

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra, and
4 Judge Christine Van den Wyngaert
5 Situation in the Democratic Republic of Congo - ICC-01/04-01/07
6 In the case of the Prosecutor versus Germain Katanga and Mathieu.
7 Ngudjolo Chui
8 Trial Hearing
9 Thursday, 4 February 2010
10 (The hearing starts at 9.33 a.m.)
11 (Open session).
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE COTTE: (Interpretation) Please be seated.
15 The accused are with us, and we can therefore start. The
16 discussion that we had yesterday -- on the 2nd of
17 April (as interpreted) -- rather, at our last hearing on the 2nd of April
18 with -- give rise to a decision of the Chamber in the absence of the
19 witness because all these discussions took place in that person's
20 absence. I therefore will give the position of the Chamber in this
21 regard.
22 In the light of Article 67(1)(b) and 69(4) and 7 of the Statute
23 the Chamber, to respond to the discussion which took place on the 2nd of
24 February, 2010, on document DRC-OTP-00029-0092, is going to successively
25 address the following points. First of all, the authenticity of the

1 document. Some of the objections made by the Defence during our last
2 hearing of the 2nd of February, 2010, in particular by the Defence of
3 Mathieu Ngudjolo, could be analysed as a challenge to the authenticity of
4 the pre -- above-mentioned document. This issue is therefore linked to
5 the admissibility of this document. During the Status Conference of the
6 2nd of October, 2009, the Chamber asked the parties to raise, as far as
7 possible, all questions of admissibility before the start of trial.

8 Furthermore, the Chamber considers that challenge to the
9 authenticity of the document does constitute an issue which should have
10 been raised before trial. It observes that the parties have sufficient
11 time to analyse the document and to formulate possible observations with
12 regards to its authenticity.

13 Now, if we go into the issue of a possible harm to the Defence or
14 prejudice to the Defence, where it concerns the link existing between
15 Witness P-250 and the document DRC-OTP-0029-0092, the Defence of
16 Germain Katanga reproaches the Prosecutor for not having been informed of
17 the fact that there was a link between the document and the witness. The
18 Chamber would like to point out firstly that the existing link between
19 the document and Witness 250 exists independently, even if the question
20 of whether Witness 250 did at a certain time or was at a certain time
21 (Expunged)

22 (Expunged) Where it concerns the obligation of notification, the Chamber
23 considers that it's not required of the Prosecutor that he indicate right
24 at the start of the case all the links that could exist between the
25 witnesses and all the other evidence.

1 The Prosecutor clearly indicated that he was not able to go over
2 this document with the witness before the month of January 2009 because
3 it was a confidential document which comes under Article 54(3)(e) of the
4 Statute. The Prosecutor should have recognised the right to present
5 evidence to a witness, even if there is not a direct link between the
6 two. And here it is a quite separate issue from that of knowing how the
7 Prosecutor can introduce evidence into the proceedings. The Chamber
8 would also like to point out that in the table of Prosecution evidence,
9 the statement of Witness 250 and the document in question are both
10 mentioned in support of the same factual allegation. Without doubt, this
11 does not demonstrate the existence of a direct link, but it's
12 nevertheless clear that the Prosecutor already intended to put them
13 together.

14 Is there or does this cause prejudice to the Defence? In the
15 case in point, the Chamber considers that the existence of a possible
16 prejudice to the Defence will depend on the questions that will be put to
17 Witness 250 in relation to the document. If the questions asked with
18 regard to the document go into new points which have never been addressed
19 until now, then certainly there could be a surprise effect which could
20 cause prejudice to the Defence. But if this is not the case, the Chamber
21 does not see how the Chamber would be prejudiced in this regard.

22 It is the same to the extent this document contains information
23 which have not been previously addressed by the witness for everything
24 which could be leading, and in this regard the Chamber understands the
25 concerns of the Defence. This is the reason why it will ask the

1 Prosecutor to strictly limit your questions to the points which have
2 already been addressed by the witness during previous hearings and which
3 relate to the existence of a delegation which left Zombe and arrived in
4 Aveba, the existence of a meeting in this latter locality, the names of
5 the participants, and the delegation heads, the nature of the reception
6 which was accorded, the identification of the seals put on this document,
7 the possible identification of the operator who is the addressee of the
8 letter. So the welcome of the delegation is included.

9 Once these positions have been made, it is important to see how
10 to introduce this document at the current stage of our proceedings.

11 Here we're talking about an important document to the extent that
12 it points to a meeting and exchanges between the representatives of the
13 FNI and representatives of the FRPI in Aveba in January 2003.

14 In paragraph 97 of its decision of the 1st of December, 2009, on
15 Rule 140, the Chamber indicated - and I quote - "if an evidence is
16 intrinsically linked to a given witness, the party calling this witness
17 can present the evidence via the witness."

18 Here in its statements to the -- in the hearing or in the
19 testimony, the witness often mentioned participation -- his participation
20 in a delegation which went from Zombe to Aveba; b, the warmth of the
21 welcome which this delegation received by the members of Walendu-Bindi
22 collectivite; c, the names of the leaders of this delegation and the
23 names of the leaders met in Aveba; d, the existence of seals in certain
24 official correspondence, seals which he is able to decipher or describe,
25 rather. Here we are talking -- here we are referring to the challenged

1 evidentiary item today which the Prosecutor intends to show the witness,
2 which he would like to have the witness's observations on.

3 At this stage of the procedure and our proceedings, the Chamber
4 does not know if other witnesses would be more qualified to introduce
5 this document or to respond to questions about it. It can only note that
6 there are convergences between the statements given so far by the witness
7 and the content of the document. The Chamber had noted during the
8 hearing of Tuesday, the 2nd of February, 2010, that when the Prosecutor
9 asked 250 the question: (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 If we go back to the start of the current decision, the Chamber
15 considers it useful, as the Prosecutor has done, to remind everyone that
16 this document was communicated to the Defence in January 2009 and that it
17 figures in the table of Prosecution evidence, that it was referred to
18 particularly in a submission number 1522 from the Defence of
19 Mathieu Ngudjolo dated 12th of October, 2009, paragraph 31. It is
20 therefore possible for the Defence to analyse it and possibly to use it
21 or to contest it before the start of our proceedings. The finesse of the
22 analysis of the Defence teams during the hearings of the 2nd of February
23 attest to that.

24 The Chamber therefore considers that the witness could have
25 this -- can have this document submitted to him and it will ask when the

1 witness comes back to the courtroom, the Chamber will ask the
2 Court Officer to put the document on the projector such that the witness
3 and all the participants can together have it before them. The
4 Prosecutor is reminded that the precise and narrow nature that the
5 Prosecutor has to ask these questions, it cannot -- there cannot be any
6 new elements. No questions with regards to points in the document which
7 are new in regard to what the witness has already spoken about.

8 Having said this, the Chamber considers that the dual-party
9 nature of the proceedings will be fully respected and that the Defence
10 will have full right to ask questions with regards to the document to the
11 witness and also that the search for the truth will also be facilitated
12 in this regard.

13 Finally, where it concerns the observations that the Defence of
14 Mathieu Ngudjolo made with regards to the content of the document, such
15 as - and this is not exhaustive - the fact that the letter sent to
16 Lenda (phoen), was received in Tatu, the length of time it took, so --
17 letter which was sent on the 4th of January and received on the 5th of
18 February, while the distance between the place of sending and of its
19 reception is very small, so these are observations made by the Defence of
20 Mathieu Ngudjolo. The Chamber notes that these are questions linked to
21 the probative value of this evidence and it is at a subsequent -- on a
22 subsequent occasion that the Chamber will pronounce or will rule on its
23 probative value.

24 Court Officer, we are now going to closed session in order to
25 introduce the witness, if you would like to introduce the closed session.

1 Yes, Prosecutor.

2 MR. MACDONALD: (Interpretation) Thank you, your Honour. I
3 would just like to make sure that I've well understood the instructions
4 of the Chamber which will allow me -- if you would allow me. Because
5 before to showing the document to the witness, the Prosecutor would like
6 to ask certain -- well, I just want to make sure that I've understood
7 your decision fully, your Honour, or the decision of the Chamber rather.
8 Does the Chamber -- is the Chamber going to allow the witness to see and
9 read the whole letter and to know everything that is -- and to read about
10 everything that is contained in this letter?

11 PRESIDING JUDGE COTTE: (Interpretation) The Bench thought it
12 was clear, it will clarify what it has just said. The document will be
13 put on the overhead projector, and it is clear that when it appears on
14 the overhead projector and on all the screens of the Court, it is clear
15 that he can read the whole document, but for the Chamber it is ruled out
16 that you can ask questions related to points other than those which the
17 witness has already raised so far and which I reminded everyone of a
18 moment ago. The existence of a delegation which went from Zumbe and went
19 to Aveba, the existence of a meeting in this latter place, the names of
20 those responsible of the delegation, the nature of the welcome, the
21 identification of the seals, and the possible identification of the
22 operator who's the addressee of the letter. When you read this document,
23 you find references to issues that the witness never went into in a very
24 prosaic way. Perhaps if we are talking at a prosaic level and there is
25 no question of asking questions with regards to the points that we would

1 like to raise -- or whether we're, for example, talking about certain
2 matters. It's not when -- there can't be questions with regards to new
3 elements, surprises, for the Defence. It's clear that the witness is
4 going to talk about what I have just said. Perhaps -- well, we don't
5 know. Perhaps you would like to have confirmation with regards to the
6 comments that he's already made to some of your questions, but we won't
7 go any further than that.

8 Is this clarification helpful? Does it satisfy you? Is it
9 clear?

10 MR. MACDONALD: (Interpretation) Yes, your Honour. If you would
11 allow me just to have 30 seconds so that I can talk to my colleagues.

12 PRESIDING JUDGE COTTE: (Interpretation) Yes, you can do it
13 while we go into closed session. The witness is going to be introduced.

14 Professor Fofe, please go ahead, but we will not re-open a debate
15 with something that has just been the subject of a decision, but we will
16 hear you.

17 MR. FOFE: (Interpretation) Thank you, your Honour. I would
18 just like to assure you that we respectfully comply with your decision.
19 I would just like to mention a concern that I have, and so I can ask for
20 clarification from the Chamber. So a question is going to be asked --
21 questions are going to be asked to the witness on the basis of this
22 evidence. And my question is as follows: Is the Prosecutor authorised
23 to ask to the witness to which the witness has already answered clearly,
24 whether -- is it a repetition of the same question or whether it is about
25 clarification, possible clarification, of points that were not clear?

