

1 International Criminal Court
2 Trial Chamber VI - Courtroom 2
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Robert Fremr, Judge Kuniko Ozaki and
6 Judge Chang-ho Chung
7 Trial Hearing
8 Friday, 12 February 2016
9 (The hearing starts in open session at 9.32 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE FREMR: Good morning, everybody.
14 Court officer, please call the case.
15 THE COURT OFFICER: Thank you, Mr President.
16 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
17 versus Bosco Ntaganda, case reference ICC-01/04-02/06.
18 We are in open session.
19 PRESIDING JUDGE FREMR: Thank you.
20 Now appearances please in usual order.
21 MR IVERSON: Good morning, your Honours. Appearing today on behalf of the Office
22 of the Prosecutor are Laura Morris, assistant trial lawyer; Nicole Samson, senior trial
23 lawyer; Rens van der Werf, assistant trial lawyer; James Pace, assistant trial lawyer;
24 Selam Yirgou, case manager; and myself, Eric Iverson, trial lawyer.
25 PRESIDING JUDGE FREMR: Thank you, Mr Iverson.

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1 Defence, please.

2 MR BOURGON: (Interpretation) Good morning, your Honour, your Honours, and to
3 all persons present in the courtroom. Representing Bosco Ntaganda, who is present this
4 morning, Elisa Binon, stagiaire; Isabelle Martineau, legal assistant on a temporary base;
5 and myself, Stéphane Bourgon. Thank you very much, your Honour.

6 PRESIDING JUDGE FREMR: Thank you, Mr Bourgon.

7 Legal Representative of Victims now.

8 MS PELLET: (Interpretation) Thank you very much your Honour. Former child
9 soldiers are represented by Mohamed Abdou and by myself, Sarah Pellet, counsel with
10 the Office of Public Counsel for Victims.

11 MR SUPRUN: (Interpretation) Good morning, your Honour, your Honours. The
12 victims of the attacks are represented by the Office of Public Counsel for Victims,
13 Anne Grabowski and myself, Dmytro Suprun, counsel.

14 PRESIDING JUDGE FREMR: Thank you, Ms Pellet. Thank you, Mr Suprun.
15 And duty counsel, please.

16 MS DOUCERAIN: (Interpretation) Good morning, your Honour, your Honours.
17 Karine Doucerain, counsel for Witness 290.

18 PRESIDING JUDGE FREMR: (Interpretation) Thank you very much
19 Madame Doucerain.

20 And now we can start with testimony.

21 Mr Witness, good morning. Are you feeling well today?

22 WITNESS: DRC-OTP-P-0290 (On former oath)
23 (The witness speaks French)

24 THE WITNESS: (Interpretation) Good morning, your Honour. Indeed, I feel fine.

25 PRESIDING JUDGE FREMR: Very good.

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1 So Mr Iverson will continue questioning you.

2 Mr Iverson, as I said yesterday, it would be ideal if you could -- even if you still have
3 more than two hours, but it would be ideal if you could finish the testimony just within
4 the first session, and we are even ready to make it a little bit longer if necessary, but still if
5 you could finish this witness in 2 hours it will be very good.

6 MR IVERSON: I'll do my best, your Honour. I think that we can actually stay in open
7 session for the time being. And I would just ask the witness to be mindful that we're in
8 open session.

9 QUESTIONED BY MR IVERSON: (Continuing)

10 Q. Good morning, sir. How are you?

11 A. Good morning. I'm fine.

12 Q. Sir, I'd like to go back to Mr Ntaganda's compound. Could you tell the Chamber
13 whether Mr Ntaganda had guards guarding the compound?

14 A. Yes, there were guards.

15 Q. And who guarded Mr Ntaganda's compound?

16 A. Soldiers. Soldiers guarded the residence.

17 Q. Could you please tell the Chamber whether there were any children among the
18 soldiers who guarded the compound?

19 PRESIDING JUDGE FREMR: Mr Bourgon.

20 MR BOURGON: Leading question, Mr President. It suggests both the answer and can
21 be answered by yes or no.

22 PRESIDING JUDGE FREMR: Objection sustained.

23 Mr Iverson, I think you can rephrase the question. Ask for example for age of guards,
24 something like that, but this question is really leading.

25 MR IVERSON:

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1 Q. Could you tell the Chamber what the ages of the guards were?

2 A. There was a mix. There was a commander, the person commanding those soldiers,
3 who was older, and amongst the soldiers there were older ones and less old ones; in other
4 words, children.

5 Q. And how old were the children?

6 A. Well, the youngest may have been 13 years old.

7 Q. And when you say "youngest," are you referring to one or more children?

8 A. I'm saying the youngest in the plural. In general, it wasn't one child, but rather
9 most of the children were not old. They may have been 13 years old.

10 Q. And how many young children were amongst the guards?

11 A. I couldn't determine the number.

12 Q. And could you describe these children, what did they look like?

13 PRESIDING JUDGE FREMR: Mr Iverson, could you be more specific to describe what
14 does it mean? Please try to be more specific.

15 MR IVERSON:

16 Q. When looking at the children what told you, what indicated to you that they were
17 children around 13 years old?

18 A. What I observed is that regarding those who were with me while I was training
19 them they were playing, they were just concerned with their own activities. And for me
20 that indicates that they were children, they were not mature at all. I was teaching them
21 something useful, but they had no interest and would turn to go and play.

22 PRESIDING JUDGE FREMR: Mr Bourgon.

23 MR BOURGON: Thank you, Mr President. Can we ask the witness to remove his
24 earphones, please.

25 PRESIDING JUDGE FREMR: Mr Witness, please -- or, court officer, could you assist

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1 Mr Witness to take his headphones off.

2 Mr Bourgon, you may proceed.

3 MR BOURGON: Thank you, Mr President. Clearly, Mr President, the witness is
4 confusing the people who were with him in the compound with the escorts. And the
5 questions do not allow him to make that difference. The issue of the persons he was
6 training has been dealt with.

