  
16 Mongbwalu.

17 Mr President, your Honours, no, Mathieu Ngudjolo is not -- and even less so the  
18 alleged combatants of the Lendu and Bedu-Ezekere, they are not responsible for the  
19 attack on Bogoro.

20 Defence objects or stands in opposition to the allegations of the Prosecutor on the  
21 opportunistic attacks by the alleged combatants from Zumbe. Paragraphs 252, 215,  
22 374, 400, 709, 766, 912, 1033, 1034, 1061, 1131, 1154, 1155, 1166, 766, 1033 of the final  
23 brief of the Defence.

24 Mathieu Ngudjolo's Defence, therefore, vehemently challenges this theory of the  
25 opportunistic participation of Zumbe combatants, which is at variance with Germain

1 Katanga's sincere testimony.

2 Defence provided evidence on the planning of the Bogoro attack of 24 February 2003  
3 by the Congolese authorities; this, by way of the letter of Samba Kaputo, and I quote,  
4 "Going by the last meeting of the security meeting of 15 September 2002, by the office  
5 of the president relating to the operations in Nyankunde, district of Ituri, and mindful  
6 of the urgency of the situation, you are hereby ordered to reinforce FARC commands  
7 and soldiers on the ground with a view to pursuing the operations on targeted sites;  
8 namely, Mongbwalu, Mandro, Bogoro and Komanda.

9 For this purpose, you are requested to send a team of officers to supervise and  
10 continue the execution of joint operations between FAC and APC in the Beni region in  
11 Ituri. Hence the -- rather, for the -- to ensure success of this mission, please reinforce  
12 your teams with the necessary and appropriate logistical materials and financial  
13 resources that the Head of State will make available to you.

14 Mindful of the sensitive nature of this situation, all confidential reports must be  
15 directly sent to the cabinet of the Head of State. Appended is a list of the additional  
16 officers, additional intelligence CNS officers, who will collaborate with the FAC  
17 commanders on ground. The situation is urgent," end of quote. EVD-D03-00136.

18 Your Honours, let the historians of international criminal justice determine whether  
19 the attack on Bogoro was an operation led to maintain the integrity of the country in  
20 light of this particular letter, or whether it was a criminal attack as the Prosecutor sees  
21 it, but if he truly wants to continue stating that it was a criminal attack he really  
22 should return to the Samba letter to find the elements, both objective and subjective,  
23 of indirect co-perpetration as defined in the relevant jurisprudence of the ICC.

24 And, to be fair, I think really the Prosecutor should listen to the Congolese authority  
25 regarding the contents of this letter, but yet he refused to do so. Unlike the soap

1 letter, this letter, the Samba letter, shows all the necessary elements of indirect  
2 co-perpetration. The protagonists, namely the office of the Congolese Head of State,  
3 the office of the president of the republic, the headquarters of the joint forces, the FAC,  
4 the APC, the CNS, were parties to an agreement - a plan - aiming to attack Bogoro.  
5 The proof of this plan is found in the first paragraph of the Samba letter, and the  
6 paragraph reads as follows, "In accordance with the last meeting held on 15  
7 September 2002 in the office of the president of the republic dealing with the  
8 operations in Nyankunde and Ituri district, and in light of the urgency of the situation,  
9 you are hereby ordered to reinforce FACA commands and troop levels in the field  
10 with a view to continuing operations on the sites: Mongbwalu, Mandro, Bogoro and  
11 Komanda."

12 That letter was dated and signed on 23 November 2002, directly addressed to the  
13 head of joint staff, Lieutenant-General Liwanga Mata Yamunyobo (phon). The Head  
14 of the State of the Congo, Mr Joseph Kabila Kabange, provided essential -- an  
15 essential contribution and this was co-ordinated. This clearly is shown in the letter.  
16 In his order as supreme commander of the FAC, his assistant Chief of Staff, the late  
17 Samba Kaputo, gives instructions to reinforce FAC commanders and troop levels.  
18 What's more, there were four battalions in Beni, and I make reference to  
19 EVD-D03-00032, 33, 35 and 36, and had asked President Kabila to withdraw these  
20 troops, EVD-D03-00084, so the troop levels were sufficient for the success of the  
21 operation.

22 The essential co-ordinating contribution can be seen in paragraph 2 of the Samba  
23 letter, where it is stated, "To do so, you are asked to send a team of officers to  
24 supervise and to continue the conduct of the joint FAC/APC operations in the Beni  
25 region and in the Ituri region. When the supreme commander also ordered, for the

1 success of this mission please provide the necessary logistic materials and financial  
2 resources which the Head of State will provide you with."

