

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
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5 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra, and
6 Judge Christine Van den Wyngaert
7 Situation in the Democratic Republic of Congo - ICC-01/04-01/07
8 In the case of the Prosecutor versus Germain Katanga and Mathieu
9 Ngudjolo Chui
10 Trial Hearing
11 Monday, 8th February 2010
12 The hearing starts at 2.06 p.m.
13 (Closed session)
14 (Expunged)
15 (Expunged)
16 (Expunged)
17 (Expunged)
18 (Expunged)
19 (Expunged)
20 (Expunged)
21 (Expunged)
22 (Expunged)
23 (Open session at 2.09 a.m.)
24 COURT OFFICER: (Interpretation) We are in open session, your
25 Honour.

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

3 Security officers, please bring in Mr. Ngudjolo and Mr. Katanga.

4 Good afternoon, Witness.

5 (The accused entered court)

6 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe.

7 MR. FOFE: (Interpretation) Your Honour, there is a technical
8 problem here. The microphone of my legal assistants are not functioning.
9 Thank you.

10 PRESIDING JUDGE COTTE: (Interpretation) Court Officers, is it
11 possible to check those microphones?

12 Good afternoon, Mr. Katanga and Mr. Ngudjolo.

13 JUDGE DIARRA: (Interpretation) Mr. Witness, the President said
14 "good afternoon" to you. Did you hear him?

15 PRESIDING JUDGE COTTE: (Interpretation) Witness, can you hear
16 me? That other microphone has to be checked also.

17 Can the Court usher check whether the witness can hear what I'm
18 saying. I do not think that is the case.

19 THE WITNESS: (Interpretation) Yes, I can hear you very well,
20 Mr. President.

21 PRESIDING JUDGE COTTE: (Interpretation) We will begin by
22 providing two pieces of information to the participants, beginning with
23 an oral decision, and then the witness will leave the courtroom to enable
24 us to resume the debate that we started on Thursday. I would like to
25 answer the intervention of Mr. Hooper during our hearing of Thursday.

1 Mr. Hooper was concerned about the possibility of the failure of
2 interpretation of something that was said by the witness and may not have
3 been translated. In the afternoon of Thursday the Chamber received from
4 the Registry the following document, and I'll read it:

5 "Mr. President, the Swahili interpreter listened to the witness
6 again and provided the following answer:

7 'Q. Did you see this document before coming here?'"

8 Interpretation of the answer of the witness:

9 "'No, I did not see it but I confirm because we travelled from
10 Olongba to Medhu. I know that that letter was there, but it was not in
11 my possession. It was in the hands of the high-ranking officers, so I
12 did not hear it.'"

13 Complete translation of the answer of the witness because in fact
14 there was something lacking as follows:

15 "'I had not seen the document before, but I can confirm it
16 because to travel from Olongba to Medhu one had to have that document.
17 It was there but it was not in our hands. It was the authorities that
18 had that document. I do not know whether it is this document or whether
19 it was pirated.'"

20 That is the sentence that he made. "I do not know whether this
21 is in fact the document or whether it was pirated."

22 So the interpreter failed to interpret that part of the sentence,
23 but everybody is correct and no one is actually incorrect because we did
24 not actually hear those words "authenticity" and "pirated." The witness
25 did not question the authenticity of the document nor did he say that the

1 document could have been pirated, and that is the sentence "I'm not aware
2 whether it is the document or whether it was pirated."

3 So he did not question the authenticity of the document or
4 whether it was pirated. He said he was not aware whether it was that
5 document that he had not seen but that he could confirm that it was in
6 existence but that he did not have in his possession and he did not know
7 whether it had been pirated. So this is the information that I have to
8 give you. The information given by Mr. Hooper was partially correct. It
9 is crucial for the interpretation to be accurate, and the
10 Chamber (as interpreted) will receive a request or application from the
11 Chamber asking for this transcript to be corrected. So we believe that
12 this should be satisfactory to all the parties.

13 Mr. Witness, please put on your headphones and we would like to
14 recall once again that the task of the interpreters is difficult, and in
15 order for them to interpret properly and to the best of their ability it
16 is important for all the participants, and particularly you, Mr. Witness,
17 to speak slowly, to speak in a loud voice, and to speak into the
18 microphone in order to facilitate the task of the interpreters and make
19 it possible for them to transmit all the information that was said. So
20 this is the information that we wanted to give you.

21 The second piece of information should have been given to you
22 before. It was forgetful on my part. You will recall that last November
23 Witness 233 was asked to assess the dimensions of this courtroom, and
24 ever since then we have learned the length of the courtroom. And it
25 appears the witness had estimated the length to be around 25 metres, but

1 I'm not very sure. But please note that according to the Registry the
2 courtroom has a length of 18.6 metres, and that was the second piece of
3 information that we wished to give you.

4 Now moving on to an oral decision. On the 5th of February, 2010,
5 the Prosecutor filed an emergency motion number 1844, applying to the
6 Chamber for leave to disclose immediately to the Defence a redacted
7 version of certain notes taken by one of their investigators during an
8 interview with P-296. That application to disclose those notes
9 immediately to the Defence is based on the concern of the Prosecution to
10 comply with Article 77(2) of the Statute. The Prosecutor pointed out
11 that it was only on the 4th of February, 2010, that those notes had not
12 yet been disclosed to the Defence. And the Prosecutor had realised that
13 there was a link between P-296 and the witness 268, who will be our next
14 witness. It is for that reason that the Prosecutor sought leave to
15 disclose immediately to the Defence the notes taken by his investigator
16 during his interview with Witness P-296. The Prosecutor, however, deems
17 it necessary to redact certain parts of that interview based on 81(2) and
18 81(4) of the Rules of Evidence and Procedure, and this was accompanied by
19 three appendices, which are ex parte, a copy of the notes with the
20 redacted excerpts, and unredacted copy, and a table indicating the
21 reasons for those proposed redactions.

22 In light of the urgency of this filing and the necessity for the
23 Defence to have in their possession those notes for the purpose of
24 preparing possible questions for Witness 268 in cross-examination, the
25 Chamber instantly grants leave to the Prosecutor to disclose the redacted

1 version of the investigator's notes on Witness 296. However, the Chamber
2 would like to have the observations of the two teams of Defence with
3 regard to the proposed redactions, and this should be done no later than
4 4.00 p.m. on the -- on Wednesday, the 10th of February.

5 And in light of the observations, the Chamber will decide whether
6 those proposed redactions should be maintained or whether they should be
7 partially lifted.

8 The Defence teams have fully understood this, so this is to
9 enable you to have in your possession and in a timely manner documents
10 that can be necessary to you, and this should be done within the coming
11 three days. So, Mr. Prosecutor, you have to disclose the redacted
12 versions, and on Wednesday at 4.00 p.m. we will have the observations of
13 the Defence teams because these are not extremely large documents and
14 their redactions are not extremely long. So this task should not require
15 a lot of time. The Chamber will then make its determination whether all
16 those redactions proposed by the Prosecutor should be maintained in full
17 or partially.

18 Mr. Prosecutor.

19 MR. MACDONALD: (Interpretation) Thank you. I would like to
20 suggest that annex A should be reclassified, so as to facilitate things,
21 and the Registrar will notify by e-mail accessibility to the said
22 document. Thank you.

23 PRESIDING JUDGE COTTE: (Interpretation) We are the ones who
24 thank you, Mr. Prosecutor. We accept that suggestion to enable the
25 Defence teams to be in possession of that document as quickly as

1 possible. The Prosecutor felt that this was useful in compliance with
2 Article 77.

3 Now, given that I have provided you with that information and the
4 oral decision, I would like to ask the Court Officer to go into closed
5 session and escort the witness out, but before that the security officer
6 should escort Mr. Katanga and Mr. Ngudjolo out of the courtroom before we
7 resume our proceedings of Thursday. So we go -- the accused will leave
8 the courtroom. We move into closed session and then the witness will
9 leave the courtroom.

10 (The accused withdrew)

11 (Closed session at 2.22 p.m.)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Open session at 2.24 p.m.)

19 COURT OFFICER: (Interpretation) We are in open session,
20 Mr. President.

21 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much,
22 Court Officer.

23 (The accused entered court)

24 PRESIDING JUDGE COTTE: (Interpretation) Very well. I will not
25 revisit everything that was said last Thursday, but in summary the

1 Prosecutor referred us to paragraph 109 of our decision of 1st December
2 2009 on Rule 140. He also referred us to paragraph 67 of the same
3 decision relating to the situation of a witness becoming a hostile
4 witness. He also recalled Article 9(2) of the Canadian Act on Evidence,
5 and we all understood that he was developing an argument to the -- to --
6 with the aim of reaching the implementation of Article
7 167 (as interpreted) of its previous decision.

8 Mr. Hooper applied for some time to be able to prepare its
9 reaction to the Prosecutor's submission. Professor Fofe gave a brief
10 observation and indicated what their reactions will be, but the Defence
11 team of Mr. Ngudjolo also indicated that they will have observations to
12 make. Mr. Gilissen said that the Legal Representatives will make a
13 contribution. So we are going to resume where we left off, hoping that
14 within a reasonable time-period we will be able to resolve the issue
15 raised by the Prosecutor and then be able to continue with our
16 proceedings.

17 So is it you, Mr. O'Shea, who is going to take the floor?

18 MR. O'SHEA: (Indiscernible)

19 PRESIDING JUDGE COTTE: (Interpretation) You have the floor but
20 I think there is some interference in the microphone. Is it only your
21 microphone or is it a general problem?

22 (Trial Chamber and Court Officer confer)

23 PRESIDING JUDGE COTTE: (Interpretation) Mr. O'Shea, the
24 technical experts ask us to be quiet for about 30 seconds and maybe one
25 minute and then everything will be perfect.

1 (Trial Chamber and Court Officer confer)

2 PRESIDING JUDGE COTTE: (Interpretation) I am very sorry and I
3 would like to also apologise to all the participants. We are being asked
4 for a ten-minute break to be able to re-establish a sound system without
5 interference. So are we going to resume at 2.40, Court Officer? I'm
6 very sorry. So it will be a brief break.

7 Break taken at 2.29 p.m.

8 On resuming at 2.43 p.m.

9 COURT USHER: All rise.

10 PRESIDING JUDGE COTTE: (Interpretation) The hearing is now
11 starting again. You can please be seated.

12 The accused are with us. Everything is fine, and it is therefore
13 Counsel O'Shea who now has the floor.

14 MR. O'SHEA: Yes, thank you, your Honour. That brief adjournment
15 actually allowed us to get some documents in order. So I would request,
16 please, for the Court Usher, if he or she could come and take some
17 documents from my assistant, Ms. Nathalie Wagner, in order to distribute
18 them to the Chamber and the parties.

19 And in the meantime, I will proceed. Your Honours, the essential
20 core of the Prosecution submission is as follows: That the witness has
21 made assertions or not made assertions in the witness box in a manner
22 which is incompatible with statements he previously made to the
23 Prosecution during interviews prior to trial. Mr. MacDonald submits that
24 on that basis he should be permitted to utilise the tools of
25 cross-examination, and in particular to pose leading questions to his own

1 witness. He cites in support of that submission a Canadian Statute, and
2 states that there is a phase before the determination of hostility
3 which -- under that law which would permit him to ask such questions.

4 Where Mr. MacDonald and I agree is that the principles with
5 regard to impeaching one's own witness are principles which are peculiar
6 to the adversarial system, and in that sense need to be defined having
7 regard to the contours of the adversarial system. While the
8 International Criminal Court is an international jurisdiction and a
9 jurisdiction of mixed influence, certain procedural aspects are clearly
10 adversarial in nature. And may I add to what Mr. MacDonald said on that
11 subject that these very basic principles - of course there are
12 differences from country to country - but the basic essence of these
13 principles go back some 300 years. The first decisions in England on the
14 subject going back to the 1690s.