1 Thank you, your Honour.

2 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor, did you
3 hear the comments made by Professor Fofe? Professor Fofe asked two
4 questions. Where it concern -- does it concern questions which you will
5 ask to the witness in this regard, do you intend to ask him questions,
6 asking for answers that this witness has already provided; or do you
7 merely intend, on the basis of the document that you'll have before him,
8 to obtain clarifications or precisions which will in some way shed light
9 on answers that he has already provided? There is a degree of nuance
10 between the two. Perhaps -- could you tell us what your intentions are
11 because it's obviously difficult for us to put ourselves in your
12 thoughts, and then we will tell you subsequently what we think of it.

13 MR. MACDONALD: (Interpretation) I -- obviously, the
14 recognition -- well, I'm going to ask questions to the witness with
15 regards to the names that appear, the places that are mentioned, the
16 seals in question. What I would say, your Honour, is that, yes, a
17 delegation that went to Aveba but this -- they went to Olongba Bavi to
18 afterwards go to Medhu. I would just like to ask -- before we show the
19 document to the witness, I would -- with regards to Tatu, there is a
20 market in Medhu according to information I have, and this was disclosed
21 to our colleagues in the statement of the witness who died, 258. Would
22 you like me to repeat that, your Honour?

23 So, yes, we will ask for clarifications, yes. I could ask a
24 question and we will see Martin Banga. Is it the same Martin, Cobra,
25 Kamini (phoen), among others. And there's also information mentioned

1 with regards to the secretary or president of the delegation. I would
2 also like to ask questions -- has he -- has the witness seen this
3 document? It's possible that he has already seen this document without
4 going into its content and the fact that he has knowledge of it already?
5 So this is something that he spoke about earlier.

6 PRESIDING JUDGE COTTE: (Interpretation) So there are things
7 that need to be avoided and I think the Defence has well understood this,
8 that you have understood that you have to avoid a situation where you are
9 confronted with new evidence which could cause difficulties, because they
10 haven't been able to prepare themselves, and this is why we have this
11 oral decision which has -- we've added to that with clarifications that
12 you've asked for which we've been explicit about. We would really ask
13 you to remain within the framework of what has already been dealt and
14 mentioned during our previous hearings and which we can find in the
15 document, and this is where the two are linked and they can be dealt with
16 and brought together and were indeed put in your table. And the second
17 pitfall, perhaps, this is something that often occurs, is to try and
18 avoid successive repetition of questions which have already been put and
19 which have been answered by a witness who we have seen that he's able
20 to -- well, that he's certainly in control of his use of language. So we
21 would like to have clarifications and precisions, that's useful because
22 that will contribute to finding the truth. I think that we have really
23 set the basis for our departure and we can now have a closed session.

24 Bring the witness in and then we can give the Prosecution time to
25 consult each other and to consult their team while we do so.

1 (Closed session at 9.58 a.m.)
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Page 12 Expunged – Closed Session

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Page 13 Expunged – Closed Session

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 (Open session at 10.06 a.m.)

2 COURT OFFICER: (Interpretation) We are in open session, your
3 Honour.

4 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Madam
5 Courtroom Officer.

6 Mr. Luvengika, you made some important remarks just now.

7 Mr. Witness, if I could have your attention, please.

8 Mr. Witness, do you hear me? Could you look at me? You can see me?

9 THE WITNESS: (Interpretation) Yes, I can see you just fine and
10 I can hear you just fine.

11 PRESIDING JUDGE COTTE: (Interpretation) I think you heard the
12 remarks made by one of the two representatives of the victims. Now, if
13 you recall, when you came in the first time into the courtroom the
14 Chamber told you that the work that you would have to do would be
15 difficult in terms of calling upon your memory, remembering past events,
16 and also in terms of the physical delivery. It is tiring to give
17 testimony. We just reminded you to speak slowly, to speak loudly, and I
18 asked you not to mix up different languages. I am utterly unable to
19 determine whether, you know, as you get going, as you respond quickly,
20 whether you are mixing Swahili and Lingala. If that is the case, please
21 speak only in Swahili so that there are no greater difficulties in the
22 interpretation booths. And if it is possible, if you were to use some
23 familiar words or slang words or words that are very much military terms,
24 if you could try to find a word from ordinary language with the same
25 meaning, please do so. Please try to use words from ordinary language.

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 If it is very much a military word or military slang, try to make
2 it clear what you mean. If you -- if you say the word -- if you could
3 say something like "as we said in the army," this would help avoid any
4 misunderstandings. The Swahili interpreters have a difficult task. They
5 do their work with a great deal of -- very conscientiously and they are
6 trying to provide the message to everyone in the Chamber, are doing their
7 very best, but your testimony is the raw product, so to speak. So please
8 try to give your testimony clearly and simply, and that way you will be
9 better understood by all of us.

10 Mr. MacDonald, please proceed.

11 Madam Courtroom Officer, I believe we need to have the document
12 put on the screen.

13 MR. MACDONALD: (Interpretation) For logistics, your Honour, I
14 realise that the document will be shown to all, but I would ask leave if
15 the witness could also not just see it on the screen, but also acquaint
16 himself with it. On the screen it may be difficult unless we zoom in to
17 particular parts of it. Perhaps the witness could review the document,
18 take some time to read it and look at it.

19 PRESIDING JUDGE COTTE: (Interpretation) I think I said that it
20 would be placed on the screen, and this is a technical matter. The
21 courtroom officer will -- pardon me, the usher will make sure that the
22 document is on the screen. Let us focus on the document as it is present
23 to everyone at the same time and in the same way.

24 COURT OFFICER: (Interpretation) Mr. Prosecutor, this document
25 is still public.

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 PRESIDING JUDGE COTTE: (Interpretation) Madam Courtroom

2 Officer, when we wish to place the document on the screen, which button
3 should we be pushing?

4 COURT OFFICER: (Interpretation) To view the document, please
5 press "Docu Cam Witness," which is right beside your computer.

6 PRESIDING JUDGE COTTE: (Interpretation) Thank you.
7 Mr. MacDonald.

8 MR. MACDONALD: (Interpretation) Your Honour, first of all, I
9 would like to ask - and I myself must glance at the screen at the same
10 time as I'm speaking to the Chamber - might it be possible to view the
11 letter-head of the document? Could you please move it down on the screen
12 so we can see the letter-head, physically move the letter down, a little
13 bit further down, please. Could we zoom in on that part of the document.
14 Could you please re-position the document so we can see each side. Let's
15 stop at this point.

16 Questioned by Mr. MacDonald: (Continued)

17 (Witness answered through interpreter)

18 THE WITNESS: WITNESS P-0250 (Resumed)

19 Q. Witness, I'd like to ask you to read the document that you have
20 before you on the screen.

21 A. It reads: "Collectivite of W/Bindi, Aveba Mukubwa" --

22 Q. Could you read the document for yourself. You don't have to read
23 it out aloud. Now, this is the first part of the letter, and then in a
24 few moments we'll be showing you the lower part of the document.

25 A. Third paragraph, please.

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 MR. MACDONALD: (Interpretation) If we could move the letter
2 further down on the screen. Further down, please. There. If we could
3 adjust the position again a bit.

4 Q. Have you finished reading the letter, Witness?

5 MR. MACDONALD: (Interpretation) If we could move the document
6 again so we could see the very bottom of the exhibit. No, please do not
7 fold the exhibit.

8 Q. Witness, if you could also look at the information that we see at
9 the bottom, at the left. Very well.

10 MR. MACDONALD: (Interpretation) If the usher could position the
11 document again and place it flat.

12 Q. Witness, my first question for you is as follows: Where is the
13 Tatu market located?

14 A. In the village of Medhu.

15 MR. HOOPER: Surely the first question is: Have you ever seen
16 this letter before? Surely that must be the beginning of any
17 questioning.

18 PRESIDING JUDGE COTTE: (Interpretation) Now, if the Bench heard
19 correctly, this was a question that the Prosecutor was going to ask, and
20 I think it is -- when it comes to the order of questions, it is up to him
21 to decide. And logically enough one would begin in this way.

22 MR. MACDONALD: (Interpretation) Each person has his own form of
23 logic, and I do note that we are entitled to choose the order of our
24 questions.

25 MR. HOOPER: Well, I'm sorry, I object to the form of the

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 question because it is leading. We don't know if there is a market at
2 Tatu at all.

3 PRESIDING JUDGE COTTE: (Interpretation) You are correct,
4 Mr. Hooper. You are correct. The question should not have been asked in
5 that way because it does seem to include a presupposition that the market
6 exists. You are correct.

7 Mr. Prosecutor, please be careful.

8 MR. MACDONALD: (Interpretation)

9 Q. Operational Commander Oudo, up until now have you spoken of this
10 commander in your testimony so far before this Court?

11 A. Operational Commander Oudo entered Bogoro by way of the direction
12 that I mentioned at the beginning, and I remember that I have already
13 spoken of him here on several occasions. He is the one who was in charge
14 of guarding the position because his superior officer was Cobra Matata,
15 and he kept the Mogodu (as interpreted) position. That was a village,
16 but the name of the market of that village is Tatu. The residence was in
17 Olongba, Medhu is a village, name of the market Tatu.

18 MR. MACDONALD: (Interpretation) If we could just reposition the
19 document to look at the stamp at the bottom.

20 Q. I'm going to ask you a question about Bukpa Kalongo, first of
21 all.

22 A. Bukpa Kalongo was one of the representatives of the people that
23 we left with in a convoy in the collectivite of Walendu-Bindi when we
24 left the FNI group to go meet the FRPI group.

25 Q. Martin Banga?

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 A. Martin Banga, you should write it this way, you should put an h
2 before the b. He was one of the members of the delegations that we
3 travelled with, and I've often mentioned him here and he was also called
4 Martin Cobra. The names -- the name here is his family name.

5 MR. MACDONALD: (Interpretation) Now, with leave, your Honour,
6 if we could zoom in on the stamp or the seal found at the bottom between
7 the two names, please.

8 Q. Do you recognise this stamp?

9 A. When I mentioned the name of FNI, we said that we had when we
10 were along the way -- when you left Kagaba, you go towards the mountains,
11 towards Madre, and that is where we got the idea to use these stamps.
12 Yes, I do recognise this.

13 Q. And it seems to say "bureau d'etat-major siege Tatsi/Zumbe," can
14 you explain what these words mean?

15 A. Tatsi Zumbe is a normal name. At the beginning we didn't have
16 set titles or expressions. We had to find a proper name and that is the
17 name that we decided upon. At that time, the FRPI was before us and so
18 we changed it, we changed, and we became FNI and they kept their name,
19 FRPI.

