

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra and Judge
4 Christine Van den Wyngaert
5 Situation in the Democratic Republic of the Congo - ICC-01/04-01/07
6 In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui
7 Trial Proceedings
8 Friday, 27 November 2009
9 (The hearing starts at 9.37 a.m.)

10 (Open session)

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

12 PRESIDING JUDGE COTTE: (Interpretation) The hearing is now in session. Please
13 be seated. The two accused are now with us in the courtroom.

14 Court officer, can you therefore call the case that we are going to be debating
15 today.

16 THE COURT OFFICER: (Interpretation) Situation in the Democratic Republic of
17 the Congo. Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui. ICC-01/04-01/07.

18 PRESIDING JUDGE COTTE: (Interpretation) The Court would like to thank you,
19 court officer. The Presiding Judge would like to apologise for the poor quality of his,
20 but this has -- is totally against his will. He would also like to indicate to you that
21 there's been a slight change in our timetable for this morning; namely, we are going
22 to sit from 9.30 to 11.30 for a two-hour period.

23 And of course, if the Prosecutor feels that the witness needs to have a suspension
24 or break, he will pass this on to us. Now, we will do this because at -- because we need
25 to have -- between 12.00 and 12.30, we are going to have an ex parte. And we will continue

1 at 2.00 for another two-hour period, from 2.00 to 4.00. So, 9.30 to 11.30, then 2.00
2 to 4.00 for the open session.

3 The Chamber, of course, isn't forgetting Counsel Gilissen and Luvengika; they
4 should have an answer today. I don't have any other particular announcements to make
5 at this time. We are going to get on with our work where we left it yesterday.

6 Court officer, the Court is going to ask you to announce a closed session to
7 enable the witness to enter the courtroom.

8 MR GILISSEN: With your permission, I am not going to hide the fact that after
9 the days that we have had, particularly the testimony, that with regards to the way in
10 which your Court is functioning, this is a Court which is young, and I just want to make
11 a reflection.

12 I have the feeling, particularly having looked at all my notes and the transcript
13 of the testimony of the first witness, the head of investigations, that perhaps it would
14 have been possible in accordance with what the Court might envisage, it might be judicious
15 to have a possibility to have comments. Not a right to comment, but the possibility to
16 make comments.

17 It would seem to me a posteriori, independently of the issue and after the
18 examination, within a very limited framework which the Court should set, there would
19 be a possibility for each of the possibilities to -- for the parties to give a reflection
20 without going into pleadings - let's be clear on this - but just a real comment. That
21 might make this a more rich process for everyone. And I would like to be open to the
22 Court. I would say this is more for reflection that I would like to make that -- than
23 anything else. Thank you.

24 PRESIDING JUDGE COTTE: (Interpretation) Thank you. The Court is going to
25 reflect on your suggestion. Court officer, if you could please take us into closed session,

1 such that the witness can now enter the courtroom.

2 (Closed session at 9.38 a.m.)

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12 (Open session at 9.39 a.m.)

13 THE COURT OFFICER: (Interpretation) We are now in open session, your Honour.

14 PRESIDING JUDGE COTTE: (Interpretation) Thank you, court officer. So,

15 Prosecutor, the floor is open to you. Yesterday you had the floor, and now you have it

16 again.

17 MR MACDONALD: (Interpretation) Thank you, your Honour. I would ask you for

18 a private session, because we are going to go back to what we were discussing yesterday

19 and we are going to give the names of certain persons.

20 PRESIDING JUDGE COTTE: (Interpretation) Court officer, please could you take

21 us into private session.

22 (Private session at 9.40 a.m.)

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16 (Open session at 9.54 a.m.)

17 THE COURT OFFICER: (Interpretation) We are now in open session.

18 PRESIDING JUDGE COTTE: (Interpretation) Thank you, court officer.

19 MR MACDONALD: (Interpretation)

20 Q. Witness, I would like to go back to the moment that -- well, 24 February 2003
21 you are in the reeds. In this place, from this place, from your hiding place, what are
22 the UPC soldiers doing? What can you see from where you are?

23 A. When we were in our first hiding place, we could only hear gunfire and bombs
24 that were exploding not far from where we were. At a certain time I moved and I could
25 see where the military camp was, which was burning, and I could see the population -- the

1 people there were going up a mountain to go behind that mountain. After the people had
2 fled, and after a certain amount of time, we started to have people who were -- well,
3 we saw people who were going towards the mountain and they had property with them.

4 Q. Have you seen -- did you see what the UPC soldiers were doing?

5 A. No, we were far away from them. We just saw them going in the direction of
6 Waka mountains and towards Bunia. These soldiers left with the members of the population,
7 but afterwards I was able to meet people who had gone with the UPC and they told us that
8 in the camp there was the enemy and people who were in that -- and so people left the
9 camp together. There was gunfire and at the time of gunfire people were injured, or they
10 were injured with machetes, but I didn't see this myself. I wasn't a witness myself of
11 the acts of the UPC soldiers.