15 So the question of non-impeachment of one's own witness and not
16 cross-examining one's own witness is a matter which has been the subject
17 of incremental wisdom of many Judges over many cases in many thousands of
18 cases in many countries.

19 What Mr. MacDonald is trying to do on behalf of the Prosecution,
20 in my respectful submission, is to put the Prosecution in the best
21 possible position that it could be: To allow himself to cherry-pick the
22 evidence of his witness. Note the timing of his application. The topics
23 that he refers to in the evidence of the witness are topics which were
24 touched upon from the very first day, day one, day two, day three we
25 started to see the emergence of these topics that indeed Mr. MacDonald

1 came back to time and again. So he has waited some two weeks, having
2 started to see the effects of what he sees is wrong in his own witness,
3 he's waited two weeks and continued with his examination-in-chief; and it
4 is now, substantially way through his examination-in-chief, that he
5 approaches the Court and says: Now that the Court has allowed me to use
6 the tools of examination-in-chief on these various topics, I'd like to
7 now go back and do what the Defence is entitled to do and use the tools
8 of cross-examination, not on all the aspects of this witness's evidence
9 but on certain specific points, the points I did not like the answers to.

10 And moreover, I'm not defining to your Honours exactly -- the
11 exact parameters of what I'm complaining about. I'm not going to tell
12 you which lines in his prior statements, and I'm not going to tell you
13 which lines in his testimony. Mr. MacDonald's submission in that respect
14 is vague.

15 Moreover, Mr. MacDonald would say: Let me tell you, I do not
16 want to treat my witness as hostile. I don't need to at this stage. So
17 this is a Prosecution counsel who for the time being continues to seek to
18 treat this witness as a credible witness in all respects and seeks to
19 treat this witness as a witness in his favour, now seeking the Court's
20 permission to use the tools of cross-examination. That is the basic
21 parameters of what the Prosecution counsel is asking this Chamber to do,
22 in my submission. What would be the effect of that on these proceedings
23 and on this Defence? Potentially, I would say, very profound.

24 This is, as it were, the first truly contentious witness in this
25 case. We've had one marginally contentious witness who came to

1 essentially give us the geography and the parameters of Bogoro but to
2 also go into the Bogoro attack, but this is the truly -- first truly
3 contentious witness in this case. There are many other witnesses to
4 come. This is the first time that I as an advocate in 17 years am making
5 a submission on hostile witnesses, but I have gone through hundreds of
6 witnesses. And the occasions when witnesses depart from their original
7 statements are, I would say in my own experience, very common. In
8 international tribunals sometimes more common than one is used to on the
9 national level, I think partly because of the complexity of the issues.
10 If I was to apply the standard of Mr. MacDonald to the case of Mr. Gbao
11 that I did before the Special Court for Sierra Leone, there would have
12 been applications to treat witnesses as hostile on a very regular basis
13 during the course of that case, but in fact while I was there, there were
14 none.

15 One has to have a sense of realism about these things. The
16 effect of putting the bar so low on matters such as this, the primary
17 effect is to lengthen and clutter this trial. As a matter of strategy,
18 your Honours will understand that the Defence may very well shy away from
19 going through vast quantities of the statements of previous witnesses for
20 strategic reasons. Once the Prosecution goes in there, however, the
21 field becomes open. This will have a profound effect on the time needed
22 to deal with each witness in this case if the other witnesses, like this
23 witness, come out with evidence which is inconsistent with their prior
24 statements, as I would predict they probably will in one measure or
25 another.

1 My learned friend has created a situation where ultimately we
2 will all at the end of the day, if he gets his way, be analysing not just
3 the testimony before this Court but the thousands of pages that we've
4 been provided with before this trial, which were there principally for
5 the purpose of notice. But the danger in your Honours going down the
6 path invited by the Prosecution is that ourselves in our closing briefs
7 and your Honours in your Honours' judgement will be extremely cluttered
8 with material, if I may put it that way. And the accused, as your
9 Honours is well aware, under Article 67(1)(c) has a right to be tried
10 without undue delay, and I would invite your Honours to take that into
11 account as a consideration when determining how low the bar should be on
12 the application of paragraph 67 of your Honours' decision 1665.

13 My learned friend rightly cites this paragraph to your Honours,
14 but he does so together with drawing to your Honours' attention a Statute
15 in Canada and as an example of how counsel could question his own witness
16 using cross-examination without there first being a finding that that
17 witness was adverse. Our primary submission is that Mr. MacDonald's
18 application falls down at hurdle number one, because the applicable law
19 here is not a Canadian Statute; the applicable law here is paragraph 67
20 of your Honours' decision. And paragraph 67 is sufficiently clear to
21 exclude the party who says "I do not want my witness to be treated as
22 adverse." It states:

23 "However, if a party declares that the witness it has called has
24 become adverse and the Chamber allows that party to continue questioning
25 the witness, it may be appropriate for the party to cross-examine the

1 witness."

2 The first problem here is that Mr. MacDonald is not willing to
3 declare that his witness is adverse to the Prosecution case. He's only
4 willing to go so far as to say that the witness is making statements
5 which were incompatible with statements he had made previously; and that,
6 in my submission, is not enough.

7 If your Honours -- I know your Honours don't need me to remind
8 your Honours of this, but the Court does not apply national law or any
9 specific national law in this Court, save insofar as the Court is
10 applying Article 21, subparagraph 1, sub-subparagraph (c) of the Statute,
11 which allows this Court - as it would allow other international
12 tribunals - to apply as one of its sources of law general principles of
13 law. In my submission, the general principles of law here are that,
14 first of all - as is contained in your Honours' own decision - a party
15 may not cross-examine his own witness, save in exceptional circumstances.
16 And the next general principle is that a party may not impeach his own
17 witness, save where that witness is adverse or hostile to his case.

18 Insofar as the statutory provision in Canada departs even
19 marginally from that general principle, it is that, a departure, but it
20 does not affect the general principle which has been developed over
21 hundreds of years; and in the case of Canada, over a hundred or so years
22 before that Statute came into effect.

23 Mr. MacDonald has referred to some jurisprudence in the
24 International Criminal Tribunal for the former Yugoslavia to support his
25 position, and may I say this about that: First of all, with respect to

1 the Popovic decision the central issue before the Appeals Chamber in the
2 Popovic decision was not the issue that is before your Honours today.
3 The central issue before the Appeals Chamber was whether a party could
4 make its own determination as to whether it could cross-examine its own
5 witness or whether that determination had to be made by the Court.
6 Insofar as there was general discussion in the Popovic case and insofar
7 as that discussion used the words "whether or not a witness is treated as
8 adverse," that in my submission was obiter to its decision, was not that
9 aspect of its decision was not fully argued before it.

10 My learned friend has also cited the case of Limaj, and -- or
11 Limaj, I'm sorry, Limaj, thank you, which I note was a decision on which
12 Her Honour Judge Van den Wyngaert sat, hence she knows the pronunciation.
13 And in that case there was not only one application to treat a witness as
14 hostile, the decision which has been referred to your Honours by my
15 learned friend is a decision which deals with the issue he says he
16 doesn't want to deal with, which is the reference to the prior
17 statements. And it's noted in that decision that the Court had in fact
18 given leave to treat a witness as hostile. It's interesting to note that
19 there was an earlier decision dated the 18th of January, 2005, also
20 dealing with an application to treat a witness as hostile. And what I
21 found impressionable in reading the transcripts relating to that decision
22 was the arguments of the parties themselves. In particular what is
23 noteworthy is what the Prosecution was arguing about its own witness in
24 that decision.

25 The Prosecution in that decision had argued that the witness had

1 aligned himself with the opposing party. The Prosecution had stated
2 that:

3 "He has openly stated that he did not want to come before us."

4 The Prosecution stated that: "The witness refused to be a
5 Prosecution witness." It would appear that he was subpoenaed.

6 The Prosecution stated that: "He's not happy to be a Defence
7 witness -- he would be happy to be a Defence witness."

8 And that: "He himself considers himself adverse to the
9 Prosecutor."

10 Notwithstanding those circumstances, the Chamber did not find in
11 the case of that particular witness - and of course we're not privy to
12 all the facts - did not find in the case of that particular witness that
13 the bar had been reached for treating that witness as hostile. And
14 what's also noteworthy is that that was the question as defined, whether
15 that witness should be treated as hostile. And that is the first
16 decision which your Honours have before you in the bundle which has been
17 numbered number 1 -- or I may number as number 1.

18 The general principle of law is contained, in my submission, in
19 the second document which I have brought to your Honours' attention,
20 which is a -- an extract from the "Modern Law of Evidence" by
21 Adrian Keane, edition of 1985. I'm afraid that's just the year when I
22 studied. That's the only relevance of that year. And at page 117
23 there's a section that deals with unfavourable and hostile witnesses, and
24 this is a book on the law of evidence used in England and Wales. On the
25 following page there's a section entitled: "Unfavourable witnesses."

1 And it reads:

2 "An unfavourable witness may be defined as a witness who,
3 although he displays no hostile animus to the party calling him, fails to
4 come up to proof or gives evidence unfavourable to the case of that
5 party. At common law, a party is not permitted to impeach the credit of
6 an unfavourable witness by any means outlined in the preceding paragraph
7 but may call other witnesses to give evidence contradicting that of the
8 unfavourable witness."

9 And then an authority is cited there, an old authority, Ewer and
10 Ambrose. Then down at section 3 the writer says -- and here we come to
11 the definition of a hostile witness.

12 "A hostile witness may be defined as a witness who, in the
13 opinion of the Judge, shows no desire to tell the truth at the instance
14 of the party calling him, to whom he displays" -- I'll start again.

15 "A hostile witness may be defined as a witness who, in the
16 opinion of the Judge, shows no desire to tell the truth at the instance
17 of the party calling him, to whom he displays hostile animus. At common
18 law, a Judge may allow cross-examination of a hostile witness by the
19 party calling him."

20 It is my respectful submission that those statements represent
21 general principles of law which one can find in the common law - and when
22 I say "common law," I mean the case law - of a number of commonwealth
23 countries.

24 The next document that is before your Honours which we may call
25 number 3 is an extract from "Halsbury's Laws on England," which your

1 Honours may be aware is an authoritative source in England of general
2 principles of English law.

3 The next document before your Honours - and your Honours would
4 have to turn over the page to see any relevant extracts - the next
5 document is a law from -- sorry, is an article or a chapter written by
6 well-known and established South African academics, Milton, Merwe, and
7 van Zyl Smit, well-known, respected, established academics in
8 South Africa in the area of criminal procedure. And on the reverse side
9 of the page your Honours will see at paragraph 659 the principle
10 re-stated as it is in English law.

11 "The Prosecutor may not ask leading questions on matters in
12 dispute and may not cross-examine, attack the credibility of his own
13 witness, unless the witness has been declared hostile by the Court upon
14 the application of the Prosecutor."

15 It then goes on to say:

16 "An application of this nature is not easily granted."

17 The next document that your Honours have before you which we may
18 label number 5 is a decision from the High Court of New Zealand. And I
19 refer your Honours to this decision simply to reiterate as a further
20 example of the re-statement of the principle. If your Honours go to
21 paragraph 15, it states that:

22 "Section 94 of the Evidence Act 2006 provides:

23 "In any proceeding the party who calls a witness may, if the
24 Judge determines that the witness is hostile and gives permission,
25 cross-examine the witness to the extent authorised by the Judge."