3 The Head of State of the Congo, Mr Joseph Kabila, did have control over the  
4 organisation. This letter deals with the FAC, the Congolese army, and he was the  
5 supreme commander of this army. Specific orders were given. Consequently, the  
6 use of the EMOI, a mechanism or an organisation that reported directly to the office of  
7 the Head of State, is quite clear, and indeed several FAC officers were dispatched to  
8 Beni and Aveba to co-ordinate the operation: Colonels Aguru, Kilebele, Duku,  
9 Ekuba; APC officers Blaise Koka, Mutombo Demouton.

10 Germain Katanga stated that Blaise Koka, who had personally led the operation on  
11 24 February, was based in Aveba. The necessary numbers of men, weapons and  
12 ammunition were provided to the troops in the field: The FAC and the APC of  
13 Mbusa Nyamwisi; the army of the RCD-K/ML, who was allied with the Congolese  
14 government facing a common enemy, the UPC of Mr Thomas Lubanga.

15 So this control exercised by Kabila can be seen in this sentence in paragraph 4 of the  
16 letter, "In light of the -- since this is such a delicate situation, all confidential reports  
17 shall be directly sent to the office of the Head of State," so you see a structured and  
18 hierarchical organisation had been set in place.

19 It was -- it included at the very top the Head of the State, and then there was the head  
20 of joint forces of the FAC, all the officers of FAC sent to the field within the EMOI,  
21 and so as supreme commander the Head of the State ensured that his instructions  
22 were followed to ensure that the operation of 24 February would be conducted  
23 without a flaw.

24 To do this he dispatched, or rather he directed the head of the joint forces to go see the  
25 intelligence officers of the CNS to get their intelligence, their savoir-faire.

1 So the hierarchy was as follows: We had the Head of the State; the supreme  
2 commander of the FAC; the head of -- chief of joint forces; the EMOI; and so on and  
3 so forth. The orders of President Kabila were followed and obeyed to the very letter,  
4 and indeed the UPC was driven out of Bogoro on 24 February.

5 In terms of the subjective elements of indirect co-perpetration provided for in  
6 Article 30 of the Statute, all the protagonists, all those present at this security meeting  
7 during which Bogoro was targeted, intended to drive out the UPC by military means,  
8 to drive the UPC out of the village. They knew the circumstances that would allow  
9 them to have control over these actions that pushed out the UPC.

10 The Prosecution called witnesses P-250 and P-28 to support the view that a delegation  
11 from Bedu-Ezekere was sent to Aveba. What a coincidence, a triple coincidence,  
12 because these two witnesses say that they know each other very well and then they  
13 were introduced to the OTP by the same intermediaries and then they were the only  
14 ones who saw this delegation.

15 The other star witnesses of the Prosecution, namely 279, 280 and 219, gave diverging  
16 and contradictory versions of this trip. Just to remind you, 279 said that it was rather  
17 Germain Katanga and his group that went to Zumbe. This is transcript T-144, page  
18 49, lines 19 to 25. He also mentioned that a cow had been slaughtered at that time.

19 Then another witness contradicted him, saying that another person went to Beni to  
20 get -- and then there was yet another contradiction saying that Boba Boba and that he  
21 never had any knowledge of Zumbe combatants taking part in meetings to prepare  
22 the attack of Bogoro, transcript 208. Which version are we to believe? Which  
23 version should trump the other and why?

24 Furthermore, how can we any credence to this coincidence? One of the  
25 intermediaries, 183, asked P-28 to lie to the Chamber, and the other intermediary

1 showed himself to be a person abusing his position in various ways, encouraging or  
2 urging witnesses to give false testimony, to perjure themselves before the Court.

3 When asked about the testimony of 279, who had mentioned a trip by Katanga to  
4 Zumbe, the Prosecutor said he no longer wished to rely on that remark, saying that  
5 the witness must have gotten the chronology wrong and he certainly must have  
6 meant the Mandro attack.

7 The Prosecution's attitude is rather surprising once again. I think we have to look at  
8 this in two ways. First of all, a strategy of wiggling away from the essential issues.

9 The Prosecutor has realised that his theory has been neutralised by his very own  
10 witness, 279.

11 Second line, this is sort of a back-up strategy. The Prosecutor was not present in  
12 Ituri at the time of the events. The person who says he was there, 279, argues that  
13 Katanga went to Zumbe and that a cow had been slaughtered. These are events that  
14 one does not forget. That is the testimony of the witness, be it true or false.

15 Up until the moment that 279 left the witness box he never said that he had made a  
16 mistake about the dates or the times, so there you have it. When people with bad  
17 intentions decide to lie before a Court, this is what happens.

18 Now, moving on to a third stakeholder in this common plan. They say that there  
19 was a third player involved in the attack on Bogoro, and this was sustained by the  
20 legal representative of child soldiers.

21 PRESIDING JUDGE COTTE: (Interpretation) Mr Kilenda, please try to slow down  
22 and please remember to finish your sentences. At times, the interpreters and the  
23 court reporters are having trouble.