12 Q. You have just mentioned you saw people fleeing. Did you see the UPC flee and
13 the civilians flee?

14 A. Yes, from my hiding place I saw a group of people who were fleeing the military
15 camp and who were going to Mount Waka and from my hiding place it was difficult to see.
16 I couldn't leave it. There was firing. I could be seen and that's why I didn't move.

17 Q. Could you indicate to us -- among the civil population who were fleeing, could
18 you give us a number as to how many people were leaving, or give us an idea of the size?

19 A. It's difficult to give you the number of people who were fleeing, but I would -- could
20 tell you that there were a lot of people in this camp.

21 Q. One question that I would like to go back to, in the UPC camp you mentioned
22 that there were houses. Could you describe these houses to us? The soldiers' houses?
23 I presume they were soldiers' houses.

24 A. There were small houses. They were called manyata. These are small houses for
25 soldiers.

1 Q. And who -- can you tell us who lived there? Sorry, could you tell us where
2 the soldiers lived?

3 A. The soldiers lived with their spouses.

4 Q. So, were these spouses and the soldiers living alone?

5 A. No. When the soldiers were in the military camp, their wives were there as
6 well. They were living with them.

7 Q. Did other people live with them, members of their family?

8 A. I couldn't know. I couldn't give you details. The members of their families
9 might come and visit and then leave. I don't know whether they could stay there. When
10 the attack occurred, well, before the attack, the members of the population alerted -- well,
11 the soldiers alerted their people so that they could take shelter in the camp.

12 Q. So, you are referring to the fact that there were many civilians who had -- who
13 were fleeing with the soldiers headed towards the mountain?

14 A. Yes.

15 Q. You spoke of a warning, because there was a warning the civil population went
16 to the camp. Was there such a warning on 24 February 2003?

17 A. On 24 February, as you saw, each time we got information people made their
18 arrangements to flee as soon as they got that information and they found a way to get
19 to Bunia, or elsewhere. That information came in the evening. It wasn't information
20 in the real meaning of that word. They were rumours. People were saying that maybe at
21 the end of the week there would be conflicts. People were not sure about that information,
22 because most of the people were in Bogoro and there was a period of mourning in Bogoro.
23 So, on 24 February the information was not very specific. When the fighting began everyone
24 was surprised, taken by surprise, and they fled. They made their arrangements.

25 Q. With regard to the attack on Bogoro on 24 February 2003, to your knowledge how

1 many warnings had there been, or had information been provided before the attack?

2 A. I couldn't give you that specific answer, because someone could give me the
3 information and give the same information to another person and this other person could
4 come back to me and give me that information.

5 Q. I think we can name that person. Who was the commander of the UPC leader? Before
6 there is an answer, unless the Chamber has observations to make? Who was the commander
7 of the UPC camp, at the institute, where the institute was?

8 A. Do you want me to give his name publicly, or not?

9 Q. You can name him publicly.

10 A. The very day of the attack, on 24 February, it was Commander Kisémbó.

11 Q. Why did you say the specific day of the attack? Was there someone else in charge?

12 A. Yes, because, you see, the commanders rotated. There was a rotation. One
13 commander would be replaced by another one. That was done regularly.

14 Q. So, on 24 February was the commander --

15 THE INTERPRETER: Inaudible.

16 THE WITNESS: Exactly.

17 MR MACDONALD: (Interpretation)

18 Q. Did you know Commander Kisémbó?

19 (Expunged)

20 (Expunged)

21 (Expunged)

22 A. No, because at that time it was very difficult because the attack was already
23 over, but he was in the habit of giving information. Each time that an attack was imminent,
24 he would give us that information.

25 Q. Regarding the attack on Bogoro, were you given that kind of information?

1 A. Regarding the attack of 24 February, I would say, no. No, I didn't have the
2 opportunity to talk to him.

3 Q. I would now like to go to the time when you were hidden in the reeds. You saw
4 civilians flee, the ones who were in the camp with the soldiers, but what about the other
5 civilians of Bogoro? How did they react? Can you describe how the other civilians as
6 you were leaving the house, what did you see?

7 A. I would give explanations about the day of the attack. When the attack began,
8 several people were far away from the camp. It was not possible to enter the camp. Those
9 who were lucky enough to get into the camp, they were able to flee behind the soldiers.
10 Amongst them there was the one who were killed in the camp. Others were shot as they
11 were in the process of fleeing, moving towards the hills. The ones who were outside the
12 camp, some hid two or three or four days. Some were stalked, when they tried to leave
13 and head towards Bunia. They fell into the traps of the enemy. They were identified,
14 judged. They were asked about their ethnic origin. They were asked to speak in their
15 mother tongue and if you used languages to try to hide your identity and they tried to
16 say that they were of other groups. Depending on what we were told about what happened,
17 some people died in the camp; some were able to survive in the camp. Others were captured,
18 and that's how we found out about the entire story.

19 Q. You, yourself, spoke yesterday about not being able to get to the camp, the
20 UPC camp, and now you just mentioned that it was impossible for some people to get to
21 the camp. Could you explain why it was impossible for the people to get to the camp?

