

1 International Criminal Court

2 Trial Chamber II - Courtroom 1

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

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

6 In the matter of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui
7 Hearing with the Registry, Office of the Prosecutor and Defence

8 Tuesday, 3 November 2009

9 (The hearing starts at 9:39 a.m.)

10 (Open session)

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

13 PRESIDING JUDGE COTTE: (Interpretation) Court is now in session. Please be
14 seated. Courtroom security officers, could you bring in Mr. Katanga and Mr.
15 Ngudjolo, please.

16 (Germain Katanga and Mathieu Ngudjolo Chui enter the courtroom)

17 PRESIDING JUDGE COTTE: (Interpretation) Mr. Hooper, we gathered that this
18 morning you or one of your colleagues would be -- were not able to discuss matters
19 with Mr. Katanga. According to the information that the Chamber received, the
20 possibility was quite -- very much a matter of circumstances. There was no
21 particular intent to keep you from talking to Mr. Katanga, but it would appear that
22 there were some difficulties related to the number of security staff available, and
23 that made it impossible to respect your request.

24 Now, if you absolutely must speak to him -- with him for five minutes, the
25 Chamber will let you have that opportunity since you were not able to do so before

1 the beginning of the hearing. Would you like to take advantage of this opportunity
2 or shall we begin the hearing?

3 MR. HOOPER: No, we can begin the hearing. Sorry, we are quite content to
4 begin the hearing. Thank you very much for the explanation, which Mr. Katanga has
5 been able to hear, and we will take an opportunity later this morning to say a few
6 words -- have a few words with him. Thank you very much.

7 MR. O'SHEA: Thank you very much, Mr. President. It was, in fact, me, and
8 the situation was explained to me. Thank you very much.

9 PRESIDING JUDGE COTTE: (Interpretation) Fine. The Chamber just wants to
10 make sure that when a hearing is scheduled and the two accused are transferred from
11 the Detention Centre to the courtroom, that everything is done in terms of the
12 security staff to ensure that minor, yet noteworthy incidents no longer occur.

13 We will resume our hearing where we ended it yesterday. The Chamber had
14 asked and had stressed -- asked of the Prosecutor to review the number of hours
15 that he thought he would need for examination-in-chief, to review this number and
16 drastically reduce the number so that the trial can be conducted within a
17 reasonable amount of time.

18 At the end of the hearing, I said on behalf of the Chamber that together we
19 needed to find the measures to be taken to help produce the number of hours, and
20 that is why we will turn to point 8 on the agenda and discuss the various areas
21 that witnesses will be dealing with.

22 The discussion may be a little bit tricky or detailed. We may have to work
23 according to the numbers that have been attributed to people, and if we work slowly
24 for the benefit of interpretation we will be able to have a comprehensive
25 discussion.

1 So, on 7 October last, sir, you sent the Chamber a breakdown of the various
2 themes and each piece of testimony you were expecting, and we thank you for that.
3 In order to reduce the number of hours allocated to presentation of each topic by
4 each witness, the Chamber would like to suggest a tighter breakdown of the various
5 topics or subject areas, tighter than what you suggested.

6 I think we all have the same objective; namely, to allow each witness to give
7 testimony on the areas that are of greatest use or the areas in which he can
8 provide a substantive contribution.

9 Mr. Kilenda.

10 MR. KILENDA: (Interpretation) I am afraid I have to report that my client's
11 computer is not working.

12 PRESIDING JUDGE COTTE: (Interpretation) Madam clerk, madam courtroom clerk.

13 Of course. Madam courtroom, Court is trying to reach a technician so that
14 Mr. Ngudjolo will be able to follow the hearing.

15 Mr. Kilenda, do you believe we can continue the hearing despite this
16 technical difficulty?

17 MR. KILENDA: (Interpretation) Of course, your Honour.

18 PRESIDING JUDGE COTTE: (Interpretation) Thank you. In order to make the
19 presentation clearer, we will proceed charge-by-charge, and we will begin with the
20 contextual elements of the war crimes and crimes against humanity.

21 Putting aside the agreements having to do with evidence that you may enter
22 into, the Chamber and the Prosecutor will be sending information in a few days.
23 Regardless of the agreements having to do with evidence, the Chamber would suggest
24 the following -- the following breakdown or organisation. We are speaking of war
25 crimes and crimes against humanity.

1 In our view, it would be important to hear on a priority basis the seven
2 witnesses; number 12, number 157, 161, 238, 250, 267 and 323. And in order to shed
3 light on what may be provided in the form of an image the Chamber thought it would
4 be useful to hear two additional witnesses: Witness 2 and witness 30. Although we
5 did wonder whether it was actually necessary to hear Witness 353 on contextual
6 elements. What is your viewpoint, sir, on this?

7 MR. MACDONALD: (Interpretation) At this stage, we take note of the
8 suggestions from the Chamber, and indeed, the contextual elements are not presented
9 by victim witnesses, and 353 is both a witness and a victim. It's quite certain,
10 as I pointed out yesterday, that Witness 353, insofar as he is heard at -- towards
11 the end, most or all of the witnesses you have mentioned will have been heard at
12 that point, so clearly, if contextual elements were established in the previous
13 testimony at that point we would not ask questions on contextual elements of this
14 witness, Witness 353.

15 PRESIDING JUDGE COTTE: (Interpretation) Thank you. I think you have
16 understood our approach. We are trying to pinpoint all aspects that are not
17 absolutely necessary so that we can really focus on the substantive issues so that
18 we can have a useful discussion or proceedings.

19 And of course, throughout the course of the trial, you will have
20 opportunities to reassess the relevance of hearing a particular witness, but before
21 we begin the actual trial we would like you to sift very carefully through the
22 subject material and determine what is not absolutely necessary. So we are making
23 this suggestion, and we would like to ask you to really consider this quite
24 carefully and not systematically speak to the possible outcome of the trial or the
25 proceedings.

1 Similarly, when it comes to the context or background, the Chamber was
2 wondering if it might be a good idea to make a choice between 166 and Witness 161.
3 These two witnesses both will be dealing with the earlier attacks on Bogoro as well
4 as the issue of the Ugandan forces and their participation.

5 The Chamber is wondering, given the controversial nature of Witness 166,
6 might it not be suitable to reconsider the usefulness and the timeliness of his
7 testimony, and perhaps you could only call Witness 161. Once again, I will ask you
8 for your response to this suggestion.

9 MR. MACDONALD: (Interpretation) My first question: Well, you speak of
10 Witness 161, saying that he is controversial. What do you mean by that? I could
11 indicate that, furthermore, 168 is also able to talk about the previous attacks on
12 the village of Bogoro, so my initial response is as follows, your Honour:

13 We are calling 168 first, first among the three. If 168 establishes the
14 context, will we have to deal with these same elements with these other witnesses?
15 Most likely not but, once again, we will have to assess the situation as we go
16 along. If we were to ask questions on matters that were already established by
17 certain witnesses we are -- would be doing so because the Prosecution has that
18 burden of proving things beyond reasonable doubt, so we may need to call witnesses
19 to corroborate certain items of evidence.

20 Clearly, if the elements were already established to the satisfaction -- to
21 our satisfaction, clearly we will not be asking questions about the same matter of
22 the next witness. It is sort of like a series of dominoes. And I am sorry to have
23 to repeat what I said earlier about the progress -- or the progression of the
24 trial. If things go satisfactorily, in our view, clearly later witnesses will not
25 necessarily be asked questions about things that have already been established.

1 It's in the interest of the Prosecution to really focus on the essentials.

2 But one particular reservation, we must take into account the situation of
3 the witnesses. We must take into account their personal background, their cultural
4 background and their education. A witness may come here and will find himself in a
5 cold courtroom before people he has never seen before. We must take some time so
6 that the witness feels comfortable and he -- the witness needs to settle into a
7 certain pace, and that may not be possible by asking questions on difficult matters
8 in the very first moments, as soon as the witness has been sworn in. So we need a
9 little bit of time once the witness settles in. But once the witness feels more
10 comfortable, and once he has reached cruising speed, so to speak, of course we will
11 focus only on the essential aspects of the trial. And once the decision is taken,
12 your Honour, initially one has a broader investigation and, as time goes by, the
13 focus becomes tighter.

14 Some decisions were made at the beginning of the process and we were casting
15 our nets rather broadly. A statement of 30 pages does not necessarily mean that we
16 will cover all 30 pages.

17 We are now focussing on Bogoro, the events and the crimes and how they relate
18 to each count. Some matters were mentioned in the statements but will not
19 necessarily be touched upon during the trial, and this is a commitment that the
20 Prosecution is making to the Chamber.

21 And one last point. My colleague, Mr. Dutertre, has just pointed out to me
22 that, indeed, I reiterate there will be cross-examination, witnesses will be
23 examined by Defence counsel, and in light of that cross-examination, we may have to
24 adjust our approach, depending on, well, matters that may not be challenged, other
25 matters that are challenged. But we will focus on what's essential.

1 PRESIDING JUDGE COTTE: (Interpretation) Thank you, sir. A few brief
2 observations. I think you have understood our approach. We are asking you to
3 drastically reduce the number of hours you plan to allocate to examination-in-chief
4 because of that number of hours -- well, the numbers of hours will determine how
5 many hours will be allocated to the other participants, and that will also
6 determine the total time for the trial. So, we are just making a number of
7 suggestions to you on the basis of information that we currently have.

8 You can look at these suggestions, and we hope that you make the best
9 possible use of them. We have listened to you, and we certainly heard what you
10 were saying when you talked about the special dynamic when one hears from a
11 witness, and we are well aware of this. Some of the members of this Chamber, in
12 domestic systems, or in international systems, have already had an opportunity in
13 their professional capacity to be in front of witnesses and knowing quite well
14 that, for a particular witness, entering a courtroom is a real trial. And we
15 realise, indeed, that some acclimatisation is necessary; time is necessary so that
16 the witness can relax, feel more comfortable and provide his contribution.

17 The additional parameter is that here we are dealing with witnesses who will
18 be coming from very far away, who will find themselves in an unfamiliar setting
19 here in The Hague. So, we certainly realise this particular aspect, and that is
20 one of the confidentiality aspects of your job.

21 My third observation, in response to one of your questions, actually, I used
22 the word "controversial", which may be difficult to translate into English, and I
23 apologise to the interpreters, but we thought that 166 had been challenged at
24 various stages of the procedure, and perhaps the word "challenge" might have been a
25 better word, rather than "controversial". He is both a witness and a victim and

1 the Defence teams did not seem to -- this is the point I was trying to make of --
2 for the Court.

3 Last observation with note to this point. The Chamber would like to note
4 that before hearing Witness 166, in the current order of appearance, Witness 166
5 being planned in twelfth position and is due to testify, and before that, Witness
6 168, 161, 250 are three witnesses who are planned to cover these contextual
7 elements, which of course leads us to ask ourselves the question whether it is
8 necessary to hear Witness 166 on this subject.

9 So, we shall continue now. In our common examination of the various subject
10 areas that the witnesses will be called to testify upon, the Chamber is wondering
11 whether it may be necessary to choose between Witness 166 and her husband, Witness
12 -- who is testifying under the code number 12.

13 You have foreseen four to six hours of examination for Witness 160 and 18
14 hours for Witness 12, who has been called to testify on your list in position
15 number 22. The Chamber would like to know whether the information provided by
16 Witness 160 is really that different in nature to that to which will testify her
17 husband in order for the testimony of that witness to be justified in terms of
18 testimony upon contextual elements.

