International Criminal Court

Trial Chamber II - Courtroom 1

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Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra, and Judge Christine Van den Wyngaert

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

In the case of the Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui

Trial Hearing

Monday, 8th February 2010

The hearing starts at 2.06 p.m.

(Closed session)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

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(Expunged)

(Open session at 2.09 a.m.)

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

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

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

Good afternoon, Witness.

(The accused entered court)

PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe.

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

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

Good afternoon, Mr. Katanga and Mr. Ngudjolo.

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

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

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

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

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

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

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

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

Interpretation of the answer of the witness:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Prosecutor.

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

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

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

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

(The accused withdrew)

(Closed session at 2.22 p.m.)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Open session at 2.24 p.m.)

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

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

(The accused entered court)

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

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

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

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

MR. O'SHEA: (Indiscernible)

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

(Trial Chamber and Court Officer confer)

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

(Trial Chamber and Court Officer confer)

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

Break taken at 2.29 p.m.

On resuming at 2.43 p.m.

COURT USHER: All rise.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

witness."

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

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

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

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

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

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

The Prosecution in that decision had argued that the witness had

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

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

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

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

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

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

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

And it reads:

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

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

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

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

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

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

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

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

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

It then goes on to say:

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

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

"Section 94 of the Evidence Act 2006 provides:

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

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

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

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

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

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

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

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

"Roach J.A. dissented."

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

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

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

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

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

"Gives evidence that is inconsistent with the statement made by

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statements that they have produced for their witnesses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He says further down line (sic) 70:

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

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

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

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

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

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

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

Recess taken at 4.00 p.m.

On resuming at 4.32 p.m.

COURT USHER: All rise.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

for your submissions and for your summary.

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

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

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

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

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

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

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

JUDGE DIARRA: (No interpretation).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To paraphrase the wise man that we all know:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

different and curious.

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel Luvengika.

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

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

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

(Trial Chamber confers)

PRESIDING JUDGE COTTE: (Interpretation) Court Officer, we are now coming back to our proceedings. We have about 15 minutes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you to the interpreters.

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

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

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

The hearing ends at 6.31 p.m.