1 Now, those are the general principles which in my submission form
2 the foundation of paragraph 67 of your Honours' ruling. If I may just
3 remind your Honours that in interpreting a provision in international
4 law, one has regard to the ordinary meaning of the words in their context
5 and in the light of their object and purpose, as stated in the Vienna
6 Convention on the Laws of Treaties.

7 We have some supplementary provisions in our own rules before the
8 International Criminal Court which are also of interest. Article 51,
9 subparagraph 4, while it does not deal with your Honours' decision and
10 while it does not deal with the specific kind of issue that we are
11 dealing with here, outlines the principle of non-retroactivity in dealing
12 with the interpretation of the Statute. I know it's in a specific
13 context, but it's interesting to note that regulation 6, subparagraph 3,
14 also refers to this same principle of non-retroactivity in the context of
15 the regulations. The reason I raise this is because in a criminal trial,
16 in my submission, when interpreting a provision one has to be very
17 careful to ensure that the accused is not placed in a position where he's
18 taken by surprise. There is the general Latin maxim of *in dubio pro reo*,
19 which is often implied in the question of interpreting laws in a criminal
20 context. If there is any ambiguity in a provision, then the benefit of
21 the doubt should be given to the accused, and what Mr. MacDonald is
22 attempting to do, in my submission, he's attempting to either distort the
23 meaning of paragraph 67 of your Honours' decision; or in the alternative,
24 he's seeking to overstep it. But even if your Honours felt that he had
25 grounds for overstepping it, it's not something which could be applied to

1 this accused because this accused relies on your Honours' ruling at the
2 beginning of this trial.

3 And according to your Honours' ruling there must be a declaration
4 from the Prosecution that his witness is adverse.

5 That brings us to the meaning of the word "adverse." Adverse is
6 not a new word, it's not a word which has been created for the purposes
7 of the ICC. It is a word that one finds frequently in the discussion of
8 hostile witnesses. If your Honours go to the document which I think I
9 labelled as number 2, which was the extract from Adrian Keane's book,
10 your Honours will see on the third page there which would be 118, 119 in
11 the book, in fact, but the photocopying has taken the number of the page
12 off, but it's on the third page of the extract which I've provided. Just
13 underneath the quote, and the quote is from the Criminal Procedure Act of
14 1865, your Honours will see a reference to Greenough and Eccles where.

15 "... it was held that the word 'adverse' in the section means
16 'hostile' and not 'unfavourable.'"

17 That brings me back to my learned friend's reference to Canadian
18 law. If your Honours go to the last document which I have provided,
19 which may be labelled as number 6, this is a decision of the Supreme
20 Court of Canada in the case of Hanes and Wawanesa Mutual Insurance
21 Company. The only reason I draw this decision to your Honours' attention
22 is that if one turns one, two, three, four, five, six pages, in the
23 middle of the page you'll see in square brackets it states page 167. And
24 it starts:

25 "Roach J.A. dissented."

1 In fact, if one takes the actual page numbers, it would be page
2 one, two, three, four, five, six, seven, eight, nine, ten, 11, 12, 13 --
3 it would actually be page 13 in terms of the way the pages are organised.

4 It starts:

5 "Roach J.A. dissented. He agreed with the learned trial Judge
6 that 'adverse' means 'hostile' and held that he was right in deciding not
7 to look at the statements for the purpose of forming his opinion as to
8 whether the witnesses were hostile. He would have dismissed the appeal.

9 "On this branch of the matter, I agree with the conclusions of
10 Roach J.A."

11 So this is simply to indicate that even in Canada, according to
12 the highest Court in that country, that is how the word "adverse" must be
13 looked at. So there is clearly a proper foundation in the common law
14 that forms the foundation of this general principle of law to interpret
15 "adverse" in that way. And having regard to the principles of
16 interpretation in international law, which I've referred your Honours to,
17 in my submission this accused is entitled to that interpretation of
18 paragraph 67 of your Honours' decision.

19 Your Honours will also note -- your Honours will also note in the
20 New Zealand decision, which I referred to your Honours, the case of
21 Penny (phoen), that in -- and that would be at paragraph 16 of that
22 decision, in summarising the relevant legislation in that country,
23 subparagraph (b) states as one of the circumstances for treating a
24 witness as hostile:

25 "Gives evidence that is inconsistent with the statement made by

1 that witness in a manner that exhibits or appears to exhibit an intention
2 to be unhelpful to the party who called the witness."

3 So it's not merely that there were inconsistencies, it's a
4 demonstration of a deliberate tact on the part of the witness to be
5 unhelpful to the Prosecution. And your Honours will note at page 35 of
6 this particular New Zealand decision, that in an analysis of the facts of
7 that case it was stated:

8 "My conclusion is thus: that the victim's evidence being as it
9 was spectacularly inconsistent with her previous statement in all
10 material facets."

11 So in our submission it is not all inconsistencies that should
12 lead us to the position we're in today, but inconsistencies should be so
13 profound and regular and taken together with the demeanour of the witness
14 and the answer of the witness and the whole of the examination-in-chief
15 up to the point where it's noticed, it should be something which happens
16 on rare occasions because it should demonstrate an unwillingness to tell
17 the truth on the part of the witness or a deliberate attempt not to be
18 helpful with the Prosecution.

19 So Mr. MacDonald's argument must fall down on this Court's own
20 rulings.

21 It is also relevant to draw to your Honours' attention Article
22 64(7), paragraph 7 -- subparagraph 7 of the Statute, which refers to the
23 public nature of the trial. While -- if statements go into evidence,
24 they are of course accessible by the public, but access is a relative
25 word. This is a case which is being watched by the population of the

1 Democratic Republic of Congo, and they're entitled to follow this trial.
2 And the reality is that if we start going into all of these prior
3 statements, these thousands of pages of prior statements, and start
4 treating them on an equal footing to what's said in the witness box, we
5 are going to compromise that public nature, even if not completely.

6 There is also of course - and this is perhaps the central
7 point - the principle that evidence is given live before the Court.

8 Now, Mr. MacDonald fails to make a distinction in his arguments,
9 and despite the fact that he fails to do this, I think he will agree with
10 this distinction as a person used to the adversarial system, there is a
11 distinction to be made between the principle of impeaching a witness and
12 the principle of cross-examining a witness. The principle that one must
13 not impeach one's own witness has one set of rationales, and the
14 principle of not cross-examining one's own witness has other reasons for
15 its existence. And it just so happens that those two principles combined
16 together when it comes to the topic of hostile witnesses -- because you
17 can't effectively, of course, impeach your own witness without using the
18 tools of cross-examination. But Mr. MacDonald is not attempting to
19 impeach his own witness. So the most relevant considerations here are as
20 to whether he should be allowed to cross-examine his own witness. The
21 common law principle will tell you that the only exception to that is
22 where you are attempting to impeach your own witness and that witness is
23 hostile. So Mr. MacDonald takes a step back. He says: Well, let's not
24 go to the area of hostility yet. Let's deal with my right to
25 cross-examine my own witness first. He says: Let's not deal with the

1 issue of prior inconsistent statements at this time; let's deal with the
2 question of cross-examining my own witness first. We can come later to
3 the question of whether we bring in his statements into evidence. I'm
4 happy to go along with that. It's up to the person who makes a motion to
5 define his application, but we all know and Mr. MacDonald has given
6 notice of this that his ultimate intention will be to refer to the prior
7 statements of this witness. We think, on the basis of what he said,
8 that's what he's really aiming for.

9 You cannot completely intertwine the two issues -- you cannot
10 unintertwine the two issues. Because if Mr. MacDonald wants to refer to
11 the prior statements of the witness in an effective manner, he will have
12 to ask leading questions. And if he's allowed to cross-examine his
13 witness, then the question of the admissibility or the use of the prior
14 statements of the witness becomes a much easier terrain for him if he's
15 granted his application.

16 Rule 68 of the Rules of Procedure and Evidence provides as a
17 condition for the admission of prior testimony that one obtains the
18 consent of the witness. Paragraph 92 of your Honours' decision, 1665,
19 lays down certain conditions to the use of prior recorded testimony.
20 Mr. MacDonald refers to, as his ICC source, Rule 140, subparagraph 2,
21 (b), which reads as follows:

22 "The Prosecution and the Defence have the right to question that
23 witness about relevant matters related to the witness's testimony and its
24 reliability, the credibility of the witness, and other relevant matters."

25 This is why I drew to your Honours' attention that there's a

1 distinction between the principle of wanting to impeach your own
2 witness - in other words, challenge the credibility of your own
3 witness - and the principle of not being able to cross-examine your own
4 witness. Because Mr. MacDonald's argument based on 140(2)(b) can only
5 have direct impact on the first principle, does not necessarily have
6 direct impact on the second principle as to whether he can cross-examine
7 his own witness. So in other words, 140(2)(b) deals with the topics that
8 a witness may be questioned on and not with the method in which a witness
9 may be questioned. That notwithstanding, we would submit that that
10 provision in any event was not meant to be a licence to impeach your own
11 witness, because if the drafters had intended such an effect which was so
12 dramatically inconsistent with the law of other international tribunals
13 and with general principles of law in an adversarial system, they would
14 have in, our submission, expressly stated so.

15 So 140(2)(b) must be understood as meaning that any party can ask
16 questions about the credibility or the reliability of a witness, but it
17 is understood between the lines that normally speaking the party calling
18 a witness would normally be trying to bolster the credibility of their
19 witness. There may be circumstances where the party is trying to attack
20 the credibility of their own witness. But 140(2)(b) does not exclude
21 that there might be procedural safe-guards for a fair trial if that turns
22 out to be the case.

23 Mr. MacDonald argues that what is important is to ascertain the
24 truth. I can't argue with that. It's stated in the documents of this
25 Court, but as human beings we must be humble on such a point. When we

1 talk about ascertainment of the truth, what we mean is doing our best to
2 come as close to the truth as possible using the legal tools at our
3 disposal. We're not pretending, any of us, that we can all be -- or any
4 of us be absolute masters of the truth in any particular incident to
5 which we were not a witness. And this is where an understanding of the
6 adversarial system becomes important.

7 It has been said in Wigmore's evidence at 1367 that:

8 "Cross-examination is the greatest legal engine ever invented for
9 the discovery of the truth."

10 I'm glad it's Wigmore that's saying it and not me as an English
11 lawyer talking to a French Judge, but the point being that
12 cross-examination is designed as a tool for coming as close to the truth
13 as possible. And I think Mr. MacDonald and I can agree on that. But
14 where it becomes contentious is that cross-examination can be used in
15 different ways depending on who's using it. If you are the opposing
16 party and you are cross-examining a witness, it is indeed a very
17 effective tool for coming close to the truth in the sense that you would
18 forensically in questioning a witness -- if, for example -- let me try
19 and put this in as simple terms as possible.

20 If, for example, you found something a witness had said during
21 his examination-in-chief was inconsistent with something he had said in
22 the past in a written statement, if you're the opposing party you're
23 going to be very careful about how you address that with the witness. If
24 you are careful, you can truly test the evidence and see if it's really
25 the truth because what you can do is you can ask certain questions of

1 foundation to make the witness commit himself to certain answers before
2 he is confronted with the position of fully understanding that he has
3 said something now which is inconsistent with something he said in the
4 past. If the opposing party is conducting the cross-examination and does
5 it forensically in that way, by closing off certain doors, whatever
6 answer the witness gives is more easily ascertainable by the Judges as
7 being the truth or a lie.

8 If you are the party calling the witness and you are using the
9 technique of cross-examination, you will have a different objective --
10 certainly Mr. MacDonald will have a different objective because he does
11 not want to treat his witness as hostile. You will move forward with
12 your questions in such a way as gives the witness the most amount of
13 liberty to get out of his lies. So the manner in which Mr. MacDonald
14 would question this witness would be vastly different from the manner in
15 which my learned friend Mr. Hooper would cross-examine this witness, and
16 that will become evident no doubt.