19 What do you think, Mr. Prosecutor?

20 MR. MACDONALD: (Interpretation) As for contextual elements, Mr. President,
21 we are in agreement with you. It is clear, of course, that Witness 12 fulfills
22 this role better than Witness 160, and we are ready to analyse the duration in
23 terms of hours that we shall submit to you by 29 November. Of course, Witness 160
24 might provide us with more specific contextual elements with reference to
25 Mr. Katanga, notably, his role within the organisation. But, of course, it is

1 clear that the importance of the testimony of Witness 160 is relevant to those
2 "questions of admission" that Mr. Katanga might cover.

3 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Prosecutor.

4 We shall now move on to the crime of murder, willful killing and attack on
5 civilian population.

6 You have grouped together these three charges; that is to say, murder,
7 willful killing and attack upon a civilian population, and the fact that you have
8 adopted this approach of grouping these facts together show that the facts
9 underlying these three charges overlap. And the Chamber, in the approach it is
10 undertaking together with you, intends to adopt the same approach, on the same
11 attitude.

12 We concede with you that it is very important, it is a priority, indeed, to
13 hear witness testimony on these three charges, notably, a first group of witnesses
14 comprising eight witnesses: 132, 159, 161, 249, *287, 323 and 353, 0280. These
15 eight witnesses are capable of providing substantial information to these trial --
16 to these three charges.

17 We further concede that for the proper leading of discussions, it is
18 important for us to hear that group of witnesses that provide substantial
19 information on at least one of these three charges, and these are witnesses --
20 three witnesses: 28, 233 -- I'm sorry. There are four witnesses, notably, Witness
21 28, 233, 250 and 268.

22 However, we have asked ourselves whether it was truly necessary to hear on
23 the subject of those three charges, notably, the following eight witnesses:
24 Witness 2, 12, 30, 157, 160, 219, 267 and 279, who offer information of a far more
25 general or indirect nature.

1 Furthermore, we are of the opinion that the examination of Witness 233 with
2 respect to this question could then mean that the Chamber would not have to hear
3 Witness 166, this witness being the challenged witness. And we noted also that
4 Witness 233 could alone -- could alone present the quantitative data that he
5 gathered with Witness 166 as to the number of victims.

6 What do you think, Mr. Prosecutor?

7 MR. MACDONALD: (Interpretation) with your leave, Mr. President, one moment.

8 PRESIDING JUDGE COTTE: (Interpretation) Indeed.

9 (Prosecution counsel confer)

10 MR. MACDONALD: Thank you, Mr. President. We shall review, in the minutest
11 of detail, the witnesses which you, indeed, indicated to us, notably, Witness 166
12 and Witness 233, and the way they interact. And I do understand the Chamber's
13 concern in view of the situation of Witness 166 and, notably, the challenges
14 raised. And this brings me to raise another issue, Mr. President, and also an
15 issue that was discussed with one of our colleagues from the legal representatives
16 of victims.

17 At this juncture, Witness 166 is the only witness to have this dual status;
18 that is to say, the status of victim and witness. Now, the Prosecution and the
19 Defence, in view of the fact that the identity of the victims is non-disclosed,
20 cannot provide the Chamber with any indications as to whether there are any other
21 witnesses with this very same dual status.

22 Now, in order to answer the concerns raised by the Chamber, in view of the
23 decision that you will have to render in connection with modes of participation, of
24 course we do understand that the Chamber raised this issue, and to the extent that
25 other witnesses will be adducing evidence similar to that of Witness 166, we will,

1 of course, favour the leading or adducing such evidence via other witnesses.

2 We also take note of the first group of eight witness which you outlined,
3 notably, the sole question that the Prosecution would like to put to you on this
4 subject is the overlapping, or the possible overlapping or corroborating effect
5 that Witness 157 might have with Witness 180, notably, with reference to the attack
6 on the civilian population, including murder and willful killing, notably.

7 Now, of course, it is clear, Mr. President, once again - and I do not want to
8 repeat myself. We have taken good note of your suggestions, and it is clear that
9 we shall focus our examination in the light of the information that you have just
10 provided us with.

11 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Prosecutor. To
12 contribute yet further to the reflective process that you will undertake, the
13 Chamber would like to give you some items of information that you no doubt already
14 have in hand, but we believe this will save time. Unless I am mistaken, it seems
15 to us that Witness 233 has really covered the gathering of the witness names in
16 relation to the attack on Bogoro. Now, whereas *166 has gathered the names of the
17 Kasenyi attack victims. So, of course, this might concentrate our arguments in
18 favour of only calling to testify Witness 233.

19 Now, with regards to the charges of murder and willful killing, *166 subjects
20 areas are covered by Witness 233, and those subject areas covered by *166 also seem
21 to be covered by Witness 161. Now, as to criminal responsibility or liability, 166
22 seems to cover what 163 covers. And with reference to the charge of pillaging, it
23 would seem to us that there are a sufficient number of useful and substantial
24 witnesses, notably, 161 and 263, for us not to have to resort to Witness 166.

25 So, these are elements of information that we wanted to bring to your

1 attention. Of course, you know your case file only too well. However, this is the
2 reaction of the Chamber and we deem this action, or reaction, necessary.

3 Now, we shall move on to the charges of rape and sexual slavery. Once again
4 following your approach, that is to say, that we have grouped together these
5 charges of rape and sexual slavery for the needs of this discussion.

6 The Chamber concedes that it is essential to hear the testimony of three
7 witnesses, notably, 132, 249 and 353, who are alleged victims of these crimes. The
8 Chamber also concedes that Witness 219 might have witnessed precise facts to
9 possibly substantiate the crimes of sexual slavery and that Witness 280 is in
10 possession of information of an important nature on the crime of rape. It also
11 appeared to us that it would be necessary to hear the testimony of three witnesses,
12 notably, 161, 233 and 250, in order to assess the scope of these charges, even if
13 they, all three, offer information of a far more general nature.

14 Lastly, we also understand, Mr. Prosecutor, that you do wish to hear
15 Witness 28 on this issue. His statement only contains indirect elements in respect
16 of rape and sexual slavery. However, examination of this witness will, no doubt,
17 enable us to obtain new information and to make our discussions more useful.

18 Now, on a more general level, because we are -- we were expecting you to make
19 such an observation, the Chamber is very aware of the fact that it is very
20 difficult, indeed, to obtain testimony on the subjects such as rape and sexual
21 slavery. The Chamber knows only too well that witnesses are hesitant to testify
22 and often hesitate to say, to admit to the fact that they were a victim of rape or
23 sexual slavery. And the Chamber is mindful of the fact that these witnesses are
24 vulnerable, and this is why the Chamber understands only too well that you have
25 reservations and that you also reserve the right to -- to call to testify more

1 indirect witnesses. However, the Chamber does not believe that it is essential to
2 hear all the witnesses that you have planned for the existence -- to establish the
3 existence of these two crimes.

4 In this respect, witnesses 12, 160, 267 and 268 could also possibly cover the
5 facts of rape and social -- and sexual slavery during their examination with regard
6 to the responsibility of the accused because, of course, we will be hearing them on
7 this subject.

8 Furthermore, the Chamber notes that Witness 373, who comes in seventeenth
9 position on your list, has not filed any photographs with reference to these
10 charges; whereas, photographs of this ilk do add value to the testimony of his
11 enlistment as child soldier -- or the enlistment of child soldiers.

12 Now, are there any observations on your part, Mr. Prosecutor, in particular,
13 with regard to this?

14 MR. MACDONALD: (Interpretation) We are in agreement with the Chamber, and as
15 you noted only too well, Mr. President, some witnesses might be hesitant to the
16 extent that those witnesses that are hesitant might mean that the Prosecution might
17 adjust their approach and focus more lengthily on other witnesses. And as you
18 said, some witnesses might feel, in view of the solemn nature of a trial, once they
19 are here in a courtroom before you, they might realise the importance of providing
20 a full answer to the questions. And during their testimony it may be that some
21 witnesses are more open to providing information that they were hesitating -- they
22 were hesitant to provide earlier, but of course there are important testimonies for
23 this theme - for this subject area - and we shall make sure that we follow the
24 instructions imparted by the Chamber.

25 PRESIDING JUDGE COTTE: (Interpretation) We thank you, Mr. Prosecutor.

1 Now, let us move on to the other two charges which you have grouped together,
2 notably the destruction of enemy property and pillaging. The Chamber also supports
3 this approach in terms of subject area, but we suggest that you take it yet
4 further. It would seem to us that it is essential to hear the six following
5 witnesses, notably Witness 161, 233, 268, 287, 323 and 353, in respect of these two
6 charges, and like you we believe that it is important to also request the testimony
7 of Witness 28, 219, 249, 250, 279 and 280 and that they provide a more detailed
8 version of the general nature of their statements, or that they at least provide an
9 explanation of them.

10 However, we are curious as to the absolute need to hear the testimony in this
11 regard of the six following witnesses: Witness 2, 12, 30, 132, 157 and 159. Here,
12 once again, I shall turn to you. This suggestion that we have provided you with
13 rather rapidly, does this meet up with your personal observations?

14 MR. MACDONALD: (Interpretation) It is clear that for these two counts, we
15 don't think that it will be necessary to have all the witnesses testify with
16 regards to this issue and we are now going to concentrate on the essential points.

17 But I would also like to mention here -- well, just let me take an example of
18 Witness 12. This is one issue. For example, "Following the attack there was a
19 visit to Bogoro and what have you seen there?", for example, and that's the end of
20 it. So, in terms of the -- the questions that are to be put, we have to see the
21 extent to which Witness 12 is testifying a long time after the others. It's clear
22 that the question might not be necessary.

23 Then you have *Witness 317, who could come and describe what was seen. This
24 witness will be asked questions about this, because this was the very subject of
25 that person's work to go to Bogoro one month after the attack. So, this is another

1 witness who could provide testimony in this regard within the framework of the
2 discussions that there were with the commanders who were in the field at the time.

3 PRESIDING JUDGE COTTE: (Interpretation) We will now go over to the charges,
4 the use conscripting and enlisting of soldiers - child soldiers. With regards to
5 these charges, numerous witnesses have brought substantial evidence with regard to
6 this charge. The Chamber has seen at least 13, namely 28 - Witness 28 - 132, 157,
7 159, 219, 250, 267, 268, 279, 280, 287, 353 and 373.

8 It remains the case that some of their testimony is perhaps not absolutely
9 essential and they could maybe be more useful to examine them with regards to other
10 charges, with regards they also have substantive information. This is the case of
11 the two witnesses, 132 and 353, who in our view would -- or would be able to
12 concentrate as a priority on the crimes of rape and sexual slavery, and of Witness
13 219 who could deal with the issue of child soldiers particularly from the
14 perspective of liability.

15 With regards to this analysis, does that fall in line with your -- with your
16 points?

17 MR. MACDONALD: (Interpretation) Yes.

18 PRESIDING JUDGE COTTE: (Interpretation) The Chamber considers that it is
19 not necessary to examine the five witnesses, 2, 12, 161, 233 and 323, which in its
20 view only provide indirect or very general information with regards to this issue
21 of the enlisting of child soldiers. This is all the more the case given that you
22 have a number of witnesses who can deal with this issue. I think on this point you
23 also agree with us?