22 A. It was impossible because of the distance. When the gunfire began, we had to
23 move quickly, hurry to the camp but, before getting to the camp, the soldiers had already
24 taken possession of the zone.

25 Q. When you say "the soldiers," which ones are you referring to?

1 A. Our enemies, the enemy soldiers who kept people from getting into the camp.

2 Q. Without naming this person for the time being - or perhaps it might be possible - you
3 spoke about a period of mourning. You referred to people mourning. Whose death were
4 you mourning?

5 A. The person in question was, well, it was a person who wanted to celebrate the
6 commemoration of his people who had died in the 2001 and 2002 fighting. Those people
7 did not survive the fighting then. He, himself, as well as members of his family were
8 not able to get away. Some survived that fighting. He lived close to the -- beside the
9 camp. His family was lucky, got into the camp, but he wasn't able to leave and flee behind
10 the soldiers.

11 Q. What is the name of that person?

12 A. This man is called -- well, we are in public session. Am I allowed to give
13 his name?

14 MR. MACDONALD: (Interpretation) This is a person who is deceased, your Honour.
15 I will allow you to rule or decide.

16 Q. Yes, you can give his name.

17 A. This man was called Matiya Babona. He, himself, and all the members of his
18 family died. Some were lucky to get into the camp and others weren't lucky enough. Some
19 lived.

20 MR MACDONALD: For the transcription purposes, your Honour, perhaps it might
21 be a good idea for the witness to spell out the name of that person or write it out,
22 as the Chamber wishes.

23 PRESIDING JUDGE COTTE: (Interpretation) We will follow the same procedure as
24 yesterday, because it was good. Mr Courtroom Usher, could you ask the witness to write
25 out the name of that person on a sheet of paper and the court officer will read out that

1 name.

2 JUDGE DIARRA: Your Honour, if you don't mind - and I would ask the Defence
3 or the counsel to be indulgent - these names being written on paper each time and being
4 added to the list of exhibit s will become a rather annoying or difficult process. I
5 think you could just spell out the name and everyone would be in agreement with that.

6 PRESIDING JUDGE COTTE: (Interpretation) Thank you, ma'am. If the name is just
7 one or two syllables perhaps, for the time being, Madam Courtroom Officer, could you
8 read that name out.

9 THE COURT OFFICER: (Interpretation) The name is Matiya Babona,
10 M-A-T-I-Y-A - B-A-B-O-N-A, and the document will be placed on the record as EVD-OTP-00012.
11 Thank you.

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you.

13 MR MACDONALD: The microphone of the courtroom officer was still on. I wasn't
14 quite sure.

15 Q. Sir, so Babona, Mr Babona, had organised a commemoration for previous attacks
16 on the village of Bogoro. And you mentioned 2001 and 2002?

17 A. That's right.

18 Q. When this memorial service was supposed to occur, when was that supposed to
19 be?

20 A. This memorial was supposed to be on 24 February 2003. It was supposed to be
21 just before the 23rd or the 24th. That is when the people spent the night for the memorial.

22 Q. You say people spent the night. Where did these people come from, these people
23 who had come for the memorial?

24 A. The people who came were people from Bunia, Kasenyi, everywhere where the members
25 of that person's family were. Also, people who lived in the area came.

1 Q. I see. I would like now to return -- you mentioned two places where you hid.
2 The first hiding spot was in the reeds and you said that you moved; and in the second
3 spot, you had a view of the civilians who were heading towards Waka mountain, if I understood
4 correctly.

5 A. That's right.

6 Q. In the second place - or in the first - yesterday, you made reference and, once
7 again, since I am paraphrasing what you said, correct me if I am wrong, you heard some
8 words being spoken in Swahili and in Kihema, basically asking people to come out, come
9 out of their hiding spots?

10 A. Yes. When we were in our hiding spots, it's true that people were calling to
11 us in Swahili and Kihema, asking us to come out of our hiding spots because the enemy
12 had left. It was sort of an encouragement to leave our hiding spots.

13 Q. I would like to ask the following question: Other than the words to come out,
14 to come out of your hiding spots, were other words uttered as you were hiding, either
15 in the reeds or in that second place, that you heard? Did you hear other words uttered?

16 A. Perhaps they might have said other things, perhaps another group but, for our
17 group, they didn't say anything else, anything other than that.

18 Q. Did you hear other words uttered for people -- for other people, words generally
19 just for the general population?

20 A. No.

21 MR MACDONALD: (Interpretation) At this stage, your Honour, this is a first
22 but this may be -- this may happen again. I would like to ask leave of the Chamber to
23 remind the witness of his previous statement, and to do so I would suggest that I ask
24 him questions about his meeting with the OTP; the people who may have been present; the
25 context in which the statement was taken; the stages that were followed, briefly, quick

1 questions. And then, after, and all depending on the answers from the witness to these
2 preliminary questions, we could show him one paragraph, 76 - paragraph 76 - that he could
3 read in its entirety and that would allow him to resituate himself and, once he's refreshed
4 his memory, I'll ask him a question about these -- in relation to these earlier questions.
5 This is my suggestion, your Honour.