24 MR KILENDA: (Interpretation) Thank you. I just would like to remind you of  
25 the concept of co-perpetration in the Lubanga trial, and this is -- you see, this concept

1 of co-perpetration is originally routed in the idea that when the sum of co-ordinated  
2 individual contributions of a plurality of persons results in the realisation of all the  
3 objective elements of a crime any person making a contribution can be held  
4 vicariously responsible for the contributions of all the others, and thus can be  
5 considered to be a principal to the whole crime. This theory of co-perpetration,  
6 based on joint control over the crime, involves the division of essential tasks between  
7 two or more persons acting in a concerted manner, for the purposes of committing  
8 that crime. So you see, it is the sharing of these essential tasks as part of a common  
9 plan that justifies the charging of one of the co-perpetrators for the contributions of  
10 the others.

11 Thus, it has to be argued that the co-perpetrators have agreed to -- either it is a  
12 common plan, and the Prosecution has to prove the case, or this is something that was  
13 dreamt up by three parties. In the Lubanga case, the co-authors who were not  
14 brought before the ICC were identified at the preliminary phase. Chief Mandro,  
15 Rafiki Saba, Floribert Kisembo, et cetera, and in the final remarks made by the  
16 Prosecution we see the weakness of his argument, this notion of the common plan.

17 No, Mr Ngudjolo did not take part in any planning of an attack on Bogoro. Not the  
18 carrying out of such an attack. He had no control and really it comes as -- it's no  
19 coincidence that our learned friends wrote the following, at paragraph 1205 of their  
20 brief and I quote: "The Defence recognises that Germain Katanga played a role by  
21 having these dealings with the RCD-K/ML, the APC and the EMOI receiving APC  
22 commanders including Koka and Mike 4, in Aveba."

23 The Defence also recognised that Katanga played a role in the implementation of the  
24 plan to drive out the UPC from Bogoro. However, none of these tasks were carried  
25 out in collaboration with Mathieu Ngudjolo who played no role in that plan.

1 The Defence wishes to stress that any contribution made by Germain Katanga,  
2 regarding the legitimate plan that had been drawn up in Beni, targeting the UPC base  
3 in Bogoro, and was not some plan to wipe Bogoro off the map, in co-operation with  
4 Mathieu Ngudjolo. This is what Mr Ngudjolo has been saying, ever since  
5 6 February 2008, the day he was arrested in Kinshasa and transferred to The Hague,  
6 on 7 February.

7 Our learned friends from the other Defence team have pointed out at paragraph 1216,  
8 and rightly so, I quote, "The Prosecution has not been able to establish that Germain  
9 Katanga and Mathieu Ngudjolo co-ordinated the essential contributions that led to  
10 this plan to wipe Bogoro off the map. There is no proof that the two were  
11 co-ordinating efforts. Nor is there any proof that Ngudjolo made any kind of  
12 contribution and certainly not an essential contribution. As for Mr Katanga's  
13 contribution to the legitimate plan drawn up, and in Beni, it was noteworthy but not  
14 essential."

15 Your Honours, the Defence wishes to draw your attention to the silence, the silence of  
16 the Prosecutor and the legal representatives of victims, the silence about this letter,  
17 the Samba letter. This silence says it all.

18 I must remind you that after hearing this testimony from fake child soldiers, the  
19 Prosecutor went all the way to Kilomoto to take the same document, and on the basis  
20 of that the Prosecutor in his final brief acknowledged that this person was over 15 at  
21 the time of the events. Why did he not do the same thing when it came to the Samba  
22 letter?

23 The letter relating to -- well, the chief of the -- the Head of State of the Congo is  
24 willing to co-operate with the Court, but the Prosecutor chose not to co-operate with  
25 the Congolese authorities. Consequently, your Honours, the Prosecutor's

1 investigation is nothing more than a cocktail of bad choices. It's been biased, it's  
2 been incomplete, because the key actors in this tragedy that occurred in Ituri, those  
3 themselves, who found themselves caught up in this -- these staggering acts of  
4 violence were not heard by the Prosecutor. There was no analysis of Mr Ngudjolo's  
5 personality. There was no psychiatric report done, which is elementary in such  
6 matters, and this is a glaring absence. An investigation done in the groupement,  
7 where Ngudjolo comes from, certainly would have shed a great deal of light on  
8 Mr Ngudjolo's personality.

9 So, this investigation has been biased. We see that the Prosecutor led this particular  
10 case only in one direction. He was only going in one direction, pointing to the guilt  
11 of Mr Ngudjolo. He ignored the suggestion by the Chamber to implement the  
12 statutory obligations, and I make reference to reports on both RFI and Voice of  
13 America. These reports relating to the Minister of Human Rights.