24 MR. MACDONALD: (Interpretation) Yes, President, we do agree with most of
25 your comments. It is clear that perhaps there are certain witnesses, for example,

1 number 2, where certain questions could be put to that with regards to the use of
2 child soldiers. And more specifically, linked to the FNI or the FRPI but as far as
3 the rest is concerned, yes, we do agree with you.

4 PRESIDING JUDGE COTTE: (Interpretation) So we still have to -- within the
5 framework of this discussion, we still have to go over the issues which could be --
6 which certain witnesses could deal with, so there are still the issues to deal with
7 the issue of criminal liability.

8 The Chamber has noted that 13 witnesses are able to provide substantial
9 information with regards to the responsibility of Germain Katanga and Mathieu
10 Ngudjolo. These 13 witnesses have the numbers 12, 28, 132, 157, 159, 160, 219,
11 238, 250, 267, 279, 280 and 287.

12 It's also quite possible to allow the two witnesses 161 and 323 to speak
13 about criminal liability. However, the Chamber would ask what the real added value
14 is of the testimony of 160 with regards to that of her husband, who I would remind
15 you is testifying under number 12 -- as number 12. I would also remind -- I also
16 reminded you that you had provided for 18 hours of examination for Witness 12
17 before re-examination by yourself and only four to six hours for 160.

18 The Chamber is aware that witness 160 can bring evidence with regards to
19 liability, but there we would also ask if the information that that person has, and
20 which could be transmitted to the Chamber would, perhaps, be redundant with regards
21 to the information that could be provided by her husband.

22 Do you also share this point of view?

23 MR. MACDONALD: (Interpretation) I am aware that the Statute doesn't require
24 corroboration with regards to guilt with -- for the evidence because to the extent
25 that the Chamber is convinced beyond reasonable doubt that these facts -- or that

1 this evidence supports the fact that these crimes have been committed, I think that
2 the Prosecution has to question, briefly question Witness 160 with regards to
3 conversations that that person is said to have had with Mr. Katanga with regards to
4 his responsibility, with regards to the Bogoro attack, from the fact that this
5 person's husband might have been present or not present at the time of the
6 conversation, and this is as a reaction, I think that the evidence that the Defence
7 would want to present during the cross-examination on this subject, and also in the
8 light of the evidence that the Defence could provide, if it decides to present a
9 defence or not with regards to this precise point, the Prosecution considers that
10 it is important that the Chamber has all of the evidence with regards to this
11 particular point.

12 But it's clear, as was mentioned, we have envisaged 18 hours, we can envisage
13 having less. Now, with regards to Witness 12 and Witness 160, we thought four to
14 six hours, but perhaps in two hours it would be possible to cover all of the points
15 which we want to cover with 160. And if I go back to the numbers that were
16 mentioned, there is another witness, which is 317, who has also been accepted to
17 the list.

18 PRESIDING JUDGE COTTE: (Interpretation) So to be able to finish this issue
19 of criminal responsibility or liability and such that you have heard this
20 correctly, understood it correctly, when it comes to hearing these four witnesses,
21 so 2, 166, 268 and 233, this is not absolutely essential.

22 So in your work of re-evaluation, we would ask you to examine the situation
23 of these four witnesses to - and the others - with regards to the absolute
24 necessity to having them testify with regards to the issue of responsibility.

25 We therefore have examined in a detailed way, as detailed as possible, I

1 would say, the different issues or subjects with regards to which your witnesses
2 will testify. We have carried out this examination in a way showing the concern
3 that we have to ensure that we really get to the heart of the matter, such that our
4 debates are useful, and such that they can be undertaken in a reasonable time frame
5 and that they can also contribute -- well, could also contribute to the necessary
6 reduction in the time needed for the hearing or other factors. And in particular,
7 and this is point 9 on our agenda, is the reduction of incriminating evidence.
8 Now, in your submission, the dense submission that you filed on 17 September, in
9 paragraph 29 you mentioned two types of measures with a view to reducing the number
10 of incriminating evidence items.

11 The first measure is the filing of Bar table motions. You mentioned that the
12 Chamber would like to know today if you still envisage such a procedure. And if
13 this is the case what deadline do you envisage and what proportion do you envisage?
14 Having -- the Chamber has noted that the Defence of Germain Katanga has mentioned
15 the very strict conditions in which, in its view, it could make use of this
16 practice.

17 Here we are not -- during this hearing, we are not talking about hearing the
18 parties on the admissibility of Bar table motions but, quite simply, we just want
19 to obtain information from you with regards to whether you intend to use such a
20 procedure, and if this is the case then what will they be about?

21 You are free to address the Court, Mr. Prosecutor.

22 MR. MACDONALD: (Interpretation) With the leave of the Chamber, if I could
23 have some few seconds just to speak to my colleagues.

24 PRESIDING JUDGE COTTE: (Interpretation) You have these seconds.

25 (Prosecution counsel confer)

1 MR. MACDONALD: (Interpretation) Your Honour, thank you for giving me this
2 time. I would like to -- well, this is something that goes back to the questions
3 that the Prosecution might have for the Chamber.

4 The way in which we have imagined the concept is that these documents would
5 be presented or this evidence would be presented from the Prosecution to the
6 Registry without it necessarily being introduced by the witnesses or commented on
7 by the witnesses. This is the way in which we had conceived this exercise of Bar
8 table motions.

9 And so the type of documents that we are speaking about are transcripts which
10 are -- that figure or precisely from the -- they come from the Prosecutor in Bunia
11 during that person's investigations. So reports that were made by -- there are
12 seven of them, I think, seven such reports -- or between seven and 11 of them, I
13 would say.

14 There are also the peace agreements as well, which were signed either by Mr.
15 Ngudjolo and Katanga or separately. There are also other documents of the United
16 Nations. There are letters, as well. There are lists. There are press articles,
17 as well. There are minutes of certain meetings, as well. There are political
18 documents or policy documents. There are NGO reports. I think I can -- there is
19 the "Ituri Covered in Blood" is the name of one of the reports -- I can only think
20 of the name in English as it is at the moment. There are also reports from the
21 United Nations. These are the type of documents, Mr. President, that we think
22 could be submitted to the Chamber without them having to be commented on by the
23 witnesses or presented via the witnesses.

24 Furthermore, there is the issue of whether the Chamber wants to receive them
25 now or during the trial. It might be preferable at this time that they be

1 presented during the trial at a particular time, and that then takes me to the
2 witness statements. 166 -- 167, rather, and the transcripts of 258. So we are
3 going to submit these comments, but this is something that has not been -- well, it
4 can be decided on when the trial is underway.

5 And with regards to the issue of admissibility and the probative value, if
6 it's admissible, this is something that will be decided on by the Chamber once it
7 has heard all the evidence. So, where it concerns these two witnesses, there is
8 perhaps no urgency in this regard for an immediate decision. But -- so here we are
9 talking about the type of documents that we intend to present via the -- or from
10 the Bench of the Prosecution.

11 PRESIDING JUDGE COTTE: (Interpretation) You have understood that the
12 Chamber would like to be able to put itself in the future perspective with a way to
13 best understand how long our debates are likely to last for. And this is why, in
14 the work that we will provide you with in a few days, we will ask you to show what
15 you think you can take -- or you understand as Bar table motions, without
16 necessarily going into the details, but what we want to know is if this is a
17 procedure which you intend to use, and even if approximately, to what extent do you
18 intend to use this process. You will -- you will have to carry out this work
19 because it is -- it is done with the view of reducing the amount of time needed for
20 the examination, and so it's a time-saving mechanism. We don't need all the
21 details, but I would like to have an overview in this regard.

22 And in the same way, in this attempt to save time and to reduce the time
23 taken for the examination, the issue of incriminating evidence in this 17 September
24 submission which for the Chamber has become a Bible, as you will see, in paragraph
25 30 you mentioned that you would study, or look at, withdrawing certain documents

1 from the list of Prosecution evidence. And the Chamber has taken note of the
2 withdrawal of seven evidentiary items from the file.

3 You have indicated in your report 1548 of 21 October 2009, which responded to
4 the submissions of Mr. Kilenda with regards to the theory of similar facts, if I
5 may call it that. So -- and in a report on 30 October, report 1579, you mentioned
6 withdrawing 28 other evidentiary items from this file. So, the Chamber would also
7 like to ask the question as to whether you envisage new withdrawals and, if this is
8 the case, what proportion and with what time frame, if you are able to answer us in
9 that regard.

10 Thereto, this is a reflection that you will have to carry out within the
11 framework of your work, with a view of reducing the length of the examination.

12 MR. MACDONALD: (Interpretation) I need a few moments, if you don't mind.

13 PRESIDING JUDGE COTTE: (Interpretation) Certainly.

14 (Prosecution counsel confer)

15 MR. MACDONALD: (Interpretation) With the Chamber's leave, thank you for
16 those few moments.

17 First of all, this is an ongoing effort, considering that the Prosecution
18 still has to review its table of incriminating elements, and this is what we are
19 doing and this is what we are finishing off. Thus, it is possible that other
20 documents may be added. I should mention that there are two transcripts of
21 Witness 311, and I can give the numbers immediately. They will be withdrawn from
22 the final version of the table DRC -- 1018-0103. And the other one,
23 DRC-OTP-1018-0159.

24 However, I would like to add one particular point. Of all the Prosecution's
25 material, 223 items have to -- are either transcripts or investigators' reports,

1 and we have 51 documents that relate to statements made by Prosecution witnesses.
2 So, of all the evidence, we have these items that have been placed in the file.
3 Why? Because when the witness will be in the stand, giving testimony, this
4 information will be provided to refresh their memory or will be used during
5 cross-examination, or will be shown to witnesses during cross-examination. So that
6 is why we have 223 documents.

7 The other documents, of course -- well, once again, there are appendices to
8 various witness statements: There are videos, a large number of photographs, 133
9 photographs. Thus, it's quite clear that the Prosecution will be showing these
10 photographs in a -- all at once or when various witnesses are appearing.

11 I can mention one particular witness - there is no security difficulty - and
12 I did that for Mr. Lesic yesterday. So I understand that you may find that there
13 is quite a few items on this list, but I would reassure the Chamber that the
14 Prosecution will not be adducing all of these documents. Well, just the 223
15 statements, transcripts and investigation reports.

16 As the trial proceeds, clearly, some documents may not be formally tabled
17 with the Court as evidence, but the Prosecution cannot provide an official reply in
18 its upcoming submission and say which documents will or will not be presented, not
19 with absolute certainty. At this stage, we can only provide some specific details,
20 perhaps documents that may be the subject of Bar table motions. But we have taken
21 note of your remarks, and we share the same concern, your Honour. We want to focus
22 on the essentials and the Prosecution evidence that is necessary for the
23 determination, the establishment, of the truth.

24 PRESIDING JUDGE COTTE: (Interpretation) Thank you, sir. I will take this
25 opportunity to go back to one point that we touched upon yesterday, and this is I

1 think something that will be useful, namely, the use of written statements. We
2 touched on that matter yesterday afternoon, I think you will remember, and I think
3 -- now, yes, I think I did ask you yesterday about written statements, whether you
4 were intending to rely on them and what proportion would be written statements, Bar
5 table motions, written statements.

6 So, there are many possibilities of reaching this objective of reducing the
7 number of hours needed. I would like to set the record straight on one particular
8 thing. While you were consulting your colleagues, I may have made a mistake a few
9 moments ago, and I will just correct the error immediately.

