

1 International Criminal Court

2 Trial Chamber II - Courtroom 1

3 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra
4 and

5 Judge Christine Van den Wyngaert

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

7 In the case of The Prosecutor v. Germain Katanga and

8 Mathieu Ngudjolo Chui

9 Trial Hearing

10 Monday, 23 August 2010

11 (The hearing starts at 2.32 p.m.) (Open session)

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

14 PRESIDING JUDGE COTTE: (Interpretation) Court is in
15 session. Please be seated.

16 The accused persons are with us. Good afternoon.
17 Good afternoon, everyone. We are resuming the proceedings after
18 a recess, which made it possible to everyone to take some rest,
19 I hope, and at the same time to continue to work so that our
20 proceedings could progress well. So good afternoon to all those
21 who are assisting us and those who are listening to us, and
22 without you we cannot work effectively.

23 The Chamber has some points of information to provide
24 you. You will remember that by email of 28 July 2010 the Chamber,
25 in its intention to react as quickly as possible to the decision

1 of Trial Chamber I of 16 July 2010, ordered the Office of the
2 Prosecutor to disclose to the Defence teams of Germain Katanga
3 and Mathieu Ngudjolo the unredacted transcripts of the hearings
4 of the Lubanga trial relating to witnesses 7 and 25 of that
5 case on condition that the protection measures ordered by the
6 Chamber are implemented. This decision, which was rendered by
7 email, had to be officialised and it is hereby officialised.
8 So, Mr Prosecutor, can you confirm to us that that disclosure
9 has been made?

10 MR MACDONALD: (Interpretation) Good afternoon,
11 your Honour. I do confirm that, and in fact we confirmed it
12 by email last week, if I'm not mistaken. Indeed, the transcripts
13 were disclosed with the redactions as approved by Trial
14 Chamber I.

15 PRESIDING JUDGE COTTE: (Interpretation) Very well.
16 Thank you, Mr Prosecutor.

17 The second piece of information concerns the issue
18 of the expenses incurred. At the end of our last hearing of
19 15 June 2010 - page 75 of the transcripts from line 16 and at
20 page 76, lines 1 to 17 - Mr Hooper indicated that he would like
21 to receive information on the amounts of monies spent for
22 witnesses and intermediaries. He pointed out that on two
23 occasions the Prosecutor had provided him information on that
24 issue, and he also indicated that the VWU - which we will simply
25 refer to as "the unit" - has so far proven to be more reticent

1 with regard to information of this nature.

2 Mr Dutertre, who was representing the OTP, said that
3 he was not in a position to give an opinion on that point because
4 he had not been informed in a timely manner that this issue
5 would be discussed. The Chamber asked the court officer to
6 transmit that part of the hearing transcript to the VWU so that
7 they could make their observations known.

8 Today the Chamber is informing you that we asked the
9 Director of Court Services, as well as any competent
10 representative of the unit, to come and personally tell us the
11 point of view of the Registry on that point. Mr Marc Dubuisson,
12 Director of the Court Services, will therefore be present during
13 one of our upcoming hearings either at the end of this week,
14 or more probably early next week.

15 The Office of the Prosecutor, which has now been duly
16 informed, will, if they wish, give us their opinion on this
17 issue and we will tell you the precise date; that is unless
18 the OTP wishes to discuss directly with the Defence teams, just
19 like they have already done on two occasions as we have been
20 told by Mr Hooper, and the Chamber will only be seized if there
21 is a difficulty.

22 MR MACDONALD: (Interpretation) Very briefly, we
23 will provide details during Mr Dubuisson's presentation, but
24 the information requested here by the Defence of Mr Katanga
25 is not in our possession. It is in the possession of the VWU.

1 We provided the two Defence teams with the amounts
2 of the expenditures made by the OTP for the witnesses so far,
3 but we are not in a position to reveal or discuss figures which
4 are in the possession of the unit and so it will be up to the
5 Defence teams and the Chamber to request that information from
6 Mr Dubuisson. It is possible that we will rely on the discretion
7 of the Chamber. We have no objection to that information being
8 disclosed, but our final observations will be made in due course.

9 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
10 Mr Prosecutor. As soon as we know when Mr Dubuisson will be
11 available we will tell you, but the financial committee of the
12 Court is meeting this week and they require representation from
13 the Registry, so we might only have Mr Dubuisson next week.

14 Third piece of information: witness 30, who is a
15 Prosecution witness and who is in the protection programme of
16 the Court, informed the Chamber on the 12th of -- or rather
17 informed the unit on 12 August that he wished to meet with the
18 Prosecutor to talk about the protection programme. The unit
19 wished to know the position of the Chamber on this issue. On
20 16 August, the Chamber pointed out that it was the
21 responsibility of a representative of the unit to conduct such
22 a briefing. Considering the request made by the witness, the
23 Chamber nevertheless authorised the presence of a member of
24 the OTP, but only as an observer and on condition that only
25 issues related to the protection of that witness be discussed.

1 The Chamber also indicated that the parties and
2 participants would be informed, and that is what we are doing
3 right now. The unit informed the Chamber that the meeting had
4 indeed taken place with one of the their representatives and
5 in the conditions that have just been outlined on 18 August 2010.
6 This is the information that we wanted to give you.

7 MR MACDONALD: (Interpretation) With your leave,
8 your Honour, in order to avoid any doubts from our colleagues,
9 we were there as observers. We did not intervene, and there
10 was nothing concerning the OTP. These were issues that were
11 simply related to the management of the Court protection
12 programme, and the Prosecution really was not involved in any
13 of the discussions.

14 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
15 Mr Prosecutor. You have added to the information of the Court,
16 and that makes it possible for all the parties and participants
17 to realise that we are all working in transparency.

18 The fourth piece of information is just a
19 recapitulation of our status conference of 9 July 2010. To
20 begin with, Mr Prosecutor, the Chamber would like to recall
21 that at the end of the hearing of 15 July 2010 you had used
22 69 as ten minutes out of the total of 120 hours allocated to
23 you for your direct examinations.

24 You should also indicate to us during the month of
25 September and as early as possible your final list of witnesses,

1 particularly with regard to witnesses 238, 157 and 28, which
2 are the themes on which witness 166 will be examined, given
3 that his appearance has been confirmed.

4 At the end of the status conference of 9 July 2010 - and
5 I am referring to transcript 168, page 38, line 24 to page 39,
6 line 7, you mentioned that there was a likelihood of your
7 submission of additional evidence, as well as a possible recall
8 of certain witnesses to ask them, and I am quoting you here,
9 very precise questions with a very limited scope. And it was
10 Madam Darques-Lane who told us this. Are you in a position to
11 provide us further information on that?

12 MR MACDONALD: (Interpretation) What I can tell you,
13 your Honour, is this: It is clear that witness 238 and
14 witness 157 -- well, we will contact the Chamber once again
15 with further information. You talked about the middle of
16 September, so we will provide information on the 15th. The
17 decision has not been taken, but in light of the witnesses who
18 will come to testify, it will be possible to resolve this issue.

19 Now, regarding the hours, the Prosecution has about
20 50 hours remaining for the examination of about nine witnesses.
21 The Prosecution believes that that time will be sufficient and
22 that we will try to focus on the important issues in light of
23 the directives of the Chamber during that status conference
24 that we have to be precise, without being leading.

25 We will provide information to the Chamber later with

1 regard to witness 166. It is no secret that the crux of his
2 testimony will be the compilation of the famous list. That will
3 be one of the themes. Our motion is still pending; that is,
4 the motion requesting that the testimony of the witness should
5 be admitted into evidence, that he should be questioned on the
6 main issues, including the famous list, after which the
7 Defence teams will have the opportunity to cross-examine him,
8 and it is because we wish to focus on what is essential. We
9 are going to provide further information regarding other themes.

10 Now, regarding additional evidence, we are finalising
11 a review of certain aspects of the cross-examinations. We are
12 going to submit a filing on that very soon. And with regard
13 to the recall of witnesses, that will be done in light of that
14 motion. So it is not out of the question for the Prosecution
15 to file a motion for the recall of certain witnesses.

16 If our opinion changes, it will be based on the motion,
17 and at that time we will have either the possibility of calling
18 these witnesses before the end of the presentation of the
19 Prosecution case or it will be after the Defence case; that
20 is, their rebuttal evidence that we could provide additional
21 evidence in reaction to the case presented by the Defence teams.
22 So we are going to file a submission to the Chamber, including
23 suggestions and proposals in order to ensure the best
24 administration of justice possible.

25 I believe, Mr President, I have covered all the issues

1 that you have mentioned and which were discussed during the
2 status conference.

3 We intend to conclude the Prosecution case by the end
4 of October, but there are witnesses who might be quite long,
5 specifically witness 219 and also witness 28. That said, with
6 regard to the other witnesses starting today with the
7 presentation of video excerpts, I think we can even go much
8 faster than we had planned initially.

9 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
10 Mr Prosecutor. If I have understood you well regarding
11 witnesses 238 and 157, you will inform us before 15 September,
12 but you have to do that before 15 September and the earlier
13 the better.