6 PRESIDING JUDGE COTTE: (Interpretation) Go ahead, Mr Prosecutor. Go ahead.

7 MR O'SHEA: My understanding -- I missed a little bit of what Mr McDonald was
8 saying, but my understanding is that he now wants to put the statement of this witness
9 in front of him in order to remind him of aspects of his evidence.

10 Now, this is a procedure which, if adopted, will be unique to this Court. I
11 know that there is a precedent for it in the Lubanga case and I am aware of the fact
12 that, in your Honour's directions, your Honour has given scope for a discretion with
13 respect to such matters. But your Honours have made it plain that, in principle, the
14 witness should give his evidence directly from the box and not through prior statements
15 he has made. So, the basic rule is that the evidence must be live and must be based on
16 the witness's memory, and the exception, based on a discretion of your Honours, is that
17 the witness may be permitted to refer to previous documents.

18 Now, there are documents and there are documents, all right? We know that there
19 may be other documents that this witness can produce for which this exercise might be
20 quite proper. If a document is produced contemporaneously with events, for instance,
21 that is a very clear instance where, in my submission, it would be proper to allow the
22 witness to refer to a previous document.

23 However, in principle, it should be inappropriate for the Prosecution, in
24 attempting to adduce incriminating evidence, to seek from the witness to refer to the
25 witness's own statement. I say that as a matter of principle. In most courts it's never

1 allowed, never allowed in most courts for a witness to provide either consistent evidence
2 of what he said before from a statement or to remind himself from a witness statement
3 produced in an interchange between the Prosecution and the witness. Normally speaking,
4 that's the position in other courts. If it is to be allowed in this Court, in my submission,
5 there must be very strict conditions applied.

6 So, our basic submission would be that, with regard to witness statements, this
7 exercise should not be done, but if the Court feels that it wishes to go down this slope
8 of referring to witness statements through the witness, through the Prosecution, then
9 the very strict conditions that we would submit should apply should be, first of all,
10 that the statement itself -- the statement itself should be relatively contemporaneous
11 with events. That would be the first condition that I would suggest.

12 In this particular instance, this statement is dated February 2007, with regards
13 to events that took place in 2003, so there is already a relatively long period of time
14 between February 2003 and February 2007, in fact, a longer period of time than that between
15 the taking of the statement and today. In those circumstances, we would suggest that
16 the potential prejudice to the Defence outweighs the potential benefit of this exercise,
17 given the date of the statement.

18 The other matter is this: That in the Lubanga case, it was suggested that the
19 witness should identify with specificity those areas where the witness is not clear in
20 his memory. Now, Mr Macdonald makes the suggestion at a point in the evidence where the
21 witness has been very clear in his answers. The witness has not said, "I do not remember."
22 The witness says, "I do remember," or, those are not his words but that is the implication
23 of what he said, "I do remember and, in fact, no, I did not hear other words." So there
24 is the answer, and this is the point at which the Prosecution is seeking to implement
25 this exercise. I don't know if the Prosecution is seeking to implement this exercise

1 with regard to that last answer of the witness.

2 If he is, then, in my submission, that is wrong because he has his answer. This
3 is not a point where the witness is saying, "I have a problem with my memory." The importance
4 of the witness indicating where his memory is failing is that there has to be some balance
5 between the interests of the Defence and the interests of the Prosecution.

6 If the witness says, well, this is my recollection, and then the Prosecution
7 puts a statement in front of the witness, to allow the witness to elaborate on his recollection,
8 then that makes it extremely difficult for the Defence to test the credibility of the
9 witness.

10 If the witness however says, I don't remember very clearly, but at the time
11 I made my statement, I had a clearer recollection, then that is a different situation,
12 because in that situation the Defence is somehow protected, because the probative value
13 of evidence given by a witness where he says he doesn't remember very clearly what happened
14 is not very high.

15 In order for there to be a fair trial here, we have to be in a position to test
16 the evidence of this witness; and one of our means of doing that is through the statement
17 of the witness. We will be deprived of that - or largely deprived of that - if the Prosecution
18 is permitted to remind the witness of what he said on a prior occasion, simply
19 because -- simply because he doesn't get the answer he likes.

20 So, there it is, your Honour. We say that -- and the reason I have gone on
21 so long is, because this is a matter of principle which is going to come up again and
22 again in this trial.

23 MR MACDONALD: (Interpretation) With your leave, Mr President, I refer this
24 Chamber to your decision number 1665, paragraph 109. I do disagree with my learned colleague,
25 because in many jurisdictions counsel have the right to refresh the memory of the witness.

1 This Chamber should bear in mind Rule 69(4) also, because the objective of this
2 Chamber is the establishment of the truth, while respecting the rights of the Defence,
3 but also the rights of the witness to be able to give a complete account. We are dealing
4 with very important and serious events here, and we also know that there were psychological
5 impacts of all of those events. So, we are dealing with a conflict zone, and access to
6 that zone was not very easy, as stated by the head of investigations. So, there is a
7 difficulty of having contemporaneous statements.