10 I spoke of Witness 166 and I hinted that he was dealing with the counting of
11 the witnesses -- or victims, rather, in one area, but there was a mistake. He did
12 count the Bogoro victims who had taken refuge in Kasenyi. It is a nuance, but
13 nuances can be very important, and I didn't want the transcript to include
14 incorrect information from me.

15 I would also like to mention that the Chamber is well aware of the
16 application that you have provided on 13 October last which deals with disclosure
17 by the Defence of a number of pieces of evidence or exhibits, basing itself on
18 Rules 78 and 79. And I believe we have received the observations from the Defence
19 teams, and we will strive to respond quickly.

20 Before we suspend, we will look at point 12 on our agenda. This is a point
21 that was added at the request of the OTP and it deals with the scheduling of
22 witnesses. The Prosecutor wanted to add this point to the agenda, and the Chamber
23 would remind all that Regulation 54 of the Court allows the Chamber to rule -- or,
24 to set an order regarding the length and content of opening statements or final
25 statements, and we will be ruling on this. And before 11:00 I will be asking the

1 various parties to tell us how much time they think they will need to make opening
2 statements. I believe this is something that you already have in mind and you have
3 already thought about that.

4 Now, sir, what amount of time do you think you will be needing for your
5 opening remarks just as -- as the trial gets underway?

6 MR. MACDONALD: (Interpretation) Experience shows, your Honour, that opening
7 remarks or opening statements that go past 45 minutes, generally speaking -- well,
8 generally, 45 minutes tends to be the maximum and, if you go beyond that, you tend
9 to wander off topic. We are saying, at the most, one hour for opening remarks.

10 PRESIDING JUDGE COTTE: (Microphone not activated)

11 THE INTERPRETER: Microphone, please.

12 MR. MACDONALD: (No interpretation)

13 JUDGE DIARRA: (No interpretation)

14 MR. MACDONALD: (No interpretation)

15 PRESIDING JUDGE COTTE: (No interpretation)

16 MR. GILISSEN: (Interpretation) Yes, your Honour, we think that a maximum, a
17 real super maximum, so to speak, of 20 minutes per each one of us. We will strive
18 to not go beyond 15 minutes each.

19 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much, sir.

20 Mr. Hooper, what about you?

21 MR. HOOPER: My immediate reaction is to say that it's unlikely I will make
22 one but, if I do, it would be no more than 30 minutes.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much, Mr. Hooper.

24 Mr. Kilenda?

25 MR. KILENDA: (Interpretation) At the most, one hour. After that, you

1 really should stop me.

2 PRESIDING JUDGE COTTE: (Interpretation) We will not forget that,
3 Mr. Kilenda.

4 Please allow me one moment to confer.

5 (Trial Chamber confers)

6 PRESIDING JUDGE COTTE: (Interpretation) We still have a few points on our
7 agenda, and one matter that I would like to take up in your presence with Mr.
8 Gilissen, and it has to do with an email.

9 I believe that the Prosecutor would like to raise one point in closed session
10 at the very end of the hearing, so we are going to suspend now. And the Chamber
11 will render a ruling on opening remarks once we return from the suspension. It is
12 10:55, and we will resume at 11:25, in principle, for a rather short period of
13 time. I think we should be able to conclude by noon.

14 We now suspend, and we will resume at 11:25.

15 (Recess taken at 10:55 a.m.)

16 (Upon resuming at 11:28 a.m.)

17 THE COURT USHER: All rise.

18 PRESIDING JUDGE COTTE: (Interpretation) Court is now in session. Would the
19 security officers please show into the courtroom Mr. Germain Katanga and
20 Mr. Mathieu Ngudjolo?

21 (Germain Katanga and Mathieu Ngudjolo Chui enter the courtroom)

22 PRESIDING JUDGE COTTE: (Interpretation) Thank you. We shall now wrap up
23 the last point on the agenda today, and we shall also have a discussion about an
24 email sent by Maître Keta. And then we shall request that counsel for Defence
25 address the Court, because they have not really had the opportunity of addressing

1 the court this morning, if they have any points or issue they would like to raise.
2 And at the behest of the Prosecutor, we will go into private session in order to
3 examine an issue that he would like to table and inform the Chamber of.

4 Now, after having heard your comments as to the possible duration of your
5 opening statements, this Chamber would like to render the following decision: The
6 Chamber has taken note of your wishes, noting Article 64 of the Statute and
7 Regulation 54 of the regulations of the Court, noting the arguments of the parties
8 and the participants on the subject, the Chamber decides to grant one hour to
9 Mr. Prosecutor to present his opening statement; 40 minutes to the representatives
10 - the legal representatives - for victims who shall then divide this equally
11 between themselves; 30 minutes to Mr. Hooper; 45 minutes to Maître Kilenda.

12 The Chamber decides that the opening statements shall commence on 24 November
13 2009, once - and pursuant to Article 64(8) of the Statute - the charges previously
14 confirmed by the Pre-Trial Chamber have been read out to the accused and once they
15 have granted them the right to plead guilty or not guilty.

16 The Chamber decides that the hearing marking the commencement of the trial
17 will commence at 9:30 a.m.; and that as a result, all opening statements will be
18 made on 24 November 2009. The Chamber orders the Prosecutor and the VWU to take
19 the necessary measures for the first witness to testify on 25 November 2009. And
20 the Chamber says that it shall adjourn its work between 12 December 2009 and 11
21 January 2010 inclusive, in addition to the following date from 2 April 2010 and 18
22 April 2010 inclusive.

23 At the behest of the Prosecutor, also to the agenda has been added the order
24 of appearance of the witnesses and the order of interviewing of these witnesses by
25 the parties. The Chamber has taken note of your request, and it also read the

1 position and the protocol adopted by Trial Chamber I; that is to say, that we have
2 to define specific regulations. These regulations have not yet been defined, and
3 we would like on this subject to ask you for your various observations on the
4 matter.

5 The Chamber, therefore, requests Mr. Prosecutor, legal representatives for
6 victims, Defence counsel, that you submit to us by 6 November 2009 at 16:00 hours
7 the proposals or observations that you might wish to make with reference to the
8 order of appearance of the witnesses pursuant to Rule 140, of course.

9 It goes without saying that the reading of the oral decision which has just
10 been made is made upon the reservation of the answer that the Chamber will give
11 with reference to the request for a postponement of the hearing made by Maître
12 Kilenda and which has also been followed by a written submission filed this morning
13 that the Chamber has not yet had the time to read.

14 The Chamber would also like to thank Maître Kilenda and Mr. Hooper, who
15 either directly, or by the intermediary of the people working in their team,
16 yesterday evening, after we adjourned, they sent to us a copy of the various mails
17 sent with reference to alibis and exonerating and responsibility -- exonerating
18 responsibility. Thank you for that, too.

19 Now, Maître Gilissen, we shall turn towards you for one moment, and we would
20 like to know whether you are in a position to answer us or not. However, on 1
21 November - that is to say, Sunday - we received an email from Maître Joseph Keta
22 saying that he wished to take part in a hearing, a status conference, were one to
23 be organised before the commencement of trial, with a view to presenting his
24 viewpoint on the common legal representation of victims and also provide his
25 interpretation of Rule 90 of the Rules of Procedure and Evidence, which is relative

1 to the legal representation of victims.

2 He also indicated that he would like to make an opening statement in
3 conjunction with yourself, Mr. Gilissen, at the commencement of the trial, and it
4 is this - in conjunction with yourself, Mr. Gilissen - that we thought that you
5 might yourself be in the know as to this email.

6 Now, the Chamber merely wanted to indicate to you that, in our opinion, the
7 decision rendered by the Registry on 22 November 2009, were it not to be
8 satisfactory for Mr. Keta - that is to say, the decision as to the common
9 representation of victims - then Maître Keta could appeal this, which is provided
10 for in Regulation 69(3) -- 79(3), and I shall read that to you: "Victims can
11 request of the relevant Chamber that they examine the choice made by the Registry
12 for a common legal representative pursuant to Provision 3 of Rule 90 three days
13 after the decision of the Registry has been notified."

14 Now, the Chamber can only recall that by virtue of such a decision - and I am
15 talking here from memory - dated back to 22 or 23, or maybe even 24 July 2009, it
16 formulated its recommendations with respect to the common representation of
17 victims. And in a Registry report in the month of August 2009, it said that the
18 Registry had discussed this with the legal representatives of victims who were at
19 that time present in order to come to an agreement, whether in Brussels or
20 Kinshasa, the best possible modes of legal representation of a common nature.

21 And that after these discussions or negotiations on 22 September, a
22 definitive decision was rendered by the Registry, which Maître Gilissen and
23 Mr. Keta -- which meant that they could then both provide a common representation
24 for those victims. So, were Maître Keta to not be in agreement with this decision,
25 it would be up to him therefore to lodge an appeal pursuant to Regulation 79, if I

1 am not mistaken, the regulation I have just read out.

2 Now, Maître Gilissen, we would now like to ask you whether you have any
3 further light to shed on the matter, but it may be that you were not informed of
4 Mr. Keta's undertaking.

5 MR. GILISSEN: (Interpretation) Much obliged, Mr. President. Mr. President,
6 your Honours, it is true that it would be want of me not to express my surprise,
7 both with regard to the existence and the contents of this mail. However, I do not
8 want to betray the spirit that Mr. Keta has always shown. He is a counsel from
9 Ituri who has really conducted a great deal of research into the victims and has
10 also brought in a great deal of information and assistance to those victims. We
11 worked together for a year-and-a-half in an association which, to my mind, was
12 extremely healthy, and it is true that the current situation with reference to our
13 collaboration, this collaboration is continuing by virtue of the decision as well.

14 Now, the report submitted by the Registry took stock of the mode of
15 functioning, if you like, but this was the term that was used in the Registry
16 report. It was talking about a bipartite functioning, if you like, between myself
17 and Mr. Keta, but I believe that it is rather difficult for us to broach a subject
18 that has been covered in a legal decision, and I would not like to do that.
19 However, the idea is clear and it would seem to me and still today, by virtue of
20 its logic, that the collaboration or co-working together with a lawyer who is out
21 in the field and who knows the field only too well and knows the people and the
22 area and who works within an association -- in association with somebody who like
23 myself, in inverted commas, is a rookie in terms of experience in the field, and
24 there we have it. So we then put this suggestion to the Registry and we are
25 convinced that the Registry did hear our suggestion, because of course in the

1 report produced by the Registry there was the distinct possibility for Mr. Keta to
2 intervene from time to time. And, of course, within this context Mr. Keta then
3 addressed his email to the Court.

4 I must say that the idea was pro bono in nature, that he appear official in
5 the nature of the work, whereas his work currently is unofficial in nature. You
6 talked about a decision which was made on the subject of legal representatives who
7 are no longer legal representatives as such, and they were the subject matter of
8 this decision, as you have just said, Mr. President, so I do understand the wish
9 and also the concern raised by Counsel Keta with reference to his participation in
10 what might be called a status conference, but also in terms of the trust that he --
11 the relationship of trust that he might have with those people out in the field.

12 And if you will forgive the expression, you know, he's saying to us that he
13 is still out there and he is not letting us down. I am not going to be any
14 lengthier on this, but I think you will understand when I say this: That it is not
15 quite the same thing to be represented by Maître Gilissen alone and Maître Gilissen
16 with Mr. Keta and the association but, of course, this email was written when he
17 came back from Ituri, and he recently travelled to Ituri, and he is under the
18 impression - and we can see this from the email - that a way for him to
19 participate, whether it be every now and then and to put him or to put us in
20 relation with a real situation out in the field, could be of interest.