7 Now, Mr President, the -- I note for the record that in his statement the witness never
8 mentioned the figure 13. We respectfully submit that this is a direct result of what
9 happened the other day and the manner in which the evidence was elicited from him. So
10 we just want to be very careful to how we will approach this topic with him so that there
11 is no confusion in his mind as to what he is answering and what the questions are. So
12 this is our objection at this time, Mr President. Thank you.

13 PRESIDING JUDGE FREMR: Mr Iverson.

14 MR IVERSON: I'm sorry, your Honour, I don't understand what the objection actually
15 is.

16 PRESIDING JUDGE FREMR: Neither do I.

17 But, Mr Bourgon, at least it is on the record. I think Mr Iverson asked Mr Witness try to
18 be more specific as concerns guards, so -- but if you want just to express your doubts, it's
19 on the record, but really I don't understand what your objection is targeting.

20 MR BOURGON: The objection, Mr President, is that the question must be directed
21 specifically not to confuse the witness. If the witness is asked about children, he will
22 necessarily be confused between the person he trained, which he covered already, and
23 with other persons. So the question should be directed at the other person. It's a
24 clear-cut objection, Mr President. Thank you.

25 PRESIDING JUDGE FREMR: In such a case, objection is overruled because we in fact

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1 followed your fair objection and we order Mr Iverson to rephrase his first question and
2 from that point I found everything okay.

3 Mr Iverson, you may proceed.

4 MR IVERSON: Could I ask for private session, your Honour.

5 PRESIDING JUDGE FREMR: All right.

6 And please you can just, yes, provide Mr Witness with headphones again. And then we
7 can move into private session.

8 (Private session at 9.45 a.m.)

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7 (Open session at 9.48 a.m.)

8 THE COURT OFFICER: We're back in open session, Mr President.

9 PRESIDING JUDGE FREMR: Mr Iverson, please proceed.

10 MR IVERSON: Thank you, your Honour.

11 Q. Now, I'm just asking a question with reference to Mr Ntaganda's guards guarding
12 the compound. Could you describe the physical appearance of the children that you
13 mentioned?

14 A. Well, as I said yesterday, your Honour, appearance isn't determinative of age, but
15 what I observed in relation to how they were, when they were with me, while I was with
16 them, they would play rather than pay attention to the things that I was there to give
17 them.

18 Q. I'm not sure that my question was entirely understood.

19 PRESIDING JUDGE FREMR: Mr Iverson, maybe again you should be more specific.
20 Are you interested in the colour of their eyes or, you know. So you said again
21 "appearance," it's very I think broad determination of the question. So if you are
22 interested in some specific aspects of their appearance, please go this way.

23 MR IVERSON: Well, it wasn't -- it wasn't that issue, your Honour, that I was talking
24 about.

25 Q. It was that I am asking specifically about the guards, sir. And you mentioned that

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1 they were playing. Can you explain what you mean by "playing"? What were
2 they -- what were they doing with -- while they were playing?

3 PRESIDING JUDGE FREMR: Mr Bourgon.

4 MR BOURGON: Mr President, when the witness mentioned those who were playing, he
5 was referring to those he was training and not to the guards. So the question must be
6 rephrased. Thank you.

7 PRESIDING JUDGE FREMR: Mr Iverson.

8 MR IVERSON: All right. Let me try this again.

9 Q. I'm just asking about people you referred to as being children and guards at
10 Mr Ntaganda's compound. Do you understand that, sir?

11 A. Yes, I understand what you are saying, but I was far from those who were guarding.
12 Generally, those that were guarding remained outside. Others were inside, but just at
13 the entrance where, as I was focused on the area where I was. So as regards the guards,
14 really it's difficult to give further information.

15 Q. Sir, you previously said that amongst the guards some of the guards were children.
16 Why did you -- why did you come to that conclusion that they were children?

17 PRESIDING JUDGE FREMR: Mr Iverson, asked and answered. You can look on the
18 transcript a few lines above.

19 MR IVERSON: Your Honour, I have asked and it was answered, but now he's come
20 back and said that he didn't observe the guards as much and so I'm trying to inquire into
21 that new piece of information.

22 PRESIDING JUDGE FREMR: Give me a second. I will double-check our transcript.
23 Mr Bourgon.

24 MR BOURGON: Mr President, I refer to page 10, lines 1 to 3, where it says "So as regards
25 the guards, really it's difficult to give further information." I think the answer is there,

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1 Mr President, and we need to proceed further. Thank you.

2 PRESIDING JUDGE FREMR: Please move further, Mr Iverson.

3 MR IVERSON: Your Honour, I would request leave to ask the question to clarify. Am I
4 granted that leave by the Chamber?

5 PRESIDING JUDGE FREMR: Okay then, try.

6 Mr Bourgon.

7 MR BOURGON: Mr President, there has -- a decision has been rendered by the
8 Chamber.

9 PRESIDING JUDGE FREMR: Yes, I --

10 MR BOURGON: When it happens to us we don't get an opportunity to get clarification.

11 If he wants a reconsideration of your decision, Mr President, he should argue why and
12 make his case and the witness should remove his headphones. Thank you.

13 PRESIDING JUDGE FREMR: But let's wait for the question.

14 MR IVERSON:

15 Q. Sir, why do you conclude that there were children amongst the guards when you
16 also say that you had limited capacity to observe the guards?

17 PRESIDING JUDGE FREMR: I see some innovation in this question, Mr Bourgon, so the
18 witness may respond.

19 THE WITNESS: (Interpretation) Well, as regards the guards, as I said, when I would
20 arrive I would encounter those who were outside, then I would enter and encounter those
21 who were inside. That's why I said that I would see them. So when I would enter, I
22 would directly pass by there going to where I had to be.

23 Regarding their appearance, what I said is that those who were with me sometimes
24 played. Those who were with me sometimes played at the location where we were.

25 As regards those who were at the gate, and I did not pay attention to what they were

1 doing, but when I saw them, looked at them, I could see, for instance, their faces, their
2 physiognomy was similar to that of those who were with me; they had the same kind of
3 faces as those who were with me, that's why I say they were children.