17 And what I submit is that if you are the opposing party and you
18 are literally testing the evidence of the witness, that's where the
19 usefulness of the tool of cross-examination really comes in, in the terms
20 of the ascertainment of the truth. If it's in the hands of the calling
21 party, then it's just free reign, then it's just cherry-pick and get what
22 you want out of the witness, and it has dangers attached to it.
23 Mr. MacDonald has spent, as we've heard before, some 50 hours or so with
24 this witness. He knows the witness better than any other individual in
25 this Court. He knows which buttons to push, which questions to ask,

1 which questions not to ask to get the most effective answers he can get
2 out of his own witness. He is certainly much better placed than we are
3 to do that.

4 The witness knows Mr. MacDonald very well. He's never met us
5 before. He will be naturally inclined to assist Mr. MacDonald in the
6 direction he wants to go. And we've seen nothing during the course of
7 this evidence to indicate the contrary. The fact that he said things
8 which are inconsistent with his prior statements, the fact that he hasn't
9 come up to proof on certain points, those aspects do not demonstrate that
10 this witness is not first and foremost a Prosecution witness, willing to
11 assist the Prosecution where necessary.

12 There is also a question of equality of arms here, Mr. President,
13 your Honours. It's not one I've seen spoken about in the writings on
14 this topic over the weekend, but it's certainly evident to me in this
15 particular instance. The International Criminal Court, one of the
16 novelties of this institution is the massive resources in the hands of
17 the Prosecution and the ability that they have to go and see their
18 witnesses any number of times, to produce hundreds or thousands of pages
19 of interview transcripts, to audio record it, to video record it.
20 They've been on this case well before we were, and they've produced a
21 vast amount of material from their witnesses. We're not in the same
22 position. When we go and see our witnesses, your Honours will be lucky
23 if your Honours see a two- or three-page statement, maybe a 10 or 15 if
24 you're lucky from the Defence side. We simply don't have the same
25 resources as the Prosecution to produce the elaborate, detailed

1 statements that they have produced for their witnesses.

2 So we will not have the same luxury to cherry-pick, to take our
3 witnesses through chief when it comes to the time of the Defence case to
4 see: Okay, where has the witness come up to proof, where has the witness
5 not come up to proof. Okay, these are the points upon which we're going
6 to ask the Judges to cross-examine. We will not be able to say to our
7 witnesses: Okay, on page 6.000 -- no, that's an exaggeration, 695 of
8 your interviews, you stated this. Here before your Honours today you
9 stated something different. Why?

10 So the Prosecution and the Defence are simply not in the same
11 position insofar as the use of this kind of tool is concerned, and that
12 is yet another reason for restricting it to the general principles as
13 I've outlined. So Mr. MacDonald doesn't reach hurdle number one, he
14 doesn't reach hurdle number two as to why cross-examination is -- should
15 be applicable here. There's yet another hurdle which Mr. MacDonald has
16 not addressed, which is the question of discretion, judicial discretion.
17 It is abundantly clear from paragraph 67 that your Honours have a
18 discretion.

19 Now, one reason for not exercising that discretion is the timing
20 of this application. The topics that Mr. MacDonald has referred to have
21 come up much earlier than his application. We have now had two weeks of
22 examination-in-chief. As I stated at the outset, the implications of
23 this type of application being successful and then coming up as an issue
24 again in further witnesses, the implications are potentially wide. By
25 choosing to only raise this matter now and not raising it when it became

1 evident, Mr. MacDonald has placed himself in an unduly advantageous
2 position as compared to the Defence. And this is one reason why as a
3 matter of discretion your Honours should not accept this application.

4 The second reason why your Honours should not exercise discretion
5 in favour of the Prosecution application is because the application comes
6 with a high degree of lack of clarity. Mr. MacDonald and the Prosecution
7 wish to sit on the fence. They are not prepared to stand forward and
8 say: My witness is lying. Let them come forward and put their cards on
9 the table, and then we can discuss whether they've fulfilled the other
10 requirements.

11 Secondly, he referred to a series of topics and suggested that
12 what was in his mind might also have been in your Honours' minds during
13 the course of the examination-in-chief. That is an unsatisfactory manner
14 of making an application to cross-examine one's own witness. In my
15 submission, if your Honours are going to exercise discretion in the
16 Prosecution's favour, they have to show their cards and be absolutely
17 specific as to what they're saying.

18 The third issue is this when exercising discretion: Is this
19 witness actually adverse to the Prosecution? I know Mr. MacDonald 's
20 application is not based upon that, but I also know that it's a question
21 which will be in your Honours' minds. This witness has not -- certainly
22 not shown himself to be favourable to the Defence. Let's be clear about
23 that. This witness has not turned into a Defence witness by any means.

24 During the lengthy examination-in-chief of the witness,
25 Mr. MacDonald has - and I don't need to go into details - but he has

1 established a great range of matters for his case from this witness, most
2 significantly the question of hierarchy and the role of the accused in
3 that hierarchy. That is not adverse to the Prosecution case. It is
4 adverse to the Defence case. He has established routes and geography and
5 the movement of a delegation to Aveba. Just before making this
6 application, he put a letter in front of the witness with a stamp on it
7 and got the witness to recognise the stamp. The witness didn't say: "I
8 don't recognise this stamp." If he was hostile to the Prosecution, he
9 may have done.

10 And what about the matters that Mr. MacDonald has referred to?
11 Well, one of the matters is the question of civilians. As certainly this
12 witness has on any view of the matter departed one way or another from
13 his written statements, but one has to really question what we're really
14 dealing with here. First of all, one has to take into account the manner
15 of questioning and the nature of the witness in front of us.
16 Mr. MacDonald, as your Honours may have noticed, has his own technique of
17 examination-in-chief, which involves -- I don't criticise so much his
18 questions. His questions are well formulated. But he does have a
19 tendency of jumping backwards and forwards. I don't criticise as such;
20 it's his way. But the consequence is that the witness and sometimes the
21 Court may find it difficult to follow.

22 If an examination-in-chief is not taken chronologically and if
23 there's too much jumping around - I know there has to be a certain degree
24 of jumping around - but if there's too much jumping around, that can lead
25 to a situation where the calling party does not get what it expects.

1 I'll just give you one example in the context of civilians. At
2 page 36 of the transcript of the 29th of January, 2010, line 7:

3 "These people, when they arrived in Bogoro, they went via Zumbe
4 hill and they built houses in areas that didn't belong to them and that
5 means they -- they occupied -- they took that area.

6 "Q. You refer to the civil population, aren't you?"

7 So it's not as if there haven't been leading questions already.

8 "Q. You refer to the civil population, aren't you?"

9 "A. Any person who lived in Bogoro, if they -- as civilians,
10 that means they were wearing civilian clothes. It was also the case that
11 you could send a child to carry out a provocation, and if you attack the
12 child you'd be massacred. There's no way in saying that there were
13 civilians in Bogoro. Perhaps coming through -- somebody going through
14 was a civilian."

15 On its face, a departure from his previous statements, but a
16 confusing answer.

17 It has -- it has the smell of this witness not defining civilians
18 as civilians because of the way that they are conducting themselves. I'm
19 not saying that that's necessarily what the witness meant to say or what
20 it reads, but when you read that fairly incomprehensible sentence, it
21 seems to start to go in that direction. This is not an illustration of a
22 witness who has demonstrated himself to be lying. And it is one small
23 aspect -- one small aspect of an entire range of issues that this witness
24 has dealt with, some of them very successfully for the Prosecution.

25 Let me give you one more example from the transcripts. Page 33,

1 28th of January, 2010, one of the other topics that Mr. MacDonald wanted
2 to refer to was the question of the definition of "kadogo." At the top
3 of that page:

4 "It would be difficult to tell the age of the person. It would
5 be better for that person, himself or herself, to tell you their age.
6 You may meet someone and think that he is younger than what he looks
7 like. That is how people were nicknamed 'kadogo,' for example. But for
8 people who knew these particular people they would also know their real
9 age."

10 Now, that might be striking for Mr. MacDonald as a Canadian as it
11 might be striking for me as a British person. But it's not necessarily a
12 striking statement in an African context, in an African context in the
13 Democratic Republic of Congo, in the context of a society which is not
14 necessarily based upon defining people in terms of precise ages.

15 He says further down line (sic) 70:

16 "When you looked at him, he could be short and who -- he could
17 look like a child, but they called him kadogo because had not been able
18 to grow normally."

19 Now, Mr. MacDonald doesn't like the fact that this witness hasn't
20 come out and said: There were children under the age of 15 (as defined
21 in international humanitarian law).

22 The point is that whether or not the witness was more specific
23 about ages before, on its face in its context there's nothing
24 particularly problematic about what he says about kadogos. This is again
25 not a clear illustration that this witness is hostile to the Prosecution.

1 It may be a combination of the nature of the witness, the manner of
2 questioning, and certain cultural issues and sometimes cultural
3 misunderstandings.

4 Let me give you an example from the statements themselves --

5 PRESIDING JUDGE COTTE: (Interpretation) Counsel O'Shea, I think
6 that this is an example which we'll take after the adjournment. Perhaps
7 if you don't get into this third example now, you will continue therefore
8 at 4.30 with your intervention. When you come to the end of your
9 intervention, the Chamber will determine whether you have the possibility
10 to take it into a short summary and to a conclusion so that you can
11 really get into the very terms of your demonstration. Once this is done,
12 we know in a very clear and precise way what your position is. There are
13 some elements that you have given to us, but at the end of the day
14 ultimately we really have to see defined what your exact position is with
15 regards to the Prosecutor's application.

16 So the third example at 4.30 and we now adjourn the hearing for a
17 half-hour. The hearing is now adjourned.

18 Recess taken at 4.00 p.m.

19 On resuming at 4.32 p.m.

20 COURT USHER: All rise.

21 PRESIDING JUDGE COTTE: (Interpretation) Please be seated. The
22 session is resumed.

23 Mr. O'Shea, you can proceed with the third example that you
24 wanted to give us.

25 MR. O'SHEA: Thank you, Mr. President, and your Honours.

1 Yeah, being struck by the fact that I'd suddenly hit the time for
2 the break made me realise that in a sense by going into these various
3 examples I was beginning to illustrate, even if in a very mild way, the
4 kind of problems and extension of time which is going to be added to
5 these proceedings once we start delving into these statements. Instead
6 of going into examples in the statements, which is perhaps what the
7 Prosecution should have done when they made their application, I think
8 I'm just going to make my general submission on the nature of the
9 statements without going into specific examples, but to highlight the
10 danger of going too easily down this road of allowing the Prosecution to
11 cross-examine their own witness.

12 When one looks at the statements one recognises that the
13 statements go into a lot of detail on a lot of different issues, not in
14 the context of -- that we're in now of a controlling Court with two
15 parties and victims representatives participants, but in the context of
16 one party being there with a specific objective in mind. And in those
17 statements you will find both open questions and leading questions. You
18 will find summarising of previous positions, as we've seen in Court, but
19 nobody there to object. And you will see that it's all being interpreted
20 from Swahili. So in a sense, once Mr. MacDonald starts cross-examining
21 the witness and then going to his next step of introducing previous
22 statements, we have to start questioning not only the Swahili in this
23 Court but also the Swahili interpretation of the statements at the time
24 of the interviews themselves. And I would suggest that this all becomes
25 a fairly complicated exercise, and it will become even more complicated

1 when we begin to observe that the witness has made inconsistencies, not
2 only between his testimony in Court and his interviews, but also within
3 his own interviews.