8 In many jurisdictions, statements are taken, specifically in order for the witness
9 to be able to refresh his or her own memory; and particularly in this Court, in the civil
10 system, the statement is tendered into evidence and it speaks for itself.

11 But here, we have a witness who gave a statement three years ago, and re-read
12 his statement during the familiarisation process 8,000 kilometres away from his own home.
13 So I am saying that a witness must have the right in the courtroom to have his memory
14 refreshed.

15 The Prosecution is not tendering the statement. We are simply asking for the
16 opportunity for the witness to have his memory refreshed on a specific point, and then
17 we end it there because we don't want an EVD number assigned to that statement. That
18 is the position of the Prosecution.

19 MRO'SHEA: Your Honour, can I just make it clear, that we may not have a difficulty,
20 in fact, with what this witness might be in a position to say from his statement. This
21 is not a witness, as far as we can see, that we necessarily might have great difficulties
22 with; but of course, this is a matter which we have to lay the groundwork for, because
23 it's going to come up again in areas which are more important for us.

24 But it might be useful for your Honours, since it's very clear from your Honour's
25 own directions, this is a matter of judicial discretion. It might be useful for your

1 Honours to hear from the Prosecution what it is exactly they are seeking to do. However,
2 I would suggest that the witness be taken out before he does that, because we don't -- we
3 don't want the witness to be given the wrong impression about what's going on here and
4 we also don't want the witness to hear what the Prosecution is seeking to do, for obvious
5 reasons.

6 So that would be my suggestion, because for all of us it would be very useful
7 to hear exactly what the Prosecution is trying to do here, and it might be relevant for
8 your Honour's decision.

9 THE WITNESS: (Interpretation) I would like to apologise to the Judges, the
10 lawyers and all those who are here. It is possible that sometimes, as I did yesterday,
11 I might give an account about a situation that happened on a specific date. I am simply
12 giving an account of information that I got from other people, and that may sometimes
13 be difficult.

14 Sometimes one might forget the time or dates of the events. I have nothing
15 to hide. I am here to tell you what happened. And at the time of the events, I did not
16 have the time to look at my watch. I did not have any time at all. I simply gave you
17 approximations.

18 I think back to those events, and sometimes one cannot be sure precisely when
19 a specific event occurred. It is possible that there may be contradictions with regard
20 to time, but I believe you have my written statement, you can re-read it and maybe ask
21 me questions about that statement. If I forget something that is mentioned in a statement,
22 then you can refresh my memory, because I am only human and it is possible for me to
23 forget. So, please understand me. Thank you.

24 PRESIDING JUDGE COTTE: (Interpretation) Very well. The Court has understood
25 that there is an issue of principle here. We are going to suspend for ten minutes. Madam

1 Courtroom Officer, can you please move into closed session to allow the witness to leave
2 the courtroom.

3 (Closed session at 10.38 a.m.)

4 (Expunged)

5 (Expunged)

6 (Open session at 10.38 a.m.)

7 THE COURT OFFICER: (Interpretation) We are in open session.

8 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Madam Courtroom Officer.
9 Before we suspend - and following the suggestion of Mr O'Shea - Mr Prosecutor, before
10 we suspend, perhaps you should be a bit more precise regarding what you want, according
11 to the suggestion made by Mr O'Shea a short while ago.

12 MR MACDONALD: (Interpretation) Certainly, your Honour. The witness told us
13 that there were certain things he cannot remember, because obviously these events go
14 back to quite some time ago.

15 The Prosecution is proposing that either I read out that excerpt - that is a
16 possibility - or perhaps the statement of the witness can be given to him, that is paragraph
17 76, so that he can read it. And I will come back to the initial stages. To begin with,
18 we will remind him that he met with the OTP and we will tell him the date. Then we will
19 tell him briefly about the procedure, the questions and answers; that the statement was
20 taken on the computer; and that there was an interpreter.

21 And that afterwards the statement was re-read to him in Swahili, line-by-line.
22 And that he may also have to recognise his signature, and be reminded that he was given
23 the opportunity to correct any errors in the statement. So this is giving him the opportunity
24 to authenticate his statement. After which, we will then come back not to the entire
25 statement, but the passage dealing with what he heard while in one of the hiding places.

1 And those words were uttered, either in Swahili or Kihema, and these words are in paragraph
2 76.

3 PRESIDING JUDGE COTTE: (Interpretation) Maybe this is a detail, but how long
4 is paragraph 76?

5 MR MACDONALD: (Interpretation) Eight lines.

6 THE COURT OFFICER: (Interpretation) Mr Macdonald, it is eight lines.

7 MR O'SHEA: I said -- I said eight lines. Your Honour, yes, thank you very much
8 to -- to Mr Prosecutor for clarifying what it is he's intending to do. And you see, this
9 is exactly the kind of exercise that we say is not commensurate with a fair trial. Let
10 me just be clear about this.

11 Mr McDonald is saying, well, where the witness is not clear in his memory, the
12 witness spoke about not being clear about dates as a response to our little engagement,
13 our little *juridique* engagement between us. That's when the witness spoke up about his
14 memory, when he heard the nature of my objection.