14 Regarding the theme of the testimony of witness 166,
15 you should confirm that to us in writing so that everybody should
16 be fully informed. And lastly, regarding your additional
17 evidence, we have heard what you have told us. The ideal thing
18 will be for this thing to be done before the end of the presentation
19 of the Prosecution case, but you will provide further information
20 in your written filing.

21 Mr Luvengika, the Chamber hopes that your trip to the
22 DRC was fruitful and made it possible for you to determine whether
23 some of the victims that you are representing could be called
24 to testify as witnesses. You surely remember that the victims
25 that you intend to call to testify, if any, should necessarily

1 testify immediately after the end of the presentation of the
2 Prosecution case, and this will be done under conditions set
3 out in paragraphs 22 to 29 of the decision of -- of the Decision
4 1665 of 1 December 2009.

5 The possible testimony of the victims should, as I
6 have already told you, follow the Prosecution case immediately,
7 and we need to know your position during the first part of
8 September. And if there are any motions that you wish to file
9 under paragraph 25 of Decision 1665, you have to do that before
10 15 September 2010.

11 MR NSITA: Yes. Thank you, your Honour. I believe
12 that I will inform the Chamber regarding our position before
13 15 September. We travelled to the field and we met some of the
14 victims that we are representing. We already have an idea, but
15 I cannot confirm whether our discussions are going to be
16 conclusive, but we will inform the Chamber of our final position
17 on this issue. Thank you.

18 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
19 Mr Luvengika. So 15 September will be the deadline, and I
20 believe that you remember the conditions for the filing of those
21 motions which will be copied to the various parties for their
22 observations.

23 Mr Gilissen, you made it known that you will probably
24 not call any of the victims that you are representing as witnesses,
25 and if your position changes, the conditions set out for

1 Mr Luvengika will be applicable to you.

2 MR GILISSEN: (Interpretation) Thank you, your
3 Honour. I would like to reassure the Chamber that there is no
4 new element in the position that I have adopted.

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
6 Mr Kilenda, Mr Hooper, Professor Fofé and all your collaborators.
7 The Chamber also hopes that the trips that you intended to make
8 have been fruitful. We would like to remind you that a status
9 conference devoted to the presentation of your respective cases
10 will be convened soon, in any case, before the end of the
11 presentation of the Prosecution case. No action has to be taken
12 immediately, but you have to be prepared. You also need to inform
13 us whether you would like to recall witnesses 161 and 159. In
14 the status conference of 9 July, we believe we understood that
15 this is not the case, but it would be necessary for you to confirm
16 this to us. Furthermore, at the end of this month, the
17 Chamber will be expecting your observations on filing
18 number 2290 of the Prosecutor dated 19 July 2010, transmitting
19 their Bar table motion proposals, with the understanding that
20 by the oral decision of 15 July 2010, the Chamber had extended
21 the delay of 21 days for your comments, and this leads us to
22 30 or 31 August. The Chamber would like to ask you to reflect
23 on the possibility of calling common witnesses, if that is
24 possible and desirable for you.

25 One last piece of information, and this will require

1 us moving into private session briefly very. For those
2 in the public gallery, that information concerns someone who
3 is under the protection programme, so we cannot provide the
4 information in public session.

5 So, court officer, can we go into private session
6 briefly, please.

7 (Public session at 2.58 p.m.)

8 (Expunged)

9 (Expunged)

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10 (Open session at 3.01 p.m.)

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

13 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
14 Madam Court Officer.

15 Before informing you of the protection measures that
16 witness 30 will be enjoying, today's witness, that is to say,
17 and before having him come into the courtroom, we believe it
18 is necessary to make a number of remarks.

19 The Chamber wishes to note that of the 29 excerpts,
20 Prosecutors, that you are planning to show to the Chamber, to
21 the parties and to the participants, five of these extracts
22 or clips do not have any objections; number 5, 14, 27, 28 and
23 29. Since that time we have learned that number 14 has been
24 objected to by the Katanga Defence team.

25 The Chamber wishes to know, Madam Prosecutor,

1 Mr Prosecutor, which abstracts are you planning to show? Which
2 clips are you planning to show? All 29 that we find here in
3 the binder that you provided to the various parties on 15 July
4 or, rather, have you selected a certain number of video clips?
5 Are you able to tell us that? Will it be 29 or will some of
6 these video clips not be shown?

7 MS LUPING: Good afternoon, your Honours. I wish to
8 confirm that we will be playing 17 extracts in the first instance,
9 but the Prosecution will be reserving its right to play the
10 other 12 extracts at the end of the witness's testimony, but
11 at this stage we are proceeding with all 29 extracts. We're
12 simply wanting to indicate that in the first instance only 17
13 will be played.

14 PRESIDING JUDGE COTTE: (Interpretation) Might it be
15 possible to send an email to everyone with the numbers of the
16 17 extracts that you are planning to show initially without,
17 of course, abandoning the possibility of the other extracts?
18 So of the 17, perhaps you could send out an email to everyone
19 so that we know exactly which 17 extracts will be played.

20 Now, I beg your pardon. Please proceed.

21 MS LUPING: I simply wish to confirm that, of course,
22 that is possible, Mr President.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you
24 very much. Now, while you are preparing this list of 17 extracts
25 that you have in mind, the Chamber shall continue with a number

1 of remarks or observations.

2 We note that the Katanga Defence team has objected
3 to 24 out of 29 extracts; the Ngudjolo team, 15 out of 29 extracts.
4 The Chamber also notes that 13 extracts are being challenged
5 by each one of the two teams. So there are 13 joint or common
6 objections for extracts 2, 3, 4, 5, 9, 10, 11, 12, 13, 15, 19,
7 20, 23 and 25.

8 what's even more important, the Chamber wishes to
9 stress the terms used by the Ngudjolo Defence team in the filing
10 that was sent by way of mail on Friday, 20 August at 9.45, and
11 the filing contains the actual objections. We read, in the last
12 six lines of paragraph 6, page 2, the following:

13 "The Defence does not challenge that Ituri experienced
14 an inter-ethnic conflict, was subject to armed conflict and
15 that political/military groups were indeed present in the
16 territory and that there were attacks on civilian populations."

17 And moving on to paragraph 18, page 5, and once again
18 I quote:

19 "The Defence reiterates that it does not challenge
20 that from 1999 to 2003, and even beyond that time, in the Ituri
21 region there was indeed a conflict, an armed conflict, during
22 which civilians from all ethnic groups were killed."

23 Mr Hooper, do you share the opinion that was expressed
24 by Mr Kilenda and Professor Fofé? And can we -- can we conclude
25 that you too do not dispute these facts, or these assertions

1 rather, that the Ituri territory experienced inter-ethnic
2 conflict, experienced an armed conflict, that
3 political/military groups were present in the territory, and
4 that there were indeed attacks on the civilian population?
5 Because if you too do not challenge these assertions, these
6 various observations, we can ask the Prosecution to carry out
7 a certain screening of the excerpts and choose only the excerpts
8 that go beyond what you would recognise jointly, and that way
9 the Prosecution will be able to present only the excerpts that
10 are relevant. So in other words, do you share the opinion
11 expressed by the Ngudjolo Defence team?

12 You may have a moment to think about it, if you wish.

13 MR HOOPER: Thank you, Mr President. I haven't had
14 the opportunity of reading the submission made by the Ngudjolo
15 team and this is the first that I've come to it. In those
16 circumstances I would appreciate a little time to discuss the
17 matter. It's not something that can be discussed here in court,
18 as it were, on the sidelines. I'd like the opportunity of 15
19 minutes to discuss this, perhaps 30 minutes, because if there
20 are to be admissions of this consequence, then they're admissions
21 that must, of course, be -- must carry Mr Katanga with them
22 as well.

23 PRESIDING JUDGE COTTE: (Interpretation) Ms Luping,
24 please proceed.

25 MS LUPING: As a point of clarification, Mr President,

1 it might be useful to note that all of the extracts that have
2 been selected we believe do go beyond the issue of the existence,
3 for example, of an armed conflict or an inter-ethnic nature
4 of that conflict. So for that reason, we believe all the extracts
5 would be pertinent and would need to be shown, in any event.

6 As an example I refer to extract 1, which was referred
7 to in Defence for Mr Ngudjolo's observations where they made
8 the statement that this is not necessary because it only goes
9 to the existence of an armed conflict. However, as the annex
10 detailing and explaining the relevance of that extract states,
11 it's also relevant to the issues of the date of the creation
12 of the FNI. That's simply one example, Mr President.