4 MR IVERSON:

5 Q. And can you tell the Chamber whether the guards at Mr Ntaganda's compound
6 were armed?

7 A. Yes, the guards were armed.

8 Q. Were all of the guards armed?

9 A. In any case, there were guards who were empty-handed who did not have weapons.
10 There were others who were armed and who would patrol and who bore weapons and
11 others who were empty-handed and who did not.

12 Q. And can you tell the Chamber what clothing the guards wore?

13 A. The guards wore uniforms.

14 Q. And amongst the children guards, were any of those armed?

15 A. As I said, your Honour, in the guards there might be 10 available, or in the post
16 there may have been five on duty who were armed and others who were not on duty at
17 that time would place their weapons in the arms store, that is to say if they were off duty,
18 but if they were on duty they would be armed.

19 Q. Sir, I asked amongst the children guards. Could you specifically address that
20 question whether the children guards were armed?

21 A. Your Honour, I think I have just said that those that were on guard duty were armed.
22 Those who were not on duty, or when there was the change of guard, the new soldiers
23 coming on duty would take up arms. So they were armed irrespective of the team or the
24 number. There were those who were on duty and those who were not. When there
25 was the change of the guard, then those who had been on duty would be at ease, but

1 when they were on guard duty they were armed.

2 Q. And what weapons did they carry, the guards?

3 A. Everybody had a weapon. They all had their own weapons, personal weapons.

4 Q. And what type of personal weapons, if you know?

5 A. The type, SMGs.

6 Q. Sir, when you were in Bunia did you have occasion to visit any other compounds of
7 any other UPC commanders?

8 A. I didn't have time to visit other residences of commanders, apart from if I was going
9 to see Pitchen, the person who was responsible for resupplying and communications, then
10 I would go to the chief of general staff, but I didn't go inside, I just spoke with him at the
11 entry.

12 PRESIDING JUDGE FREMR: Mr Iverson, sorry, I would like to interrupt you because I
13 would like to make one minor but important correction of the transcript. Please, page 11,
14 line 9, I didn't say I see situation, but I said I see innovation, like something new. And
15 because it was an important part of the dispute on this objection, please correct the
16 transcript in this way, innovation.

17 Mr Iverson, you may proceed.

18 MR IVERSON:

19 Q. And at the entry of the chief of general staff, did you observe any guards?

20 A. Yes. Normally when I left they were inside, and those who accompanied him they
21 were in front of the entry.

22 Q. And how old were these guards at the compound of the chief of general staff?

23 A. They were -- well, some were larger, taller, and some were small. There was a
24 difference, different sizes.

25 Q. And are you able to tell the Court how old these guards were?

1 A. Whether I can determine their age, as I said, it's a bit difficult. They were young,
2 they were very young. Because even Pitchen he was like a friend, he was big. There
3 were those who were the same age of him, there were some who were younger than him,
4 and then there were the young children, but in terms of the age, there must have been a
5 maximum of 15 years old. They were very young.

6 Q. And for the guards at the chief of general staff's compound that you call young
7 children, could you describe their physical appearance?

8 A. Speak about the very young ones, the physical appearance, that's the person who
9 was with me, that's what I call very young. These children were very young. There
10 were young ones, there were older ones, but the very young ones, those were the children.

11 Q. And can you tell the Chamber why you say they were young children?

12 PRESIDING JUDGE FREMR: Mr Bourgon.

13 MR BOURGON: Mr President, these -- this line of questioning, whether with the guards
14 in the first location or the guards in the second location, these questions have been asked,
15 they been answered and I suggest we should move on, Mr President.

16 PRESIDING JUDGE FREMR: Mr Iverson.

17 MR IVERSON: Well, I would submit that I haven't asked these questions with relations
18 to -- with relation to the guards at the chief of general staff's compound.

19 PRESIDING JUDGE FREMR: I think it is true. Objection overruled.

20 MR IVERSON:

21 Q. Let me ask the question again, sir: Can you tell the Chamber why you say they
22 were young children, the guards at the chief of general staff's compound?

23 A. The reason is the physical aspect. In relation to those who were with me, that was
24 the same. From that basis, I'm a father of a large family.

25 Q. Sir, can you tell the Chamber if you know whether Mr Ntaganda had bodyguards or

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1 personal escorts?

2 A. They had bodyguard -- there was a bodyguard which accompanied him. When he
3 travelled he was always accompanied by the guard.

4 Q. Did you have occasion to travel with Mr Ntaganda?

5 A. Yes.

6 Q. And I don't want to get too hung up on terminology, but you say -- I said -- I asked
7 bodyguards or personal escorts. I'm not sure if you make a distinction. Did
8 Mr Ntaganda have personal escorts?

9 A. There were escorts for the commander who was commander of a unit, that was the
10 person who provided the guards, those who accompanied Mr Ntaganda and those who
11 carried out the guard. There was a unit that sent soldiers to provide that service.

12 Q. Okay. You mentioned that you did travel with Mr Ntaganda. Where did you
13 travel with Mr Ntaganda?

14 A. I travelled with Mr Ntaganda to Mongbwalu.

15 Q. And how did you travel? What mode of transportation?

16 A. We travelled by plane.

17 Q. And was it just you and Mr Ntaganda or were there other people in that plane?

18 A. There were the soldiers who accompanied him.

19 Q. And who were these soldiers who accompanied him?

20 A. The soldiers of this unit, the unit I told you about, which sent soldiers, guards to
21 guard Mr Ntaganda.

22 MR IVERSON: Your Honour, I'd like to ask if we could move into private session,
23 please.

24 PRESIDING JUDGE FREMR: All right. Let's move into private session, please.

25 (Private session at 10.15 a.m.)

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10 (Recess taken at 10.51 a.m.)

11 (Upon resuming in open session at 11.20 a.m.)

12 THE COURT USHER: All rise.

13 Please be seated.

14 PRESIDING JUDGE FREMR: So now we are in open session, I think we can stay in open
15 session because we will start with procedural issue, and moreover there is no witness in
16 the courtroom.

17 So, Mr Bourgon, you previously indicated that you were not ready, I mean yesterday, you
18 were not ready to proceed with the cross-examination of this witness. To this extent you
19 provided the Chamber with further information by way of an ex parte email. The
20 Chamber has considered your request and has already indicated that it does not find that
21 to be a basis for postponement of the cross-examination of this witness.