21 Of course, this is the subject of -- it is passive in nature but it is also
22 the subject of this trial, of the coming trial, that these may not be active
23 subject matter for the accused. But were I to go any further, Mr. President, I
24 believe I would then enter a field of explanation that is not necessary. It might
25 be a little bit excessive, and I am not using this word willy-nilly. This pain

1 expressed, which is not only intellectual on the part of Mr. Keta that he cannot
 2 take part fully but that he wishes to take part every now and then in particular
 3 subject areas and precise areas that are specific to the local areas with regard to
 4 the people we have the honour to represent, and you will understand that Maître
 5 Keta did not want to challenge this decision in any respect because you will recall
 6 that, contrary to Maître Nsita, who was appointed between myself and Mr. Keta,
 7 there is an agreement and there is an agreement of this ilk.

8 Now, were I to continue, Mr. President, of course I would become somewhat
 9 lengthy, and I don't want to do that. Thank you.

10 PRESIDING JUDGE COTTE: (Interpretation) The Chamber would like to thank
 11 you, Maître Gilissen, and the Chamber recalls that this, whether it be an ex parte
 12 or public hearing, we are perfectly mindful of the use or application of the
 13 talents of Mr. Keta in this trial, and the Chamber has not forgotten that he was
 14 entirely up to speed with the legal questions that were put to him.

15 You will understand, at the same time, that Maître Keta is putting us in a
 16 somewhat delicate situation. He has written to us by email and he has voiced his
 17 concerns that he might then come again to a status conference and take part on the
 18 first day of commencement of trial in the opening statement session, and this email
 19 is nevertheless contrary to the decision of 1488 of 22 September 2009, a decision
 20 of the Registry.

21 I believe that it would be a good idea for you to be the intermediary of the
 22 Chamber and for you to indicate to Maître Keta that, possibly, one could redefine
 23 or re-establish the collaboration that he might furnish you. He needs to go over
 24 this with the Registry, and were there any specific difficulties, the Registry
 25 would then refer these difficulties to us but, in its current state, the Chamber

1 has a decision before it dated 22 September 2009 which could be a source for
2 lodging appeal pursuant to the Regulations of the Court, and this decision of 22
3 September 2009 is the decision we need to refer to. So we would request that you
4 be our go-between with Mr. Keta and tell him that we have taken this into
5 consideration, that we can only refer to the decision of 22 September and who
6 defines you as legal representative and Maître Luvengika, and were there to be any
7 possibility of sharing out work between yourselves and Maître Keta, it would be in
8 conjunction with and by asking the services of the Registry, and I believe that it
9 is the services of the Registry that need to overview this situation and the
10 Chamber would only intervene. And we thank you, Mr. Gilissen, for being our
11 go-between.

12 MR. GILISSEN: (Interpretation) Mr. President, with your leave, and really
13 with your leave, I was -- I wanted to broach an issue. I realised this morning
14 that the VWU no longer received all the transcripts, and I mean by that that they
15 no longer received the transcripts directly, the real-time, but they only received
16 the public transcripts, that is to say the transcripts that have been worked upon.
17 Of course, I would not hide from you that this might pose a problem for us; that is
18 to say, indeed, what happened yesterday for one of the legal representatives, I was
19 not surprised to hear that Madam Paolina Massidda, for her to be named, was not
20 informed of what had happened yesterday in the hearing.

21 We are very pleased with the action that had been taken and the quality - the
22 very high quality - of the assistance that we have been provided in our work, and
23 it is true that I took care yesterday to see that if a decision was issued, well, I
24 didn't manage to find it but I have perhaps missed the document. I didn't manage
25 to find it and if there was no decision, Mr. President, then would it be possible

1 to envisage re-establishing this contact to the extent that it is of a very real
2 need and will allow a useful functioning of the legal representation of victims?

3 PRESIDING JUDGE COTTE: (Interpretation) With regards to this point, I don't
4 know if the court officer has something to say to us in this regard. It would seem
5 that it was very simple, that the court officer could just say this simply. She
6 can do that, so it would be much more simple. I will give the floor over to you.

7 THE COURT OFFICER: (Interpretation) Mr. Gilissen, all you have to do is
8 send me an email saying that Paolina Massidda is assisting you with this and you
9 will have access to the transcript real-time and these extracts will be given with
10 the agreement of the Chamber.

11 MR. GILISSEN: (Interpretation) Thank you very much.

12 PRESIDING JUDGE COTTE: (Interpretation) Before giving the floor to
13 Counsel Hooper, who has asked to be able to address the Court, I would just like to
14 ask the participants here, as we are -- have officially been written to -- had a
15 matter referred to us to have a delay of the substantive trial made by Counsel
16 Kilenda, I would like every participant to provide us with their comments on this.
17 The written application has the number 1000 - of 2 November - has the number 1587.
18 If you could provide us with your observations and comments - we are currently
19 Tuesday, 3 November - Friday the 6th, at 1600 hours, we would like to have your
20 written comments unless -- because we do have time at the hearing, unless you would
21 prefer to make oral submissions with regards to this issue, in which case we will
22 be happy to listen to your submissions.

23 Before giving you leave to address the Court, I would perhaps ask
24 Counsel Hooper to do so as the Defence hasn't had much opportunity to be able to
25 address the Court and it now has the opportunity to address the Court. Counsel

1 Hooper.

2 MR. HOOPER: Thank you, Mr. President. Do you want me just to deal with this
3 question of the application for the adjournment? I have some other matters to
4 raise as well. Shall I deal with everything? It might be --

5 PRESIDING JUDGE COTTE: (Interpretation) I would propose that first of all
6 you look at Mr. Kilenda's application and then, with regards to this application,
7 we will hear the points of view of the Prosecutor and legal representatives, and
8 then I will give you leave again to address the Court to take up the other issues
9 that you want to raise. So, first of all, with regards to the application for a
10 delay from Counsel Kilenda, if you can make oral submissions, do so. If you would
11 prefer to do it in writing, you can do that as well. Which is the best formula, as
12 far as you are concerned?

13 MR. HOOPER: I am quite happy to make an oral submission, because the
14 decision which is essentially being sought here is one that we all need to know
15 about as soon as possible, and so an oral submission will perhaps expedite that.

16 The application by Mr. Kilenda yesterday was for an adjournment for three
17 months, which take us to mid-February if it were granted. Of course, I have heard
18 the general directions of the Court this morning in respect of our starting at 9:30
19 on 23 November, and as I heard that I wondered -- 24th, I am sorry, of November --
20 and as I heard that, I wondered to what extent my views or observations would be of
21 use to the Chamber, but I am glad that we have this opportunity to express a view.

22 I think the first point I would seek to make is that we recognise that, of
23 course, Germain Katanga has been in custody now, in prisons, for five years, or
24 coming up for five years. It will be five years at the beginning of next year, and
25 he has been here for two years. That is a long period. And, of course, the

1 observations I make this morning are made, as you would expect, having discussed
2 this matter with him.

3 It is our belief that when you have a co-accused in a trial as serious as
4 this, it is imperative that that co-accused receives effective representation.
5 That is in everybody's interest. I can only put myself, as it were, in the shoes
6 of Mr. Kilenda and imagine to myself what it would be like if I lost, for whatever
7 reason, the services of a legal assistant, let alone two legal assistants in a
8 case, particularly one who had been until recently the case manager in the case,
9 which was the position with one of those ladies. I don't mention their names.

10 I would be very concerned at the position that that could have on the team,
11 and the point I'd wish to make, because I am aware that certainly two of this
12 tribunal have great experience, having come from the International Criminal
13 Tribunal for Yugoslavia, that those who have had experience - and there is a number
14 of us here who have as well - of other tribunals may see the position of legal
15 assistants and case managers really in the light of those previous tribunals. And
16 all I would wish to add, really, to that is that that would be a misconception.

17 I can well imagine, and I have suffered the loss of assistants such as that
18 in cases at the international tribunals, and it has been an inconvenience, but the
19 situation here is that this is quite a different kind of establishment. We are, as
20 I know you have probably yourselves realised now, to a great extent, a very
21 paper-heavy court, a very electronic court, and it brings with it, may I say,
22 certain structural and systemic difficulties in terms of preparing a case where
23 one's reliance on legal assistants and case managers becomes an imperative. So I
24 emphasise that point.

25 Now, today we are -- and I was very glad to hear you, Mr. President, make the

1 observation about needing weekends. We are 13 working days from the start of this
2 trial and there are many things outstanding. We, as you know, have, for example,
3 an application relating essentially to an abuse of process, a pending decision.
4 Whatever that decision is, it is going to require us to consider reaction and a
5 possible appeal.

6 There are other issues that are central, not only just in terms of the way in
7 which a case is to be conducted, but in terms of the Defence preparation in the
8 light of decisions as to how that case is to be approached and conducted.

9 Victim participation. That is a matter which, as you know, there are motions
10 pending before this Chamber and awaiting decisions, and I can add to that briefly
11 this morning in a matter that I will raise subsequently as a specific topic.

12 Witness familiarisation and that position, basic issues of admissibility.
13 Our motion of, I think 23 October, raised a number of issues such as the issue of
14 statements from persons now dead, as well as a number of general issues such as the
15 application of statements from documents and the like, and witnesses who are not
16 witnesses in court or persons who do not give witness evidence in court, as to the
17 weight to be given to their statements concerning acts and conduct of an accused.
18 These are very basic evidential structures that we need to know and, until we know
19 them, it is very difficult to actually plot a route through the evidence.

20 There are issues such as -- I think still the issue on Bar table motions and
21 the like. So these are all the basic building blocks of evidence, and our reaction
22 to them is absolutely essential.

23 We are still facing disclosure problems. I say "problems," late disclosure.
24 We are still to get, for example, the transcripts in the Lubanga case that are
25 relevant to our case. They have been authorised to be released, but we haven't

1 received them yet. And it is not just a question of reading them. Those then have
2 to be structured and compared to the evidence.

3 There is the addition of witnesses. Witness 219, a very substantial witness,
4 with 1,300 pages of statements. The tribunal helpfully had the foresight to order
5 the release of those transcripts to us pending its decision, but I am sure as
6 practitioners yourselves, you know that there is the world of difference between
7 the latent witness and the witness in fact; and that witness became not a latent
8 witness but a witness in fact, in the latter part, I think, of last week.

9 That is a very substantial witness, indeed. And moving that witness to the
10 end of the list, to the end of the Prosecution queue, doesn't address substantial
11 issues that any witness gives arise to, not least of all, that that witness has to
12 be seen in the context of other witnesses and that things that that witness says
13 has to be examined against things other witnesses say and that, between that
14 witness and other witnesses, there is, of course, a capacity for controverting one
15 or the other. That is quite an extensive process and it means, when a witness is
16 added, that one has to really, many times, go back to the beginning and trawl
17 through the evidence again, looking for points that otherwise would be missed.

18 We have Witness 317, still I think now added as a witness as of yesterday.
19 That is the UN witness. And the significance of a witness like that is that the
20 witness will bring in its train a whole load of, as it were, United Nations
21 material that needs to be reassessed and now looked at afresh, because these are
22 not now just documents but they are also, of course, potential evidence for that
23 witness and potential evidence for us to controvert the witness or to question the
24 witness in respect of particular issues.

