

1 International Criminal Court

2 Trial Chamber II - Courtroom 1

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

4 Judge Christine Van den Wyngaert

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

6 In the case of the Prosecutor versus Germain Katanga and

7 Mathieu Ngudjolo Chui

8 Trial Hearing

9 Wednesday, 26 May 2010

10 The hearing starts at 9.04 a.m.

11 (Open session)

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

14 PRESIDING JUDGE COTTE: (Interpretation) Our session is now  
15 commencing. Please be seated.

16 The accused are with us and we can therefore start by addressing  
17 different issues that came up at yesterday's hearing. During yesterday's  
18 hearing Counsel Hooper intervened at the end of that hearing, with a view  
19 to having clarification as to the interpretation of words spoken by the  
20 witness, 279. This was carried out yesterday and the Registry  
21 transmitted the correction made by the competent Registry service after  
22 re-listening to the Swahili remarks of the witness. Taking into account  
23 our transcript of yesterday, we can note on page 64, line 10, that the  
24 Swahili-French interpreter addressed himself to me saying that the  
25 witness did not finish his sentence, please could he help us. I

1       therefore addressed myself on line 12 to the witness to indicate:

2               "Witness, the interpreter says you did not finish your sentence.

3       I don't know if it was not finished or if he was unable to understand the  
4       end. Please could you add to it if it needs finishing."

5               And the witness did not finish his sentence, but he had another  
6       remark. However, I think that the remarks and I'm certain that the words  
7       which had not been well understood by the interpreter and which were then  
8       found after re-listening to the Swahili were those which Counsel Hooper  
9       communicated to us, page 65, line 7, which is on the corrected version  
10      and which in the French version is as follows:

11              "While they were in a classroom, some of the soldiers took those  
12      hostages away. They were not aware." "They" indicating the persons of  
13      Mr. Katanga and Ngudjolo.

14              In the English version, I now read it, and please excuse my  
15      pronunciation:

16              (In English) "It was while they were in a classroom that some  
17      soldiers took away those hostages. They were not aware."

18              (Interpretation) So I think this question has now been solved.  
19      The intervention of Counsel Hooper was therefore justified and the  
20      correction that was made to the two transcripts in French and in English  
21      can be those that have to be taken into consideration today. That is the  
22      first point that I wish to make.

23              We also yesterday received information according to which the  
24      parties were told that the following facts were not contested.

25              Witness 279 was relocated on the 15th of March, 1998 (as

1 interpreted). This was done in the month of April, 2010, and it cost  
2 over \$4.000, namely 4.281. Now, Witness 280 was relocated on the  
3 1st of April, 2008. The costs thereby go to -- the costs involved were  
4 \$2.808. The Chamber notes the fact that the parties came to an agreement  
5 with regards to these two points.

6 Court Officer, the Chamber therefore notes this.

7 Yesterday two parties have expressed the intention to be able to  
8 consult the passport of Witness 279. The Chamber therefore has had  
9 communication of the passport thereof. When the question arises we can  
10 give you the content of this passport.

11 The French transcript is blocked. I will therefore stop for a  
12 moment.

13 THE INTERPRETER: Witness 279 was in fact relocated in 2008, the  
14 interpreter corrects.

15 PRESIDING JUDGE COTTE: (Interpretation) We therefore have this  
16 passport in front of us, and if you so wish we can already read the  
17 content --

18 MR. HOOPER: (Previous translation continues) ... we don't need  
19 that information until we begin our cross-examination, and it's a  
20 significant matter for both of us. Thank you.

21 MR. MACDONALD: (Interpretation) With your leave.

22 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor.

23 MR. MACDONALD: (Interpretation) I was going to intervene  
24 because we're in session -- in open session. The Prosecution has seen  
25 the passport this morning and we would ask that a photocopy -- I

1 understand that there are available prints of the -- available  
2 photocopies thereof. I would ask an EVD number be given to this passport  
3 and that it be confidential and that the copy of the passport becomes an  
4 item of evidence.

5 PRESIDING JUDGE COTTE: (Interpretation) Counsel Kilenda.

6 MR. KILENDA: (Interpretation) Would it not be more appropriate  
7 for this issue of the EVD number to come up when we are discussing this  
8 passport during the cross-examination?