22 However, we note you indicated yesterday that you wish to make further submission on
23 this matter. So please you have the floor.

24 MR BOURGON: Thank you, Mr President. I'm grateful for the opportunity to address
25 the Chamber on such an important topic.

1 Mr President, since the beginning of the examination-in-chief of Witness 290, we have
2 carefully of course reviewed firstly the evidence provided by Witness 290 during his
3 examination-in-chief; second, we have also examined again the information in our
4 possession, including that disclosed by the Prosecution as well as what we managed to
5 obtain during our limited investigations; and thirdly, of course, we have been trying to
6 assess what we believe can be achieved during the cross-examination of this witness.
7 Now that the Prosecution has completed its examination-in-chief and having addressed
8 the matter further with the accused, one more time, I confirm that we are not in a position
9 to cross-examine him at this time and that we are seeking for him to be called again at a
10 later point to complete his testimony.
11 In this regard, Mr President, I wish to make a few observations as mentioned yesterday,
12 which we believe are necessary.
13 First, I would like to make clear, Mr President, that we are neither forfeiting, nor giving
14 up our right to cross-examine the witness. Our submission is that we are unable to do so.
15 In our respectful submission, this makes a huge difference in assessing the present
16 situation.
17 Secondly, Mr President, we are aware of the fact of the position that we are taking today is
18 exceptional and that it will ultimately be up to the Chamber to decide whether or not to
19 grant our request, to allow this witness to continue his testimony at a later time.
20 Thirdly, I will not return on the issue as to why, or the reasons why we are -- we say we
21 are not able to cross-examine this witness. I've already mentioned and referred to lack of
22 time, investigation difficulties, both short term and long term, as well as health issues and
23 the absence of the co-counsel. So I don't want to belabour that point at all.
24 For now what I would like to do, Mr President, is to focus on the evidence of this
25 particular witness.

1 Now, if I look at the examination-in-chief and what we've heard over the last -- since the
2 beginning of the examination-in-chief, we -- it is our position that other than for evidence
3 elicited from the witness regarding the age of guards and escorts, or persons who were
4 trained, which was elicited in a manner that we will be challenging by way of a request
5 for leave to appeal, there aren't too many issues for us to address as a direct result of the
6 examination-in-chief.

7 The issues addressed during the examination-in-chief could be addressed in
8 cross-examination with limited preparation time. So this is an admission on our part.
9 However, Mr President, our position is that cross-examination goes way further than
10 answering the exact evidence that was put to the -- that was elicited from the witness
11 during examination-in-chief. For one, it is our obligation when a witness for the
12 Prosecution appears, to put our case to the witness. We respectfully submit that we are
13 not able at this time to put our case to the witness.

14 Secondly, Mr President, examination in -- cross-examination is also the most, and if I can
15 say the sole means by which the Defence can obtain evidence which will suit its case. It
16 is a tool by which we can get information that will serve and that will be of benefit to the
17 case for the accused.

18 The interest of justice, Mr President, demand that the truth-seeking function of the
19 Chamber be assisted by the thorough examination of all witnesses by the calling party and
20 that this information be duly challenged by the opposing party so that it may be used by
21 the Trial Chamber effectively for its aim.

22 Regarding the exact testimony of this witness and what we feel that we can obtain from
23 the witness, but are not able to do so at this time, first, there are issues that are in, or that
24 were known to us, and that the Prosecution has not touched upon. More importantly,
25 there are issues that the Prosecution or for which no material was communicated to us.

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3 PRESIDING JUDGE FREMR: Mr Bourgon --

4 MR BOURGON: Some were saying I should -- maybe I should --

5 PRESIDING JUDGE FREMR: -- we will go --

6 MR BOURGON: -- maybe I should go into private session.

7 PRESIDING JUDGE FREMR: -- into private session. We are too specific issues.

8 So first of all we have to redact the last sentence said by Mr Bourgon and we also have to
9 move into private session.

10 (Private session at 11.29 a.m.)

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- 25 (Open session at 11.33 a.m.)

1 THE COURT OFFICER: We are back in open session, Mr President.

2 PRESIDING JUDGE FREMR: Thank you.

3 You may proceed, Mr Bourgon.

4 MR BOURGON: Thank you, Mr President.

5 Since April of 2015, when we submitted a first request to the Chamber to delay the

6 beginning of the trial, we have unfortunately not been able to convey the right

7 information and/or to convince the Chamber that the difficulties we face are real.

8 One thing is sure, I can honestly say that we have tried to do so, but we have failed. We

9 will continue trying to try and explain to the Trial Chamber the position we are in and

10 why this trial could proceed much quicker if we had some more time and resources to

11 prepare. We understand that in rejecting our request, the Trial Chamber has a very

12 important aim, and that is expeditious conduct of proceedings.

13 Again, we have mentioned that we adhere to this aim. Personally, I have worked many

14 years. When I was with the ICTY I was -- I worked so hard to try and reduce the

15 duration of these trials. They are much too long and we're going in the wrong direction.

16 So I understand. I fully understand the Trial Chamber in your aim to reduce the trial, but

17 the trial should not be reduced at the expense of the right of the accused, at the expense of

18 the real truth-seeking function.

19 Mr Ntaganda wants a speedy trial. We're not able to convince. We say it, but I guess

20 either what we say does not match what we do because maybe, as my colleague said, we

21 are putting motions, and maybe that's the reason, I don't know, but we are not able to

22 convince the Trial Chamber or to convey the right information. And I assume full

23 responsibility for that. I can only say that we will continue trying.