15 Your Honours will remember that what the witness said - and I am just paraphrasing,
16 because I am paraphrasing from my notes - Mr Macdonald put the question to him, well,
17 I remember from yesterday you spoke about two hiding places; one when you were in the
18 reeds and another place.

19 Now, whether you were at one hiding place or whether you were at the other hiding
20 place, you said that you heard Swahili spoken and that you heard Kihema spoken. And I
21 would like to know from you, you know, apart from coming out, what -- what other words -- did
22 you hear any other words? The witness then said, well, to our group, no, there were no
23 other words.

24 Then Mr Macdonald went up with a follow-up question, and said, well -- well,
25 to any other group other than your group or to the population in general, were any other

1 words said? And what was the answer? No, I did not hear any other words.

2 That's not an issue of a lack of recollection. He has -- Mr Macdonald has done
3 his job. He has asked his questions and he's got his answers, but he doesn't like his
4 answers because what he wanted was the contents of paragraph 76, fourth line down. He
5 wanted the witness to come out with those words which he had come out with in his interview.

6 And so, what is he doing? He is -- he is seeking leave from your Honours to
7 cross-examine his own witness, I suggest. He is seeking leave to put into evidence a
8 prior inconsistent statement and have the witness change his answer on the basis of seeing
9 the statement. That's the job of the Defence, not the Prosecution. If it comes to our
10 turn and we wish to do that, we will do it.

11 PRESIDING JUDGE COTTE: (Interpretation) You have the floor.

12 MR FOFÉ: (Interpretation) Thank you very much, your Honour. Allow us to
13 contribute to this interesting debate. I have two points to raise. From the methodological
14 standpoint, the first thing is what has just happened shows the necessity to have the
15 witness stand down from the witness box when there is an important decision such as this
16 to be taken; that is because the witness cannot follow the debate taking place between
17 the Prosecutor and the Defence with regard to certain objections such as this one, because
18 if the witness is allowed to follow, then he can know what they are talking about.

19 I did not intervene yesterday, but very respectfully, your Honour, I would like
20 to point out that whenever there is an important objection, you can have the witness
21 taken out of the courtroom temporarily.

22 Secondly, when it comes to the manner in which the Prosecutor would like to
23 proceed, we totally subscribe to the objection raised by our learned colleague, Mr O'Shea.

24 The Prosecutor has his witness before us here. He had all the time to work
25 with his witness; and during that period, he was able to take a written statement that

1 he has disclosed to the Defence. So it is not in the courtroom that the Prosecutor has
2 to present his statement to the witness. The Prosecutor simply has to ask the witness
3 questions and it is up to the Defence, during the cross-examination, to raise issues
4 arising from the statement in order to ascertain whether there are contradictions and
5 to test the credibility of the witness to ensure that his oral testimony is consistent
6 with the written statement. These are issues related to methodology. Thank you, your
7 Honour.

8 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Professor Fofé, for your
9 contribution. And I think the legal representatives for the victims wanted to also
10 contribute to this legal debate.

11 MR GILISSEN: (Interpretation) Thank you, your Honour, for this opportunity.
12 I am a bit confused, because there are two sides to this debate and we have to strike
13 a balance here. I am very sensitive to the objection of the Defence and I understand
14 it very well. I understand that in a system in which testimony is crucial the objection
15 of the Defence of Mr Katanga can be understood, and I also understand what Mr Fofé has
16 just said.

17 If I understand correctly, the solution would be to allow the Prosecutor to
18 re-examine in another way; that is to try his luck in another way by rephrasing his statements,
19 or questions, to the witness. Besides, I was reading Rule 69 and it is stated there that
20 you are the judges of both the admissibility and relevance of testimony and you are also
21 responsible for assessing the probative value and the credibility. So, in your assessment
22 of the testimony we do not doubt that you will bear in mind the difficulty that the witness
23 had in remembering certain things and, whatever happens, you will be able to determine
24 the value of that testimony and take into account whatever has just happened.

25 This is usually a delicate issue in procedural matters. While we are doing

1 everything to establish the truth - and I am looking at my learned colleague here - the
2 legal representatives also wish to have that truth established and, even though we repeat
3 ourselves all the time, the victims are not looking for the establishment of the truth
4 to be carried out in just any conditions.

5 The other possibility which would be more formal, and that is not pejorative
6 but it is more procedural, but when I am listening to this witness I feel that he is
7 having difficulties and this is linked to the psychological fragility. And, in this
8 particular case, this is something that is reflected in the difficulty that has arisen,
9 so in order for us to have total fairness I believe all the parties and participants
10 can trust the arbitration, or assessment, that the three Judges on the Bench will carry
11 out regarding what the witness may tell us after re-reading an excerpt of his statement.

12 So, with all due reservations concerning this part of the testimony, I think
13 we can proceed because the witness will do that under the direction of the Court. If
14 I was too long, I am sorry. I just tried to be very clear.