9 PRESIDING JUDGE COTTE: (Interpretation) Counsel Kilenda, you  
10 are anticipating what the Bench was going to reply. We have this  
11 passport. Two parties yesterday said they wanted to consult it. What  
12 the Bench wanted to do was to have it communicated directly to itself.  
13 It has taken the initiative to ask the Registry to prepare photocopies  
14 thereof. The photocopies are therefore going to be provided to you.  
15 When you have seen these photocopies, we will assess whether it should be  
16 attributed an EVD number. We're not going to do this before you have  
17 seen the documents and the useful pages of this passport, and by useful  
18 pages, by this, I mean the pages on which all the identifying information  
19 concerning this witness figures.

20 So, Court Officer, if you would be so kind, during the break  
21 possibly or even before then, to provide the parties with a photocopy of  
22 the passport. You will also provide one to the members of the Bench so  
23 that we can provide this passport back to the unit concerned if we have  
24 to see the original again, but the photocopies having been made by the  
25 Registry, I don't think there's any difficulty in that regard. And when

1 everybody has seen the content of the identifying information that  
2 figures in this passport, then the Bench will assess whether there's a  
3 possibility to give it an EVD number or not. And it's at this stage that  
4 we find ourselves at the moment.

5 MR. MACDONALD: (Interpretation) Just to finish on this subject,  
6 your Honour, it's the intention of the Prosecution that this be dealt  
7 with in its examination-in-chief or evidence -- main evidence before the  
8 cross-examination, and that is the reason why we raise this issue now.

9 PRESIDING JUDGE COTTE: (Interpretation) Perfect. Thank you.

10 Registrar, do you have the photocopies here? So if they are  
11 here, please could you distribute them to the different parties and  
12 participants, and before the Prosecutor finishes the  
13 examination-in-chief, we shall address the issue if an EVD number should  
14 be attributed thereto. Here I provide you with the passport original  
15 itself.

16 We also have received the items requested yesterday by the  
17 Prosecutor where it concerned the spontaneous interventions of the  
18 witness relating to the four boys who were captured at the same time as  
19 he was, as also to the feast in Zumbe or festivities in Zumbe, and also  
20 to references made to fetiches. Now, this is something we will address  
21 following the cross-examination of the Defence teams if they maintain  
22 their position, but you should have been the addressee, Counsel Hooper  
23 and Kilenda, of information provided by the Prosecutor yesterday evening.

24 I would just like to note that the Prosecutor has provided us  
25 with the information that we have asked of him.

1                   Now we have the question taken up by Counsel MacDonald at the  
2    end --

3                   MR. MACDONALD: (Interpretation) If you would allow me,  
4    your Honour, there was also another e-mail that was sent this morning  
5    with regard to the issue or the other issue of these celebrations, also  
6    this morning. I don't know if that was sent to everybody.

7                   PRESIDING JUDGE COTTE: (Interpretation) Well, certainly the  
8    Bench received this e-mail. It concerned what I called the feast, which  
9    was in fact the Zumbe ceremony shortly after the fighting in Bogoro.

10                  Counsel Hooper, please go ahead.

11                  MR. HOOPER: It's just a small point and it may be a simple  
12    matter of clarification, but of course we move to see the document and  
13    yet my understanding is the Prosecution had this placed in their hands  
14    before those who'd requested it had received it. I'm just concerned as  
15    to how that came about, that the Prosecution were provided with this  
16    passport copy and the information contained in it when it was the Defence  
17    who'd requested access to it and who came second in the queue. Now, it  
18    may be it was just something that happened a few moments before we  
19    received the papers, I don't know. But it's just a matter of concern as  
20    to the system in place.

21                  MR. MACDONALD: (Interpretation) If I could answer, your Honour.

22                  PRESIDING JUDGE COTTE: (Interpretation) Yes, the Chamber simply  
23    indicated that two parties wanted to consult this passport. The Chamber,  
24    where it concerned, doesn't want to privilege anyone.

25                  Now, Prosecutor, please go ahead.

1           MR. MACDONALD: (Interpretation) Yesterday evening we had an  
2 e-mail from the Registry and the Chamber requesting a view of this  
3 passport. The Defence was not copied on this exchange of mail because  
4 the Prosecutor wanted to see this passport independent or independently  
5 within the framework of its investigations, and therefore I understand  
6 that afterwards or at a simultaneous way Counsel Hooper also made his  
7 request. Therefore, when the Chamber replied to this request this  
8 morning, I also asked to have the passport, and it is then that I saw  
9 that there were also photocopies which had been prepared by the Registry.  
10 And it is in that context that the Prosecution was able to see it.