24 In denying our motions for additional time or to delay a cross, or for some various issues,

25 the Chamber has referred to its management powers and has referred to the fact that

1 when the Defence would be facing difficulties it could exercise these powers.
2 Well, in closing, Mr President, we say that this is one situation where we respectfully
3 submit that it is appropriate for the Chamber to exercise these management powers and
4 allow us to call this witness at a later time so that the interests of justice can best be served.
5 All this to say, Mr President, is -- I mean, I think I've said it all, so thank you very much.
6 PRESIDING JUDGE FREMR: Thank you, Mr Bourgon.
7 And one point of clarification. You summarized some information you got that in your
8 view could be good basis for cross-examination, but you are saying that you need some
9 more time to explore those facts. But I don't understand one thing, all this amended
10 schedule was in fact taken because of, and we fully understand this problem, because of
11 absence, sudden absence of Mr Boutin, but I don't understand why the reasons you
12 mentioned or what is the connection between the absence of Mr Boutin and the reasons
13 you are highlighting as the main reasons for your request because it seems to me that
14 those facts said had been known to you earlier. You also were informed about the
15 schedule for this evidentiary block.
16 So in my view it's nothing surprising, nothing sudden and nothing that should have direct
17 connection with Mr Boutin's absence, which is the main reason why we are considering to
18 amend schedule of this evidentiary block.
19 Could you give me a response to that?
20 MR BOURGON: Absolutely, Mr President. I've said before that the manner in which
21 we prepare the witnesses and, first of all, I think we need to go back to before the trial and
22 the fact that we were not ready to begin trial, contrary to the Chamber's view, that we
23 were not ready to proceed to trial, because the material at trial had -- before trial had not
24 all been viewed and analysed. I can't go back to this, but it is the starting point. With a
25 few more months with the trial date that we were stuck doing some litigation on the

1 restrictions and the investigators with few more months, we would be in a completely
2 different position today.

3 The fact that our investigations, again the investigations we have submitted to the
4 Chamber a number of notices, the Chamber knows exactly when we were able to
5 investigate or when we were not able to investigate.

6 So this is the situation we face by the time we prepare. So from the beginning of trial we
7 have been playing catch-up because of this situation. And when you play catch-up and
8 you have the necessary staff it's difficult. I can tax my people, I can push them to the
9 limit, and I have been, I can assure you that, Mr President, I have been taxing my people.

10 And if the Chamber is interested in looking at our time sheets you will see the number of
11 hours this team has been putting into preparing for trial and for the witnesses.

12 Now, catch-up is one thing. Then you lose a person who was supposed to do three
13 witnesses and this person goes away and I have to step in in the middle. In ideal
14 circumstances, I've said that before, I should be able to do this like this, but I'm not, for the
15 reasons going back in time.

16 Accordingly, when this happens I have to fill in for the person who is missing and while I
17 do this I can't do my own work. So all this put together, we arrive at the end of
18 Witness P-17 and it is only from that moment on that I'm able to begin working on 290.

19 The team has done some work, but that's the time I had. And then happened to me some
20 health issues at the same time.

21 Now, that's one thing where we lack the limited time to prepare, especially for this cross.

22 But the most important issue relates to our absence of investigations. I mentioned last
23 Monday or Tuesday, I believe, I lose track of the days, I mentioned that we, in terms of
24 our investigations, that they have resumed as of January, and as of January a lot of
25 information has been flowing in from the field. We have a person going to the field this

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1 Sunday. We have done our best to obtain the information necessary in order to be able
2 to put our case to the witness and to elicit the information from 290. And we have not
3 been able to do so.

4 That being said, I can say, Mr President, that we have located some people who are able to
5 help us, despite the situation I addressed in an ex parte basis in a mail, or the day before,
6 we have located some people who can help us.

7 Had it not been for the absence of Maître Boutin there is a possibility that we could have
8 been ready. But we are not.

9 The Chamber just mentioned, you just mentioned, Mr President, that the block has been
10 re-arranged as if we are doing -- as if we are doing something completely out of the
11 ordinary. Mr President, we suggested to remove two witnesses and to proceed along. It
12 did not work. We are -- at the end of this block the way things are forecasted, we will
13 have missed one witness over a two-year trial in a period that even the Chamber qualified
14 as being exceptional. That's nothing more I can say other than we are into an exceptional
15 period and we are asking for the indulgence of the Court so that we are able to do our
16 work and to effectively represent our client. Thank you, Mr President.

17 PRESIDING JUDGE FREMR: Thank you, Mr Bourgon.

18 And in this connection, do you also want to address, just to keep your submission in one
19 piece, also address the remaining witnesses for this block, or not?

20 MR BOURGON: Mr President, we responded to the Prosecution request yesterday
21 regarding Witness P-55. We believe that if P-55 was not called, but we said that in
22 writing, so we believe that if he was not called we would have time to finish as well this
23 witness at a little later time next week and the other witness which is P-800. And I don't
24 want to say more about P-55.

25 However, in respect of Witness P-800, who is scheduled to testify next, there is one

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1 completely separate issue I wish to bring; however, I need to bring it at this time because
2 it is an issue that might have time implications.

3 PRESIDING JUDGE FREMR: Please.

4 MR BOURGON: Do you wish --

5 PRESIDING JUDGE FREMR: Yes, please.

6 MR BOURGON: Thank you, Mr President.

7 I think we need to move into private session just to be on the safe side, Mr President.

8 PRESIDING JUDGE FREMR: All right.

9 Court officer, please, let's move into private session.

10 (Private session at 11.46 a.m.)

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16 (Open session at 11.56 a.m.)

17 THE COURT OFFICER: We are in open session, Mr President.

18 PRESIDING JUDGE FREMR: Mr Iverson, please proceed.

19 MR IVERSON: Well, this was a lot of information to respond to, but I'm going to try to
20 be brief, your Honours.

21 As Mr Bourgon stated quite eloquently, an accused does have the right to confront
22 evidence against him and the right to cross-examine. But I -- the Prosecution submits
23 here that this is a choice by Defence counsel and his client. And I don't presume to know
24 how Mr Bourgon prepares for cross-examination, but reading through the relevant
25 materials to Prosecution Witness 290 would probably take around a day. I know that I

1 was able to read it in a day and identify issues that I thought would be salient issues for
2 the examination.