15 PRESIDING JUDGE COTTE: (Interpretation) You were not too long, Mr Gilissen.
16 All contributions are necessary. We will suspend now. Okay, Mr O'Shea, very briefly.

17 MR O'SHEA: (Interpretation) Very briefly, but I have to correct three points
18 from the legal representatives. (In English) Let us be clear about this. This witness
19 has not said that he has a difficulty with his memory, which has just been suggested,
20 all right? So, let's be clear on the transcript first of all.

21 Secondly, this is a very different situation -- and I say this with great care
22 being in front of a French Judge, but this is a very different situation from a situation
23 in a French court where there is a dossier. The Prosecutor in this International Criminal
24 Tribunal is partisan. That is my second point.

25 And my third point in response to the representative of the victims is this.

1 Article 69 has to be read in the context of Article 69(4), which states that:

2 "The Court may rule on the relevance or admissibility of any evidence taking
3 into account *inter alia* the probative value of the evidence and any prejudice that such
4 evidence may cause to a fair trial, or to the fair evaluation of the testimony of the
5 witness."

6 That is where the nub of the issue lies here. Thank you.

7 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr O'Shea, and also for
8 the briefness of your intervention.

9 We will break for ten minutes, we will resume at 11.05 and give you our decision
10 before we proceed.

11 Court is suspended.

12 (Recess taken at 10.56 a.m.)

13 (Upon resuming at 11.08 a.m.)

14 PRESIDING JUDGE COTTE: (Interpretation) The hearing will now commence.
15 Please be seated.

16 Before having the witness enter once again, the Chamber would like to take the
17 opportunity to bring clarification and to make comments with regards to paragraph 109
18 of this document, the 29th of November 2009, and that is with regards to the proceedings;
19 we are allowed to do so, comments we would like to make with regards to the exchanges
20 that have just taken place, which were interesting at a legal level and they were useful
21 as well.

22 The Chamber would like to recall the terms of paragraph 109. In principle,
23 a witness should testify of what they remember having observed. "The witnesses aren't
24 authorised" -- and this is a free translation that I am reading out; it's a free translation
25 in French, which I am better able to speak in than English.

1 "Witnesses are not able just to read previous witness statements or other documents.
2 However, given the length of the time between the facts and the testimony and the traumatic
3 nature of the acts with which the witnesses have to testify, the Chamber could allow
4 the witness to refer to the document such that this person's memory can be refreshed
5 but, nevertheless, (a)" -- and here I am going to read it in English. I ask for your
6 indulgence in this regard.

7 (In English) "The document in question contains the personal recollections of
8 the witness." Thank you.

9 (Interpretation) Copies of the document have been made available for the adverse
10 party which can support itself on the information mentioned by the witness during the
11 cross-examination, and I wanted to read this such as it figures in the transcript of
12 the hearing, but the Chamber is persuaded that each of you has paragraph 109 before you.

13 So, the principal is announced. A witness has to testify with regards to what
14 they remember having observed, and there is an exception which is envisaged and provided
15 for. Now, in order to judge whether this is within the framework of this exception, the
16 Chamber would like to take into consideration a certain number of different elements
17 on a case-by-case basis. It would be interested in the witness's profile, in the mastery
18 that that witness has, in the facility of expression that the witness has, as well as
19 in a witness's ability to remember what was seen or heard and to add nuance to his remarks.

20 In this case the Court has noted that the witness, whom we have heard since yesterday,
21 has a good mastery of events and a wide facility of expression, that he is able to carry
22 out personal work with regards to remembering things that are a long time ago, and this
23 is why the Court considers that it is -- that within the framework of this exception
24 announced in paragraph 109, so the Court would like to say that it doesn't fall within
25 the exception provided for in paragraph 9 (sic). Therefore, we would invite the Prosecutor

1 to reformulate the questions and then perhaps, once these questions are reformulated,
2 you will be able to get the answer that you wish to have.

3 Court officer, could you take us please into closed session such that the witness
4 can come back into the courtroom.

5 (Closed session at 11.14 a.m.)

6 (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Open session at 11.15 a.m.)

11 THE COURT OFFICER: (Interpretation) Open session.

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you, court officer.

13 Prosecutor, you now have 15 minutes before the break. At the start of our hearing
14 this afternoon at 2 o'clock, the court officer will make precise the time which has already
15 been given over to hearing the witness and will also give precision with regards to how
16 much time the legal discussion took place and which led to the decision which has just
17 been issued. So, you now have the floor again, Prosecutor.

18 MR MACDONALD: (Interpretation) With regards to this aspect, could I just remind
19 you that we have experienced certain technical problems, as well as other problems yesterday
20 at the start of the testimony, which I hope -- which I would hope would lead the Chamber
21 to review the number of hours per witness that the Prosecution has.

22 PRESIDING JUDGE COTTE: (Interpretation) So, the -- yes, that's something we
23 will look at.

24 MR MACDONALD:

25 Q. So, either the first hiding place, the first or the second, were you able to

1 give us a precision as to how the civilian population reacted in the immediate region
2 where you were?