13 PRESIDING JUDGE COTTE: (Interpretation) Madam
14 Prosecutor, now, have we understood the approach -- have you
15 understood the approach taken by the Chamber? Now, it's not
16 a matter of underestimating the importance of the 29 extracts
17 that you are planning to show. We have merely pointed out - and
18 this is for Mr Hooper's benefit, among others - that in the
19 filing of 29 August in which the Ngudjolo team set out the extracts
20 for which there were objections, explaining in a -- summarising
21 the reasons for the objections, that these phrases were to be
22 found. The phrases that I set out, namely, that there had been
23 inter-ethnic conflict in the Ituri region, that there had been
24 political/military groups in Ituri, that Ituri had seen civilian
25 populations attacked. And it appeared to the Chamber that column

1 4 that we find in this very complete chart that you have provided,
2 in the middle of the fourth chart we find this same reference;
3 existence of an armed conflict and an inter-ethnic conflict
4 in Ituri; political groups, armed groups. And so, the Chamber
5 thought that if Mr Hooper were to take the same position as
6 Mr Kilenda and Professor Fofé, it would have been possible for
7 you to carry out a new selection of the various extracts to
8 be shown to the Chamber.

9 I may be repeating myself unnecessarily, but I just
10 want things to be extremely clear. We are in no hurry, but we
11 do want to conduct these proceedings as effectively and
12 consistently as possible.

13 Do you still maintain that -- now, even before it is
14 necessary to allow Mr Hooper to say whether he supports the
15 position of the Kilenda team, now, are you planning to show
16 the * 17 excerpts, plus an additional * 12, possibly?

17 MS LUPING: If we could just have a minute,
18 Mr President.

19 PRESIDING JUDGE COTTE: (Interpretation) We will
20 grant you 20 minutes now for the -- actually, half-an-hour for
21 the Hooper Defence team and, thanks to that half hour, the team
22 will be able to read the filing from the Kilenda and Fofé team.
23 This is -- well, not so much read but, rather, mull over the
24 filing. And this is a filing of six and a half pages, quite
25 easy to read, and very easy to make sense of. During that same

1 half hour, Mr Prosecutor, you can reflect upon the proposal
2 that has been made. It is 15 minutes after 3. Madam Court Officer,
3 we will suspend until 1545 and I'd like to specify that we may
4 have to reschedule our day's work slightly. If you can settle
5 this in 15 minutes, that will be fine. Otherwise we will have
6 the usual suspension and then resume.

7 Madam Court Officer, it is important to specify that
8 the actual appearance of witness 30 may be delayed somewhat.
9 We hope that we can begin this afternoon, but he may not actually
10 be brought into the courtroom today.

11 Now, gentlemen, are you in agreement? You shall review
12 the filings, and on your side you can reflect upon the various
13 extracts, and we will see each other in half-an-hour.

14 we shall now suspend.

15 (Recess taken at 3.16 p.m.)

16 (Upon resuming at 3.52 p.m.)

17 (Open session)

18 THE COURT USHER: All rise.

19 PRESIDING JUDGE COTTE: (Interpretation) The
20 hearing is resumed. would you please be seated.

21 Before we resume where we left off on witness 30, I'd
22 like to confirm that strictly speaking it's at the start of
23 next week and probably next Monday that the Director of the
24 Court Services will be present to set out the point of view
25 of the Registry - and more specifically the VWU - as regards

1 the expenditure concerning the witnesses and the intermediaries.
2 we'll confirm that later, but it's certainly not going to be
3 this week and it's most likely that it will be early next week.

4 Mr Hooper, I think you're going to be speaking first.

5 MR HOOPER: Yes, thank you, Mr President. In fact
6 Mr O'Shea is taking the next witness for the Katanga Defence
7 and, as these in effect admissions touch on his evidence, can
8 I give way to Mr O'Shea to address you in respect of them?

9 MR O'SHEA: Yes, thank you, Mr President. I'll take
10 the words quite carefully as they --

11 PRESIDING JUDGE COTTE: (Interpretation) Mr O'Shea,
12 for the time being we're finding out whether or not you shared
13 the opinion - the point of view - expressed by the Ngudjolo
14 Defence team. We're not going to go straight on to questions
15 of relevance as to the different elements of evidence.

16 MR O'SHEA: Yes, I just wanted to say that I wanted
17 to quote the words of the Ngudjolo team just to be clear what
18 we were talking about. So far as the expression "vécu un conflit
19 interethnique", which I would translate as "underwent an
20 inter-ethnic conflict", the Katanga team would have a problem
21 admitting that. We characterise the conflict as politico,
22 economic and geographical, and it's really by virtue of the
23 geographical apportionment of Ituri that the ethnic element
24 comes in, as far as we are concerned, so we cannot, I am afraid,
25 agree to that.

1 The second element which the Ngudjolo team raises is
2 "a subi un conflit armé", which we understand in the English
3 language to be "underwent an armed conflict."

4 Now, that's something that we accept. Apparently the
5 Prosecution, based on previous correspondence that we've had
6 with the Prosecution, has a difficulty with admissions which
7 amount to -- admissions relating to legal characterisations.
8 The Prosecution has expressed themselves to us in the past that
9 because of Rule 69, or is it Article 69 -- Rule 69, which deals
10 with agreements as to evidence, that if something constitutes
11 an element of a crime it is a legal characterisation and, therefore,
12 it's not possible to have an admission. That's the Prosecution's
13 position, or the way they have expressed it to us in the past.
14 For our part, we have no difficulty with accepting that there
15 was an armed conflict.

16 With regard to the third element mentioned by the
17 Ngudjolo team, "A connu l'existence, de groupes
18 politico-militaires." I translate that into English as, "There
19 existed political military groups." Well, that's not a legal
20 characterisation, that is a fact, and it's a fact which we accept.

21 As to the last element mentioned by the Ngudjolo team
22 expressed in French as "a subi des attaques contre la population
23 civile," so Ituri was subjected to attacks against the civilian
24 population, I'm afraid that again that is something that we
25 cannot accept. It is our position that, certainly so far as

1 we were concerned, we were not in any way targeting civilians,
2 therefore it is difficult for us to make an admission of that
3 nature.

4 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
5 Mr O'Shea. So that means that of the four elements that the
6 Ngudjolo Defence team felt that it was not necessary to challenge,
7 there are only two that you in the Katanga team would agree
8 with; in other words, the existence of armed conflict and the
9 existence of political military groups. However, as to the
10 inter-ethnic conflict, we've understood from you that you
11 consider that the wording is too restrictive, and the attack
12 against the civilian population, you cannot go along with the
13 point of view on that either.

14 Prosecutor, in the light of what's just been said,
15 does the OTP feel that it might be possible to cut back on the
16 number of extracts that you have been good enough to provide
17 us with? And for the time being, we have a figure of 17.

18 MS LUPING: Mr President, we want to make it clear
19 that the 17 extracts that we have selected and wish to play
20 from the outset are priority extracts, but we do wish to reserve
21 the right to play the additional 12 subsequently. Perhaps first
22 just a few points, first to reassure the Chamber that we are
23 proposing only to ask a limited number of questions in relation
24 to each of these extracts.

25 Secondly, that the main purpose of these extracts has

1 never been simply to prove the existence of an inter-ethnic
2 armed conflict. And if I may, Mr President, if I could give
3 you some examples, to indicate from the 17 priority extracts
4 identified, very briefly, the relevance we see for each of these.
5 The first extract --

6 PRESIDING JUDGE COTTE: (Interpretation) The
7 Chamber simply suggested to the parties and participants to
8 adopt a methodology of work, and obviously you do not want to
9 follow that methodology, and I understand you. The Defence team
10 of Mathieu Ngudjolo made a proposal and you have just heard
11 what Mr O'Shea has said. We have also heard what the Prosecutor
12 has said. So, you intend to present 17 extracts to begin with;
13 and if necessary, you will present 12 others, or some of the
14 12.

15 So, for the time being, we are going to base ourselves
16 on the presentation of the 17 excerpts that you informed us
17 of
18 by mail.

19 So we are asking you now to tell us clearly, that is,
20 to us the Chamber and to the Defence, you have to tell us in
21 which way those 17 extracts are relevant. So how can you defend
22 the relevance and usefulness of those extracts? So you will
23 tell us about the relevance, the Defence teams will respond
24 and then the Chamber will decide whether it is appropriate to
25 present those 17 extracts. But before that, Judge van den

1 wyngaert would like to ask you a few questions.

2 JUDGE VAN DEN WYNGAERT: I just wanted to make sure
3 that I had fully understood what Mr O'Shea was saying to the
4 effect that the Prosecution seems to think that Rule 69 only
5 addresses facts and not the legal characterisation of such facts,
6 and that, therefore, the Prosecution would not be in a position
7 to accept or to invite -- accept the proposal of the Defence that
8 there would be an armed conflict and that that would not need
9 to be proven.

10 MS LUPING: Madam Judge, to clarify the Prosecution's
11 position, our position in relation to Rule 69 was simply to
12 state that it was actually a decision that the Chamber needed
13 to make where it related to a legal characterisation as opposed
14 to issues simply related to facts. That was the position we
15 stated. And in this instance, the determination of an existence
16 of an armed conflict and the characterisation of that conflict
17 is a legal characterisation, which is for the Chamber to decide.