3 The Defence has also had two days and two nights to think about and prepare
4 cross-examination, and I just observe that Mr Bourgon made pretty lengthy and pretty
5 informed and intelligent observations about issues contained in Prosecution Witness 290
6 potential testimony and in his statements. The ability to identify those issues obviously
7 show that the same preparation that would have taken place for preparation in
8 cross-examination took place so that Mr Bourgon could make submissions to explain why
9 he couldn't cross-examine the witness.

10 Again, I don't presume to know his preparation techniques, but the Prosecution would
11 submit that it is not that complicated to understand, for an experienced counsel, as
12 Mr Bourgon said he has spent years as a counsel, he should be able to prepare
13 cross-examination.

14 What Mr Bourgon tried to use to justify his lack of ability to prepare cross-examination
15 were very generalised, they were not concrete, and it would be difficult for this Chamber
16 to find they were cogent or compelling reasons to delay cross-examination. He has a
17 right to cross-examination. That cross-examination can take place now. It's also
18 incumbent upon the Chamber that they keep this trial as expeditious as possible, and
19 that's why counsel are obviously expected to be in a position to cross-examine witnesses
20 while they're here present in The Hague and that's what we have. All the issues that
21 Mr Bourgon raised would be capable of being put to the witness while he's here right
22 now.

23 And the fact that Mr Bourgon doesn't believe that there are many issues to address from
24 the examination-in-chief, also in the Prosecution's submission, shows that he should be
25 able or should be prepared to cross-examine the witness.

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1 He claims that he's not able to put the Defence case, but then fails to explain why, or fails
2 to provide any concrete reasons why he's unable to put his case to the witness, as he,
3 himself, put it.

4 And in using this submission --

5 PRESIDING JUDGE FREMR: Just maybe to correct it a bit, it's true that to be fair to
6 Mr Bourgon then some of the reasons, I'm not tabulating them, has been brought to the
7 Chamber by this email I mentioned, so it's not known to you, but it's known to us. But
8 please proceed.

9 MR IVERSON: All right. Well, if there are concrete or compelling reasons it's certainly
10 not known to the Prosecution, so to -- in order to respond intelligently I would have to be
11 apprised of that in order to provide our submission on whether or not those are
12 compelling reasons. But I'll leave it to the Chamber to decide that. Absent knowing
13 that, nothing that I've heard so far today or previously would justify delaying the
14 cross-examination.

15 We would ask that the Chamber would take this as a voluntary and intelligent waiver of
16 cross-examination. His explanations do not justify his actions and it appears to me that
17 he is in a position to cross-examine this witness because of his familiarity with the
18 material and his familiarity with the issues upon which he intends to cross-examine the
19 witness. Pending any of your questions, your Honours, those are my submissions.

20 PRESIDING JUDGE FREMR: Thank you, Mr Iverson.

21 I have to say that we have already preliminarily discussed or deliberated on that issue.
22 Our deliberation was based on information we had at our disposal until yesterday.
23 Today we also heard some new information, even if the majority I think remain like in the
24 past, so we will need some time to complete our deliberation, but I don't think it will be a
25 long time because, as I said, the core of the arguments have been known to us in advance,

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1 so please remain in the courtroom and we will just enter the deliberation room here and I
2 guess we will be back shortly.

3 THE COURT USHER: All rise.

4 (Recess taken at 12.02 p.m.)

5 (Upon resuming in open session at 12.21 p.m.)

6 THE COURT USHER: All rise.

7 Please be seated.

8 PRESIDING JUDGE FREMR: So having deliberated, the Chamber will now deliver its
9 oral decision on Defence submission.

10 At the start of this witness testimony on Wednesday, the Defence indicated that its, quote,
11 "not in a position," end quote, to cross-examine Witness P-290 at the end of the
12 Prosecution examination.

13 Two reasons were provided to the Chamber: First, that the five and a half days since the
14 conclusion of the previous witness testimony had been insufficient to prepare, noting in
15 that regard that lead counsel had been unwell for part of the time; and second, that the
16 Defence has been pursuing certain investigation leads for some time for which there have
17 not yet been any results.

18 The Defence indicated that the decision not to conduct a cross-examination and to
19 subsequently submit a request to the Chamber to recall Witness P-290 at a later stage had
20 been discussed with Mr Ntaganda.

21 Having heard further oral submissions from both parties on Wednesday, the Chamber
22 indicated that the examination of the witness should proceed as planned and that it did
23 not consider that requiring the cross-examination to be conducted would compromise the
24 fairness of the proceedings.

25 Later that day the Defence provided the Chamber with further details by way of ex parte

1 email regarding the investigative leads being pursued.

2 The Chamber indicated yesterday that the further information provided by the Defence
3 had not altered its conclusion that the examination of the witness should proceed.

4 Today we have heard further oral submissions, in particular the Defence identified the
5 number of specific issues which it stated it wished to explore with the witness, but
6 claimed it was not in a position to do so.

7 We can inform you that these submissions have not altered our view that the Defence
8 should be in a position to start its cross-examination in the remaining time available today
9 and to continue next week.

10 The Chamber has recognized the difficult circumstances that lead counsel has faced in
11 recent weeks and has made adjustments to the schedule to accommodate this.

12 The Chamber does not, however, accept that an experienced counsel supported by his
13 team and on notice for over two and a half months of the scheduling of the present
14 witness testimony is not in a position to conduct the cross-examination. Further, since at
15 least last Thursday final detailed preparations for the cross-examination of this witness
16 should have been the priority.

17 The Chamber additionally does not consider there to be any material change in
18 circumstances from when the Defence itself submitted the schedule, which included the
19 examination of this witness.

20 The relevant investigative leads referred to by the Defence appear to have been on
21 standing for some time and do not themselves provide the basis for postponing the
22 cross-examination. Rather, as the Chamber has indicated in the past, with respect to
23 other witnesses, it would be open to the Defence to proceed with cross-examination now
24 and subsequently either seek to recall the witness should it be able to properly justify such
25 a request or to present relevant information as part of its own defence case.

1 With regard to the Defence submission that it is not in a position to put its case to the
2 witness, the Chamber recalls paragraph 28 of the decision on the conduct of proceedings,
3 which reads, quote, "The cross-examining party is required to put to the witness any facts
4 or evidence available at the time and upon which it intends to rely to impeach his or her
5 credibility." Unquote.