25 We have unredacted documents still to deal with, and some of these statements

1 you might have seen are redacted -- many of them are redacted, I should say, from
2 time to time. All those redactions - and it might just be a line here or a line
3 there - have to now be gone through and assessed. And that process can be done, of
4 course, to some extent by some members of a team, but eventually it has to be in
5 the mind of the person who is going to question the witness. All these matters at
6 some time have to be brought to the mind of the person who is going to question the
7 witness.

8 Witness 267 was only recently revealed because he had been an anonymous
9 witness, and we need to investigate that witness. There will be appeals on certain
10 issues, including, for example, the admission of those witnesses and other issues
11 as well, such as permanent redactions. All this takes time.

12 I noticed that in a recent decision of the Chamber, the observation was made
13 that the Katanga team had completed its missions. If only that were so. We are
14 far from completing our missions. We have had a number of obstacles in relation to
15 doing missions, and the need for particular reorientation of missions has of course
16 been incurred by the admission of particular witnesses.

17 One of the particular problems I was going to touch on in general -- or,
18 rather, specifically, in my requests or submissions to the Chamber this morning
19 concern the issue of missions. Essentially, the position is this: The area where
20 we need to investigate is an area that has received, over the last six months, a
21 degree of military activity. I use the word neutrally.

22 We hoped to have a mission last week. We decided not to have it because the
23 amount of work that kept us here, but also because when I sought a security report
24 from the relevant office here, the report I got back was to the effect that, as I
25 recall, among other villages that we had specified, there had been attacks in the

1 area of the villages of Kagaba, Ngeti and Boga.

2 There had been shooting incidents in the past week, but we were told we could
3 go. Well, maybe I could go, but I would be very reluctant to send some members of
4 my team there. So we have a need to conduct a mission, and one of the difficulties
5 is, as you can see, that a mission that takes two weeks is very difficult to fit in
6 over Christmas period when there are other family demands.

7 Now, today and yesterday one can see that the Prosecution position is still
8 unsettled. The very large document that the Prosecution are addressing again, the
9 1,300 page document, we are now going to get 1,660 pages. Perhaps I didn't read to
10 the end, but 1,660 pages. We are going to get that three days now before the
11 commencement date of the 23.

12 There is a possibility that the Prosecution may withdraw witnesses. Now, a
13 withdrawal of a witness has certain effects because it also may be, of course, a
14 welcome phenomena, as far as the Defence are concerned, but the withdrawal of a
15 witness means that one's approach to the case also necessarily may have to change.
16 It requires a readjustment.

17 We won't know, at least for a short time now, whether there is going to be a
18 restructuring of the ordering of the witnesses. That obviously has a modest
19 effect, though perhaps a significant one, though I don't foresee a radical change,
20 judging by Mr. Macdonald's words in the course of the arguments. There may be the
21 withdrawal of documents, but I also noticed Mr. Macdonald referred to the fact that
22 he was still reviewing the list of incriminating evidence, and documents may be
23 added.

24 Now, given that there is 13 working days to the trial, that is a very
25 significant list of uncertainties that confronts the Defence. Back in January,

1 Mr. President, when you and your fellow Judges set 30 January as really the cut-off
2 date for the presentation of evidence by the Prosecution, I know it was not in your
3 mind then that 13 days - or however many weeks it is now, three weeks before the
4 beginning of trial - the Defence would have imposed upon itself -- have imposed on
5 it, rather, the current regime that I have just briefly outlined. That was far
6 from your intention but, sadly, here we are within hand's reach of the beginning of
7 this trial with this abundance of problems confronting the Defence.

8 The Prosecution, we remind ourselves, has been ensconced here for five years
9 preparing this case. Now, Mr. Kilenda made his application and requested an
10 adjournment of three months. I may be wrong in saying that I thought I detected a
11 possibility in the mind of the Tribunal yesterday that perhaps that was a little
12 long, but an alternative date might be possible, such as the beginning of the year;
13 in other words, starting the trial at the beginning of January. And my position is
14 this, that for all the reasons which I have indicated, if that were to be the case,
15 then I, for one, on behalf of Mr. Katanga and having discussed this with him, would
16 not oppose such a suggestion. Indeed, we have every reason to take advantage of
17 that. And if we were given the advantage of it, then we would welcome the
18 opportunities that such an adjournment would provide us.

19 And not least of those would be, of course, general preparation in the light
20 of these significant and awaited events, but also in respect of a further mission.
21 Because you can see at this stage it would be difficult to organise a mission; I
22 couldn't go away now and address the matters I need to address in terms of witness
23 preparation. Because there is so much going on, it has been very difficult to come
24 to grips with witness preparation. So, my time between now and the commencement of
25 trial is necessarily dedicated to that at this stage.

1 Christmas poses a particular problem because between 12 or 11 December and
 2 Christmas is not really, really sufficient to get from here to DRC and do what we
 3 want to do and be back so that Mrs. Hooper is content, as well, over the Christmas
 4 period. And then after Christmas, whatever happens, we are going to have the
 5 prospect of starting in mid-January for the long haul. That would be the long
 6 haul. And, again, that would be not necessarily a good period to -- a very
 7 difficult period, an impractical period to go on mission to DRC.

8 So, if this case were in fact adjourned until January, we could go to DRC
 9 this month, not for two, but probably three weeks, into December, and still be able
 10 to meet these other commitments. So, when Mr. Kilenda raised this difficulty
 11 yesterday, we could see that there were distinct advantages as far as we are
 12 concerned. Of course, we all know that there are good, good reasons for the Court
 13 to want to start on 23 November, to keep to that date. But all I can say is I have
 14 always been a great admirer of the French railway system and of that technological
 15 phenomena, the TGV. But there may be some disadvantages in the *procès de grande*
 16 *vitesse*; maybe that, in fact, time won now might be to the advantage of all of us,
 17 which makes this suggestion of a January date perhaps definitely attractive to us.

18 I would also indicate that we are very aware, having heard the discussions
 19 between the Tribunal and the Prosecution of the Tribunal's concern as to quite how
 20 long the Prosecution case will take, given its estimate of hours and the like. The
 21 Prosecutor told us yesterday, I think -- I may have got this wrong, but my
 22 recollection was that he told us he thought his estimate was - even on his hours -
 23 that the case would take -- was it 14 weeks or 16 weeks? I thought he gave us a
 24 period in weeks. In other words, that that trial - his case - could be present
 25 within six months. That wouldn't be an unreasonable period, if that were to take

-- if that was to happen, bearing in mind the Lubanga case with one Defendant and essentially one charge has taken six months.

It may be this trial would overreach that a little bit, but for our part, myself and certainly Mr. O'Shea having some experience, as you know, of these -- of practice in these tribunals -- and may I say, I am acutely aware how difficult it is to predict how long a particular witness may take, but that we are for our part confident that so long as the Prosecution is - as it has plainly demonstrated it is - aware today, as long as it is very focused on its witnesses and what it wants to get from them, that we don't see this case and the Prosecution case, including cross-examination of witnesses, taking -- I'll use a very general word, an "unreasonable" time. We don't see that.

Quite a number of these witnesses, for example - the Defence, for our part - may have very little challenge, and there may be within that some opportunity of discussion with the Prosecution as to how that evidence can be perhaps best and most speedily presented. Other witnesses are going to take us a considerable period of time.

I think if we aimed at an average of about two witnesses a week, I feel that that wouldn't be an unreasonable timing, but those are all generalities. And I appreciate being so general, they may not best assist you, the tribunal. So those are my general observations and submissions in a way in respect of Mr. Kilenda's application. I emphasise that, for our part, knowing the way in which these teams are structured and the nature of this Court, my heart goes out to him.

PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Hooper. From the Bench the Chamber will not respond point by point to all the arguments that you have presented us with regarding a possible postponement of the commencement of the

1 trial, but once each party, each participant, has made his or her views known,
2 there may be a few questions from us or we may ask for additional information.

3 Mr. Prosecutor, it is 12:20 and we have until 1 o'clock, so you will have to
4 divide your speaking time fairly regarding the possible date of commencement.
5 Mr. Macdonald.

6 MR. MACDONALD: (Interpretation) Thank you, your Honour. We will be brief
7 and we will offer some possible analysis to the Chamber, because of course the
8 Chamber has the discretion to grant the postponement, or not.

9 The Prosecution would like to raise the following points. Now, the first
10 point is that it is true that the case manager of the team left the team a month
11 ago, and I presume the context may have been such that the team was warned in
12 advance of her departure. I understand that Mr. Kilenda is trying to replace Miss
13 Roche by another person, but the Lubanga team and another team have raised some
14 objections regarding this, and we find it a pity that of all the people who may be
15 available to do this work, that they tried to hire someone who was involved in the
16 Lubanga case. All the evidence is disclosed in a confidential manner in both cases
17 and some documents may be relevant to both cases and, in light of the ruling by the
18 Chamber regarding security matters and considering the public nature of this
19 hearing, I will limit myself to that remark regarding security in the two cases.

20 My second point, it's a pity that the accused himself dismissed Maître
21 Maryse Alié because of a breach of confidence. That was his choice, and in light
22 of the fact that we find ourselves three weeks before the commencement of the
23 trial, that must be noted, and also in light of the experience of other
24 international tribunals where such things were reprimanded because requests for
25 postponements were refused just because an accused had dismissed a member of his

1 team.

2 The third point, security of witnesses and the fact that if we were to
3 postpone the trial again, that would have an impact. And the Chamber has been
4 informed of this and the Chamber is aware of the witnesses I am referring to when
5 we talked in particular about one witness during yesterday afternoon's ex parte
6 hearing. Beyond all that, your Honour, I think we could be open to the 24th and we
7 could hear some witnesses before the recess of December 11th, as long as resumption
8 of proceedings occurred at a later date, later than 12 January, in accordance with
9 the schedule.

10 The order of appearance has been known for a while now and I believe the
11 Defence teams have started their preparations accordingly, and I believe it would
12 be possible to respond to the concerns of Maître Kilenda and the concerns regarding
13 safety of witnesses.

14 As for the rest, the Prosecution is ready, ready to go, ready to begin on the
15 24th, ready to begin its presentation of evidence on the 25th.

16 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much, sir, and we
17 will be asking a few questions of you in a few moments. I'd like to hear from each
18 party first.

19 Mr. Fidel and Mr. Gilissen, which one of you would like to go first?

20 MR. FIDEL: (Interpretation) Thank you very much, your Honours. Thank you
21 for this opportunity to speak to the Court on this matter. I would like to begin
22 by expressing my great concern regarding the victims. I was in Bunia in October,
23 and before that trip in October I had been there in July, and I had said that there
24 would be a trial in September. When I returned to the field in October and began
25 discussions with victims, it was somewhat difficult because indeed the victims do

1 not understand why the matter is dragging on and they are quite -- there have been
2 several deaths amongst the victims - six in fact have died - and some fear that
3 justice will only be done at some time in the future once they are all dead. It is
4 true that in light of these statements from the victims, I can only adopt the
5 argument of my colleague, the Prosecutor, and call for a commencement of trial on
6 the 24th.

7 I was designated to -- or appointed to this file quite recently, and access
8 to all the information in the file has just been granted to me, and since the
9 Court's computer system is rather complex, I am having a hard time gaining access
10 to all the confidential information. I spoke to the OTP regarding the witnesses,
11 because it seems to me that amongst the witnesses there must be some victims, and I
12 believe that it is my duty if there are witnesses who are also victims to take part
13 in their preparation to avoid any possible self-incrimination. So far, the OTP has
14 responded saying that they are not aware of -- or they haven't provided me with the
15 identity of the witnesses, so it is difficult to respond to this concern.