14 What about the threat to appeal, if you dare to acquit the accused, how can we -- how  
15 can we understand, how can we explain why the Prosecutor went off on these  
16 Outreach campaigns and publicly accused the two of being responsible for the  
17 massacre in Bogoro while the trial was still under way here?

18 It's because the Prosecutor wanted a guilty verdict at any cost and you, your Honour,  
19 on behalf of your Chamber, and the two colleagues beside you, it's you that we turn  
20 to, and I refer to transcript 74, page 10, line 14 and page 11, line 13 and I quote you:  
21 "Scrupulous respect for the fundamental text of this Court is our greatest safeguard  
22 for all of us."

23 The Prosecutor was clearly lacking in objectivity and impartiality in his attempt to  
24 ascertain the truth about the attack on Bogoro on 24 February. He obviously  
25 violated the statutory rights of Mathieu Ngudjolo, the presumption of innocence, and

1 actually presumed he was guilty, right from the very beginning. He clearly rejected,  
2 dismissed, swept aside Article 54(1) of the Statute which clearly states that he must  
3 investigate both incriminatory and exculpatory materials and he failed to respect the  
4 regulations relating to evidence, and has failed to demonstrate the guilt of the accused  
5 beyond all reasonable doubt in accordance with 66(3).

6 May it please the Chamber, that in accordance with Article 74(2) of the Statute and on  
7 behalf of the very principles that govern the operations of this Court, we call upon the  
8 Chamber to acquit Mathieu Ngudjolo and to order his release.

9 There you have it, your Honours. I thank you. With your leave, I wish to deal with  
10 one other task, one other duty, namely to introduce the two other members, Ann  
11 Ellefsen, a Canadian, and Caroline Andrivet, a French woman, and the two -- these  
12 two colleagues are from the Quebec Bar, and from the Paris Bar, respectively. They  
13 have provided immense assistance to us in our final arguments. I thank you.

14 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr Kilenda, for your  
15 final arguments, and wishes to greet the two members of your team, whom you have  
16 just introduced. Along with the other members of the Katanga team that were  
17 introduced, we can see that the Defence teams here at the ICC are very lucky, because  
18 they have this assistance from these young ladies, who are now members of the legal  
19 profession.

20 We shall now conclude with remarks by Mr Kilenda, and this has to do with  
21 the -- we've heard the final arguments from the teams. We have four hours  
22 tomorrow, four hours of hearings, and this afternoon we shall determine whether we  
23 will be asking questions of the two Defence teams. And no doubt we will have some  
24 requests for clarifications, and in the ordinary course of events that should not exceed  
25 one hour of hearing at the most. One hour of time tomorrow for Mr Hooper and his

1 team, Mr Kilenda and his team, they will have that hour to provide additional  
2 information regarding remarks made during the final arguments, or points raised in  
3 their respective briefs.

4 Then we were thinking of giving the Prosecution an hour to rebut, to provide  
5 arguments in rebuttal of arguments made here by the Defence. You may have an  
6 hour to provide additional information, if you think that is useful. We will then  
7 have a half-hour break and then, if the Defence teams wish to rebut in turn, provide  
8 some arguments in rebuttal of the Prosecution's rebuttals they will have an hour, all  
9 depending on the remarks made - I'll just be finished in a moment,

10 Mr MacDonald - and then the last hour will be allocated to Mr Ngudjolo, he will have  
11 30 minutes, pursuant to 67, Article 67 and then Mr Katanga will be speaking for  
12 15 minutes. He will have 15 minutes but he does know that he can exceed that time.  
13 He can go from 15 minutes to 30 minutes and, consequently, we will be able to end at  
14 1.30. Mr MacDonald.

15 MR MACDONALD: (Interpretation) Thank you, your Honour. I didn't want to  
16 interrupt you right in the middle of what you were saying but I don't think we will  
17 take a full hour. We do have some points we would like to return to, I don't know  
18 how much time that will take, but I certainly hadn't thought it would be an hour. I  
19 just wanted to make that clear to everyone, so there you have it. I thank you.

20 PRESIDING JUDGE COTTE: (Interpretation) Thank you. We have, we had  
21 provided for more time. If we adjourn earlier, very well. We had not allocated any  
22 time to the legal representatives. We thought that they certainly had had their  
23 opportunity to make their views known Wednesday morning, and I believe  
24 Mr Luvengika did want to deal with one point that he was -- he thought was quite  
25 critical and Professor Fofé cleared up a few points as well. The Chamber has not

- 1 forgotten what Mr Luvengika pointed out last week. So the Chamber may not need  
2 a full hour for our questions, but I think you can see that we have allowed time for  
3 various rebuttals and so on and so forth. Are we all in agreement? Apparently we  
4 are all in agreement.
- 5 So we shall resume tomorrow at 9 a.m. for a last hearing, and the hearing now stands  
6 adjourned. Tomorrow at 9 a.m.
- 7 (The hearing ends in open session at 12.59 p.m.)