18 PRESIDING JUDGE COTTE: (Interpretation) Madam
19 Prosecutor, you can now address the Court to tell us how those
20 17 extracts collectively are relevant. To the extent possible,
21 please, do not take those excerpts one-by-one. That would be
22 too complicated. The Defence of Ngudjolo talked about
23 pacification, Drodro, battle, then Bunia May 2003, and then
24 the withdrawal -- or rather the Ugandan troops and so on, and
25 so you can follow the same procedure while still attempting

1 to be very clear. So we need a lot of clarity during the
2 examination-in-chief and cross-examinations of this witness.
3 Please, you can address the Court.

4 MS LUPING: Yes, Mr President. I'll try to group the
5 extracts according to topic and explain briefly their relevance.
6 Extracts 1 to 6, generally speaking, are extracts drawn from
7 video 0127-0065 and depict footage from the CPI meeting. The
8 extracts selected from this part of the footage relate to issues,
9 including the date of the creation of the FNI. That's extract
10 1, as I mentioned previously, and I mention this one again simply
11 to emphasise, too, that if this extract is shown, there may
12 be the possibility that witness 238 would not need to testify
13 on this specific issue. It also relates to the presence and
14 existence of relevant military political groups, including the
15 FRPI, the FNI, the Lendu North, and the separate nature of those
16 groups, as well as the presence of one of the accused, Mr Mathieu
17 Ngudjolo, which is relevant to his role and authority at that
18 time.

19 The footage also covers violations of the cessation
20 of hostilities agreement, to which others will be testifying.
21 We have imagery of the witness himself which is relevant to
22 authentication of the video.

23 As regards the footage that I will refer to as the
24 footage from Bunia, depicting images of Lendu combatants,
25 including child soldiers, and for this I refer to extracts 15

1 to 18, and 21 to 22, this footage is important to show for
2 contextual purposes images of child soldiers, Lendu combatants,
3 Lendu child soldiers, the weaponry that they were carrying at
4 a relevant period of time not long after the attack on Bogoro.

5 They are seen in Bunia at a time when one of the accused,
6 Mathieu Ngudjolo, had control over those forces. We would also
7 in this context specifically in relation to the child soldiers
8 refer to witness 373 and his testimony. In that instance, images
9 of child soldiers which relate to a much later period were
10 introduced and questioned on.

11 In this instance, this is much earlier footage, closer
12 to the relevant period after Bogoro, with commanders that we
13 will seek to have identified who are also already identified
14 in the transcripts, Commanders Unega, Pascal and Gorille, also
15 present together with Lendu child soldiers, working together
16 with the accused.

17 This evidence is relevant as circumstantial and
18 corroborative evidence to understand the context of the charges
19 the accused face, the contextual elements for war crimes and
20 crimes against humanity.

21 I now refer to the Bunia footage of attacks on civilians.
22 These are extracts 23 and 25. We submit that it is very important
23 for the Chamber to have before it imagery and evidence relating
24 to contextual elements of the war crimes and crimes against
25 humanity, showing Hema victims of attacks by Lendu and Ngiti.

1 From a contextual perspective, this is important to
2 demonstrate the organisational aims and policies of the groups
3 concerned, the modus operandi as well. The details you see in
4 this footage is very important.

5 Defence for Mathieu Ngudjolo have argued that it is
6 not appropriate to show certain images on the basis that it
7 is emotional, it's emotional content, and have alleged that
8 we are simply seeking to sway your Honours. On this point we
9 would stress that, obviously, this is not a jury; we are dealing
10 with professional judges,. We do not have footage from Bogoro,
11 but we have footage of related massacres and attacks. We believe
12 it is important for the Chamber and for the public to see the
13 reality of the massacres.

14 In terms of the importance of this footage for context
15 and chronology in terms of fighting in Bunia, we would refer
16 you also to the cross-examination of the Defence of the prior
17 witness, Witness 267. There was questioning in relation to the
18 context, both historical and chronological, including in
19 relation to the fighting and attacks in Bunia. It is only logical
20 that we provide further context and footage relevant for that
21 purpose.

22 Extract 24 indicates the date at which the UPDF withdrew
23 from Bunia on 6 May 2003, a point on which we were not able
24 to achieve an agreement on facts. And finally, extract 26
25 indicates the witness's contemporaneous knowledge of the attack

1 on Bogoro on which he is able to - and he is in a position
2 to - elaborate on. Sorry, I should refer to extracts 27 to 29.
3 These images from the cessation of hostilities agreement signing
4 are not only being produced to indicate the date on which the
5 agreement was signed, they're also clearly relevant to the issue
6 of the role and the authority of the accused within the group,
7 the FRPI, and the separate nature of that authority from the
8 FNI and, specifically, from Floribert Ndjabu Ngabu. You see
9 images of them signing the agreement separately and for their
10 own separate, respective organisations.

11 We have not had any admissions from -- agreed admissions
12 from Defence on any of these points, and it is for this reason
13 that the Prosecution felt it would be necessary to show this
14 footage.

15 We do submit that we believe this footage will be helpful
16 to the Chamber in resolving the issues before it.

17 Thank you, Mr President. We have no further
18 submissions at this stage.

19 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
20 Madam Prosecutor. Regarding the last extracts, that is
21 number 26, this has been objected to by Mr Hooper, but extracts
22 27, 28 and 29 have not been objected to formally by any of the
23 Defence teams. So you were going to briefly explain -- you have
24 explained to us the relevance, but Mr Hooper or Mr O'Shea,
25 because you will be the one leading this witness, can you tell

1 us, or rather elaborate on, your objections in light of what
2 Madam Luping has just said?

3 In principle we should break at 4.30, but we resumed
4 at 4, or at 3.45, so maybe we can work right up until 5.00 p.m.
5 If everyone agrees, we let the Defence teams express themselves
6 and then we break.

7 MRO'SHEA: Yes, thank you, Mr President, your Honours.
8 If I may, first of all, draw a distinction from a procedural
9 point of view, which the Chamber may or may not find helpful.

10 There are video extracts which we oppose the admission
11 of into evidence and there are video extracts which we oppose
12 being shown, and I think that the majority of the objections
13 relate to video extracts being admitted into evidence as opposed
14 to being shown.

15 And I don't know if this is helpful for the Chamber,
16 but that category of videos could be shown and then, on seeing
17 the videos, the decision as to whether to admit them could be
18 made at a later stage. I make that as a preliminary procedural
19 point. I don't know if that assists in saving time, but I put
20 that as a question to the Chamber, because there is just a small
21 group of videos which I could address now, because we think
22 they shouldn't be shown at all, but perhaps the ones that can
23 be shown, but the question of the admission is a problem, might
24 be dealt with later. I don't know what your Honour thinks about
25 that.

1 PRESIDING JUDGE COTTE: (Interpretation) You can
2 proceed for now and then we will see what happens later. Whatever,
3 these extracts should be dealt with collectively and not extract
4 by extract, because I think we would have a lot of difficulty
5 there.

6 Yes, Madam Prosecutor.

7 MS LUPING: Mr President, we simply wanted to bring
8 to your attention that we would have no objection to, for instance,
9 video footage being shown to the witness, the witness being
10 questioned, MFI numbers being assigned and the various
11 objections being dealt with at the very end for a determination
12 as to whether they be admitted into evidence and EVD numbers
13 assigned, if that would assist the process.

14 PRESIDING JUDGE COTTE: (Interpretation) I think
15 that proposal seems to be reasonable and it could be very helpful.
16 Anything that is provisional, given the expected difficulty
17 of the discussion, can really be dealt with only at the end
18 of the cross-examination; that is before EVD numbers can be
19 assigned.

20 MR O'SHEA: Yes, indeed, and I think my learned friend
21 is thinking along similar lines to myself. I think that would
22 assist, because there are quite a lot of extracts and the reasoning
23 is not always common to all of them.

24 Let me -- let me deal, then, specifically with the
25 ones that we have a difficulty with being shown, because in

1 our submission there are -- there are certain video extracts
2 which have a prejudicial value or a prejudicial effect not only
3 insofar as their admission into evidence is concerned, but
4 insofar as them being part of an exercise before this tribunal,
5 and to that extent we share the opinion of the team for Mathieu
6 Ngudjolo.

7 (Expunged)

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5 PRESIDING JUDGE COTTE: (Interpretation) Very well.

6 Mr O'Shea, in your submission please try to be very cautious.

7 It is very delicate, I know.

8 MR O'SHEA: But I think I can develop the argument
9 now. Oh, perhaps I'll go into closed session for this portion
10 of the argument. Otherwise that whole argument will have to
11 be redacted later, if my learned friend is right.

12 So if we can go into closed session for a couple of
13 minutes.

14 PRESIDING JUDGE COTTE: (Interpretation) Court
15 officer, let us go into private session, briefly. You are all
16 aware that we wish to have our proceedings in open session as
17 much as possible. We were talking about adopting a code of
18 conduct that would be even better than that which we have developed
19 over time.