16 Furthermore, it is just now, given the amount of victims whom I represent, it
17 is just now that I have been able to set up a team of two assistants and a case
18 manager, so it is just now that the team has been formed, and the entire team does
19 not yet have access to the Court's computer system. So this makes our work very
20 difficult and very complicated, particularly just before a trial that is supposed
21 to begin on 24 November. But I had the assumption that we would try to catch up,
22 catch up to the train, even though it was already under steam, underway, and catch
23 up on a day-to-day basis.

24 When the Prosecutor said that the list of witnesses had already been
25 disclosed, the legal representatives did not have access to that list. We did not

1 see it and we don't know which witnesses will be the first to appear. If these
2 witnesses are also victims, we will have to prepare our clients to avoid any
3 possibility of self-incrimination. And during yesterday's hearing, your Honour,
4 although the ruling regarding the mode of participation of victims has not been
5 rendered, we do have that possibility of questioning victims. So, in order to
6 prepare examination, we need access to the files and this access to all
7 confidential exhibits within the file.

8 Furthermore, I find that the amount of time requested by Mr. Ngudjolo's
9 Defence team -- now, I understand the reasons why and the right of Mr. Ngudjolo to
10 have time to prepare his Defence, but I believe that this amount of time is
11 somewhat long. Three months is somewhat long. I would be of the opinion, rather,
12 that in view of the period of adjournment that has already been announced between
13 mid-December and mid-January, well, that period could be used by the team, Maître
14 Kilenda's team, with a view to catching up somewhat. However, I dare not deny them
15 the right to request such a postponement, or an arrangement that we might meet as
16 to the date of commencement of trial, and this is why I believe that I can,
17 therefore, support Mr. Hooper's suggestion, notably, that the trial commence in the
18 month of January, or at least at the earliest possible date thereafter, in view of
19 the victims' interests that I am defending. Thank you.

20 PRESIDING JUDGE COTTE: (Interpretation) Thank you.

21 Maître Gilissen, we have 30 minutes outstanding.

22 MR. GILISSEN: (Interpretation) Yes, Mr. President, but I believe that I
23 will be extremely brief. However, the rainbow that has been presented to us in
24 terms of colour, it seems that there is a wealth of choice.

25 Now, were we to postpone the commencement of trial for three months, there

1 may be more disadvantages than advantages. You heard the arguments advanced by
2 Mr. Hooper earlier, and we should thank him for his transparency. He was talking
3 to us about the duration of detention, notably. That is not the only difficulty at
4 hand. You will also have heard my learned friend, Maître Luvengika, talking about
5 all those legitimate requests on the part of victims who are getting itchy feet -
6 excuse the expression. You know, we feel that they are beginning to question
7 things in view of the waiting period.

8 There is also a constraint that we need to take into account, notably, the
9 arrangements and the measures that have been taken on a domestic level, to provide
10 us with the legitimate priorities within the scope of your court.

11 Now, rather than postponing, we think that an arrangement could be reached in
12 terms of organisation. We don't want to adopt one viewpoint or the other, but to
13 my mind it is obvious that the rights - the guaranteed rights - of Defence, the
14 equality of the procedure, we cannot ignore these facts, nor can we be insensitive
15 to them, and I was under the impression that even though they had lost two legal
16 assistants, the schedule that the Chamber mentioned in an oral decision could,
17 however, be maintained without there being any prejudice; notably, that we commence
18 this trial by the reading out of the charges which you mentioned earlier and also
19 with the opening statements because this would be a strong message not only to the
20 victims but to the international community, and I do not see how this could be of
21 any specific or real prejudice to the Defence teams.

22 Now, were we to go beyond this, of course, this might be rather delicate.
23 So, with serious reserves, and regrets even, I concede the reality of the
24 situation. Even a schedule that is defined by legal -- a legal ruling might be
25 called into question by the actual reality of the situation. As Maître Nsita was

1 saying, in taking into the account the adjournment of the month of December, it
 2 would seem to me that the hearing date of 24 November, as I said, could be
 3 maintained with reference to what I just said. This is a suggestion, but this is a
 4 suggestion from this side of the courtroom, Mr. President, your Honours.

5 However, this would enable everybody to guarantee the rights of the Defence -
 6 for Mr. Ngudjolo notably. We, I believe, owe him this, but this is one aspect of
 7 the procedure. There are other imperatives. This is a difficult task for the
 8 Chamber to decide upon. I do not believe that we can really dismiss the realities
 9 submitted to us by the Defence teams. Thank you.

10 PRESIDING JUDGE COTTE: (Interpretation) Yes, thank you, Maître Gilissen,
 11 for your wise words, and we noted that during this brief discussion a number of
 12 comparisons in terms of railways were made, railway imagery, and the Chamber is
 13 entirely aware that one should not confuse precipitation and speed. However, we do
 14 have a legal requirement to follow that we are all aware of, which is that of a
 15 necessary speed. All our domestic systems and all our international systems get
 16 bogged down in over-lengthy procedures at the prejudice of the accused, at the
 17 detainees, and the victims who are expecting justice. As you said, Maître
 18 Gilissen, we have to find a balance here, and this is the interest of the
 19 discussion we have just had.

20 Now, in view of the short lapse of time we have ahead of us today, I would
 21 ask that the Defence team now provide us with a very brief response, because we are
 22 victim now of very serious organisational constraints.

23 Maître Kilenda, you lost your case manager some time ago. You have just lost
 24 a co-worker who was precious to you. We understood that. Luckily, your co-counsel
 25 is still by your side. The fact that your co-counsel is there, is this not a very

1 -- is this not an element that needs to be taken into consideration? I request not
2 a yes-or-no answer, but nearly.

3 MR. KILENDA: (Interpretation) Yes, thank you, Mr. President, your Honours.
4 I would like to clarify an issue. We have not lost our case manager as such. We
5 have lost -- Aurelie Gaelle Roche was, in fact, a legal assistant and not a case
6 manager. Now, it is true that the -- and also the resignation of our first legal
7 assistant, that is Madam -- Mademoiselle Aurelie Gaelle Roche, who resigned on 2
8 October, and she gave us three weeks of notice; and the second resignation occurred
9 on 29 October, for reasons that I shall not hark back to, and you have this in
10 writing. Also, this resignation was unavoidable.

11 In a civilised structure like ours, when parties come up against a
12 difficulty, it is of course -- it behooves the Bench to decide the matter, to rule
13 on the matter, because you are impartial. You have heard us, you have heard all
14 the parties to the hearing, and I can only refer myself to you in the matter.

15 PRESIDING JUDGE COTTE: (Interpretation) Madam Diarra, please, and then I
16 will have another question to put to Maître Kilenda.

17 JUDGE DIARRA: (Interpretation) Maître Kilenda, there is a new element. Our
18 other members of counsel and participants have just made further comments, notably,
19 that you have heard the various proposals put forward by your colleagues, and I
20 would invite you to -- I would invite you, in a courteous manner, to take a
21 position as to one of the two proposals put forward, notably, that we start the
22 trial on 24 November so that the victims do not continue to wonder whether it will
23 ever happen, and the other opportunity would be to postpone until January because,
24 of course, you are mindful of the fact that an initial postponement followed by a
25 second and now a third postponement for a period of three months is difficult for

1 us. Now, Defence counsel, the Prosecutor, counsel for victims and we, members of
2 the Court, are of this opinion.

3 PRESIDING JUDGE COTTE: (Interpretation) Judge Diarra has just expressed
4 very well what I was about to say to you or ask you in fact and you did well,
5 Madam Judge Diarra, in the sense that we are up against a bipolar situation, if you
6 like, and this is what I was saying yesterday, and I am not quite understanding --
7 I am not quite sure whether Mr. Hooper understood me and I would like to repeat
8 this once again, notably this should be clear in everybody's mind.

9 Proposal number 1: That we commence on the 24th. We had thought that there
10 would be one month of adjournment which might seem sufficient and would it be
11 necessary for you for that postponement to be deferred?

12 Now, proposal number 2: Postponement until 12 or 19 January. Now, so
13 proposal number 2, that we begin at the beginning of January. Can you see here
14 that there is a period separating the two dates? 2 January and 12 December. Now,
15 is there one of those two proposals that seems more attractive than the other to
16 you? Would the first not be more attractive to you? I am trying to sort of guide
17 you in your choice here.

18 MR. KILENDA: (Interpretation) Mr. President, I would like first and
19 foremost to reassure the Bench and all parties present that we are in the habit of
20 regularly discussing matters with Mr. Ngudjolo and we always make the effort that
21 he be advised in terms of legal practice, and everything that has been happening
22 within our team has nothing to do with him and you will understand this once you
23 read the application.

24 I am not opposed, secondly, to the commencement of the trial being set for 24
25 November. Mr. President, I needed a clarification which has just been given to us,

1 and that is why we are a team. So, we are in agreement for the opening statements
2 to be made on 24 November. We see no inconvenience in this.

3 JUDGE DIARRA: (Interpretation) We thank you for your contribution.

4 PRESIDING JUDGE COTTE: (Interpretation) Mr. Prosecutor, a very brief answer
5 to a very brief question. Now, a postponement, that is to say postponement to
6 mid-January from 24 November, would this question have a negative impact on the
7 witness whose identity was revealed on 9 October? That is to say, this witness
8 whose identity was due to be revealed 45 days before the beginning, that is to say
9 Witness 267.

10 MR. MACDONALD: (Interpretation) Now, Mr. President, the situation of this
11 witness is being assessed on a regular basis and to date there is no true concern
12 with regard to the safety of this witness.

13 PRESIDING JUDGE COTTE: (Interpretation) Second question - no, not question,
14 second request: Mr. Prosecutor, you made mention in your brief intervention of the
15 ad hoc tribunals' decisions and we would like you very much to send these to us.

16 Now, thirdly, we said that the commencement of trial on 24 November with
17 opening statements at that date would be possible. It would seem to us that in the
18 scheduling of the trial as envisaged it could be important for us to hear one or
19 two witnesses before the adjournment that had been planned for 12 December. Of
20 course, this is in regard to the safety of these witnesses. This is important
21 because the options that we had might change. So it could be that they enter a
22 plea of guilty or not guilty on 24 November, that we have the opening statements on
23 that date and that we hear the testimonies of one or two witnesses, but of course
24 this is very much conditioned by safety concerns.

25 MR. MACDONALD: (Interpretation) Yes, we would like to hear witnesses 233

1 and 28 and then after that we could take the adjournment.

2 PRESIDING JUDGE COTTE: (Interpretation) So, I reiterate what I said
3 earlier: The Chamber will rule on the subject. Nevertheless, we should be mindful
4 that commencement of trial at the date of 24 November could start with entering a
5 plea of guilty or not guilty; we could have the opening statements and we could
6 have the testimony of one or two witnesses; we need to bear this in mind.
7 Mr. Hooper?

8 Mr. Fofé, please.

9 MR. FOFÉ: Thank you, Mr. President. The Defence for Mathieu Ngudjolo would
10 like to clarify an important issue in this regard. We have just said that after
11 having listened to the various parties and participants, and as an answer to the
12 question put by Judge Diarra, which was a very important question in nature, we are
13 able to make our opening statement on 24 November. However, it will not be
14 possible for us to conduct the cross-examination of Prosecution witnesses. So, in
15 view of our current situation, the situation of our team, we can accept that the
16 commencement of trial take place on 24 November, and the testimony of those first
17 Prosecution witnesses and their cross-examination may then commence in the month of
18 January. That is the position, or the proposal - the final proposal - put forward
19 by the Defence for Mathieu Ngudjolo and I thank you.