20 Q. It was mentioned that they, they kept the name of FRPI. What do
21 you mean by that exactly when you said "they, they kept the name FRPI"?

22 A. Because it was the same people. The people had nothing to do, so
23 they would go from one party to the other. FRPI was the Force De
24 Resistance Patriotique d'Ituri.

25 THE INTERPRETER: Overlapping microphones.

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 THE WITNESS: (Interpretation) To give clear explanations, that
2 is the name of a political party that was in existence. It was the name
3 of a political party, but in reality it was a defence organisation.

4 MR. MACDONALD: (Interpretation)

5 Q. And so there was an FRPI base at some point called Tatsi/Zumbe;
6 is that correct?

7 A. Yes, that name is correct because the whole collectivite of Tatsi
8 was empty, since the local people had taken refuge in Zumbe. That's why
9 we gave it that name. Tatsi is bigger than Zumbe in that particular
10 groupement, in the Ezekere groupement.

11 MR. MACDONALD: (Interpretation) If you will allow me a moment
12 or two, your Honour.

13 (Prosecution counsel confer)

14 MR. MACDONALD: (Interpretation)

15 Q. Just to be very clear, Witness. You mentioned FNI and you linked
16 that to a location, Kagaba. Can you give us more information about what
17 you just said, what you meant by that?

18 A. I want to tell you this about Kagaba: There was an FRPI
19 battalion there. There were several soldiers there and that was why I
20 mentioned that. It was a camp, a "garrison" camp, and there was a
21 battalion there, a battalion of FRPI.

22 Q. When did you learn that the Zumbe group was now part of the FNI?

23 A. There were some sympathisers who came from Bindi to Tatsi, others
24 went from Tatsi to Bindi, and Zale (as interpreted) looking --

25 THE INTERPRETER: The interpreter in the Swahili booth wishes to

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 mention that the witness is speaking very quickly.

2 PRESIDING JUDGE COTTE: (Interpretation) Mr. Witness, you are
3 going quickly, but you are speaking too quickly. Please speak slowly.
4 No one will criticise you if you speak too slowly.

5 Mr. Witness, as you have already been told before, what you say
6 is translated into French for the benefit of most of the participants
7 here and then translated into English. This leads to some delay in
8 understanding, that is, for some of the Defence team. This means that
9 you have to be very slow for everyone to be able to do their job.

10 Mr. Prosecutor.

11 MR. MACDONALD: (Interpretation)

12 Q. Witness, I will repeat your answer on page 22, line 7. It is
13 indicated question but it is indeed the answer of the witness. When I
14 mentioned the name FNI, I had told you that we had received that name on
15 our way after leaving Kagaba, and let me just come back to what I have
16 just read and then I will ask you my question.

17 When did you learn that the combatants of Zumbe were to be known
18 as the FNI?

19 A. When we arrived Lakpa, we spent the night together, and the
20 people of Zumbe and Bindi met and became one group. So it was difficult
21 to call some FNI and some FRPI. So when we arrived at that location, we
22 created the name FNI. So there was a decision to have both FNI and FRPI,
23 but the confirmation came after the Bogoro battle and that is how come
24 you had the names FNI, FRPI. It was when they met for a meeting that it
25 was confirmed that they were now together because these groups were led

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 by two different leaders.

2 Q. And who told you that your group would be known as the FNI? And
3 if I understood you correctly, this happened while you were in Kagaba.

4 A. With regard to the names FNI, FRPI, this came from Martin while
5 we were still on our way, but the final confirmation was made when the
6 authorities, that is, Germain, Cobra, and Boba Boba met and decided that
7 under the circumstances those were the names to be used. But generally
8 speaking, the names were first mentioned by the fighters.

9 Q. You subsequently said that after the battle of Bogoro these names
10 were confirmed?

11 A. In order to understand FNI, there were people like
12 Floribert Ndjabu, and that was when we understood that it was FNI; but
13 before we were just trying out the names. We knew that our enemies were
14 such and such people. But the FNI had uniforms, while the others were
15 fighters who tried to come up with a name but it was not easy to
16 understand.

17 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe.

18 MR. FOFE: (Interpretation) There is an issue of interpretation
19 here. The witness said apart from the fact that these -- that UPC
20 soldiers had uniforms, and the interpreter said apart from the fact that
21 the FNI soldiers had uniforms. There is an inaccuracy here.

22 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Professor.
23 The interpreter -- the witness should repeat his answer slowly so that it
24 should be interpreted properly.

25 MR. MACDONALD: (Interpretation) Thank you, Mr. President. I

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 would like to thank Mr. Fofe for his intervention, which is very
2 important.

3 Q. Mr. Witness, try to be shorter in your answers and please take
4 all the time you need, because what you are telling us is obviously
5 important and we want the translation to be as accurate as possible. Can
6 you kindly repeat the answer that you just gave, and I will place you
7 back in the context with the indulgence of the Chamber and my colleagues.
8 You mentioned Floribert Ndjabu and the time after Bogoro when the name
9 FNI was confirmed. That is a confirmation of something that already
10 existed before the Bogoro attack. That is when you had been at Kagaba.
11 So, please, you have to distinguish between the fighters, and then after
12 the attack at Bogoro Floribert Ndjabu. And I think he was a politician.

13 A. In Ituri when people went into the bush there was the UPC in
14 Bunia, but afterwards the fighters who were there or some of them were
15 called FRPI and then after that they were referred to as FNI. This was a
16 matter for the politicians, and we were unable to understand.

17 Q. Very well. Let us come back to the letter or to the exhibit.

18 MR. MACDONALD: (Interpretation) And with your leave,
19 Mr. President, if the Court Usher could return to the witness stand and
20 show us the letter. Show us the whole letter, please. Zoom out. Very
21 well.

22 Q. Mr. Witness, you had the opportunity to read that document and to
23 make observations. Do you recognise the document?

24 (Expunged)

25 (Expunged)

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

Page 24

1 (Expunged)

2 (Expunged)

3 (Expunged)

4 (Expunged)

5 (Expunged)

6 (Expunged). I know that this letter existed, but it

7 was not in my possession. It was in the possession of the high-ranking

8 officers, so I never had this letter in my possession.

9 MR. MACDONALD: (Interpretation) Mr. President, at this point
10 the Prosecution would like to tender this document into evidence with a
11 reference number.

12 PRESIDING JUDGE COTTE: (Interpretation) Madam Court Officer,
13 please.

14 (Trial Chamber and Court Officer confer)

15 PRESIDING JUDGE COTTE: (Interpretation) I should have been more
16 explicit, that is, in answer to the Prosecutor's request.

17 COURT OFFICER: (Interpretation) Mr. President, this would be
18 EVD-OTP-00025.

19 MR. HOOPER: Can I -- sorry to interject. Something's been drawn
20 to my attention. Can I request the witness, with respect to him, to
21 remove his earphones through your Honour. Can I ask -- thank you very
22 much, Mr. Witness, very courteous.

23 I understand - it hasn't been translated - but that this witness
24 said that he did not know if this letter was genuine or whether it had
25 been pirated. Now, all I'm saying is that's something I've been told,

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

Page 25

1 and because it's something I've been told and I cannot verify myself, I'm
2 dealing with it in this way, with the witness in fact with his earphones
3 off, so that that matter can be resolved. But obviously, if that's the
4 case - and I don't know for sure if it is or it isn't - then it's
5 something that needs to be addressed.

6 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Hooper.
7 I was trying to follow the proceedings with keen interest, but I did not
8 seem to hear any such thing. And in light of the interpretation that I'm
9 listening to and the transcripts that I'm looking at, the issue of
10 authenticity of the document or pirating of the document was not
11 mentioned. No question was put to the witness, as far as I can remember,
12 and the Prosecutor did not mention it.

13 MR. MACDONALD: (Interpretation) I did not ask the question and
14 Mr. Fofe is actually saying that no it was never mentioned. The witness
15 is in the courtroom. Should we ask him to leave because ...

16 PRESIDING JUDGE COTTE: (Interpretation) No. Let us try to
17 remain serene.

18 Mr. Hooper.

19 MR. HOOPER: (Previous translation continues) ... heard I don't
20 know whether the document's original or whether it's been pirated. Now,
21 I don't know whether that was said or not, but I need it to be explored.

22 MR. MACDONALD: (Interpretation) Maybe Mr. Fofe can assist us,
23 since he's listening to Swahili.

24 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe is
25 becoming one of the great wise men of this courtroom.

Witness: Witness P-0250 (Resumed) (Closed Session)
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1 MR. FOFE: (Interpretation) Mr. President, that is a heavy
2 burden, but I'm afraid I might disappoint you. I was not paying much --
3 too much attention, so I cannot take the risk of misleading the Chamber.
4 And I believe the best solution would be to ask the witness the question.

5 PRESIDING JUDGE COTTE: (Interpretation) Mr. Fofe, you are a very
6 tactful person.

7 MR. HOOPER: (Previous translation continues) ... to 11.00, and
8 it's something that perhaps I can resolve at the break. I've already
9 asked through the Court clerk to allow me to speak to the interpreter, in
10 any event, at 11.00, if that's a convenience -- not too great an
11 inconvenience to the interpreter, just to ask a short question. And
12 perhaps I can also raise this matter at the same time, and I can come
13 back to it, if needs be, after the break. Sorry to interrupt my friend.

14 PRESIDING JUDGE COTTE: (Interpretation) Mr. Witness, please
15 take off your headphones for now.

16 If I have understood well this issue of originality might have
17 been mentioned just a short while ago. I think we should scroll back up
18 and examine the issue, both the French and the English transcripts, and
19 we should try to see whether that issue of authenticity and pirating was
20 mentioned. So far I seem to remember that I was the only one who had
21 used that word "authenticity" in my oral decision. So I'll ask the Court
22 Reporter to scroll up the transcript in French and someone else might do
23 so in English.

24 So Madam Court Reporter scroll up the transcript in English and
25 then we will do the one in French.

Witness: Witness P-0250 (Resumed) (Closed Session)
Questioned by Mr. MacDonald (Continued)

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1 MR. HOOPER: The words I'm led to believe --

2 PRESIDING JUDGE COTTE: (Interpretation) Yes, please.

3 Who was on his feet first?

4 MR. MACDONALD: (Interpretation) I was the one, sir. Maybe he's
5 reading the transcript.

6 PRESIDING JUDGE COTTE: (No interpretation)

7 MR. MACDONALD: (Interpretation) Maybe he also understands
8 English, but when you look at the French and English transcripts, the
9 Chamber can see that none of this was mentioned.