20 Are we in private session, Madam Court Officer, or
21 do we need closed session? Prosecutor, please.

22 MS LUPING: No, Mr President. I believe partial
23 closed session will suffice.

24 (Private session at 4.24 p.m.)

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13 Page 32 expunged. Private Session.

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10 (Open session at 4.28 p.m.)

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

13 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
14 Court officer. Mr O'Shea, please proceed.

15 MR O'SHEA: There's a second subcategory of videos
16 which, in our submission, should not go into evidence or be
17 shown to the witness before the Judges, and that is the group
18 of videos which - and I put this as bluntly as I see it - shows
19 images of dead bodies lying either in a hospital or on the ground.

20 My learned friend has gone into some discussion around
21 this a moment ago and explained that these are contextual. Well,
22 contextual. I assume that she's referring to the
23 elements of a crime against humanity that is to say widespread
24 or systematic attack against a civilian population.

25 Images of dead bodies, in themselves, do not go very

1 far in demonstrating the manner in which those people died,
2 or the intention of those combatants or soldiers involved in
3 attacks where those people died.

4 We are not dealing here with video footage of battles,
5 so this is not evidence of the scene of the crime. Let me put
6 that differently: This is not evidence through video footage
7 of the crime.

8 what my learned friend needs to prove, contextually,
9 is that there was a widespread or systematic attack against
10 a civilian population, in the context of a governmental policy
11 or an organisational policy, as I understand it. So if there
12 are video images of people being killed that is one thing but
13 if they are simply images of injured or dead bodies in hospitals
14 or on the ground that has very, very minimal evidence.

15 For example, a mortar can be set off and it can have
16 the result of killing civilians. That may be because of a
17 directed attack against civilians or it may be a result of
18 incidental, unintended damage because of the nature of the
19 weapons used. So the fact of dead bodies or the images of dead
20 bodies on a screen does not actually prove anything substantive
21 to your Honours.

22 It does, however, have, as my learned friends for
23 Mr Ngudjolo have put it, an emotional impact. I entirely accept
24 that the judges are professional judges. That is why I have
25 proposed that some of these videos can be shown before the question

1 of their admission comes into place but the fact that your Honours
2 are professional judges, or that we are professional lawyers,
3 does not detract from the fact that we are human beings. We
4 are capable of being provoked into emotion and it does not detract
5 from the fact that some pieces of evidence are simply unnecessary.
6 They have a great shock effect, and that shock effect at a very
7 minimum would give the appearance that the Prosecution was
8 running its case against Mr Katanga on the basis of shock effect.
9 So we would say that those videos, their prejudicial effect
10 far outweighs any probative value that they have.

11 The other difficulty is that in one or two of these
12 videos you have somebody standing by, in one instance -- in
13 one instance you have commentary from inside a car; in another
14 instance you have somebody going along with the camera man and
15 making comments about the nature of injuries, for example. That,
16 in our submission, is a highly inappropriate way to present
17 evidence.

18 When witnesses come to Court, if they have suffered
19 injuries or they know of people who have suffered injuries or
20 have died during a battle scene, they can describe that to your
21 Honours. Their descriptions are subject to cross-examination.
22 If there is a question mark over the nature of specific injuries,
23 this Court can have expert evidence on those specific injuries.

24 PRESIDING JUDGE COTTE: (Interpretation) Mr O'Shea,
25 indeed. As much as possible, and systematically, please try

1 to tell us which extracts you're referring to? Now, twice you
2 said you, in one extract or another, if you have particular
3 video numbers, that would be most useful and we thank you.

4 The extract number actually. We are speaking of
5 extracts.

6 MR O'SHEA: Extract number 10 involves images of
7 wounded women, and wounded or dead children, and a baby inside
8 a hospital. There is commentary over the top in the form of
9 questions about references to machetes or amputation, in the
10 form of questions. Extract number 11 involves commentary about
11 pregnant women, and women who have delivered babies, and that
12 a number of mamas found their death. This again is a form of
13 commentary from a person speaking on the video; a person that
14 this defence will not have an opportunity to cross-examine.

15 That same video, apart from that commentary, simply
16 shows some landscape, a view of graves, and a building. Extract
17 number 12, shows a view of the countryside, a sign with "Hospital"
18 written on it, people running, and commentary from inside a
19 vehicle, with reference to expressions such as "fresh blood
20 yesterday", "cut those not dead", and I am giving English
21 translations, perhaps not very good ones.

22 MS LUPING: I am sorry to interrupt my learned friend,
23 but as I --

24 PRESIDING JUDGE COTTE: (Interpretation) Please
25 proceed, Madam Prosecutor.

1 MS LUPING: -- as I understood it at this stage we
2 are only supposed to be dealing with issues of relevance of
3 the first 17 prioritised extracts and leaving issues in relation
4 to the other extracts subsequently. So in the interests of
5 saving time perhaps Mr O'Shea can indicate to us those concerns
6 or extracts which they don't believe should be shown from those
7 17 priority extracts.

8 PRESIDING JUDGE COTTE: (Interpretation) Thank you
9 Madam Prosecutor, you are correct in terms of work method.
10 Indeed, videos 10, 11 and 12 that Mr O'Shea just spoke of, or
11 the ones that he is speaking to right now, are not to be found
12 on the list of the 17 extracts that the Prosecution would like
13 to initially present. The other two are of secondary interest.
14 If we are to understand correctly, the Prosecution wishes to
15 hold them in reserve. So if you could be clear, Mr O'Shea, about
16 the 17 extracts that are mentioned in the email that we received
17 at 15.11 with the exception of 28, 29.

18 MR O'SHEA: Extract 23, there we see an image of women
19 crying. We then see bodies, and then a woman gives an account
20 of what happened to her, and basically speaks about her being
21 asked to take off her clothes; asked her ethnic group; and how
22 people forcibly entered into the house.

23 So, again, that's an example of a shocking impact video
24 which at the same time has effectively the testimony of a
25 crime-based witness being given across the video, and that would

1 not comply with Rule 68 and it would not comply with fairness
2 to allow that kind of extract to be given. Unless that person
3 was giving evidence, then there may be exceptions.

4 Extract 25, again a voice-over of the nature of an
5 attack and images of bodies, including children in the streets,
6 and again opinion being given on the causes of injury, so again,
7 some form of testimony across video extract with scenes of dead
8 bodies without us knowing whether those individuals had been
9 the subject of a target from a specific group.

10 And these videos, in my submission, must be looked
11 at also in the context of the fact that they are not dealing
12 with Bogoro; they are dealing with a place called Drodro, and
13 Bunia respectively, which falls outside the matter which your
14 Honours are dealing with. So to show these kinds of shocking
15 videos, with testimony which cannot be tested on battles post
16 the battle which we are dealing with in this Court is unfair
17 on the Defence, in our respectful submission.

18 The other reasons or the other objections can be dealt
19 with in the way my learned friend suggests, that MFI numbers
20 can be attached and then the question of admissibility can be
21 dealt with, either at the time or later, as your Honours pleases.

22 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
23 Mr O'Shea, for those remarks. Mr Kilenda, Professor Fofé,
24 which one of you will be speaking? Professor Fofé, we are
25 listening; please proceed.

1 MR FOFÉ: (Interpretation) Thank you very much, your
2 Honour, honourable Judges. Before reviewing the first series
3 of extracts that the Prosecution wishes to present in Court
4 I would first like to make the following point, your Honours.

5 The various extracts that we are challenging have no
6 bearing on the attack on Bogoro on 24 February 2003. We see
7 the injured, the dead, in Bunia, Fataki, Katoto. The Bogoro
8 attack on 24 February 2003 does not come within, and I stress
9 this point on behalf of the Ngudjolo Defence team, the Bogoro
10 attack of 24 February 2003 does not come within the framework
11 of an interethnic conflict. The interethnic conflict was a low
12 level conflict. The Bogoro attack comes within the category
13 of an armed conflict of high intensity, involving state powers,
14 and the Prosecution must strive to identify those responsible,
15 those responsible for these high intensity attacks, attack,
16 pardon me, on Bogoro, in 2003.

17 The Defence team of Mr Ngudjolo would suggest extracts
18 for witness 30 that provide the more general context within
19 which the Bogoro attack occurred. It was not an interethnic
20 attack.

21 Furthermore, before reviewing the various extracts,
22 I would like to highlight what we said, and I refer you to paragraph
23 18 of our filing or, rather, our document sent by email. The
24 Ngudjolo Defence team would like to reiterate that we do not
25 contest that from 1999, to the year 2003, and even beyond that

1 period of time, in the Ituri region, there was an armed conflict
2 during which civilians from all ethnic groups were killed.
3 That's a historical fact.

4 Civilians from all ethnic groups were killed. That
5 being said, I would like to turn to the extracts that have been
6 suggested by the Prosecution and I would like to state that
7 these extracts which we are opposed to do not meet the requirements
8 to be admitted as evidence, because these extracts are not
9 relevant. These extracts have absolutely no bearing on the
10 actual facts of the case, in terms of the actual place of the
11 events, or the time of the events. These extracts do not meet
12 the requirements of equity, of fairness, towards the accused
13 person. Their probative value, with regard to the facts, the
14 events occurring in Bogoro in 2003, on 24 February 2003, is
15 clearly less in comparison with their potential effect, and
16 their hypothodical (sic) effect.