3 A. From where we were, I think everybody was hiding in their own way. Those who
4 could be stopped either were taken to the camp to be questioned, with a view to obtaining
5 information, or there were others who were taken and then killed. They were crying, screaming,
6 and others were asking for clemency; they were asking God to help them so they managed
7 to escape from this alive. Others were asking for pardon. They were asking why they
8 wanted to kill them. There were lots of different reactions. Everybody reacted in their
9 own way. That's what we heard.

10 Q. How did the civilians express themselves? What did they say when they were
11 asking for pardon?

12 A. Each person spoke in their own way when they were asking for mercy. For example,
13 somebody could say, "God forgive me for all the sins that I have committed." Another
14 one could say, "God, deliver me from this danger." Each of them had their own way of
15 crying and each had their own wording.

16 Q. The enemy, what did the enemy say when hearing -- on hearing these words?

17 A. No, I am not able to reply to this question. The enemy was carrying out its
18 work. I was hidden. I protected myself.

19 Q. I would like to go back to your testimony of yesterday, yesterday afternoon
20 it was. Without naming the person, because we are in open session, you mentioned that
21 one of your companions, or one of the people that was with you, was arrested or stopped
22 and taken to the UPC camp and, later, you saw this person again. And at the time when -- well,
23 you heard this person; he called your name. Do you remember having testified about this
24 yesterday?

25 A. Yes, I do. When this person was stopped and then freed to come and find us

1 in the bush, when he -- when we were with him -- when he managed to get away, when we
2 were in Bunia, he explained what had happened. He explained what had happened and he
3 explained how he was taken to the camp and he was asked to show the hiding place, and
4 he said how he came to the place, to our hiding place, how he was calling our names,
5 and he also describes how he was able to hide himself and get to Bunia. He managed to
6 free his own hands to do this. And when he entered the bush, he managed to hide himself
7 and eventually flee, to go towards Bunia. The enemy heard him and he never came back.
8 We were -- they burned this area where we were hidden. When he didn't come back, they
9 burnt the bush. And then we went into swampy area of the river and we hid there. We
10 didn't have enough air to breath and God, who is great, he -- we were able to find trees
11 which weren't dry and they stopped the fire from reaching the swamp where we were. When
12 they burnt the bush, we saw that if we stayed there, they're going to catch us, we're
13 going to have to go to Bunia.

14 Q. So the reaction of the enemy was to burn the place where you were, you and your
15 companions?

16 A. Yes. Yes, because the person who was sent to find us disappeared. So, to get
17 him back so they decided it was a good idea to burn the bush, to be able to get him.

18 Q. I would just like to ask a question with regards to another subject which you
19 mentioned yesterday during your testimony. You referred to a house of a minister that
20 was burnt. Do you remember making this reference yesterday? Yes? Do you remember? Do
21 you remember how this incident occurred? Did you see it with your own eyes?

22 A. Yes.

23 Q. Please, could you describe to the Court once again what happened. How many
24 people participated among the enemy, and how did they do it?

25 A. You know, I don't know if I said it yesterday or not, when the enemy occupied

1 the town -- I don't know if you have a map of Bogoro, but if you look with regards to
2 where I was, on my left there was the *groupement* and, on my right, the UPC camp, and
3 the enemy occupied the whole town. Now, behind the office of the *groupement* there is
4 a small path which goes down to the priests, where the priests are and -- or the ministers,
5 and it goes to the UPC camp. There were five people in the enemy who went down this path,
6 and it was then that they saw this house and they set it on fire. Having burnt this house,
7 they continued towards the camp. When this enemy went there, we heard the rattle of gunfire
8 from the camp. We probably -- they were calling the enemy to come towards the camp, and
9 that's probably when they passed by there.

10 MR MACDONALD: (Interpretation) Just before presenting the map, would you allow
11 me one last question?

12 PRESIDING JUDGE COTTE: (Interpretation) Yes, one last question, but perhaps
13 without the map, given our time restrictions.

14 MR MACDONALD: (Interpretation)

15 Q. Did you hear the language that these five fighters were speaking?

16 A. Yes, these five fighters, I don't know if I said it in my statement but these
17 five people were speaking in Kilendu. When the people were speaking together, they can
18 speak their language and they were speaking in Kilendu.

19 MR MACDONALD: (Interpretation) Thank you, your Honour.

20 PRESIDING JUDGE COTTE: (Interpretation) Okay. Taking into account the change
21 that we've had to make to the organisation of this day, that's the -- and we are now
22 going to adjourn so I am going to ask the court officer to take us into closed session
23 so that the witness can leave the courtroom, and then we will go into public session
24 very quickly before adjourning.

25 (Closed session at 11.29 a.m.)

1 (Expunged)

2 (Expunged)

3 (Open session at 11:30 a.m.)

4 THE COURT OFFICER: (Interpretation) We are now in open session.

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you, court officer. So we will
6 come back at 2 o'clock, 2 o'clock until 4 o'clock for -- in the public session.

7 The hearing is now adjourned.

8 (Luncheon recess taken at 11.31 a.m.)