6 The Chamber therefore strongly recommends the Defence to proceed with its
7 cross-examination of Witness P-290 on the basis if it indeed wishes to conduct one. We
8 will not force you to do so, Mr Bourgon; however, should you choose not to conduct a
9 cross-examination, we will require you again to confirm that Mr Ntaganda fully
10 understands the potential consequences of this choice.

11 The Defence stated that it is not forfeiting its right to cross-examine, but rather that it is
12 not in a position to cross-examine. However, the Chamber has carefully considered the
13 Defence submissions to postpone the cross-examination and found that the Defence
14 should be in a position to proceed.

15 Mr Ntaganda does have the right to have witnesses against him examined. However,
16 this is a discretionary right and it can be forfeited. It is very important that Mr Ntaganda
17 understands that if you choose not to examine the present witness as recommended by
18 the Chamber, this can be construed as a waiver of the right to cross-examine him. In
19 other words, Mr Ntaganda risks losing the right to have the witness cross-examined.

20 It is of course open to the Defence to subsequently request in the future that the witness be
21 recalled, but cogent reasons should exist to warrant such recalling and there is no
22 guarantee that such a request would be granted by the Chamber.

23 Therefore, Mr Bourgon, I am asking you again to confirm that you have fully explained
24 the potential consequences of this decision to Mr Ntaganda, including the fact that by
25 choosing not to have the witness cross-examined now he may lose his right to do so. So

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1 if you need a short break to discuss it briefly with Mr Ntaganda, you may. If not, you
2 can just express your position immediately.

3 MR BOURGON: Mr President, I do require some time to discuss the matter with the
4 client in all fairness to the accused. Thank you.

5 PRESIDING JUDGE FREMR: Are you able to make it now?

6 MR BOURGON: Yes, but we would need to take a short break, Mr President. I cannot
7 do this in the courtroom.

8 PRESIDING JUDGE FREMR: Okay. Could you just estimate time needed?

9 MR BOURGON: 15 minutes is enough.

10 PRESIDING JUDGE FREMR: And are you fine to make this consultation in the
11 courtroom or do you want to --

12 MR BOURGON: I would like to make it behind the courtroom, Mr President.

13 PRESIDING JUDGE FREMR: No problem. No problem. So we will break and we will
14 wait until Mr Bourgon will come back with his client.

15 THE COURT USHER: All rise.

16 (Recess taken at 12.29 p.m.)

17 (Upon resuming in open session at 12.39 p.m.)

18 THE COURT USHER: All rise.

19 Please be seated.

20 PRESIDING JUDGE FREMR: So after break that allowed Mr Bourgon to consult his
21 client, Mr Bourgon, you have the floor.

22 MR BOURGON: Thank you, Mr President.

23 Let me begin quickly by referring to the Chamber's decision on page 51, lines 4 to 8, where
24 it says: "Should you choose not to conduct a cross-examination," now this is addressed to
25 me, "we will require you again to confirm that Mr Ntaganda fully understands the

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1 potential consequences of this choice."

2 We come back on the issue of Mr Ntaganda being informed at a later point in this
3 decision.

4 Consequently, Mr President, I had no choice but to request this short adjournment in
5 order to consult with Mr Ntaganda. Do I like to be called incompetent? No. But it's
6 your view, so I am incompetent, and because I am not in a position --

7 PRESIDING JUDGE FREMR: Sorry, Mr Bourgon --

8 MR BOURGON: -- to conduct --

9 PRESIDING JUDGE FREMR: -- now I fully don't understand. Did we say you that you
10 are incompetent?

11 MR BOURGON: Yes, you did, Mr President. You did specifically said that I was
12 incompetent because I should be able to prepare and I'm telling you that I'm not prepared,
13 that I'm not able. You don't accept that, you don't believe that, you don't take that into
14 account, so you are saying that I am incompetent. I accept your ruling, but I have to
15 discuss this with my client, and I did.

16 And I have to discuss again. This happened before, Mr President, where I had to discuss
17 this issue with my client whether he still wants me to represent him, being incompetent as
18 you believe that I am incompetent. And I will discuss that with him again this afternoon
19 after I go to the hospital for my medical appointment that I was not able to take during the
20 last two days at the request of the Chamber.

21 But the final position, Mr President, is I did consult Mr Ntaganda again, but let me assure
22 you that Mr Ntaganda has been made aware of this from the beginning, from the moment
23 I stood up on Tuesday, Mr Ntaganda has been aware, it has been very difficult to inform
24 him of all the details over the phone, but he has been on board with the Defence team and
25 all members of my team are on board with me on this issue.

1 What we will do next I don't know, but for sure the Chamber and the Defence we are at
2 cross-purposes. For sure the Chamber does not understand what we do, how we do and
3 why we do it. Or better put, we don't understand what the Chamber is trying to do
4 because, frankly, Mr President, I have to tell you I do not understand. When the
5 Chamber says that it has made some changes to the schedule, to this day there has been
6 no change. All witnesses who have appeared who were supposed to be scheduled to
7 appear to this day have appeared, all of them. The changes are about to take place.
8 They have not taken place yet.

9 So bearing in mind the Chamber's view regarding my incompetence, bearing in mind my
10 inability to conduct a cross-examination, we maintain.

11 We are very disillusioned by the fact that the Trial Chamber is not interested in hearing
12 evidence, in obtaining evidence that would assist it in its truth-seeking function. But we
13 maintain our position and we will at a later time make a request to recall this witness, we
14 will justify the request, the Chamber will deny it, and we will continue building the
15 record for the appeal in the (overlapping speakers) --

16 PRESIDING JUDGE FREMR: Mr Bourgon, nobody said --

17 MR BOURGON: Thank you, Mr President.

18 PRESIDING JUDGE FREMR: Nobody said that we will deny that.

19 Okay, just a short comment because, you know, I am afraid that you get a little bit too
20 much emotional, Mr Bourgon, which in case of such experienced lawyer like you I
21 wouldn't expect. Nevertheless, first of all, I didn't say that you are incompetent. On the
22 contrary, one of the reasons why I -- why this Chamber believed that you could be
23 prepared to examine this witness is that you are highly competent.