10 PRESIDING JUDGE COTTE: (No interpretation)

11 MR. MACDONALD: (Interpretation) And at this point I do not see
12 what is very funny about the Defence team when they intervene in such a
13 way in the middle of testimony. So I think that it would be better to
14 discuss this without the witness during the break.

15 (Trial Chamber confers)

16 PRESIDING JUDGE COTTE: (Interpretation) I have some personal
17 difficulties in scrolling up because this is not something that is very
18 familiar with our generation. Maybe the Legal Officers, one of them in
19 front of me, can scroll up for me because -- you shouldn't go too far up
20 because Mr. Hooper spoke about it very recently. So is there an
21 indication in the French transcript?

22 Were you able to locate anything, there's any possible mention of
23 this in the English transcript?

24 Mr. Hooper, based on the information that you have, at what point
25 was this issue mentioned?

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Questioned by Mr. MacDonald (Continued)

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1 MR. MACDONALD: (Interpretation) 23, line 18.

2 PRESIDING JUDGE COTTE: (Interpretation) Page 23?

3 MR. MACDONALD: (Interpretation) Page 23, line 18 in the
4 English.

5 PRESIDING JUDGE COTTE: (Interpretation) On page 23 in English,
6 is there anything that corresponds to what Mr. Hooper was speaking about?

7 MR. HOOPER: Sorry, Mr. President, I think we're going to have to
8 check the tape -- that is, we'll have to get access to the tape and then
9 we'll come back to the Chamber, whether it's yes or no. Of course, what
10 we're saying is it was said in Swahili.

11 JUDGE DIARRA: (Interpretation) The question and the answer,
12 were both of them in Swahili, but was the question asked and the answer
13 not translated? Were the two omitted?

14 MR. HOOPER: No -- yes, my understanding is that the witness said
15 something that may not have been interpreted, and he's speaking quickly,
16 as we know, he's speaking, we understand, a melange of language. So it's
17 quite easy to not keep up with him. And I fear that the only way to come
18 to it, short of directly asking the witness - and I don't impose that on
19 my friend - is to check the tape which is not a process we've done yet,
20 so I don't know how easy that is. But we'll sort that out during the
21 break. As I say, I don't want to take up more time. I wouldn't raise
22 this, of course, unless I thought it was significant.

23 MR. MACDONALD: (Interpretation) Mr. President --

24 PRESIDING JUDGE COTTE: (Interpretation) It is obvious that the
25 issue is important, but from what you said we should clarify the

1 intervention. It seems like it is something that might have been said
2 but not interpreted by the interpreters. During a hearing when twice or
3 three times the interpreters were called upon to be attentive, the
4 witness was called upon to speak slowly to be well interpreted,
5 Professor Fofe was thanked for his contribution, and I hope that after --
6 in examining the tape we should notice that nothing was said because that
7 would have been time wasted.

8 So, Court Reporter, how is it possible for us to know from the
9 interpreters whether such a thing was mentioned, that the document might
10 have not been authentic or it might have been pirated, something that
11 might not have been interpreted into our headphones and which does not
12 appear in the French and English transcripts? Is there a way of finding
13 this out?

14 (Trial Chamber and Court Officer confer)

15 PRESIDING JUDGE COTTE: (Interpretation) We are going to
16 cross-check whether it is technically possible for the beginning of the
17 afternoon; and if not, it will be Monday. I cannot see what else we can
18 do, but it is something that would be a problem. Because if that was
19 mentioned and was not interpreted and did not appear in the transcript,
20 then it would be problematic. And if it was not mentioned, then we will
21 make our determination.

22 MR. MACDONALD: (Interpretation) I do not know whether the
23 alternative would be to ask the interpreters themselves?

24 PRESIDING JUDGE COTTE: (Interpretation) I think at this point
25 it would be necessary to listen. We should not have to go back to

Witness: Witness P-0250 (Resumed) (Closed Session)
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1 impressions. I think we have very little time before the break.

2 MR. MACDONALD: (Interpretation) Is it possible to give a
3 reference number to the document?

4 PRESIDING JUDGE COTTE: (Interpretation) I believe that was
5 already done.

6 MR. MACDONALD: (Interpretation) Thank you.

7 With your leave, Mr. President, let me gather my thoughts. I
8 know that we have lost some time, but I have no further questions
9 regarding this document. I'm going to a totally different line of
10 questioning, and I would like to announce when we resume, that is, in the
11 absence of the witness, that we are going to refer to your decision 1665.
12 And given that the witness is here, I will give no further details, but
13 I'm referring to paragraphs 66 and 67. I will not mention any details,
14 but we are submitting that it is now time to merge these paragraphs as
15 well as your paragraph 109 of that same decision, 1665. That is to
16 refresh our memories in combination with other possibilities open to the
17 Prosecution, with the leave of the Chamber of course.

18 PRESIDING JUDGE COTTE: (Interpretation) Very well.

19 We will suspend and resume in 30 minutes.

20 Madam Court Officer, let us go into closed session to allow the
21 witness to leave the courtroom.

22 And, security officers, please escort Mr. Katanga and
23 Mr. Ngudjolo to the waiting-room reserved for them during the break.

24 (Closed session at 10.58 a.m.)

25 (Expunged)

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Questioned by Mr. MacDonald (Continued)

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1 (Expunged)

2 (Expunged)

3 (Expunged)

4 (Expunged)

5 (Expunged)

6 (Open session at 10.59 a.m.)

7 COURT OFFICER: (Interpretation) We are in open session,
8 Mr. President.

9 PRESIDING JUDGE COTTE: (Interpretation) We are in open session.
10 Mr. Prosecutor, please.

11 MR. MACDONALD: (Interpretation) I will come back in the
12 presence -- that is, after the -- in the absence of the witness and talk
13 about what has just happened and also the attitude in this Trial Chamber.
14 This is something that is very serious. The people outside are observing
15 us, and when we are pleading legal issues I do not know what is in --
16 very funny about laughing at the statements of the opposing party. So I
17 intend to make an observation on this.

18 PRESIDING JUDGE COTTE: (Interpretation) I am not sure that I
19 fully understood you, but on the other hand I understood that you were
20 quite irritated. Whether this irritation is legitimate or not, we are
21 not very sure; but the simple fact that there is irritation here leads me
22 immediately to request all of you to make sure that our proceedings
23 continue in the same conditions as we have been following so far. We are
24 jointly seeking to establish the truth, and each party, each participant,
25 has a role to play, and I'm persuaded that we will achieve our goal in

1 serenity and with mutual respect for each other. This is so obvious that
2 I am almost ashamed to remind you of it. The session is suspended.

3 Recess taken at 11.01 a.m.

4 On resuming at 11.34 a.m.

5 (Closed session)

6 (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

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20 (Expunged)
21 (Expunged)
22 (Expunged)
23 (Expunged)

24 (Open session at 11.38 a.m.)

25 COURT OFFICER: (Interpretation) We are now in open session,

1 your Honour.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
3 Court Officer.

4 MR. MACDONALD: (Interpretation) Thank you, your Honour. With
5 your permission, the Prosecution at this stage of the proceedings would
6 like to present or submit that the witness previously has made statements
7 which are incompatible with the testimony before the Court; in other
8 words, with regards to certain subjects the witness has made statements
9 to the Office of the Prosecutor in 2006 and 2007 which are different with
10 regards to certain precise elements than what he has said or what he
11 hasn't said with regards to certain issues raised by the Prosecution
12 which he has not stated before this Chamber. The Prosecution does not
13 want the Chamber to declare that this is a hostile witness. We don't
14 want the witness to be declared as a hostile witness, but we would ask
15 for leave from the Chamber to go back to these precise subjects which I
16 can detail to the Chamber and ask questions which firstly do appear to be
17 a memory-refreshing exercise, if you like. And depending on the
18 exercise -- on the responses of the witness, they could, even before the
19 witness be declared a hostile witness, it could lead to a situation
20 whereby the Prosecution has the possibility to ask guiding questions or
21 closed questions with regards to the subject on certain precise issues or
22 topics.

23 I would like -- as I've mentioned, I would like to refer to your
24 decision 1665, and obviously paragraph 66 and 67 thereof, where the
25 Chamber uses the expression "hostile" or once again "opposed." And it is

1 therefore the subject of our intervention.

2 I would also like to refer the Chamber to Rule 140(2)(b) of the
3 Rules of Procedure and Evidence, which states the following:

4 "The Prosecutor and the Defence have the right to examine the
5 witness on relevant points concerning his testimony and the reliability
6 thereof as well as on his own credibility and other relevant issues."

7 So there we can see that the Prosecutor and the Defence can ask
8 questions to the witness. They can go back to issues which could be
9 leading or closed when the witness has previously made statements which
10 are different to the testimony in the hearing.

11 I would also like to draw your attention, your Honour, to Article
12 69(3), and you know very well that the Court can ask for the presentation
13 of all evidence that it considers to be necessary to show not for one
14 truth but of the truth, determination of the truth. We are here in the
15 presence of a legal system of the International Court. The International
16 Criminal Court is certainly mixed, so it has -- it is inspired both by
17 civil and common law, but I think that it is clear, as the Chamber has
18 observed, that where it concerns the presentation of evidence, this is
19 generally done via the presentation of the witness. So perhaps we are
20 more ready when we listen or when we examine the witness and also with
21 regards to the way that the Statute and its Rules define it, it would
22 seem to us more of an adversarial system or a common-law system.

23 It is clear that in your decision 1665, the Prosecution or the
24 Defence, when it presents its own witness -- therefore, a party cannot
25 ask leading questions to its own witness, and we would submit to you that

1 certainly in common law there are exceptions to this rule, among others,
2 to bring up a subject or a topic. These are -- is perhaps the most known
3 areas. But there are exceptions when a witness previously is said to
4 have given statements or signed statements or even given statements via
5 audio or video or both which are different or incompatible with the
6 testimony in Court.

7 I am going to refer to certain case law that we have. I've
8 already provided the Legal Representatives with it during the break, and
9 this is how we saw that there was a problem with a photocopy of a
10 decision that we will resolve. And I'm also going to provide these
11 copies to the usher and we'll discuss -- as I discuss them. But
12 essentially, this jurisprudence, this case law, which comes from the
13 ICTY --

14 MR. HOOPER: I very regretfully get to my feet. I don't mean to
15 interrupt my colleague. He's in midflow, I know. I notice there's been
16 some disclosure of authorities. This is potentially a very significant
17 area and an entirely new area in terms of the jurisprudence of this
18 Court. I can only say that it's regretful that the Defence were not put
19 on notice that this point was going to be taken earlier than one minute
20 to 11.00 or so this morning. Because we haven't come forearmed in the
21 way that my friend has come, and I'm afraid that -- I appreciate from
22 what he's just said, there may have been a photocopying problem, but we
23 haven't received - though the participants appear to have received - we
24 haven't received disclosure of any of the case law that's about to be
25 referred to.