20 PRESIDING JUDGE COTTE: (Interpretation) Very briefly, Mr. Hooper. The
21 Chamber listened to you keenly earlier and you raised a number of issues which
22 seemed problematic to you still. Those might have been resolved at an earlier
23 stage in the opinion of some, of course we are conscious of that, but we are also
24 conscious of the fact that in terms of organisation, the organisation of your
25 missions and journeys in the field, it might also be taken into consideration,

1 because of course a year ago we had put the commencement of trial date in June, and
2 then it was postponed to 24 September and once again to 24 November, and it may be
3 that this 24 November date be postponed again to the month of January, but of
4 course this trial will have to commence sooner or later, or we shall all have to
5 wonder how we are all working.

6 Of course, we also need to wonder -- we also need to ask ourselves questions
7 about the provisional detention of the accused, but I would like to call your
8 attention to what precisely is a postponement of the commencement of trial. It was
9 very important for each and every one to address the Court. We have at hand many
10 items of information which sometimes are contradictory, but sometimes also converge
11 as to the commencement of trial on 24 November for a short duration. We shall now
12 withdraw and give you our decision shortly. We also have one brief issue we would
13 like to raise with Mr. Macdonald. Thank you.

14 MR. HOOPER: No, I have nothing to add. I notice from the original list of
15 witnesses that the first two were to be 233 and 419, and I would have thought that
16 might be possible. 28 poses difficulties for reasons which I am sure are apparent
17 from your knowledge of that witness. That is my contribution to the menu, as it
18 were, and my quip, by the way, about TGV, I want to make it quite clear that we are
19 very aware that throughout this process we have been, if I can say so with respect,
20 very impressed by the very keen desire that has been demonstrated by the tribunal,
21 as one would expect, to preserve at all times the interests of the Defence. This
22 has been very striking and I wouldn't like it thought that my perhaps unguarded
23 quip may have been a suggestion that it was a court -- tribunal was after speed. I
24 am very aware, having been in these tribunals, what a monster these cases can be
25 and that taming it has been the objective. I am very aware of that. Thank you.

1 PRESIDING JUDGE COTTE: (Interpretation) Counsel Hooper, we have very well
2 understood your sense of humour and France is very well pleased with its TGV as
3 well.

4 MR. HOOPER: Really, the analogy I was going to make was that we are actually
5 building the railway here. That is the problem.

6 PRESIDING JUDGE COTTE: (Interpretation) We can continue for a long time in
7 the field of the comparative discussions with railways. Court officer, please
8 could you announce a partial closed session. Could you organise a partial closed
9 session, please, for the Chamber has asked for, because the Prosecutor wants to
10 express certain difficulties or concerns that he has.

11 *(Open session at 12:52 p.m.)

12 MR. HOOPER: While that is being done, can I just indicate that there is some
13 issues I was going to raise. I am aware of the time. I am entirely in the Court's
14 hands. I can skip over them very quickly, or I can do it by not a motion, a sort
15 of submission, but there are some certain points which I would wish to raise with
16 the Court and, sir, I can deal with them extremely quickly just by way of an
17 indication, you will get a better idea of what they are. They are not very lengthy
18 things.

19 We admitted an authority on our motion concerning dead witnesses, if I can
20 put it like that, which is so significant that we are going to submit an addendum
21 and I shouldn't think I need authority for an addendum that - well, that concerns -
22 I shouldn't need leave to add an addendum that concerns an authority, but it is
23 such a significant authority, it is the Lubanga decision, 1603, which I missed, we
24 missed and it was drawn to my attention yesterday and it is spot on the point.

25 There is an issue we are waiting in respect of a decision for our motion 858

1 which is the troubled area of victims' participation, and it was drawn to my
2 attention yesterday that the Special Tribunal for Lebanon has introduced a Rule 113
3 which places on victims participating in proceedings that they shall have the same
4 obligations as the Prosecution; i.e., disclosure of, for example, exculpatory
5 material. And it is an issue that we have discussed as a team on an earlier
6 occasion, but it has never really come to the forefront of a discussion, so the
7 issue is: What duties should counsel representing victims have to disclose
8 exculpatory matters to the Defence? And perhaps that could be the subject of a
9 short matter.

10 Mr. Katanga is due a family visit. There has been great problems the Congo
11 in terms of getting passports, and we hope that he can get a visit in the next few
12 weeks. The problem is that might also conflict with his trial dates. I don't
13 think I need to emphasise the anxiety that Mr. Katanga has had over a family visit
14 that has been a very long time coming now, and his hope and desire that it won't,
15 as it were, run parallel with his attendance at court for hearings.

16 I have mentioned the issue of missions, Yes.

17 PRESIDING JUDGE COTTE: (Interpretation) With regards to this last point,
18 the Registry has also referred this matter to the Chamber, namely, the concerns of
19 Mr. Katanga to be able to -- well, if his visit does take place, to be able to take
20 advantage of that, and well done for reminding us of that. Everything will be done
21 to ensure that the detainee is not denied this access to his family which he would
22 like to enjoy.

23 JUDGE DIARRA: I would like to add to this issue of the difficulties with
24 regards to the family and the passports is on the agenda of a meeting of the
25 Presidency which is going to start at 2 o'clock.

1 MR. HOOPER: The family now has a passport, as I understand it. It did take
2 a long time, a lot of uncertainty and anxiety because of that, so we hope that
3 things can go ahead and I know Mr. Katanga has already been in discussions himself
4 with the authorities on this.

5 I mentioned disclosure of transcripts. We are waiting for disclosure in
6 respect of four incriminating witnesses in the Lubanga case. It was ordered on 7
7 October in your Decision 1516. We are hoping to get it.

8 And there is one other matter which concerns my being able to bring in a
9 laptop or not. Now, I am concerned -- I am aware the Court is very concerned about
10 the time as we now approach 1 o'clock. The essential problem is this: I work with
11 a laptop and I can't frankly work without it, and I bring it into court, as does
12 Mr. O'Shea, and also my case manager, Ms. Menegon. I travel about. It is
13 absolutely essential for me.

14 Now, the Registry have raised objections to my bringing this into court. I
15 haven't quite got to the bottom of the reason why, but in an email that I received
16 from the Registry they have referred to my -- they have offered me another laptop,
17 their own laptop. It is a laptop which will have, if I can find the reference to
18 it, they said, "The Registry would procure you with a laptop where the recording
19 facility is disabled." So it seems to me that somewhere, at some time, a committee
20 has decided that in order for security reasons you are only allowed into these
21 courts if you don't have a recording facility, hence the offer of this alternative
22 laptop.

23 Now of course I assume this would have a recording facility on it, it is a
24 good laptop. I haven't accessed it. I wouldn't know how to use it. And I would
25 certainly give a clear undertaking to the Court that I would never, as counsel,

1 abuse my position in court, and I give that undertaking and I hope that that might
2 be sufficient to allow me to bring my laptop into court.

3 As I say, I really can't work without it elsewhere. There is something
4 called the EPN here, which is a facility whereby if I am in London or The Congo or
5 Tanzania, or more happily the south of France say, that I can access the case file
6 here through something called Citrix, which works sometimes, sometimes it doesn't,
7 but also poses particular problems because you can't save to your own laptop. It
8 is a great problem - a functional problem.

9 And in addition to all that, we have adopted and run a system which would be
10 no doubt known to you, called CaseMap. It is a very common or garden system, but
11 it is a search engine and it is a way of organising your work and, over the past
12 very many months, we have applied this software, CaseMap, to the files because we
13 don't find Ringtail very good. We don't find it a very efficient suggestion. And
14 when we raised the fact that CaseMap required us also, and particularly Ms. Menegon
15 who is here with her laptop and accessing material all the time, when we pointed
16 out that CaseMap is essential for us, we received this comment from the Registry
17 that "As to CaseMap," they say, "this is not installed on any other computer in the
18 courtroom. Consequently, using ICC equipment in the courtrooms ought to comply
19 with equality of arms requirements," which is an unusual extension of the concept
20 of equality of arms, rather like if they are using fountain pens, we can't use
21 biros. But it clearly is a misapprehension of our function and, in general, we
22 would say that this restriction is unnecessary. It is clearly very prejudicial to
23 us and it is disproportionate. We give whatever undertaking is necessary not to
24 abuse this matter. In fact, I don't know what kind of material we would get in
25 court that we don't get anyway by way of transcripts and the like outside of court.

1 It is a bit of a puzzle, but there we are. So the application essentially is,
2 please, can we bring our laptops in because we can't work without them. I am sorry
3 to have taken up that time on unnoted items that weren't on your agenda. I am
4 sorry.

5 PRESIDING JUDGE COTTE: (Interpretation) First of all, I will address myself
6 to our interpreters and our court reporters, just to ask them to be a bit patient.
7 We are going to finish very quickly.

8 Counsel Hooper, here the most senior people in this courtroom started with
9 paper, pens, et cetera, so then you had IT which came. That really invaded the
10 situation. The Chamber is very well aware of the difficulties that you have. Our
11 court officer has noted that, expressed that to us, and when we came in this
12 morning she said that this was a concern that you had. It is difficult for us, as
13 we are not in possession of all the different technical data and facts with
14 organisation with regards to this house to be able to answer you here with regards
15 to the application that you have just made, but we do understand the significant
16 interest that it has for you. I would ask the court officer to -- I would -- to
17 the Registrar or anybody who is authorised at a high level within the Registry to
18 see under what conditions it can be possible, in the most satisfactory way, that we
19 can answer your concerns, which we perceive as very legitimate. There has to be
20 here security constraints which do not allow personal computers. We all know that
21 everything can be solved, in principle, where there is goodwill.

22 Now, if it would appear that between the highest representatives in the
23 Registry that you can't come to some kind of agreement, then you would have to come
24 back to the Chamber but, first of all, I would ask the court officer to make the
25 Registrar aware of these issues and the useful part of this transcript to be taken

1 up to the highest level such that your concerns are expressed.

2 Now, Counsel Macdonald. Everything that we have mentioned was said in a
3 private session, so for everything that has just been said, I think the court
4 officer, it is possible to lift this private session even if it is a posteriori,
5 but such that everything that was said can be usefully brought to the notice of
6 those who can give Counsel Hooper an answer.

7 (Private session)

8 (Expunged)

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Page 60 - Expunged - Private session.

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25 (The hearing ends at 1:10 p.m.)

1 CORRECTIONS REPORT

2 *Page 11 line 16 "266" is replaced by "166"

3 *Page 11 line 19 "266" is replaced by "166"

4 *Page 11 line 20 "266" is replaced by "166"

5 RECLASSIFICATION REPORT

6 *Pursuant to Presiding Judge's instruction, dated 03/11/09, the following
7 part of the transcript from p.54 line 11 to p.59 line 6 held in private session is
8 reclassified as "Public".

9 SECOND CORRECTIONS REPORT

10 After verification, the Court Interpretation and Translation Section
11 has made the following corrections into the transcript:

12 *P 9 line 14

13 ...287, 323 and 353

14 Is added

15 ...287, 323 and 353, 0280

16 *p 14 line 23

17 ...Witness 307

18 Is corrected by

19 ...Witness 317

20