24 The issue of preparedness is really subjective that, believe us, that we also are I would say
25 competent, and what is the role of the Chamber? To make final decision. You obviously

1 are fully allowed to be unsatisfied, but you are here as a counsel, we are here as a
2 Chamber. And we also have our duties, you have already mentioned that our duty to
3 guarantee fair and expeditious trial, and also I'm intentionally putting those two words
4 together, "fair" and "expeditious." We are not only interested of an expeditious trial at
5 any rate. But we really very thoroughly considered all those factors and we decided as
6 we decided, so please respect that.

7 The other issue why I ask you repeatedly to consult Mr Ntaganda, if you look carefully on
8 the transcript, I even said that I'm sure that you would do it anyway. So I suppose that
9 you would -- even if I won't ask, but because this decision not to conduct
10 cross-examination has really important impact on the rights of the accused, generally not
11 in this concrete case, it is my duty even to put to the record that the Chamber was really
12 very careful about that. So that was why. And don't take it as something that should
13 offend you, but it was just our guarantee that we did our best to ensure ourselves that this
14 impact on the rights of the accused have been taken.

15 So I think it's all I would like to say to this.

16 And now we can -- we would still like to utilise the rest of the session by putting really a
17 few questions to the witness. Maybe we will get slightly over 1 o'clock, but I think it will
18 be the rest of the programme for today, so please now bring witness into the courtroom.
19 Mr Bourgon.

20 MR BOURGON: Mr President, I look at the timing issue. There is a request we wish to
21 put before the Chamber completely unrelated to this previous topic. It is an issue we
22 would like to address with the Chamber on an ex parte basis. It has to do with the
23 conditions of detention of Mr Ntaganda. We believe that the Registry should be here, or
24 at least -- simply because our request would be to raise an issue before the Chamber, so I
25 would like to make this ex parte issue orally in order to save some time in order that we

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1 can devote more time to the preparation of the next witnesses.

2 PRESIDING JUDGE FREMR: How long do you think you will need for such a meeting?

3 MR BOURGON: I believe 10 to 15 minutes at the most, Mr President.

4 PRESIDING JUDGE FREMR: Okay, so we will consult this after this -- at the end of this
5 testimony.

6 (The witness enters the courtroom)

7 PRESIDING JUDGE FREMR: Mr Bourgon, maybe it would be -- we just discuss the most
8 efficient way how to -- obviously we will take it into our consideration. Would it be
9 possible to inform us briefly in email about the main issues of this and we will then just
10 adjust timing and all conditions of this possible meeting, to your information?

11 MR BOURGON: Yes, Mr President, we will do.

12 PRESIDING JUDGE FREMR: Thank you very much.

13 Mr Witness, yes, Mr Witness could be provided with headphones.

14 Mr Witness, the final and probably very short part of your testimony will include a few
15 questions from our part, from the Chamber.

16 So I will start, and in fact most of those questions are questions in order to clarify some
17 points you have mentioned during your previous testimony.

18 First, I am referring -- it's rather for the parties than for the witness -- to transcript 65,
19 page 57, you indicated that Mr Ntaganda was superior to you and then he was a superior.
20 I believe that you were referring to the period of your stay in Bunia in the end of the year
21 2002; is that correct? Because otherwise you have a different superior if I'm not wrong.

22 Sorry, we have to -- I forgot. Please hold on, Mr Witness, don't give me your response
23 because we have to move first into private session. I forgot. Sorry.

24 (Private session at 12.51 p.m.)

25 (Redacted)

Trial Hearing
WITNESS: DRC-OTP-P-0290

(Private Session)

ICC-01/04-02/06

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Trial Hearing
WITNESS: DRC-OTP-P-0290

(Private Session)

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Trial Hearing
WITNESS: DRC-OTP-P-0290

(Private Session)

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Trial Hearing
WITNESS: DRC-OTP-P-0290

(Private Session)

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Trial Hearing
WITNESS: DRC-OTP-P-0290

(Private Session)

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Trial Hearing
WITNESS: DRC-OTP-P-0290

(Private Session)

ICC-01/04-02/06

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7 (Open session at 1.11 p.m.)

8 THE COURT OFFICER: We are in open session, Mr President.

9 PRESIDING JUDGE FREMR: Thank you, court officer.

10 Although the Chamber originally had anticipated that we would continue with
11 cross-examination of the witness, the situation obviously has changed, so now we will
12 have to adjust our further schedule to this. But before doing that we will first need to
13 decide on the Defence request concerning disclosure of upcoming witness.

14 Mr Iverson has already indicated that the Prosecution is ready to respond in writing. So
15 we order the Prosecution to respond even by email, it's enough, but because we are in
16 some time pressure, we would like to ask Prosecution to do it by 3 o'clock. Is it feasible,
17 Mr Iverson, because we would like to decide today about amended time schedule?

18 MR IVERSON: Yes, your Honour, we had previously discussed 5 p.m. within the team,
19 but we can -- we can provide it to you by 3 p.m.

20 PRESIDING JUDGE FREMR: Very well. We appreciate it. And please add also the
21 preparation session log just for the Chamber to be informed.

22 MR IVERSON: Yes, your Honour.

23 PRESIDING JUDGE FREMR: Okay, so now Court is adjourned. And as concerns the
24 further schedule, as I said, it depends on our decision on the request I have mentioned.
25 Any further request for the floor before we adjourn?

- 1 Mr Bourgon.
- 2 MR BOURGON: Mr President, just in terms of the following witnesses, when can we
- 3 expect a decision on Witness P-0055?
- 4 PRESIDING JUDGE FREMR: Allow me to consult because I think we have already
- 5 deliberated on that and we are in the stage of drafting. Allow me to consult our legal
- 6 assistants.
- 7 So your estimation is either this afternoon or on Monday at the latest.
- 8 If there are no further requests for the floor, Court is adjourned.
- 9 THE COURT USHER: All rise.
- 10 (The hearing ends in open session at 1.14 p.m.)