1 Now, obviously many times in the course of any trial, matters are
2 going to arise quite ex improviso which we are not going to be in a
3 position to -- to forewarn other parties about, but it seems to us that
4 where you have such a significant area as this and a new area as well, a
5 degree of notice would not only be of assistance to the Defence, but
6 through assisting us, I hope that we would be in a better position to
7 assist the Court in resolving what could be a very significant decision,
8 not only in respect of this case but, of course, for other cases and
9 other cases to follow.

10 So I interrupt my friend with that note of regret, with a request
11 that we are given the same facility as those on the other side of this
12 room, by having those authorities provided to us, and that that can
13 happen perhaps before we continue with his submission. Alternatively,
14 that we hear his submission through and then get at least time perhaps to
15 a little later point in the day, because my friend has got other matters
16 to raise, as I understand it, with this witness, and as I understand it
17 he's not asking that this witness be declared adverse or hostile. If he
18 was doing that, then of course it would be difficult for him to continue
19 with any cross-examination -- or any examination I should say.

20 So if, as appears to be the position -- thank you. If, as
21 appears to be the position, this is a question of -- solely of my friend
22 saying that he'd like the witness to refresh his memory from previous
23 statements, if that's the issue and we're not dealing here with - as my
24 friend has just said - "I'm not asking that this witness be declared
25 adverse," if that's the position, then it's a matter I submit that we

1 could take, having heard this argument, we could for ourselves, the
2 Defence side, consider this over the luncheon adjournment, the arguments,
3 and come back better informed and better armed as well in this equality
4 of arms after the luncheon adjournment. So that's just a proposition.

5 PRESIDING JUDGE COTTE: (Interpretation) Counsel Hooper, to the
6 extent that the interpretation didn't seem 100 per cent at one
7 particularly -- right, but I noticed right at the beginning which was
8 that I (as interpreted) remarked that there were certain disclosures of
9 authorities, and I'm not sure that I understood what you mean by certain
10 disclosures of authorities. I think that in fact when -- what is of
11 concern to you is that the Prosecutor is dealing with this issue of a
12 witness who is not hostile, while being a bit hostile, while being not a
13 bit hostile, this problem of familiarisation, and it also mentions the
14 existence of case law. What you are concerned by is that that's done in
15 a sudden way, unusual way, without you having been notified of it and
16 without you having a minimal degree of time in order to be able to take
17 acquiescence of it and without being able to make comments on it. I
18 think that's what it is, but you haven't ruled out the Prosecutor
19 finishes his remarks which would make it possible for everyone to have a
20 minimum degree of time to react to that. Is that correct?

21 MR. HOOPER: Exactly, Mr. President. Thank you.

22 PRESIDING JUDGE COTTE: (Interpretation) Perfect. Thank you,
23 Counsel Hooper.

24 So, Prosecutor, you will finish your remarks. It is perhaps true
25 that you have to give a minimal amount of time to the Defence teams so

1 that they can pass on their points of view, but we don't know what we
2 have to give a point of view on because you haven't finished. So please
3 finish.

4 MR. MACDONALD: (Interpretation) Thank you, your Honour. And I
5 can immediately provide the Chamber and the parties with the case law
6 with regards to this issue. Now, the first ruling is one from the
7 Appeals Chamber of the ICTY and this is the Popovic decision, namely, of
8 the 1st of February, 2008, so I'm going to give this copy in. Now,
9 Popovic isn't translated into French. It is an English version only, but
10 I do have other jurisprudence in two languages for the benefit of
11 everyone here.

12 Quite simply, I'm going to distribute it in a moment. There's a
13 copy for the Defence, a copy for Counsel Hooper.

14 THE INTERPRETER: The English booth would also ask if copies
15 could be distributed to the interpreters.

16 MR. MACDONALD: (Interpretation) The next decision which I would
17 like to distribute this time is the French/English version. This is
18 decision of the 5th of July, 2005, still from the ICTY, Halilovic
19 decision.

20 MR. HOOPER: Is there a chance to beg a further copy so that both
21 myself and other members of the team can have regard to these at the same
22 time, as it were? Do you have a further -- other -- can we have a second
23 copy?

24 MR. MACDONALD: We don't have a second copy.

25 MR. HOOPER: All right.

1 MR. MACDONALD: I'm sorry.

2 MR. HOOPER: Well, maybe as practice it would be a good idea,
3 bearing in mind there are two counsel on both teams.

4 THE INTERPRETER: The interpreters would also like to request
5 that in practice there are copies for the interpreters.

6 JUDGE DIARRA: (Interpretation) Aren't there any for the
7 interpreters either?

8 MR. MACDONALD: (Interpretation) No, unfortunately, I don't have
9 any for the interpreters.

10 PRESIDING JUDGE COTTE: (Interpretation) Judge Diarra is going
11 to give her own copy of jurisprudence for the interpreters so that they
12 may have access to it immediately.

13 MR. MACDONALD: (Interpretation) I would like to apologise. The
14 most important decision when we have difficulties, I'm asked to make
15 other photocopies, which I will make here and provide them to the
16 Chamber. And also for the interpreters, if this is to be done. This is
17 the main ruling that we wanted to quote this morning. I have additional
18 copies. I'm going to -- will the Chamber give me leave to provide the
19 Court Officer with copies, bearing in mind that the usher is outside the
20 chamber?

21 PRESIDING JUDGE COTTE: (Interpretation) Yes, you have leave so
22 to do.

23 MR. MACDONALD: (Interpretation) The other decision, your
24 Honour, that we would like to distribute also is the Krajisnik ruling of
25 the 23rd of November, 2004, also from the ICTY in its French version and

1 English version. It's an oral decision, so we have a transcript of the
2 hearings that took place on that particular date. I would have to state
3 that the French version, the translation therein is -- perhaps leaves
4 somewhat to be desired, but I would like to provide it to the Registrar.

5 Final decision, your Honour, is decision of the 25th of February,
6 2003 (as interpreted), also from the ICTY. Here we are talking about
7 decision in the Milosevic case and we have a French and English version
8 of it, and I have to say that this French translation is a lot more near.
9 So if we could provide you with that.

10 If you would allow me to come to the -- approach the
11 Court Officer, then I could also provide her with this decision.

12 (Trial Chamber confers)

13 MR. MACDONALD: (Interpretation) Your Honour, I am convinced
14 that the Chamber certainly had this jurisprudence in mind, this case law
15 in mind, when it issued its 1665 decision, and in particular paragraphs
16 66 and 67 thereof. And obviously these proceedings, as you defined
17 them -- or I say this procedure, this is -- exists in common law, it
18 exists in the ICTY. I understand that I can -- well, I've come this
19 morning. I've submitted this case law to you just like that, but it is
20 case law which obviously is known certainly by Counsel Hooper, who comes
21 from a common-law system, where this procedure is not new. And also, to
22 a certain extent, the Kilenda team will know the decision 1665, and
23 they're certainly able to recognise the previous situations which there
24 have been in the ICTY.

25 In domestic law - and I'll take the example of Canadian

1 law - without international tribunals necessarily having to apply such
2 principles of common law, but the ICTY in its ruling which I just
3 mentioned drew -- drew inspiration on -- from, rather, what was done in
4 English-speaking countries such as Australia, the United States, and
5 Canada. And in such jurisdictions, there is an earlier stage - and I
6 digress momentarily - the Chamber specified the matter in ruling 1665
7 with -- in -- with regard to jogging the memory of a witness. And the
8 Chamber said that there is that possibility to define or to detail by way
9 of additional criteria, certainly in paragraph 66 of the ruling. In
10 English-speaking jurisdictions, there is an earlier stage and I will
11 quote in French. 9(2) of the Canada Evidence Act, article 9, two
12 paragraphs. The first deals with the fact that a judge may, at the
13 request of the Prosecution, when the facts have been established
14 recognise that a witness is hostile. Generally speaking, in the English
15 tradition, when one is dealing with a hostile witness, this person can be
16 cross-examined in the broader meaning on all of his testimony, all of his
17 testimony. And everything that he may have said can be the subject
18 matter of cross-examination. Now, that is not what the Prosecution is
19 asking for today, but in Canadian law there is a previous stage 9(2) of
20 that particular act, and I quote:

21 "When the party that presents a witness invokes the fact that at
22 other times that person made a written statement that was taken down in
23 writing or which was recorded on an audio-tape or a video-tape or by any
24 other means, and when this statement is incompatible with the current
25 testimony, the Court may without evidence being established that the

1 witness is opposed to the party at hand, the Court may grant that party
2 the leave to cross-examine the witness regarding the statement. And the
3 Court may take into account the cross-examination with a view to
4 determining whether in its opinion it is -- whether the person is opposed
5 to the party in question."

6 In other words, your Honour, basically this is an earlier step or
7 stage in the proceedings, and this stage consists after showing the
8 statement to the witness, the witness recognises that he has given this
9 earlier statement. And the party questioning him - in this case the
10 Prosecution - does have the opportunity to ask questions that are leading
11 in nature or closed-ended on the only points on which the witness made
12 earlier statements that were inconsistent. All depending on the
13 witness's answers and the way in which he responds, at that point the
14 Prosecution may then come back and ask the Court for the witness to be
15 deemed hostile, and thus could be subject to cross-examination on all his
16 previous statements on all matters on which he provided a statement to
17 the Prosecution.

18 Now, before the ICTY - and I refer to the main ruling of the
19 Appeals Chamber of the ICTY 1 February 2008 - the Appeals Chamber
20 recognised this particular state of affairs and recognised that the party
21 that introduces a witness may, with a view to establishing the truth and
22 taking into account the fact that the Appeals Chamber -- that the Chamber
23 assessed the credibility of a witness, allowed the Prosecution -- allows
24 the Prosecution to question a witness by way of leading or closed-ended
25 questions on points that were inconsistent, without necessarily having

1 the witness declared hostile. That is to say, the -- whereby the
2 Prosecution would try to have the witness's testimony rejected entirely.

3 I think there's a nuance here, your Honour, between an opposed
4 witness and a hostile witness, the meaning of a hostile witness. Perhaps
5 the Chamber had in mind this procedure in -- at paragraph 67. Perhaps
6 the fact that one might declare or have -- or allow the questioning of a
7 witness on certain points, this may have been a declaration of hostility
8 just on that specific point. However, I would argue that the nuance here
9 is not a minor one because the Prosecution in this case -- allow me to
10 rephrase.