4 Once Mr. MacDonald goes down that road with this vast amount of
5 material at his resource, not only can he invite the witness to measure
6 up with things that he might have said before under those less-impartial
7 conditions - if I can put it that way - not only will the witness be
8 easily suggestible to go in that direction, but counsel for the
9 Prosecution will also have the opportunity to effectively place
10 roadblocks in front of my learned friend Mr. Hooper and my learned friend
11 Professor Fofe. What do I mean by that? As my learned friend Professor
12 Fofe stated quite correctly the other day, cross-examination is the
13 province of the opposing party. And what he meant by that eloquent
14 articulation of the principle is this: When Mr. MacDonald starts
15 cross-examining his own witness, and when he does it in his own way with
16 his own Prosecution objectives, it then becomes difficult for us to come
17 back to those areas and test them in the same way as we would have done
18 if the witness had not been cross-examined by his own counsel.

19 So that brings me back full swing, but rather a long full swing,
20 to the third area I was dealing with which is your Honours' discretion.
21 There's an element of prejudice here. How far that prejudice will go we
22 simply don't know until we see Mr. MacDonald on his feet asking his
23 leading questions, but there is potentially a prejudice there for the
24 Defence in their ability to conduct a proper cross-examination of this
25 witness. Because Mr. MacDonald can cover areas we want to cover but do

1 it in a pro-Prosecution perspective -- from a pro-Prosecution perspective
2 and leave us in a very difficult position with regard to taking the
3 witness forensically and closing the doors to new lies.

4 And that brings me to the last point on the issue of discretion
5 which is the point that, your Honour, Mr. President, you raised the other
6 day so aptly. Under the rules of the International Criminal Court, the
7 Judges may ask questions at the beginning of the testimony of a witness
8 and at the end of a testimony of a witness if they so wish. In my
9 submission, in exercising your Honours' discretion in this matter I would
10 invite your Honours to understand that from our point of view we'd much
11 rather you, the Judges, put the questions to the witness because the
12 witness doesn't know you, the witness has respect for you as Judges but
13 he doesn't know you. He hasn't spent 50 hours of interview with you, as
14 Mr. MacDonald has. He's less suggestible when the questions come from
15 you. He will obviously answer his questions respectfully, but he won't
16 be trying to swing your way because he doesn't know what your way is.

17 That's a strange submission from an advocate from England and
18 Wales, but I'm trying to think laterally here. I'm trying to respect the
19 position that this is an international tribunal with mixed civil law and
20 common law intertwined, while recognising that an adversarial system I
21 have to think laterally and say, well, of the two evils which one do I
22 prefer. The danger in the Judges asking the questions is the Judges
23 don't have instructions as we do, but I'm sure your Honours are aware of
24 that limitation. But the danger of the Prosecution asking leading
25 questions is much greater because not only does the Prosecution have his

1 own objective and his own instructions from his own boss, but he knows
2 more about this witness than any of us do.

3 So I now turn to the summary of my submissions that,
4 Mr. President, you kindly requested. Essentially there are three prongs
5 to our submissions. The first prong is that we have to rely on paragraph
6 67 of decision 1665, and that if we are faithful to the wording there and
7 if we give the accused the benefit of the doubt that he should be
8 entitled to in the event of any ambiguity, paragraph 67 doesn't help the
9 Prosecution. It's not the route that the Prosecution can take to
10 cross-examine this witness, and that is the Prosecution application. The
11 Prosecution application at this stage is not to admit statements and it's
12 not to render its witness hostile. It's to cross-examine its witness.
13 And we say that on the basis of paragraph 67 his application falls down.

14 We say that paragraph 67 is unaffected by the ICTY jurisprudence.
15 The ICTY, of course, one must remember has Rule 92 bis and Rule 89(C) of
16 its Rules of Procedure and Evidence, which have over the years eroded the
17 principle of live testimony, which is so concretely placed at the centre
18 of proceedings before the International Criminal Court. That erosion has
19 not been accepted by the drafters of the documents which formed the
20 foundation of this Court.

21 The principle is more in line with the less-amended ICTR Statute,
22 where I may add that these kind of applications have been much rarer. I
23 only know of two. One was in a contempt of Court case by the name of
24 Nshogoza, and the other was in the case of Karemera with reference to a
25 witness Gap (phoen) who had basically alleged that he had been

1 manipulated to make false statements. So in the ICTR these kinds of
2 applications are very rare, which is why we're not flooded with
3 jurisprudence on it. But the reason why they're very rare is because the
4 principle of live testimony is very essential, still, to the ICTR
5 Statute, and 92 bis has not been taken as far in that forum as it has in
6 the Yugoslav Tribunal.

7 The second prong of our submissions is on the basis that your
8 Honours are against me on my first submission. So if your Honours do not
9 accept my first submission that on the basis of paragraph 67
10 Mr. MacDonald's submission falls down, then we go to the second part of
11 the submission. And the second part of the submission, your Honours will
12 remember, is where I spoke about the nature of cross-examination, the
13 potential application of Rule 140, the concept of ascertainment of the
14 truth, the important principle of equality of arms, and the question of
15 the suggestibility of the witness. What I was doing there is I was
16 attempting to establish before your Honours that when your Honours are
17 considering where the bar should be on this question of adverse
18 witnesses, how adverse does a witness have to be before your Honours
19 exercise discretion?

20 I was pointing out a number of dangers and problems associated
21 with cross-examination by counsel of his own witness. And I say that
22 even if paragraph 67 is deemed to apply - which we say it does not --
23 well, it -- I say "it does not," it's not the tool that Mr. MacDonald can
24 use to succeed in his application. Even if I'm wrong about that, the
25 nature of cross-examination, the nature of the Rules of Procedure and

1 Evidence and the articles of the Statute and the consequences come
2 together to put the bar very high. In other words, an application under
3 Rule -- 67 must reach a certain level which is very high in our
4 submission. This must be a rarely granted application. Paragraph 67,
5 not Rule 67, if I said that.

6 The third prong of our submissions is based upon the
7 understanding that your Honours might be against me, not be with me, on
8 our first major submission nor our second major submission. In other
9 words, if your Honours accept Mr. MacDonald's submission that he can use
10 67 even when he's not prepared to say his witness is adverse, if your
11 Honours put the bar a little bit lower than I'm suggesting your Honours
12 ought to, then we still come to the question of judicial discretion. And
13 we say at that level, because of the timing of the application, the lack
14 of clarity of the application, the fact that this witness has not
15 demonstrated himself to be favourable to these accused or particularly
16 against the Prosecution, and the fact that we still have the possibility
17 of your Honours addressing any difficulties, if your Honours feel that in
18 the interests of justice there's certain points which need to be
19 clarified with this witness, we feel that we'd rather that be in your
20 province than in the province of the Prosecution because of the
21 associated dangers.

22 I hope that that summary assists you, Mr. President, in
23 contextualising everything that I've said. But I'm happy to answer any
24 questions, otherwise those are my submissions.

25 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. O'Shea,

1 for your submissions and for your summary.

2 Professor Fofe or Mr. Kilenda, any one of you can address the
3 Court.

4 MR. FOFE: (Interpretation) Thank you very much, Mr. President.

5 Mr. President, your Honours, the Defence of Mathieu Ngudjolo
6 submits that the application of the Prosecutor must be dismissed for
7 reasons that I am going to spell out. The fundamental issue on which I
8 would like to insist is the joint nature of the judicial structure of the
9 International Criminal Court. The first mistake that the Prosecutor is
10 making is to try to transpose on to the ICC a national legislation that
11 is not consistent with the core texts of the Court.

12 The second mistake which affects his reasoning is the fact that
13 he referred to jurisprudence that cannot under any circumstances
14 influence the decisions of the honourable Judges of the International
15 Criminal Court. In fact, it is of extreme importance for all of us to
16 recall the provisions of Article 21 of the Rome Statute, which sets out
17 the law that is applicable and requires that the Court applies its own
18 Statute in the first place as well as the elements of crimes and its
19 Rules of Procedure and Evidence.

20 The Registry quite successfully brought together in a single
21 volume, this volume that I am showing to you now, the core legal texts of
22 the International Criminal Court. This means that faced with any problem
23 that arises, the Judges must first of all seek a solution from within
24 these core texts which set out a legal system that cannot be considered
25 as fully derived from the common law or fully derived from the civil law.

1 But it is a combination that brings together the best mechanisms selected
2 from the two systems and which together constitute a coherent whole.

3 The honourable Judges have complemented that harmonious legal
4 structure with relevant instructions.

5 JUDGE DIARRA: (No interpretation).

6 MR. FOFE: (Interpretation) Let me repeat. The honourable
7 Judges have complemented this harmonious legal system with relevant
8 instructions that are designed to ensure the appropriate implementation
9 of the principles enshrined in the Statute of the International Criminal
10 Court. In fact, one of the fundamental principles provided for in this
11 Statute, it is the obligation placed on the Prosecutor to investigate
12 incriminating and exonerating circumstances equally for the purpose of
13 ascertaining the truth, and this obligation is provided for in Article
14 54, paragraph 1, subparagraph (a) of the Statute.

15 We have tried to carry out research to determine whether this
16 principle is enshrined in the legislation referred to by the Prosecutor,
17 namely, Canadian legislation. We did not find this principle in that
18 legislation. However, it is possible that the Prosecutor could quote the
19 act in the Canadian legislation that deals with this fundamental rule.
20 In the criminal law of the International Criminal Court, this principle
21 is the driving force. It demands the neutrality and, better still, the
22 impartiality of the Prosecutor in the conduct of his investigations and
23 the obligation on him to be concerned only by the need for the
24 ascertainment of the truth.

25 Moreover, the principle of that -- or rather, the spirit of that

1 principle should guide all the phases of the case, including both the
2 investigative phases as well as the hearings before the Trial Chamber.

3 The Prosecutor of the International Criminal Court should not
4 therefore do everything possible to extract from a witness at all costs
5 allegations against the accused, and this is more so because the choice
6 of the people that he has decided to call as witnesses are curious at the
7 very least because his choice overlooked key individuals who, in fact,
8 are alive and well within his reach.

9 The Defence has underscored this point in their opening statement
10 and during the cross-examination of the head of investigations of the
11 Office of the Prosecutor. Another fundamental principle that
12 characterises the criminal system of the International Criminal Court is
13 that of the public nature of the trial, to be found in Article 67,
14 paragraph 1, and 64, paragraph 7 of the Statute. This public nature has
15 as its corollary the principle requiring an oral hearing, which manifests
16 itself where precisely it concerns testimony through the oral testimony
17 of the witness in the hearing. The testimony of a witness at trial shall
18 be given in person. That is what is provided for under Article 69,
19 paragraph 2 of the Statute.

20 Certainly, Article 56 of the same text and Rule 68 of the Rules
21 of Procedure and Evidence envisage exceptions to this principle in
22 strictly limited circumstances, namely, when it is considered that the
23 possibility to obtain information is no longer there will -- will no
24 longer be there or when the witness cannot appear in person or when it is
25 established that the Defence has been able to exercise its rights when

1 the statement -- the prior statement was taken from that witness. In the
2 case in point, we are not in any such of these configurations which
3 envisage these exceptions. We are in none of these areas.

4 Furthermore, any reference to the case law of the ICTY in the
5 matter is not relevant and cannot be transposed before the International
6 Criminal Court. It should be stressed that Article 69(2) states
7 *expressis verbis* that any exception to the principle of an oral hearing
8 should be done in compliance with the provisions of the Statute of the
9 Court and the Rules of Procedure and Evidence. They should not be
10 prejudicial to or inconsistent with the rights of the Defence.