17 As we said in our filing, the Defence wishes to base
18 itself on the jurisprudence of the Court which, dealing with
19 various criteria for admissibility of evidence, states that
20 the core text of the Court does -- the text do state that all
21 elements of evidence can be provided but there is a condition;
22 each time the Chamber can rule on their admissibility and
23 relevance, in light of the requirement for fairness and to make
24 a ruling on such a matter, the Defence, pardon me, the Chamber
25 often has to balance a number of considerations; the possible

1 prejudicial effect and the possible probative value of the
2 evidence in question.

3 Now, if we review the various excerpts that have been
4 suggested by the Prosecution, we would like to observe that
5 these criteria have not been met. First of all, extracts 1,
6 2 and 4, in these extracts, which represent a total of
7 approximately 20 minutes of footage, in these extracts filmed
8 on 4 April 2003 during the conference of the Commission for
9 the Pacification of Ituri, the Prosecution believes that they
10 can demonstrate the existence of an armed conflict in Ituri, the
11 existence of political/military groups in Ituri, the existence
12 of attacks on civilians and community conflict between Hema
13 and Lendu.

14 The Defence is of the opinion, your Honours, that such
15 a presentation is a waste of time, a waste of Court time, because
16 this agreement did not have to do only with the Bogoro attack.

17 And I must also highlight that other witnesses have
18 spoken and will come to speak of the conflict in Ituri. We are
19 of the opinion that the extracts, extracts 1, 2 and 4, are not
20 relevant.

21 with regard to extract 15, this particular extract,
22 as Mr O'Shea said, deals with the situation in Bunia in May
23 2003. It shows a number of dead people, injured people in Bunia,
24 and of course the Prosecution has not chosen extracts 19 or
25 20, and we hope, of course, that these extracts will not be

1 presented because they only deal with Fataki, Katoto, and we
2 see in them the dead and the injured of Fataki and Katoto.

3 With regard to extract 15, well, we see the situation
4 in Bunia in May 2003, nothing that is relevant to this case,
5 nothing that has to do with the events that occurred in Bogoro
6 in February 2003, the 24th.

7 Allowing the introduction of such extracts would be
8 agreeing to expanding the jurisdiction of the Court beyond
9 the-- beyond the attack on Bogoro on 24 February 2003.

10 The Ngudjolo Defence team also wishes to object to
11 the presentation of extract 23, extract 23 which shows a young
12 girl telling the circumstances under which her brother died,
13 and I believe Mr O'Shea spoke of this as well.

14 At no time does this young girl give the name or the
15 origin of the killers, and these events have nothing to do with
16 the Bogoro attack of 24 February 2003.

17 The Defence has no means at its disposal to
18 cross-examine this person who is speaking. It would be unfair
19 to allow such an item to be placed on the case file or to even
20 view the item. This is of no bearing on the events that occurred
21 in Bogoro on 24 February 2003.

22 With regard to extract 25, this particular extract
23 lasts approximately 12 minutes, and the Prosecution would like
24 to show the injured and the dead in Bunia in the house of Elaran
25 (phon) on 13 May 2003. And this has nothing to do with the Bogoro

1 events. So there you have it for the first series of extracts
2 that the Prosecution would like to use.

3 It's quite clear that we desire that the extracts that
4 are set aside be set aside for once and for all definitively,
5 and we would be in a position, we would be willing to make an
6 objection regarding those other extracts.

7 To conclude, your Honours, I would like to stress once
8 again that the Defence team of Mr Ngudjolo is opposed to the
9 presentation of these extracts because they are not relevant
10 and they are of a nature that would cause prejudice to our client,
11 an unnecessary prejudice. The showing of images of dead people,
12 injured people, from Bunia, from Fataki, Katoto, is not at all
13 necessary to shed light on the events that occurred in Bogoro.
14 And the presentation of these extracts would only stir emotion,
15 provoke emotion amongst the members of the Chamber, with a view
16 to having an influence on the Chamber, with a view to swaying
17 them to take an attitude not favourable to the accused.

18 The efforts on the part of the Prosecutor should really
19 be to prove the responsibility of the accused in the attack
20 against Bogoro on 24 February 2003. To do that, there is no
21 need whatsoever to create any diversion, the effect of which
22 would be to waste the Court's time pointlessly.

23 Your Honours, this is the position of the Defence of
24 Mathieu Ngudjolo. I see the Prosecutor standing. This anyhow
25 is the position of the Defence team for Mathieu Ngudjolo as

1 regards the first series of extracts proposed by the Prosecutor.
2 Thank you.

3 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
4 Professor Fofé.

5 Court officer, I believe that we now have problems
6 as regards the tapes.

7 Does Ms Luping have time to say something? I'd also
8 like to hear from the legal representatives. I should have said
9 this earlier on before we heard from the Defence. How long do
10 we have? One minute? Two minutes? Three minutes?

11 First of all, the legal representatives, do they wish
12 to speak to these different matters? We have three minutes,
13 which is not a lot, because if we can't do that, we will come
14 back to it after the break.

15 MR GILISSEN: (Interpretation) I can be very brief.
16 Yes, we do wish to take the floor.

17 PRESIDING JUDGE COTTE: (Interpretation) Well, you
18 will be able to do so, then we will come back to the Defence
19 afterwards.

20 Ms Luping, do you have something brief or lengthy to
21 say? We have only two minutes left now.

22 MS LUPING: Mr President, I do intend to be brief,
23 but it will take a few minutes, so my suggestion is that we
24 deal with my submissions at the end of the break.

25 PRESIDING JUDGE COTTE: (Interpretation) Very well.

1 So, after the break, Ms Luping will take the floor,
2 then the legal representatives of victims will tell us what
3 their position is, then the Defence will speak again, having
4 heard from the legal representatives of the victims, that's
5 the rule, and after that the Court will take the necessary time
6 to respond to your different interventions. We shall break now
7 and resume at 17.35 for a further hour. The hearing is, thus,
8 adjourned.

9 (Recess taken at 5.04 p.m.)

10 (Upon resuming at 5.40 p.m.)

11 (Open session)

12 THE COURT USHER: All rise.

13 PRESIDING JUDGE COTTE: (Interpretation) We are in
14 session. Please be seated.

15 Prosecutor, you stood just before the break and we
16 should now like to listen to what you have to say. Please proceed.

17 MS LUPING: (Microphone not activated) Thank you,
18 Mr President. If we could briefly go into private session so
19 I can deal with the first category of objections of
20 Defence Counsel.

21 PRESIDING JUDGE COTTE: (Interpretation) Yes. To
22 the extent possible, whenever there's a request for us to go
23 into private session, please try to explain to us why so that
24 we have a full understanding, all of us, of what's happening.
25 You're probably going to talk about questions to do with the

1 protection of the individual. Fine.

2 Court officer, in that case, we shall briefly go into
3 private session.

4 (Private session at 5.42 p.m.)

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6 (Open session at 5.44 p.m.)

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

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

11 Before I ask you to proceed once more, Ms Luping - and
12 I should have done this beforehand in order to organisation
13 things correctly - let me say that we will be working through
14 until 18.30. So we're hearing from you, after which we'll hear
15 from the legal representatives, and then we will have to hear
16 both of the Defence teams responding, and that will bring us
17 to the end of the day, unless we still have enough time for
18 me to read out to you the decision concerning the protection
19 measures granted for witness 30 during the hearing.

20 And tomorrow the Bench will give you its response to
21 the exchange, the debate that we've had so far. I just wanted
22 to clarify this so that we would be able to begin tomorrow morning
23 on the basis of the decision we will have taken.

24 Is that all you had to say, Ms Luping? You were not
25 intending to continue?

1 MS LUPING: I did intend to continue, Mr President.
2 I was waiting for us to go back into public session.

3 PRESIDING JUDGE COTTE: (Interpretation) We are in
4 public session, so please proceed. Remember that you have to
5 allow enough time for the legal representatives of the victims
6 and the Defence teams as well, and we have a total of 45 minutes.

7 MS LUPING: I shall be brief, Mr President.

8 My next submissions relate to the objections made by
9 Defence in relation to what I would describe as footage of
10 attacks on civilians. First dealing with the point that there
11 is no value or relevance of this imagery, the imagery, to a
12 large extent, speaks for itself. In our submission, it is for
13 your Honours to consider the footage and to come to a conclusion
14 subsequently as to the weight that you place on that evidence,
15 and conclusions, for example, as to whether you consider injuries
16 seen simply amount to collateral damage or whether they evidence
17 targeting of civilians. for example, by machete wound.

18 One example I would give from footage, from extract
19 26 -- sorry, extract 25 -- depict a child with his genitals
20 removed. And in this instance it could be argued that this
21 doesn't just simply show collateral damage, but a clear targeting
22 of a civilian.