11 The Chamber will have to assess the credibility of the witness.
12 The credibility -- credibility is assessed in general, in the general way
13 that the witness testifies before the Chamber, his body language, the
14 facility with which a witness answers questions; and this credibility
15 must be assessed in light of all the evidence once the Chamber withdraws
16 for its deliberations. The Prosecution will have an opportunity to
17 present closing arguments and may say that a witness is credible on
18 certain points; on other points his credibility is lessened. But a
19 witness may be not credible on one point, but that does not necessarily
20 mean that all his testimony must be dismissed out of hand.

21 And I would like to quote the Popovic ruling, paragraph 24 and
22 25. I'll quote this in English because unfortunately we have not
23 found -- last night we were unable to find a French translation of the
24 ruling. The Appeals Chamber said the following:

25 (In English) "While the Tribunal is in no way bound by the rules

1 of the common law and the Rules do not provide clear guidance on the
2 question of impeaching a party's own witness, Rules 85 and 90 are
3 nonetheless largely reflective of the common law system."

4 (Interpretation) So before the ICTY it is recognised that the
5 Rules of Procedure and Evidence draw their inspiration on the common law,
6 and I apologise to the interpreters because I know I am switching
7 languages here. But that's the way it goes.

8 (In English) "It is the parties who call and question 'their'
9 witnesses in turn and who are then cross-examined by the opposing side.
10 Accordingly, recognising that the procedure for the hearing of witnesses
11 at the Tribunal is rooted in the adversarial process, it is important to
12 be cautious in removing safe-guards that belong to that process for
13 reasons of fairness to the parties and for the purpose of ascertaining
14 the truth; in this case, leaving the determination of adversity, and the
15 green light to cross-examine, to the calling party rather than to the
16 Trial Chamber."

17 (Interpretation) And the party that is of most particular
18 interest here is as follows. I quote paragraph 25:

19 (In English) "To be sure, reasonable alternative procedures for
20 impeaching one's own witness do exist. The Trial Chamber may, for
21 example, decide to grant the calling party leave to cross-examine its own
22 witness on an inconsistent statement without a prior showing of
23 adversity. The determination could then be made on the basis of the
24 cross-examination. A Trial Chamber might also adopt a flexible approach,
25 as was done in the Krajisnik case, where the calling party raises the

1 issue of its witness' hostility and the Trial Chamber then decides how to
2 proceed. In that case, the Trial Chamber informed the parties that it
3 might show more initiative than would be expected under the traditional
4 common law approach, by determining on a case-by-case basis whether to
5 allow the Prosecution to put questions in a more leading way to the
6 witness, and in relation to which issues."

7 (Interpretation) I will repeat this last point.

8 (In English) "In that case, the Trial Chamber informed the
9 parties that it might show more initiative than would be expected under
10 the traditional common law approach by determining on a case-by-case
11 basis whether to allow the Prosecution to put questions in a more leading
12 way to the witness and in relation to which issues."

13 (Interpretation) Your Honour, I will conclude by informing you of
14 the topics on which the Prosecution would like to ask questions, leading
15 questions, which the Popovic ruling refers to as "leading questions."
16 Firstly, with regard to the issue of civilians, civilians who died during
17 the attack on the village of Bogoro. The Prosecution alleges and already
18 has called a witness in this regard and certainly others will come later,
19 but in this particular case with a view to establishing the truth and
20 assessing the credibility, it is -- of the witness, it is important to
21 ask questions about the earlier statement made by the witness, earlier
22 statements that -- an earlier statement, singular, that he made on this
23 matter. And with regard to this matter, the reasons -- the possible
24 reasons or how the solution was found in Aveba -- solution that was found
25 in Aveba or perhaps after in Zombe before they swept down upon Bogoro.

1 Another topic that the Prosecution wishes to return to is the
2 songs, the songs that were sung by the combatants as the combatants were
3 going from Zumbe down to Bogoro. I'm speaking of the groupement when I
4 speak of Zumbe.

5 Another question that is of interest: Despite the fact that the
6 witness may have given a beginning of a reply, the question of munitions
7 obtained in Aveba. And we would like to return to the quantities and
8 also where these supplies were obtained. Obviously, we would argue that
9 according to earlier statements the witness also spoke of travels that
10 Mr. Katanga may have done, and then after he mentioned ammunition,
11 ammunition for which particular weapons, and how the supplies were
12 distributed.

13 The last topic - and this is certainly not the least - the issue
14 of children less than 15 years of age at the time of the fighting. The
15 witness - and the Defence took note of this point - noted the importance
16 of this matter; and in this search for the truth, I believe it is
17 important for the Prosecution to have this ability to go back to earlier
18 statements of the witness and look at the descriptions he provided. And
19 in some cases, he provided specific ages and names in the Zumbe camp or
20 amongst his own ranks, the child soldiers amongst his own ranks during
21 the attack, even though the Prosecution cannot ask questions about this
22 yet. But with the Chamber's leave, if we are allowed to ask leading
23 questions, we may ask questions about the use of children aged less than
24 15 at the time of the attack, either by the FNI or by the FRPI. And of
25 course it will all depend on the answers provided by the witness, but the

1 Prosecution can assume that the witness will respond in the same manner
2 as he did earlier regarding the presence of child soldiers in the camp in
3 Zumbe.

4 So the Prosecution ...

5 (Prosecution counsel confer)

6 MR. MACDONALD: (Interpretation) I beg your pardon.

7 The Prosecution would also like to hark back to the looting and
8 destruction of property which formed the basis of charges before the
9 Chamber as well as the question of -- the question of the solution and
10 the fact that apparently some wished to wipe Bogoro off the map.

11 I would like to specify initially, your Honour, that sometimes it
12 is not impossible if one takes one particular approach -- for example, an
13 approach consistent with your paragraph 109, trying to jog the witness's
14 memory, that the witness will recall what he said earlier and recognise
15 that indeed his memory has been refreshed and in this manner the witness
16 can provide answers. And then the questioning can resume in a
17 non-leading way. If the witness does not recognise or does not provide
18 answers that are in keeping with earlier statements, then the Prosecution
19 will ask leave of you to cross-examine using leading questions, and we
20 are speaking of cross-examination and leading questions but only on the
21 matters that I have mentioned.

22 And finally, I would remind -- I would remind of -- all that
23 there's a certain vulnerability here. The -- let us recall the witness's
24 reaction when we were in closed session when he made reference to certain
25 members of his family. This witness is vulnerable. Unfortunately, I can

1 say no more than that because we are currently in open session, but his
2 replies at that point and the name of the people that he mentioned who
3 are still alive can be understood and perhaps even explained for some
4 points by the way he provides his replies. And in paragraph 109 of your
5 ruling - and if you allow me, I will -- I beg your pardon, I believe that
6 the Chamber did specify in Court that one of the criterion was when we
7 were to discuss Witness 250 and jogging his memory, we must consider the
8 state of the witness. And unfortunately, I have lost the particular
9 excerpt from the transcript of the hearing when the Chamber did provide
10 details -- oh, I have just found that excerpt, and I shall quote your
11 Honour on the 27th of November, 2009, transcript page 84 -- transcript
12 84, I believe this is the corrected version, page 30, 37, and 38. You
13 said, among other things:

14 "So the setting out of a principle: A witness must give
15 testimony of what he remembers observing, and one exception is allowed.
16 To determine whether this exception is to be allowed, the Chamber shall
17 take into account a certain number of matters -- items on a case-by-case
18 basis. For example, the witness's profile, the witness's mastery of the
19 issue, the ease with which the witness speaks, his eloquence. The
20 Chamber shall assess his ability to remember what he saw or heard, his
21 ability to provide a number of nuances in his testimony."

22 I believe that is not a corrected transcript. It may have been
23 the initial transcript that is displayed on the screens during hearings.
24 So there you have it. And if you will allow me five seconds to consult
25 my colleagues regarding the matters that we would like to present on this

1 point.

2 (Prosecution counsel confer)

3 MR. MACDONALD: (Interpretation) Of course, your Honour, we are
4 not quite there yet, but we do wish to give notice to the Chamber and to
5 our learned friends opposite that this jurisprudence is also related to
6 another matter. We're not there yet, but this is a later stage and
7 later, if necessary -- earlier declarations may be produced and,
8 according to international jurisdictions, there are two reasons for this
9 or two grounds, whereby a Chamber may accept earlier statements from a
10 witness who is testifying, who is present for cross-examination. And the
11 objective could also be for the Chamber to assess any possible remaining
12 contradictions. So first of all, the issue of credibility, a principle
13 of common law that is entirely recognised, but also -- also recognised in
14 common law and by international criminal tribunals, that these statements
15 be admitted for their content, that they be placed in the case file. And
16 then the Chamber will be in a position to turn to these statements for
17 their final ruling at the end of the proceedings. Now, we're not at that
18 stage yet, but we are announcing our colours.

19 I thank you.

20 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
21 Mr. Prosecutor, and that coming -- Mr. Hooper --

22 MR. HOOPER: (Previous translation continues) ...

23 PRESIDING JUDGE COTTE: (Interpretation) Yes, in just a moment.
24 Now, coming after the remarks from two days ago, once -- now we
25 have another set of remarks, very dense from a legal standpoint.

1 Mr. Hooper, you may address the Court. Please go ahead.

2 MR. HOOPER: Very dense from a legal standpoint, and you can
3 imagine the chapters in learned academic books that are going to spring
4 from the loins of this discussion. This is a very dense area, and it
5 deserves and merits proper reflection, in my submission. And perhaps for
6 that purpose, the timing that we find ourselves at the moment is perhaps,
7 in my submission, propitious. Because we're not sitting tomorrow and we
8 have the weekend, and we're next sitting on -- for the afternoon session
9 on Monday.

10 (Trial Chamber confers)

11 MR. HOOPER: Lundi --

12 PRESIDING JUDGE COTTE: Monday.

13 MR. HOOPER: I have the same problem with French. But, Lundi is
14 Monday.

15 Which will give Mr. O'Shea all the time he needs to address these
16 issues, because he will be taking the argument in respect of the issues.
17 And I must say, when one looks at the shopping basket that the
18 Prosecution have enumerated this morning, not just concerning victims but
19 considerable details, this is obviously a matter not just of academic
20 interest, not just interest in terms of the jurisprudence of this still
21 new Court, but obviously directly concerned with the fairness of these
22 proceedings in respect of Mr. Katanga.