11 Furthermore, Article 69, paragraph 4 of the Statute provides that
12 the Court can rule on the relevance and the admissibility of any
13 evidence, taking account in particular of the probative value of this
14 element and of the possibility that it might prejudice a fair trial or a
15 fair evaluation of the testimony of a witness. Precisely when in the
16 case in point a previous statement has been drawn up in the absence of
17 the Defence, it has not been able to effectively challenge the evidence
18 that has been brought during this recording or seizure. As such,
19 admitting such a statement would not fail to violate the rights of the
20 Defence.

21 Any case law, whether national or of international criminal
22 tribunals that are *ad hoc* against these provisions of the Rome Statute
23 cannot be imposed on the International Criminal Court. This reminds us
24 of the eminent lawyer Portalis, who already at his -- during his time had
25 these famous words to say:

1 "In criminal matters where there is only a pre-existing formal
2 text which can form a basis for the action of the Judge, it is necessary
3 to have precise laws of jurisprudence. When the law is clear, it has to
4 be followed."

5 Certainly, the case law should not be disregarded which provides
6 information on the application of law in specific cases which are as
7 diverse as they are varied; but when the law is clear it has to be
8 followed, that is to say to -- it has to be applied. The principle of
9 the public nature and the oral nature of hearings which we are speaking
10 about and which, as we know, have a close link with the adversarial
11 principle are to be found in most national criminal laws, particularly in
12 Spanish law, Peruvian law, Ecuadorian law, German law, Congolese law,
13 that is to say law of the Democratic Republic of Congo, and French law.
14 Do not go further here. Let us take two decisions, a Spanish one and a
15 French one respectively.

16 In 1995 the Tribunal of Constitutional Guarantees in Spain
17 confirmed that the principle of oral proceedings was de rigueur, that all
18 the evidence should be presented at the hearing, and that were exceptions
19 to be admitted and prior statements to be produced, these would have to
20 have been taken in the presence of the Defence counsel.

21 Furthermore, the criminal chamber of the French Cour de cassation
22 does not accept that a deposition of a witness can be read at a hearing
23 before that person has finished to testify, as that would constitute a
24 violation of the principle of oral proceedings. It also judged that
25 under Article 331, paragraph 4 in fine of the code of criminal procedure,

1 witnesses testify orally, which implies that they are not allowed to read
2 out a written statement. The application of the law is done by the
3 president who, after seeing that the witness is helping himself with
4 written notes, invites that person to take an oath again and to start
5 again his testimony.

6 The principles of adversarial proceeding, the public nature of
7 trial, and the oral nature of the trial are also founded in Article 6(1)
8 and 3(d) of the European Convention on Human Rights and Fundamental
9 Freedoms. In the case we are looking at here, the implementation of the
10 principle of public hearings and of the -- and oral testimony has the
11 following as a result. When there is a contradiction between the
12 statements made by the witness before the Prosecutor and his oral
13 testimony before the Chamber, it is this latter testimony - that is to
14 say the oral testimony before the Chamber - that prevails and which
15 should be retained as the testimony of the witness. Indeed, it is before
16 the Chamber that the witness before testifying takes the solemn and
17 public undertaking to speak the truth, the whole truth, and nothing but
18 the truth in accordance with Article 69, paragraph 1 of the Statute and
19 with Rule 66, paragraphs 1 and 3 of the Rules of Procedure and Evidence.

20 Witness 250 has accomplished this substantial formality in the
21 public hearing of the 27th of January, 2010. And the Presiding Judge
22 called the attention of Witness 250 before starting his testimony with
23 regard to the offence of false testimony as defined in paragraph 1(a) of
24 Article 70 of the Statute. And here I would refer to the transcript of
25 the hearing of the 27th of January, 2010, page 13, lines 22 to 25, and

1 page 14, lines 1 to 21. This formality of taking the oath is substantial
2 in that if it is not carried out, the testimony of the witness cannot be
3 admitted as evidence. On the other hand, before the Prosecutor or the
4 investigators, Witness 250 did not take the oath whether publicly to tell
5 the truth, the whole truth, and nothing but the truth.

6 Furthermore, the mere fact that previous statements differ from
7 those made at the hearing, before the honourable Judges, cannot give the
8 Prosecutor the right to cross-examine him. The Prosecutor should not
9 look to create an ambiguous situation to try to pull the rug from under
10 the Defence's feet.

11 Presiding Judge, honourable Judges, you have well analysed the
12 case which is present before us. There is no real difficulty, no real
13 difficulty. At this phase of his examination-in-chief, the Prosecutor
14 simply has a clear choice which he has to make. Either he carries out
15 his examination-in-chief and leaves to the Defence the responsibility of
16 cross-examining his witness, or he declares that his witness is hostile
17 and therefore requests from the Chamber the right to cross-examine him,
18 in which case the question arises who cross-examines the Witness 250
19 first. Who will start the cross-examination? Is it the Prosecutor? Is
20 it the Defence? But before going to this debate, first of all the
21 Prosecutor has to clearly make known to us what his choice is. The
22 Prosecutor cannot in the case in point invoke paragraph 109 of your
23 instructions, 1665, as the witness 250 has nowhere shown that he had
24 forgotten anything, nowhere.

25 Witness 250 replies to the questions of the Prosecutor with ease.

1 He does not need to have before him his previous statements made before
2 the Prosecutor or his investigators. The Witness 250 even replies with
3 such ease and such speed that on several occasions the Presiding Judge
4 and the Prosecutor himself have had to ask him to slow down, to reduce
5 the speed of which he is speaking. Witness 250 gives with slightest
6 details and precision answers that are so focused, such as those stating
7 the number of days spent in Aveba, that the delegation spent in Aveba,
8 one month, one week, and four days. What precision.

9 He has also given precision with regard to the number of
10 munitions which he had received and also with regard to the composition
11 of the delegation in Aveba. The witness has therefore not shown any
12 memory difficulty. Witness 250 is not suffering from amnesia.

13 It is also useful to remind ourselves that at the hearing of the
14 27th of January, 2010, before Witness 250 started to testify, the
15 Presiding Judge clearly said to him the following, and I quote:

16 "Witness, you have to understand well that nobody here is trying
17 to put you in difficulty. The only thing that is asked of you is to
18 answer the questions that are put to you. If at any time you are tired,
19 tell us. The Court has also ordered that a psychologist be present in
20 the courtroom. This psychologist is on the left of the courtroom. He is
21 not next to you, but not very far from you either. And this
22 psychologist, if that person notes that you are finding yourself at one
23 moment or another in difficulty, the psychologist will tell the Court via
24 the Court Officer."

25 See the transcript of the audience of the 27th of January, 2010,

1 page 10, lines 24 to 25 and page 11, lines 1 to 7.

2 Right until today, this psychologist has not pointed out anything
3 in particular with regards to the attitude of Witness 250 in the hearing.
4 When the witness had a need to leave for any reason, he addressed himself
5 to and obtained the authorisation of the Chamber. Witness 250 continues
6 to reply well to the questions that are asked of him. The problem is
7 therefore not at the level of the witness, but it is at the level of the
8 Prosecutor himself, who has to make a choice: Either continue his
9 examination-in-chief or to declare that his witness is hostile. It is up
10 to the Prosecutor to choose. The witness does not have difficulties.

11 The Defence knows that in the Lubanga case Trial Chamber I
12 granted certain particularly vulnerable witnesses, in that case former
13 child soldiers, leave to refresh their memory through the statement made
14 before the investigators of the Prosecutor, but only when the witness
15 himself had made the request to the Chamber -- only when the witness
16 himself had made this request to the Chamber.

17 In our case Witness 250 is not a former child soldier. He is not
18 a former child soldier. As -- even if he was born in 1986, something
19 furthermore that the Defence challenges, he would have had -- he would
20 have been 17 at the time of the acts of which the Chamber is seized, is
21 therefore not a child soldier, and the Defence will furthermore bring
22 proof that Witness 250 was born before 1986.

23 Furthermore, the witness 250 did not ask the Chamber for the
24 possibility of having another look at part or all of his previous
25 statements made before the Prosecutor's investigators or the Prosecutor

1 himself, T-250 did not submit such an application to you, your Honour --
2 your Honours. It is also necessary to recall the oral decision of your
3 Chamber of the 27th of November, 2009, which relevantly underscores the
4 fact that the witness seemed to remember easily the events on which he
5 was speaking and that this was a decisive element in refusing to allow
6 him to refresh his memory.

7 Mr. President, your Honours, the criminal, legal, or regulatory
8 texts, whether procedural or substantive, must be impersonal and neutral.
9 This impersonal and neutral nature is guaranteed by the fact that these
10 texts are drafted or adopted previously. You set out instructions 1665
11 prior to the trial in an impersonal and neutral manner. None of the
12 parties appealed against those instructions, that is document 1665, which
13 laid down the rules of the game and the testimonies before the Chamber.
14 Today, the time has come to implement them.

15 The situation in which the Prosecutor seems to find himself is
16 indeed provided for in paragraph 67 of those instructions, 1665. Indeed,
17 the normal procedure is laid down in paragraph 66, while paragraph 67
18 deals with exceptional situations. Let me quote these two paragraphs.
19 Paragraph 66 of your instruction 1665 states as follows:

20 "As a general rule during examination-in-chief, only neutral
21 questions are allowed. The party calling the witness is therefore not
22 allowed to ask leading or closed questions unless they pertain to an
23 issue that is not in controversy."

24 That was paragraph 66. And paragraph 67 adds as follows, and I
25 quote:

1 "However, if a party declares that the witness it has called has
2 become adverse and the Chamber allows that party to continue questioning
3 the witness, it may be appropriate for that party to cross-examine the
4 witness. In such a case, cross-examination must be limited to issues
5 raised during the initial part of the interrogation or contained in the
6 witness's previous statements."

7 Mr. President, your Honours, these two paragraphs are clear and
8 complementary. It is up to the Prosecutor to tell us in which situation
9 he believes that he finds himself today. If he finds himself in the
10 normal situation, then he should continue with his examination-in-chief,
11 in conformity with paragraph 66, and allow the Defence the responsibility
12 of cross-examining that witness, that is, Witness 250. If, on the other
13 hand, he feels that he is in a situation provided for in paragraph 67,
14 then he should tell the Court so. He should not try to create confusion
15 or create an ambiguous situation whereas things are very clear.

16 Mr. President, your Honours, with all due respect, I would like
17 to draw your attention to the fact that if you amend paragraph 67
18 following the application of the Prosecutor which is unfounded, there
19 would be a risk of you completely undermining your instructions contained
20 in document 1665. If you add another rule now following that application
21 which is unfounded from the Prosecutor, then the new rule will not have
22 the advantage of having been previously established or of neutrality or
23 of having an impersonal nature. It will be considered as something that
24 is tailor-made for this particular occasion. And we have pointed out
25 that the conditions of the implementation of paragraph 109 have not been

1 met in this particular case because Witness 250 did not at any point
2 indicate that he had forgotten anything. He did not seek any permission
3 to refer to his statements given to the Prosecutor or to his
4 investigators.

5 To paraphrase the wise man that we all know:

6 "There is no use for needless rules; they weaken the rules that
7 are necessary."

8 Mr. President, your Honours, for all the foregoing reasons the
9 Defence of Mathieu Ngudjolo requests your august Chamber to declare the
10 application of the Prosecutor unfounded and to dismiss it forthright.
11 Thank you.

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Professor
13 Fofe, for your intervention and for your submissions.

14 Who of the Legal Representatives, Mr. Luvengika, Mr. Gilissen, is
15 going to take the floor now? And if it is possible, can you give us an
16 approximate time of the duration that each of you is going to take?