23 Secondly, dealing with the issue of individuals or
24 survivors of attacks speaking on the video footage, the argument
25 made was that the Defence would need to have recourse to these

1 individuals for the purposes of cross-examination for that
2 footage to have any value. Well, our response to that is this
3 footage has nothing to do with Rule 68 or prior testimony of
4 a individual, per se. This evidence is similar to hearsay
5 evidence. It is evidence of an account provided by another
6 individual to one of our witnesses. But instead of having that
7 third-party account recorded in a witness statement, in this
8 instance it's been recorded on film for us to see for ourselves.
9 We can hear for ourselves what that third party had to say about
10 the events in question.

11 And we would refer the Chamber to your decision of
12 12 July regarding the admissibility of hearsay evidence and
13 that it should be admissible. It's an issue of weight to be
14 determined subsequently.

15 As to the argument that only imagery or footage from
16 Bogoro itself should be seen as relevant, as this Chamber itself,
17 as well as Trial Chamber I in the Lubanga proceedings has accepted,
18 information regarding other attacks perpetrated by the same
19 group is relevant for the purposes of context. It demonstrates
20 not only the organisational aims of that group, a targeting
21 of Hema civilians, the modus operandi, the use of machetes,
22 for example, on civilians, it shows a clear targeting of civilians.
23 For example, in extract 23 we hear an account - and 25 - we
24 hear an account -- accounts of how the attackers were
25 specifically targeting and searching for Hema civilians. In

1 extract 25 Lendu attackers are explicitly mentioned. So we would
2 argue that it's clearly relevant for the Chamber to see and
3 hear this evidence for the purposes of understanding the context
4 of the charges against the accused.

5 And finally, in relation to this type of footage, we
6 would ask that the Chamber not shy away from this type of imagery.
7 It's not the intention of the Prosecution to simply submit
8 evidence for shock value, as the Defence has alleged. At the
9 same time, it's important that this Chamber, bearing in mind
10 its mandate and its function as an International Criminal Court
11 dealing with the most serious crimes, including attacks on
12 civilians, murder, genocide, extermination, that you allow
13 yourselves to have the depictions, the footage to enable you
14 to see the reality of these attacks on civilians and the results
15 of those attacks and what they mean for the victims.

16 And we would recall that the Defence has made it clear
17 they do not admit to the targeted nature of these attacks on
18 civilians, nor do they admit the inter-ethnic nature of the
19 conflict. This makes the footage, including searching out of
20 Hema civilians in Bunia, extremely relevant.

21 And they themselves, Defence, have made, in particular,
22 the footage in Bunia an issue for us to consider. They questioned
23 Witness 267 at length on the issue of the attacks and the conflict
24 in Bunia, and for this reason we must be given an opportunity
25 to provide the Chamber with further contextual evidence in that

1 regard.

2 As regards relevance of specific extracts mentioned
3 by Mr Fofé, as we explained previously, the date of the creation
4 of the FNI has not been admitted by the Defence. And these
5 circumstances - we would repeat the importance of extract 1 - we
6 have not had any concession on the role and authority of Mr Mathieu
7 Ngudjolo at the relevant time in the period not long after Bogoro
8 at an important pacification meeting. The image of Mr Ngudjolo
9 at that meeting, the clear signs indicating the presence,
10 existence of FRPI, the Lendu North and the FNI are all issues
11 to be considered by this Chamber and have extremely important
12 value.

13 We have also not had any concessions of the violations
14 by the FNI or FRPI of the cessation of hostilities agreement,
15 even not long after it was signed. On this basis contemporaneous
16 footage referring to those violations, (Expunged)
17 (Expunged)
18 (Expunged), again has clear relevance and pertinence.

19 Those are our submissions, Mr President. We have no
20 further submissions to make on this point.

21 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
22 Prosecutor. Mr Gilissen or Mr Luvengika, which of the two of
23 you wishes to speak? Perhaps both of you, in which case who
24 will begin? Mr Gilissen. Please proceed, Mr Gilissen.

25 MR GILISSEN: (Interpretation) Thank you, your

1 Honour. Your Honours, honourable colleagues, I feel as if I'm
2 jumping into the deep end, to a certain extent, because I think
3 this is an important debate. We have doubtless reached a key
4 moment of what will happen subsequently in our discussions,
5 and we feel that the Defence in this instance has put the finger
6 on a very important aspect. In International Criminal Law - and
7 this is historically true - there's always been a tendency to
8 go ahead with an extensive admission of evidence. It's
9 early -- it's true early on - the Blaskic case is a very good
10 example - and the Rules of Evidence of the Court have
11 institutionalised this through Article 69(4) and Rule 63(2),
12 which show tremendous flexibility and effectiveness of the
13 evidence. I think it's important to highlight that particular
14 aspect.

15 what we are concerned with and the point of everything
16 we are doing here is to seek the truth. And the rule is very
17 clear. There is no specific measure as regards the exclusion
18 of evidence if the probative value of the latter prevails over
19 the need for a fair trial. That is the rule that's been set
20 down in the text of the Court and it's been laid down in an
21 autonomous regime of admissibility of proof.

22 So what does this mean in concrete terms? We have
23 to see whether the evidence that's to be shown is relevant,
24 and is relevant prima facie; in other words, at first sight is
25 immediately seen as being relevant. And such relevance -- well,

1 we know that the idea is to seek a potential effect of that
2 evidence, potential relevance from the point of view of each
3 of the charges laid out and set out against the accused by the
4 Prosecutor. And your Honours, we submit that that relevance
5 is to be found within the context that was stated, and stated
6 very well indeed by the Prosecutor, but it's to be found within
7 the context.

8 In this particular case, the context is one of the
9 constitutive elements of the charges levelled at the accused.
10 So I think it's essential, if there's no prima facie element
11 that would establish the opposite, that we should see how we
12 can progress on these grounds. I think there is probative value,
13 and I would say that there's a degree of confusion because,
14 to my mind, this concerns the element of proof or evidence and
15 not the perpetrator or the author behind it.

16 So your Honours, this is what comes to my mind in the
17 context of your balancing out with the pros and cons, because
18 this is what you have to do and this is part of your autonomous
19 role and it's something that has to be said time and time again.

20 At this particular state in the case - and I want to
21 make this clear again so as to avoid there being any confusion - is
22 such that we mustn't get confused in the context of analysing
23 things prima facie.

24 So ladies and gentlemen, I want to make sure that I am stating
25 things objectively. We have taken a look at the extracts,

1 together with my learned colleague, and these extracts, to our
2 mind, make it possible to see an essential aspect; in other
3 words, what actually happened in Ituri. These are images which
4 have not been reworked, revisited in any way.

5 what do these extracts show us? Rightly or wrongly,
6 whether it's in -- with a positive or a negative intention,
7 these images show us a certain amount of information as to the
8 mode of action, the weapons used, the tactics or the techniques
9 that were used. Clearly, the fact that these attacks involved
10 civilians, you know that the Gordian knot is there to be cut,
11 and I would say that one of the Gordian knots here is the position
12 of the civilians. There have been civilians as victims. We
13 have to see in what circumstances. And then there's the famous
14 issue of ethnic appartenance.

15 So, in showing these extracts, a certain amount of
16 information will be submitted to you, will be provided to you
17 and you will assess it, and then obviously we will have the
18 opportunity to discuss things, all of us together, but this
19 is not a prima facie issue, it's a matter that goes to the merits
20 of the case.

21 So, your Honours, I don't want to go on to excessive
22 length. Perhaps here I'm putting things in a somewhat summary
23 fashion and certainly setting out the theoretical point of view,
24 but when we're seeking the truth in a system that strives to
25 be flexible, can we do away with images that set out reality?

1 Our position is clearly to say, no, that's not possible.

2 The intrinsic value of these images and the words that
3 we will be hearing will be discussed by us once we've seen them.
4 But I think - and I would, your Honours, like to stress this
5 point, I think that such information is essential from the point
6 of view of the victims. Here we are talking about the very crux
7 of the matter. This information has to be examined from the
8 point of view of the merits in this case. Thank you.

9 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
10 Mr Gilissen.

11 Mr Luvengika, do you wish to add to what has been said?

12 MR NSITA: (Interpretation) Yes. Your Honours,
13 learned friends, I think that while I subscribe to what my learned
14 colleague Mr Gilissen has said, I would like to add something
15 that seems to be quite important, and that is a fact that regarding
16 the victims that we represent, we have realized, generally
17 speaking, relating to the civilian population of Ituri, there
18 is the way that the attacks and the war actually took place.
19 They know what happened, and those people are very interested
20 in knowing what is happening here in the Court, because according
21 to them an understanding the situation and the ascertainment
22 of the truth will come from this Court.

23 That said, when it comes to context which we have been
24 discussing this afternoon, this seems to be very important for
25 the victims that we are representing. The Prosecutor has said,

1 and Mr Gilissen has supported it, that the elements are not
2 directly linked to the Bogoro attack of 23 February 2003, but
3 it gives a general overview of the situation in Ituri between
4 1999 and 2003, and even beyond.