23 So I hope that the Court is attracted, I hope, by my submission
24 that in order to provide us, the Defence, with the opportunity to respond
25 to these matters, these dense matters, as you've quite rightly stated

1 they are, Mr. President, that perhaps we can address the Court in respect
2 of them on Monday.

3 Now, if that were a situation that was attractive to the Court,
4 it would of course raise the question of valuable Court time between now
5 and then, which is that we're sitting today of course until 4.00. As I
6 said earlier this morning, the Prosecution are not asking that this
7 witness be declared hostile. The very basic common-law position in terms
8 of a hostile witness, the origins of the rule, was that if you had -- as
9 a Prosecutor you called a witness - this is either in civil law -- I say
10 "civil law," within the common-law system whether it's a criminal case or
11 a civil case in that context, if you called a witness with the
12 expectation that the witness was going to say that X was murdered by the
13 accused, but the witness arrived and said: No, the deceased was killed
14 by somebody else, then that would be a classic situation where you could
15 as a Prosecutor, for example, or the opposing party confront the witness
16 with a previous inconsistent statement with this effect, that the
17 witness's evidence as to who killed the deceased was completely
18 neutralised. In other words, his evidence would then count for nothing,
19 neither for the Defence nor the Prosecutor.

20 Now, that rule has various reflections and alterations. But I
21 mention that because one can see here why there is a degree of
22 trepidation on the part of the Prosecutor to have the witness declared
23 hostile or adverse, because what is then going to be the effect on the
24 totality of the evidence he's given -- or at least that may be one of the
25 difficulties that Mr. MacDonald is addressing in his mind. But whatever

1 the position is, as he's not, in fact, as I understand it seeking to have
2 his witness declared hostile or adverse, that is not an issue that we're
3 concerned with. The issue, as far as I'm in a position to identify it,
4 is that Mr. MacDonald is asking for leave to present at this stage
5 previous statements made by the witness to refresh his memory and to
6 cross-examine. They are two distinct and separate steps, but one is
7 obviously aimed at the other.

8 And let's be realistic here, that we're not of course talking
9 here about a lack of memory in terms of some aspects of what this witness
10 has said. It would be a fiction to consider that that's the position
11 necessarily.

12 So if that's the case, it's a question now of the Court, after
13 hearing arguments from us as to whether or not the witness should have
14 his memory jogged in this way and the extent to where we -- and the
15 extent of it and where we go with that, that that seems, in our
16 submission, be a matter that can be the subject of argument from the
17 Defence on Monday and subsequent resolution by this Chamber. And we
18 don't need to lose the time that we still have available to us today, the
19 two hours as it now is that we have available to us today. Because this
20 witness has still got several months to go in his evidence. And we can
21 anticipate - unless he has any other difficulties - we can anticipate
22 that the Prosecution, looking at their resume of what their expectation
23 is, will wish in fact to be asking him several hours more questions I'd
24 have thought. So we're not at the end of the -- as I understand it,
25 we're not at the end of this witness's testimony as far as the

1 Prosecution are concerned by any means. We have a full session or two
2 left of questions that Mr. MacDonald I anticipate - he can
3 confirm - still has to go. And so we could use the time, in other words,
4 this afternoon usefully to address those other issues. And so far as I
5 can see, that will not affect the argument or the status of the witness
6 in any way in respect of this dense argument, that then we could then
7 profitably address on Monday. And when I say "address on Monday," I can
8 see that it would take much of Monday to address it in terms of how long
9 this argument might take.

10 I doubt if we're in a position to put forward written submissions
11 by Monday on this issue, but we'll be quite happy to make a full oral
12 response on Monday and we'd have had the time to present that, and
13 perhaps even to present a skeleton argument in lieu of that with
14 authorities.

15 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe.

16 MR. FOFE: (Interpretation) Thank you very much, your Honour.

17 It is true that the issue raised by the Prosecutor is a
18 fundamental one and deserves to be given sufficient time for reflection.
19 But as he himself has said, he has set the pace.

20 To begin with I would like -- or rather, pending further
21 explanation, let me say that regarding the law applicable before the
22 International Criminal Court, Mr. President, your Honours, we are here at
23 the International Criminal Court, which is governed by basic documents
24 which set out principles, positive principles in criminal law. The
25 Statute of the ICC in many points constitutes developments in criminal

1 law. The issue here is not to transpose what happens in one system or
2 the other to the ICC. The ICC system is a mixed system, and it is a good
3 one.

4 Secondly, I would like to recall one of the fundamental
5 principles enshrined in the Statute of the ICC in Article 54(1)(a). This
6 Article states as follows:

7 "In the determination of the truth, the Prosecutor shall carry
8 out investigations of issues that are both incriminating and
9 exculpatory," and I believe that the spirit of that decision should apply
10 at all levels. The Prosecutor must investigate incriminating and
11 exonerating circumstances.

12 Mr. President, your Honours, after reading paragraph 67 of your
13 instructions, that is, 1665, and I will read that paragraph, that is
14 paragraph 67:

15 "However, if one party states that the witness it has called has
16 become hostile and the Chamber grants leave to the party to continue
17 asking the witness questions, it might be proper for that party to
18 conduct a cross-examination. In such an event, the cross-examination
19 must be limited to the points discussed or raised during the first phase
20 of the examination or in the prior statements of the witness."

21 Mr. President, your Honours, this provision, this paragraph, is
22 quite clear. It only needs to be implemented. The paragraph does not
23 provide for an intermediary situation. The Prosecutor only has to tell
24 the Chamber whether the witness has become hostile to him or not. He has
25 to say that, if the witness has become a hostile witness then he should

1 seek leave to cross-examine the witness. Otherwise, if the witness has
2 not become hostile to him, then it is important for the cross-examination
3 to be conducted by the Defence. One should not create an intermediary or
4 hazy situation that does not exist.

5 With regard to the points that he has mentioned, the Prosecutor
6 stated that he wanted to ask questions to the witness on the existence of
7 civilians in Bogoro. Mr. President, sir, your Honours, the witness was
8 more than clear on this issue. The witness was very clear.

9 I also feel that I should point out to the Chamber that the
10 testimonies that have to be taken into account are those that are given
11 before the Chamber. In the event of inconsistency or contradiction
12 between the prior statements of the witness given to the investigators of
13 the OTP and the testimony of the witness in the courtroom, it is the
14 testimony of the witness in the courtroom that has to be considered as
15 authentic, because here in the courtroom the witness testifies under
16 oath, whereas the witness did not give statements to the investigators of
17 the Prosecutor under oath. He is therefore supposed to tell the truth
18 here.

19 Similarly, with regard to the second point mentioned by the
20 Prosecutor, that is the songs, the witness even mentioned the lyrics of a
21 song that was sung by the combatants. He answered that question. The
22 same applies to the ammunition. Questions were put to him to know how
23 they received supplies of ammunition, and he answered clearly to those
24 questions. There is no need for me to repeat his answers because those
25 answers appear in full in the Court records.

1 The same applies to the important issue of child soldiers. The
2 witness expressed the understanding that he had of the term that is
3 generally known as kadogo, he explained it clearly. And if my memory
4 serves me correctly, the Prosecutor even abandoned that line of
5 questioning; and therefore, we were led to believe that he had exhausted
6 his questions on that issue.

7 As concerns the pillaging and destruction, questions were also
8 put on the situation of Bogoro before and after the attack. The
9 Prosecutor even asked specific questions on the existence of houses and
10 the witness gave his answers.

11 As to the next point, that is what the Prosecutor referred to as
12 wiping out Bogoro, I do not have any precise information on that.
13 Because if I have been following the proceedings closely, the Prosecutor
14 has not yet put any questions on that issue to the witness.

15 The Prosecutor also raised the issue of familiarisation of the
16 witness. I am wondering whether this is the appropriate time to raise
17 the issue of the familiarisation of the witness, that is familiarisation
18 with his prior statements. I thought I understood that it was upon the
19 arrival of the witness at The Hague that such familiarisation can be
20 considered. Familiarisation cannot take place during the testimony of
21 the witness.

22 Lastly, the Prosecutor talked about the vulnerability of this
23 witness. Mr. President, your Honours, please allow us in the Defence to
24 disagree with this point of view. We have been observing this witness,
25 we know that he feels at ease, and that you have actually had to ask him

1 several times to slow down his speech. The witness easily answers any
2 questions put to him. So we do not see how can -- he can be considered
3 as vulnerable.

4 Mr. President, your Honours, that is what I had to say. Thank
5 you.

6 MR. KILENDA: (Interpretation) Mr. President.

7 PRESIDING JUDGE COTTE: (Interpretation) Yes.

8 MR. KILENDA: (Interpretation) Thank you. I will not want to
9 come back on everything that Mr. Fofe has said, but I just wanted to draw
10 the attention of the Court to the fact that after analysing the statement
11 of the Prosecutor we realised that this is something that he has really
12 prepared. When you look at the elements of jurisprudence that he
13 produced, then we realised that it is something that he fully prepared.
14 Without repeating what Professor Fofe said, I believe I understood that
15 the fundamental legal issue raised by the Prosecutor is whether yes or no
16 you allow him to tender the prior statements of the witness into evidence
17 or to refer to them, because he has realised that he is not at ease with
18 the witness, who is a key witness of the Prosecutor, thanks to whom he
19 was able to obtain the confirmation of charges.

20 There is point four in the issue -- in the case of the Prosecutor
21 against Halilovic and I quote:

22 "The admission of a prior statement would not prejudice the
23 witness's right to a fair trial or his right to challenge the evidence
24 insofar as the Defence counsel was aware of the inconsistencies and had
25 the opportunity to question the witness on these points."

1 You heard Mr. Fofe when he pointed out that in this case the
2 Prosecutor is not asking you to declare his witness hostile and he said
3 that the burden of the cross-examination should be on the Defence. And
4 we submit that at this point the Prosecutor should conclude his direct
5 examination. We are going to conduct the cross-examination, after which
6 he can raise these issues and the Chamber will make its determination.
7 For the time being, we have not made our cross-examination and tendering
8 the prior statements of the witness at this point will prejudice our
9 client's right to a fair trial.

10 That was what I had to say, Mr. President. Thank you.

11 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Kilenda.