17 MR. GILISSEN: (Interpretation) That would be difficult,
18 Mr. President, but in any case I will be shorter or at least less complex
19 than my legal -- my colleagues. I will summarise.

20 PRESIDING JUDGE COTTE: (Interpretation) We are listening to
21 you.

22 MR. GILISSEN: (Interpretation) Thank you, Mr. President. It is
23 certain that we have a problem, and I should say that all of us have a
24 problem. We have been able to realise that the Prosecutor finds himself
25 in a situation where he has to manage a lot of differences between what

1 we know, including the Legal Representatives, about the statements given
2 to the representatives of the OTP and to the investigators and this is
3 with regard to specific points, and there have been different statements
4 made in the courtroom.

5 The Prosecutor is telling us that these are not simple
6 differences, and I would like to draw the attention of the Court as well
7 as the attention of the Prosecutor to this point, that these simple
8 differences that do not create a problem. This is due to the fragility
9 of the witness, given that we know about these from experimental
10 psychology, and it is possible to have different statements in the
11 courtroom and outside of the courtroom. But we know, all of us, what the
12 problem is, and the problem is specific difficulties -- a specific
13 difficulty where suddenly there is the written statements of the witness
14 and then the oral testimony of the witness in the courtroom, which are
15 not consistent at all on certain points. So the problem is not a problem
16 that involves simple differences. It is contradictions, and this is a
17 very different. So this is a problem of contradictions as between black
18 and white and between white and black.

19 Furthermore, certain statements made in the courtroom which seem
20 to be quite logical are totally inconsistent with what we saw in the
21 prior statements or in the handwritten statements. And so we are faced
22 with a real problem which goes beyond the simple problem of a variation
23 in the witness's statements. It is not that they are not consistent, and
24 I'm compelled to say this, as this has been brilliantly pleaded. The
25 Prosecutor has to take another approach. I have heard a short while ago

1 that the problem is the Prosecutor himself. I think that is wrong. The
2 problem is not the Prosecutor or his team or his investigators. No one
3 is claiming that the written statements are inaccurate or mistranslated
4 or that they have been misread by the Prosecutor. The problem is in what
5 the witness has been telling us in his prior statements and in his oral
6 testimony.

7 Mr. President, your Honours, this means that the problem that we
8 are faced with shall have to be dealt with by your Court, because in any
9 case your Trial Chamber is going to be called upon to assess the witness
10 in his credibility, his reliability, his relevance, and I was surprised a
11 short while ago to hear that there is a sort of religion in the claim
12 that statements made under oath should be gospel truth. I don't think
13 any of those statements should be more gospel truth than others. You
14 have to assess the testimony and the quality of that testimony in light
15 of a fundamental principle, which is a complex fundamental principle, and
16 that is the principle of the determination of the truth. But the
17 determination of the truth in respect of a fair trial which is fair to
18 everybody. It should not be the monopoly of anyone. There should also
19 be respect of the rights of the Defence. These are two completely
20 different things.

21 And, your Honours, this determination of the truth shall
22 absolutely be based on and it is absolutely necessary for each of us,
23 given that each of us has gauged the real problems when -- and I thank
24 Mr. O'Shea for the examples that he pointed out, the examples which
25 actually raise problems. When it is said that there were only civilians

1 in Bogoro, who in this courtroom can stand up and say that there are no
2 difficulties with regard to those famous prior statements of the witness?
3 Who can stand up here and say that there is no problem in this case?

4 When the witness comes and tells us that it is not easy to
5 approximate the ages, but then he tells us that a child is someone who
6 has no children or that once one become a father he's no longer a child
7 and that it is difficult to say whether they were "kadogos" because there
8 are pygmies in Congo. Either he is correct by saying so or his position
9 was quite curious when he gave a statement to the investigators of the
10 Prosecutor. Because he is not using any of those criteria in those
11 statements. We all agree that he has said things that cannot really be
12 consistent with what we have heard here in the courtroom.

13 So, your Honours, my feeling is that to begin with we must
14 understand what is true. What is true to us Legal Representatives is
15 obviously true to the Defence and true to the Prosecutor. And I cannot
16 say whether this truth will be the same for the Bench, but I would not be
17 surprised if that is also the necessity there. We have to understand
18 what is going on and we have to specially understand the reasons why this
19 is going on. And I would like to add, Mr. President, your Honours, we
20 have to allow the witness all freedom to express himself, and we would be
21 jumping to conclusions if we suppose that what he's saying today is not
22 the truth or that what he said in his prior statements could be the
23 truth. We all know about culture shock. When I find myself in the great
24 northern area with the Eskimos, their culture is different and curious to
25 me. And when they come to my own area, they find that everything is

1 different and curious.

2 And now, when we look at these contradictions from the witness,
3 maybe he will explain them to us. Those contradictions are the same for
4 all of us. And I feel, your Honours, that there is an -- there is a
5 misunderstanding. What the Prosecutor asked is what I thought I
6 understood was to allow the witness to express himself, maybe not to
7 cross-examine him but to present those statements to him. And if I
8 understand correctly, this seems to me to be the only fair manner of
9 going about this, that is, present to the witness some of his statements.
10 And if, as the Prosecutor feels the issues that he has raised that are
11 inconsistent are presented to the witness, then that may be the way to
12 go. I agree with the Defence when they say that this is a way of
13 catching up. There shall be a cross-examination to reject or contradict
14 anything that may have been said initially, but we have to target what
15 all of us are looking for, that is, the determination of the truth.

16 I have listened to all the parties and with keen interest because
17 I have learned a lot. The parties have talked about common law, but this
18 is not a common law Court and I share the opinion of Mr. Fofe. This
19 Court must not become a common law Court, and it cannot and should not be
20 allowed to become a civil law Court. I heard the Prosecutor talking to
21 us about his beautiful country, Canada; I heard Mr. O'Shea talking about
22 his beautiful country also, the United Kingdom; I did not hear Mr. Fofe
23 talk about his very beautiful country, Congo; and I will briefly talk to
24 you about my own country, which is no worse than any other country, and
25 that country is known as Belgium. And we have Article 318 of the Code of

1 Criminal Investigations, and this article is interesting. Let me tell
2 you that Belgian law is not probably the best, but it is just as good as
3 the others. Article 318 is entitled the Fact of Taking Note, and our
4 Court of Assize is our criminal jurisdiction, and if there is a variation
5 in testimony before this Court between what is said in the courtroom and
6 what is in the written statements discussed -- or rather, disclosed to
7 all the parties, each person will note of course that in that system the
8 Judge is the jury -- and in that oral procedure in which the Judge does
9 not have the statements, Article 318 of this criminal code gives
10 authority to the president of the Court of Assize or to the Prosecutor or
11 to the accused to give notice of the differences between the statements,
12 and that is a right. It is also a right to read out to the Judges who do
13 not have access to the previous statements, that is, to read those
14 statements before the Judge and to point out the inconsistencies between
15 those two types of statements.

16 And here we find ourselves in a system which, under certain
17 circumstances, is quite close to what the Prosecutor was telling us on
18 Friday about what exists in his country. During lunchtime, some
19 Congolese lawyers told me - but not the lawyers of Ngudjolo and
20 Katanga - that in Congolese law, and I point out that Article 21 of the
21 Statute states that the general principles of the Court derived from the
22 national laws can serve to describe the law before this International
23 Criminal Court, including as necessary the national laws of the states
24 under the jurisdiction of which that crime would normally fall.

25 And I'm telling you that in Congolese law - and I shall not be

1 contradicted in this - there is no Article 318 but there is a procedure
2 for notification. And I'd like to come back to what my colleagues of the
3 Defence said. It is explained that the "faire de tenir" note that is in
4 the Belgian procedure, regarding that a Congolese lawyer in the Court - I
5 will not mention her name - she said that this was a provision of the
6 military jurisdictions, but it was only an implementation of what is
7 generally done.

8 But, your Honours, I think that there is jurisdiction in this
9 case. The ICTY is respectable, it is a marvelous tribunal, it is an
10 active legal laboratory, which made it possible to find solutions such as
11 those that seem to us Legal Representatives to be necessary to make it
12 possible for an active determination of the truth within the context of a
13 fair trial for all. And of course that is important because there is no
14 justice without that and within the context of the respect of the rights
15 of the Defence.

16 Within an adversarial framework, everybody who has been taking
17 part since the beginning of this trial in the statements of the witness
18 and those who have had these statements right from the very start can see
19 the reaction of the witness when he will be put before his own statements
20 and that he will explain his impressions, his -- without having any
21 pressure on him, without being subject to any threats under the control
22 of the Court which must of course, I would say, it should have to --
23 because we're in a mixed system, I would say that it has to drive -- it
24 has to drive forward the process, and we have to be sure that the witness
25 will tell us where he is. And of course, dear colleagues, if the witness

1 does not have an explanation to give to us, this would be information
2 which will have a certain value.

3 Thank you, ladies and gentlemen, that's what I wanted to tell you
4 here. I think we could also say that the comments, the guide-lines, with
5 regards to Rule 140 could be interpreted on the basis of 69(3). That's
6 what I wanted to -- on the base of 64(b), (d), (f). I know that the
7 Court, if it considers that there is in this paragraph which we will
8 discuss -- if there is a place for -- a mediating place between the
9 general principle with regards to this law that has to be respected and
10 the extraordinarily characterised situation -- or the situation which is
11 extraordinarily characterised by a hostile witness, if this Chamber
12 considers that between these two potential excesses on the scale -- if
13 these two situations, if there is a third situation, a median situation,
14 well I think that you would adopt in the interests of all that with
15 prudence, you would adopt an additional rule which would be complementary
16 to the situation which we haven't thought of, and that would be right for
17 the participants in the judicial process to have something new. And to
18 find a type of arbitration through the extremely interesting explanations
19 with regards to common law and certain words which I have clumsily said
20 with regards to civil law and to find a system which -- and here I know
21 I'm repeating myself, but sometimes you have to repeat yourself not to
22 make a mistake, under the control of the Court, and I stress that, it
23 would make it possible to have this essential information for all of us
24 and which will not prejudice in any way whatsoever the rights of the
25 Defence. This happened through the adversarial procedure and the Defence

1 will be better armed than ever because during the cross-examination it
2 will have been able to observe all the process and it will be able to go
3 back to areas which it would like to go back to, the first statement, the
4 testimony during the hearing, to the explanations, I don't know. I don't
5 want to draw up any type of a plan, but it's enough to say that the
6 Defence will more than ever be better armed to be able to prepare its
7 cross-examination. And just do take an example because it does seem to
8 be in fashion at the moment, imagine that there are explanations on the
9 part of the witness which give a third version. What happiness for the
10 Defence, you have Lubanga Defence, I was (indiscernible) years, and there
11 would also be a fresh cream, if I'm allowed to put it like that.

12 Well, ladies and gentlemen of the Court, I hope I haven't been
13 too long. I have felt above all that it is now, now, that it is
14 necessary to act and not to wait for things to get any worse. I put
15 myself in the place of this boy who comes from his country having been
16 undergone events which are quite extraordinary and which must affect that
17 person and who would want to -- who would want -- I think what we owe to
18 this witness is that we should point out this problem that we find to
19 this witness, that we should ask that witness for explanations, and if he
20 has an explanation to say what they are. We owe that to the witness,
21 ladies and gentlemen of the Court. And I think if I was too long, I'm
22 sorry for that. I would like to thank you.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Counsel
24 Gilissen.