5 And so without repeating what the others have already
6 said, we think that the texts governing the Court in its Articles
7 69 and 64 allows the Chamber the leeway to determine the probative
8 value of these elements. At this stage we are requesting the
9 Chamber to allow this information which would enlighten all
10 the parties and participants, as well as the Chamber, and also
11 the population of Ituri who are following these proceedings,
12 to know what happened to them during the period in question.
13 Thank you.

14 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
15 Mr Luvengika.

16 In light of what has just been said, can you, Mr O'Shea,
17 add to what you said a short while ago?

18 MR O'SHEA: Mr President, your Honours, the
19 flexibility which has been referred to in the ICC Statute has
20 to be measured against the very key and pillar provisions in
21 the statute of Article 69(2), which states that evidence must
22 be given in person and Article 69(4), which invites your Honours
23 to balance the degree of probative value of evidence and the
24 degree of prejudice that evidence might carry to a fair trial.

25 And in my submission, when the drafters of the Statute

1 drafted 69(4), they had exactly this kind of situation in mind.
2 what the Prosecution is inviting, the practice which the
3 Prosecution is inviting your Honours to undertake is, if I may
4 say so, a very dangerous practice. It is an invitation to allow,
5 to an extent, trial by media.

6 In 2003, the Statute of the International Criminal
7 Court had already entered into force. The International
8 Criminal Court already had jurisdiction and its existence was
9 well-known, and the media knew of its existence. If we were
10 today to allow video footage of accounts of what happened in
11 attacks, carried out by journalists and cameramen, we would
12 open up a door for the preparation of trials in this International
13 Criminal Court by the media, by the sort of interviews that
14 my learned friend is seeking to admit at this stage.

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Expunged)

21 (Expunged)

22 (Expunged)

23 (Expunged)

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25 (Expunged)

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5 (Expunged)

6 (Expunged)

7 (Expunged)

8 MR O'SHEA: Very well.

9 PRESIDING JUDGE COTTE: (Interpretation) You are
10 perfectly correct. I missed that myself.

11 Mr O'Shea, if you have to continue on that aspect,
12 then it is preferable for us to go into private session, or
13 you move on to something else.

14 MR O'SHEA: Perhaps I can express it in a way which
15 does not go --

16 PRESIDING JUDGE COTTE: (No interpretation)

17 MR O'SHEA: Essentially, what I'm saying is that
18 there -- the category of speech that we see in extract 4 in
19 particular has greater dangers than if an extract were, in fact,
20 prepared for the purpose of Court proceedings because the
21 individuals who are speaking in that video extract are speaking
22 with a political motive, they are speaking with a political
23 purpose. So the fact that a video footage is not prepared for
24 court does not make it less dangerous but more dangerous from
25 the point of view of what's being done.

1 And the danger that we see in extract 4 is that the -- the
2 subject matter which is being spoken about, the commission of
3 massacres or whatever the case may be, is exactly the sort of
4 thing which should be given in evidence in court.

5 Now, my learned friend says that we cannot go back to P30. Of
6 course we can, if necessary, go back to P30. The important
7 point is to preserve the fairness of this trial. (Expunged)

8 (Expunged)

9 (Expunged)

10 Now, with regard to this other category of videos,
11 my learned friend expresses herself in terms of images of attacks
12 on civilians. That I say, with the greatest of respect, is a
13 misleading expression. We do not have here images of attacks
14 on civilians. We have images of dead bodies.

15 And my learned friend cites one instance where she
16 says that the genitalia of a child were removed. What we see
17 is the genitalia of a child absent or severely damaged. We don't
18 know how that occurred without testimony as to how it occurred.

19 And even if we were in a position to make the assumption
20 my learned friend makes in relation to that single image, a
21 single image where an assumption can be made about the nature
22 of a wound does not justify the admission of that evidence,
23 because this evidence is being produced by the Prosecution for
24 the purpose of establishing widespread or systematic attacks
25 against a civilian population.

1 So even if my learned friend were right in her assumption,
2 that would not justify the admission of this evidence for the
3 purpose for which she's seeking its admission. It's a very
4 interesting argument that she raises when dealing with the
5 accounts of what combatants did by individuals on video footage.
6 It's a very interesting argument to say that, "well, it's hearsay
7 and hearsay is allowed in international criminal courts." I
8 must say I didn't expect that one and so congratulations on
9 the ingenuity of it, but the issue here is not whether it's
10 hearsay or direct. The point is that somebody is telling a story
11 and the issue is prejudice, and the prejudice is that the
12 Defence does not have the opportunity to examine that person
13 who is telling the story.

14 So it is not quite what my learned friend is suggesting. It's
15 not that P30 will come into Court and give an account of
16 something he experienced and then, in addition to that, give
17 some evidence of what he heard from other people about the same
18 incident. That's not what we're dealing with here. (Expunged)
19 (Expunged)

20 So just to conclude, in our submission the real issue
21 here is prejudice to a fair trial. If something is
22 contemporaneous and gives an indication of a reaction of an
23 individual, such as we will see in some of the videos which
24 my learned friend is purporting to put forward, where, for example,
25 combatants are themselves giving a reaction to something which

1 has occurred, that's one thing. But for someone to tell a story
2 across a video, as to something -- as to a past event, that's
3 something quite different.

4 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
5 Mr O'Shea. Professor Fofé?

6 MR FOFÉ: (Interpretation) Thank you very much, your
7 Honour. I will try to be concrete and to respond to the Prosecutor
8 as well as to our learned friend Mr Gilissen.

9 Regarding what the Prosecutor said, she started by
10 saying that in extract 25 she would like to show the Chamber the
11 victims of an attack. The question that arises is as follows,
12 your Honours: which attack are we talking about? which attack
13 was responsible for those victims?

14 And the same question arises with regard to extract
15 23. Your Honours, extract number 25 talks about death, dead
16 people in Bunia on 13 May 2003. The question that the
17 Defence would like to ask is the following: why would you want
18 to link these extracts to the accused, whereas, these excesses
19 might have been committed by the UPC, by the UPDF, by the FAC,
20 by APDF, and so on and so forth.

21 I believe when you put it that way, it is simply
22 tarnishing Mr Mathieu Ngudjolo's image. It is not fair.
23 I would like to point out to the august Chamber that the decision
24 of the International Court of Justice of 19 December 2005, in
25 the case Democratic Republic of Congo versus Uganda, that is

1 a decision that we are all familiar with, and in that judgment
2 the Court refers to civilian populations of all ethnic groups
3 in Ituri who were massacred by the Ugandan armed forces. This
4 judgment exists and shows that civilian populations from all
5 ethnic groups were massacred by Ugandan forces.

6 Then how is it that in this context you can take images
7 of dead people in Bunia and come and present it in the Ngudjolo
8 case? It is not fair.

9 Third point regarding what the Prosecutor said, she
10 told us that she would like to show extract number 1 apparently
11 to show the date of creation of the FNI. Your Honours, the founder
12 of the FNI is there; he's alive. Why can the Prosecutor not
13 call the founder of the FNI, for example? It is not relevant.

14 Let me now come to what our learned friend Mr Gilissen
15 has said, and I am going to be brief. Mr Gilissen asked a
16 question, and that question was as follows: Can we overlook
17 images of reality? And the Defence would like to answer that
18 question with another question: which reality are you talking
19 about?

20 why can the Prosecutor not show us images of the victims
21 in Bogoro of 24 February 2003? Bogoro is the context. It is
22 about Bogoro that we are dealing with in this case. Why would
23 she want to link images from the extracts that she wants to
24 show us to the Ngudjolo case? It is to unjustly or unfairly
25 accuse him, and that is not fair because, as I have already

1 said, those killings could have been perpetrated by others,
2 by the Ugandans, by soldiers of the UPC, the FARC, the APC,
3 and others, so it is not fair.

4 To conclude, your Honours, the Defence submits that
5 the Chamber will administer justice by limiting itself to the
6 case of which it is seized; that is, Bogoro. Very respectfully,
7 I would like to say that the Chamber should not accept
8 digressions that unjustly vilify the accused persons. Thank
9 you, Mr President.

10 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
11 Professor Fofé. We are not going to read to you the decision
12 on the protection measures for witness 30; we are going to do
13 that tomorrow. The Chamber would like to thank all the parties
14 and participants for your contributions to our proceedings that
15 was necessary today. We will reconvene here tomorrow morning
16 at 9 a.m. and we will give you our opinion.

17 Court is adjourned. And I would like to thank all
18 the support staff.

19 (The hearing ends at 6.25 p.m.)

20 CORRECTION REPORT

21 The following correction has been made to the English transcript:

22 * Page 17, lines 15 to 16

23 "...are you planning to show the 27 excerpts, plus an additional
24 two, possibly?"

25 Is corrected by

- 1 “...are you planning to show the * 17 excerpts, plus an additional
- 2 * 12, possibly?”