12 We will take some time out to consult on the Bench with
13 Judge Diarra and Judge Van den Wyngaert.

14 (Trial Chamber confers)

15 PRESIDING JUDGE COTTE: (Interpretation) Before anything else,
16 Mr. Prosecutor, do you feel that it is impossible for you right now to
17 ask any other questions to the witness because we have one and a half
18 hours this afternoon, and independently of the decision to be taken
19 later, can you use the time to ask the questions that you have not yet
20 asked him? You said that the Prosecution is presupposing that he will
21 answer in the same way, and we have bad memory of this -- your statement,
22 you cannot anticipate the witness's answers. So are there any issues,
23 such as possible pillaging, looting, or destruction, children of less
24 than 15 years, even though, as Professor Fofe has said, some questions
25 have already been put on that issue. But do you have any questions that

1 you think you can ask the witness or have you already decided on the
2 issue as stated at the beginning of your submission? That is the
3 question we are asking you with regard to the organisation of our time
4 and our proceedings.

5 MR. MACDONALD: (Interpretation) Yes, Mr. President. We can
6 proceed with other lines of questioning, but I do not know whether we
7 will cover up to one and a half hours. But the issues that remain to be
8 discussed depend on how the witness will react after his memory is
9 refreshed, but my answer to you is: Yes, we can continue this afternoon.

10 But I have another question for the Chamber. Unfortunately, I do
11 not have the timetable for tomorrow. Was it for -- is it for
12 maintenance?

13 PRESIDING JUDGE COTTE: (Interpretation) Yes. Tomorrow is
14 reserved for maintenance. We cannot sit tomorrow, and the maintenance
15 days are always scheduled on Fridays, which is important for all of us.
16 And we can be sure that all the participants can be available for other
17 tasks. So tomorrow is a maintenance day for this courtroom, and it
18 happens once every month. So we will not sit tomorrow. It is preferable
19 not to risk falling into a situation of confusion this afternoon, given
20 what you have told us this morning, and we have to make a ruling on that.

21 Initially I had thought, as suggested by Mr. Hooper at the very
22 beginning of our session, allow the Defence the lunch break to come up
23 with its observations. The Chamber is fully aware that the necessity for
24 the fairness of the trial maybe does not make it possible for each
25 Defence team to prepare its oral submissions, even though Professor Fofe

1 has summarised a whole series of arguments which, in his opinion, should
2 lead to a rigorous application of paragraph 67 of the decision.

3 The Chamber is nonetheless aware that we are at the beginning of
4 the substantive proceedings and we have so far heard only four witnesses.
5 We are actually hearing the second witness coming out of the Democratic
6 Republic of Congo. It looks like I'm going too fast.

7 Can I proceed? Very well.

8 We are actually in the presence of the second factual witness in
9 our proceedings. The Prosecutor is asking for a clarification of Article
10 67, just like at other times, and I was talking about paragraph 67 of our
11 decision, actually. The Chamber feels that we are dealing here with
12 something beyond a request for clarification, and what we are actually
13 being asked is to add something to this article by modifying procedure
14 consistent with other jurisprudence, particularly the Appeals Chamber of
15 the ICTY. That is why we need some time to resolve the issue, to
16 determine whether the suggestion is useful or indispensable, or whether
17 paragraph 67 is sufficient in and of itself. So this is also the time
18 for reflection for all the participants, because you must not forget that
19 the Chamber also has the possibility of asking questions as well as the
20 Legal Representatives.

21 So if the Chamber wishes to ask questions witness by witness, we
22 can obtain additional information on issues that we deem to be
23 indispensable for the ascertainment of the truth and regarding which the
24 Prosecutor or the Defence did not obtain any answers. So even though
25 this would involve a delay in our proceedings, this is an issue that is

1 too important to be treated hastily. We have decided that we will
2 adjourn today and resume only on Monday at 2.00 p.m. this will make it
3 possible for the team of Defence of Germain Katanga and Mr. O'Shea in
4 particular to prepare their oral submissions, and that will also make it
5 possible for the Defence of Mathieu Ngudjolo to respond, that is, after
6 listening to Mr. O'Shea. And if they believe that they have said
7 everything that they had to say then, let me tell them that the Chamber
8 has understood perfectly.

9 So with the transcript we will be able to understand your
10 requests, Mr. Prosecutor. It seems to me that there were stages that you
11 mentioned. The first stage would be a sort of refreshment of the
12 witness's memory, allowing you to ask questions with which, if you were
13 satisfied, then that would be the end of it. And in your opinion if the
14 witness persisted with his attitude, then you should be allowed to
15 conduct a cross-examination, and the ultimate possibility that you
16 requested would be to tender the prior statements of the witness. The
17 Chamber cannot take any final ruling right now. We are going to hear
18 from the team of Mr. Hooper and then the observations of Mr. Kilenda and
19 Mr. Fofe, and we will take a decision early next week.

20 MR. MACDONALD: (Interpretation) Perhaps we could clarify the
21 notification that I indicated with regards to the admissibility of the
22 statement. The Prosecution didn't -- this point isn't being debated
23 before the Chamber, we didn't submit this jurisprudence. We are not at
24 this stage at the moment -- and it is not because we submitted that this
25 morning. It is only the issue of paragraph 109 and 67 and the

1 proceedings of refreshment, opposing witness, and questions and at what
2 time we could ask the questions and in what circumstances. It's only
3 with regard to these aspects that we have submitted these points at the
4 moment.

5 PRESIDING JUDGE COTTE: (Interpretation) I have understood this.
6 It is the ultimate point, but this is with regard -- we don't want to
7 multiply the debates in terms of a theoretical -- at a theoretical level.
8 And if comes to tomorrow -- we don't want to have a debate with regards
9 to the provisions to the proceedings of the statements of the witness.
10 So if the Defence teams can take the floor in this regard, of course it
11 would be desirable that they so do, such that we have a coherent block of
12 legal questions related to the attitude of a witness which you consider
13 to be surprising with regards to the previous statements that were made,
14 and also the comments that were made which I'm taken up.

15 Counsel Hooper.

16 MR. HOOPER: Thank you very much to the Tribunal for allowing us
17 this very useful time.

18 A moment ago, Mr. President, you asked the Prosecutor whether
19 this afternoon presented an opportunity to -- whether we could use it
20 usefully, and my friend effectively said - and this is what I understand
21 his position to be - that well, that depends on what happens in terms of
22 this ruling. When one looks at the objectives of the ruling, we can see
23 that -- what I referred to earlier as a shopping basket, his list of
24 issues, it's a retrospective re-visiting of issues that this witness has
25 dealt with. That's what we're dealing with. But I'm looking at the

1 annex 4 for this witness relating to the areas that the Prosecution
2 sought to deal with with this witness, and I see that there is a
3 substantial amount of material that hasn't been dealt with and which has
4 nothing to do, that I can see, with the application the Prosecution has
5 made. And I refer in this context to Mandro, Tchomia, Bunia, and
6 Kisenyi. Now, is it the intention of the Prosecution to seek to lead
7 this evidence or not? And if it is his intention, why is it that that
8 can't be done this afternoon? Because it seems completely independent of
9 the issues that we're concerned with here.

10 And I should indicate that there may well be an objection in any
11 event to his leading to evidence relating to post-Bogoro events. So
12 there's another -- another argument looming, if I can put it like that,
13 and the Court may well anticipate it that the Defence will be questioning
14 the relevance of post-Bogoro events to the issues in this trial to some
15 degree or another. But coming back, forgetting the arguments that might
16 well be met when we touch upon that issue, and quite quickly touch upon
17 that issue I anticipate, I fail to understand for my point of view why
18 the Prosecution can't use the time this afternoon, if it is their
19 intention, to go into Mandro, Tchomia, Bunia, and Kisenyi, why they can't
20 make that attempt this afternoon. It's -- well, it might be the
21 Prosecution aren't intending to go there, they may have abandoned their
22 position in which case can we please know, because it will be very
23 helpful to us in terms of the preparation that we also have to make in
24 terms of cross-examination on issues. So I think we need to know this
25 side of the weekend, it would be very helpful. Thank you.

1 PRESIDING JUDGE COTTE: (Interpretation) Just one word, I would
2 like to thank the interpreters and the technicians, who we have noted
3 that we've gone beyond the time to adjourn this hearing. They are aware
4 of the fact that normally we won't be sitting this afternoon, that's what
5 I've just said, and perhaps they will have a bit more time this
6 afternoon.

7 Now, Mr. Hooper, we have certainly heard well what you said. You
8 noted that the Chamber had a concern of ensuring itself that it wasn't
9 possible to continue this afternoon, and now we are between the
10 requirements of equity towards you such that you have a minimum amount of
11 time to react to what the Prosecutor did mention this morning, because
12 you consider that this is something that was brutal and that it came in a
13 very sudden way and also the other requirements that we have which is
14 very important.

15 Now, during our debate I would like to be patient, and we are
16 patient particularly where it concerns clarifying fundamental issues.
17 Now, apparently the question was asked by myself not long ago. The
18 Prosecutor answered that he was able to ask a question which hadn't asked
19 yet, but everything would depend on the way in which the witness replied.
20 And the Chamber wanted to avoid confusion. We wanted to avoid a
21 situation where there would be new interruptions which would take us back
22 to things -- matters that we're going to talk about on Monday.

23 Now, if you want us to go into the decision that we've taken, we
24 don't -- we never want to reduce the hearing time ever. This is -- we
25 really want to have all our proceedings in a reasonable time-frame.

1 We're going to say that.

2 MR. GILISSEN: (Interpretation) If you would allow me, your
3 Honour, to make a very short intervention?

4 PRESIDING JUDGE COTTE: (No interpretation)

5 MR. GILISSEN: (Interpretation) would the Chamber accept hearing
6 the Legal Representative on the subjects that have been mentioned or not?
7 Because obviously it does concern the problem of child soldiers,
8 potentially.

9 So without revealing anything at all, the problem is complex,
10 this is something that we know, and it's sensitive on many levels, and I
11 have the feeling that the interests of victims could be affected by the
12 proceedings.

13 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Counsel
14 Gilissen, for your intervention, certainly. The Legal Representatives of
15 Victims, well that's -- it's essentially the decision that was issued,
16 even it's been subject for leave to appeal which we're going to examine
17 very quickly, the Legal Representatives of Victims have been authorised
18 to speak at different points in our debate when the interests of victims
19 which they represent are affected, and it is clear that certain answers
20 from the witnesses -- witness to certain questions that have already been
21 asked or to come are at the heart of the interests that you represent.
22 So a contribution from you or both of you or one or other of you, a
23 contribution which wouldn't make the debate longer and would clarify it
24 would be welcome.

25 The session is now adjourned. Thank you again to the

1 interpreters and the technician.

2 The hearing ends at 1.11 p.m.

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- 1 CORRECTION REPORT
- 2 (Expunged)
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