25 Counsel Luvengika.

1 MR. LUVENGIKA: (Interpretation) Your Honour, I don't have very
2 much to add with regard to what my esteemed colleague, Counsel Gilissen,
3 has already said. I fully subscribe to what he has said and therefore as
4 regards to the rest we are confident that the Chamber and the Court is
5 fully aware of the problem which is of concern to us, and it's not for
6 nothing that the Chamber wanted to put this debate to today to allow the
7 participant parties to be able to reflect on the issue, and I think that
8 it is a premier because we have tried to mention quite a lot of
9 provisions by calling on different legal systems, Canada with the
10 Prosecutor; our esteemed colleague, Counsel O'Shea, took us through
11 moreover three centuries to discover the notion of a hostile witness; and
12 we have also heard the developments of Mr. Ngudjolo's team, and all this
13 is done with a concern of making a contribution to the Chamber because we
14 are aware that it is something fundamental. And the case law -- the
15 decisions that you are going to issue are going to be -- serve in the
16 future. We're only at the start of this. We're not even at the fourth
17 witness, so perhaps the Chamber will shed light on this and for the rest
18 of the proceedings which we are -- which we have undertaken before this
19 Chamber. Thank you.

20 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Counsel
21 Luvengika.

22 We are now going to ask for a short amount of time whereby I can
23 consult Fatoumata Diarra and Christine Van den Wyngaert. So I would just
24 ask you for a break for a moment.

25 (Trial Chamber confers)

1 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, we are
2 now coming back to our proceedings. We have about 15 minutes.
3 Prosecutor, Thursday at the end of the morning you asked a
4 certain number of questions, you made a -- proposed
5 answers (as interpreted), and in a very schematic way these went into a
6 possible application first stage of the paragraph 109 of our decision of
7 the 1st of December relating to Rule 140, which, at a second stage, would
8 invite the Chamber to have a look at a more open reading or a re-thinking
9 of paragraph 67 of this same decision and at the same time you also
10 brought to the proceedings, mentioned in the proceedings, Article 9(2) of
11 the Canadian Law on Evidence. And there was also an ultima ratio, a
12 third possibility which could consist of introducing into our debate the
13 statements made by the witness himself, but this is a third solution and
14 once again I'm summarising to a great extent your remarks, and you don't
15 have to say that immediately, but this is -- after hearing the different
16 interventions today, we think that we have or we believe we've understood
17 that this was the intermediary solution which was leading to read
18 somewhat differently paragraph 67 that was your preference. The Chamber
19 wished, as you have all recognised, that everybody should be able to
20 express themselves at length, not at too much length, in future with
21 regard to certain questions of principle. We'll have to try and be
22 somewhat briefer, but we certainly don't regret having been able to
23 listen to each other. Certainly, for some of us have been -- made
24 certain discoveries, to have learned something, or better understood
25 certain aspects with regards to the proceedings, legal notions with which

1 we are not all familiar. So we do not regret the time that has been
2 spent in listening to each other. The Court is not certain that the
3 accused have found a place in this long debate, which perhaps was not
4 very lively, but it was -- and the Defence team, they have to be aware
5 that it wasn't lost time or wasted time.

6 Mr. Katanga and Mr. Ngudjolo, we have Thursday at the of the day,
7 and today as well, we have made law, and it is a law which is useful to
8 ascertain the truth and for the proper functioning of our proceedings.
9 You have to be aware of this.

10 The Chamber has also noted that the steps could be -- or the
11 approach could be taken from the -- on the side of the Defence team and
12 also, perhaps, on the side of the Legal Representatives of victims, but
13 that these different approaches do have a certain degree of convergence
14 at the end of the day, even if the proposed solutions are not exactly the
15 same or are not necessarily presented in this same order of priority.

16 Prosecutor, we therefore have listened and heard on last Thursday
17 the -- what you said, the Defence teams have expressed themselves, the
18 Legal Representatives have expressed themselves. Now, where it concerns
19 your first stage, the first phase, the objective of which was to ask us
20 to reflect on the application of paragraph 109 of our 140 decision -- on
21 Rule 140, the Chamber does not think that it can apply this paragraph,
22 109, because a lot of things have been said. Our witness is a witness
23 who expresses himself clearly. When he wants to answer in a precise way,
24 he asks -- he answers in a precise way, and sometimes he chooses another
25 type of answer, but the Chamber does have the feeling that the modalities

1 with which he answers aren't due to a lack of memory but a concern which
2 is personal to him to express himself in a particular manner. If you all
3 remember that, I don't know on what day, but on a particular day, after
4 taking his oath I did remind him that he was speaking under oath. This
5 is something that I think was well noted by him.

6 And also furthermore the Chamber reminded him that prior to the
7 hearing in the so-called familiarisation phase, as conceived within the
8 International Criminal Court, that the witness had the possibility to
9 refer to these statements. So I don't think it is the time now to give
10 leave to go to these statements.

11 Now, where it concerns your second phase and the reference to
12 Article 9(2) of the law -- the Canadian Law on Evidence, the Chamber has
13 examined Article 9, parts 1 and parts 2 -- paragraphs 1 and 2, and it is
14 understood that for you it is a matter of clarifying or completing
15 paragraph 67 with a view -- in accordance with -- not
16 with (as interpreted) 9(2) to obtain from us leave to cross-examine the
17 witness with regards to the statements made during the investigation
18 stage, which would make it possible for us given this cross-examination
19 to assess whether there is hostility there and this is exactly what this
20 Article 2 aims at. The recourse to Canadian law is a perfectly
21 honourable possibility which could be envisagable (as interpreted), but
22 it can only be envisaged if the Chamber had not already taken a position.
23 And in fact - and this has also been recalled - the Chamber had taken a
24 position in paragraph 67, its decision of the 1st of December. It wished
25 for that things be as clear and simple as possible, and that is why the

1 provision in paragraph 67, which as Professor Fofe indicated just now is
2 a means for the Chamber not just to say that it's a pure common law
3 system that is applied during our debates, but it is a means by which it
4 can remind everyone that this system of common law does, to a large
5 extent, find its echo in the Statute and the Rules of Procedure and
6 Evidence which we have to apply. It also reminds that -- reminds
7 everyone that the principle of the -- that the rule -- the debates is to
8 be found here. Now, in regards to 67 the Chamber finds it difficult to
9 hold it to this at the moment. It has to have this paragraph applied
10 that the provisions of this paragraph be applied.

11 This comes back to the point, Prosecutor, that -- and it is here
12 that tomorrow at 2.00 you have to give us your position, again you have
13 to be given the floor. And this, as far as the Chamber is concerned,
14 means that things have to be as clearly put as possible. Where a witness
15 is considered as hostile, it is up to us to show it. If he's not hostile
16 to you, you can continue with your examination-in-chief without being
17 simplistic, the Chamber has listened well to Counsel O'Shea, without
18 being simplistic, the Chamber does have the feeling that in order to
19 determine if a witness is hostile then it is necessary to examine that
20 person to see whether he responds to questions orally during the debate
21 in a way that is directly opposed to what he affirmed in a previous
22 statement before the investigators. It is also necessary to determine
23 whether this witness refuses to reply to a question while he perfectly
24 replied to the same -- while he replied to the same question during a
25 statement before one of your investigators. Or if he replies in a

1 totally different way, so, Prosecutor, it is important that tomorrow at
2 2.00 that you can tell the Chamber if you consider that this witness is
3 hostile. If he's hostile to you. It is -- and if that is the position
4 that you take, you have to indicate it clearly to us, not the examples,
5 but you need to indicate the points to us which in the answers that were
6 given you -- they make you think that that witness is hostile. The
7 Chamber will then withdraw in order to examine the answers that you will
8 give to us, and if it considers that the witness is indeed hostile, it
9 will give you leave to proceed with a cross-examination as envisaged in
10 paragraph 67 of this decision.

11 If, on the other hand, you take the position of not declaring
12 that this witness is hostile, then you will continue with your -- I'm
13 sorry, with your examination-in-chief. The Judge apologies for saying
14 "cross-examination" the first time.

15 We noted with interest in the words of Counsel O'Shea as well as
16 in the words of Counsel Gilissen, and this is the contribution of civil
17 law, that there is a possibility to ask questions which can be closed,
18 they can be open, they can be leading while they are -- they are done
19 with a view to finding the truth. The Chamber has a possibility to ask
20 questions which perhaps Mr. Gilissen will make it possible for the
21 witness either to overcome the contradictions which perhaps for him are
22 not contradictions, you are right; or to make him to realise that he is
23 in contradiction with himself. The Chamber has a possibility to ask
24 questions which will make it possible to continue together in the search
25 of the truth, and these questions can, if necessary, be done with regards

1 to what was done with regards to the presence of that person when he was
2 in Bogoro. But there are other questions which could be envisaged. So
3 these are -- this is the end of a long day of legal debate, which started
4 on Thursday morning. We all wanted to indicate to you that we are
5 staying with paragraph 67. We wanted in our decision of the 1st of
6 December, so we don't think that so quickly it will be implemented, but
7 throughout the discussion it was justified by the fact that we have to be
8 clear while a lot of other witnesses are going to come, other witnesses
9 who have perhaps states of mind or in situations of great vulnerability
10 which could perhaps provide answers which might seem contradictory or
11 which would indeed be contradictory.

12 Whatever the case, Mr. Prosecutor, if I can use this formula,
13 currently the ball is in your Court and tomorrow at 2.00 you will tell us
14 if you consider that this witness is hostile to you, and if it is the
15 case you will tell us how and why and we will make a determination on
16 that. And if he is determined hostile by this Court, then you will
17 proceed with cross-examination with the questions which will show
18 possible contradictions and which will give rise to hostility. It won't
19 go into new issues.

20 If you take, on the other hand, a decision not to consider that
21 person as hostile then you will continue with your classic questions
22 within the framework of the examination-in-chief. It is now 6.29. You
23 have one minute, Prosecutor, we're listening to you.

24 MR. MACDONALD: (Interpretation) And if the witness is declared
25 hostile, that could be limited to the precise points which I would raise

1 and make precise to the Chamber. I would just like to put this question
2 again. If you would allow me to cross-examine him on these points, then
3 can we come back and examine him with -- on other points without
4 cross-examination?

5 PRESIDING JUDGE COTTE: (Interpretation) In the immediate
6 circumstances, it is up to you to choose. You have understood this well.
7 It has appeared to us that cross-examination can only be done with
8 regards to -- justifies it if the Chamber considers that the witness is
9 indeed hostile, which we haven't yet decided. It is up to you to
10 demonstrate that, to bring all the elements from with precise examples,
11 and once this cross-examination which you will open up -- which opens up
12 to you much wider questions, once this is finished, then the Chamber will
13 consider that you can continue with your examination-in-chief on issues
14 which you haven't yet gone into. But be careful, it is up to you not to
15 mix these aspects and to really frame your questions so there are no
16 surprises. This is something that we do not want.

17 Thank you to the interpreters.

18 Counsel O'Shea, very quickly, because we have to free the
19 interpreters.

20 MR. O'SHEA: It's a question of correcting an am politesse it
21 appears that when I was referring to Judge Van den Wyngaert I referred to
22 her as Judge Wynberg (phoen) on one occasion, and I'd just like to
23 reassure her that it's not my English brutishness which leads me to make
24 that mistake. I was 16 months is a case with a Judge Wynberg and it was
25 a slip of the tongue, but I apologise.

1 PRESIDING JUDGE COTTE: (Interpretation) We can note in looking
2 at Judge Van den Wyngaert how much she is sensitive to the remarks that
3 you've just made. Courtesy of Counsel O'Shea is going to become
4 legendary in the International Criminal Court. So thank you to our
5 interpreters in English, in French, in Swahili, and we have had an
6 interesting hearing and we thank -- that's thanks to all of you. So we
7 are now adjourned until tomorrow at 2.00.

8 The hearing ends at 6.31 p.m.

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