11           PRESIDING JUDGE COTTE: (Interpretation) I think it's important  
12 that the Bench replies completely to Counsel Hooper. It received  
13 yesterday at 2.49 a message from the Prosecutor expressing the wish to be  
14 able to consult the passport. It received at 3.23 a message from  
15 Madam Menegon, also stating that the Defence team of Germain Katanga  
16 wished to consult this passport. And it was astonished that the message  
17 of the Prosecutor was not copied to the other parties, noting that two  
18 parties expressed the same consultation wish and it thought that it would  
19 have been preferable that it receives this passport and makes photocopies  
20 thereof and then addresses this issue with you this morning. It did not  
21 know, however, that the Prosecutor could consult this passport from this  
22 morning, but I think everybody has its full rights with the passport  
23 available to them which can be consulted in an original form as well as  
24 photocopies thereof made by the Registry, all within a dead-line of less  
25 than 24 hours after the request was made.

1           That's where we are at the moment.

2           So currently, Prosecutor, at the end of the hearing you expressed  
3 quite late the request to have proper modalities to enable 279 to be able  
4 to recognise the two accused. Now, we are therefore going to listen to  
5 you in this regard, then we will hear the different parties. Everybody  
6 wishing that this episode -- which we consider to be somewhat late at the  
7 moment but we haven't yet taken part with regards to the grounds, we  
8 don't want this to take up too much of the hearing time and we are  
9 listening to you.

10           (Trial Chamber and Court Officer confer)

11           PRESIDING JUDGE COTTE: (Interpretation) You have the floor.

12           MR. KILENDA: (Interpretation) If you would allow me,  
13 your Honour, I didn't want to interrupt the proceedings but our client  
14 has pointed out to us, and we can see it, that the transcript in French  
15 is not working.

16           (Trial Chamber and Court Officer confer)

17           PRESIDING JUDGE COTTE: (Interpretation) It would seem that the  
18 transcript, the French transcript, is working once again.

19           Prosecutor, you therefore have the floor.

20           MR. GARCIA: (Interpretation) Your Honour, ladies and gentlemen,  
21 good morning. Essentially, as stated yesterday, the Prosecution wanted  
22 to identify the accused and have the witness do that. Now, there are  
23 three possibilities or three ways in which this can be done to carry out  
24 this identification. These three options are as follows: Firstly, there  
25 is the type of identification which can be called traditional

1 identification, where the witness himself indicates by looking into the  
2 courtroom if he can see the accused and identifying them. Now, this  
3 would imply that the curtain which now prevents the witness from seeing  
4 the accused and vice versa would have to be withdrawn. We have to take  
5 into account that there are protection measures concerning this witness  
6 and that this witness has already been described as vulnerable by the  
7 VWU. So there are certain disadvantages in carrying out that  
8 identification procedure.

9 The second means of identification envisaged would require the  
10 assistance of the video-camera operator in the courtroom. That person  
11 would take images of the person in the courtroom, the witness would be  
12 able to see that person on his screen, and in theory, he could be able to  
13 identify the persons in question in that manner.

14 There is also a third possibility, and we have reflected upon  
15 that one. It was only yesterday in the course of the afternoon that we  
16 thought about how to do this. This would be to show the witness  
17 video-clips in which the accused persons appear so that they should be  
18 able to identify them on those videos. For the record, these are two  
19 video-clips ERN 0080-0011, and this is a video recording which has been  
20 disclosed to the Defence teams on the 6th of June, 2008. This is a video  
21 recording of Germain Katanga and the images were taken on the 11th and  
22 the 24th of March, 2003.

23 (Prosecution counsel confer)

24 MR. GARCIA: (Interpretation) Just to be clear, Mr. President,  
25 it was on the 11th or the 24th of March, 2003. That is video

1 ERN 0080-0011.

2 The second recording is ERN 1017-1482. That is a video recording  
3 of Mathieu Ngudjolo which was taken on the 30th of March, 2003.

4 Mr. President, it is important to point out that for purposes of  
5 identification, if we use the three -- the last procedure, then the  
6 recording will be played without any sound. It will only be the images  
7 that would be projected for a few seconds, and a question will be put to  
8 the witness to know whether he recognises the person on the video  
9 recording.

10 So those are the three possibilities that could be used for  
11 identification. We have made the submissions to the Chamber so that you  
12 should be able to determine what option is most appropriate, taking into  
13 consideration the fact that the witness is a vulnerable witness as well  
14 as the protection measures that have been taken in favour of that  
15 witness.

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

18 It will be necessary for us to have the opinions of the Defence  
19 teams.

20 Mr. Hooper -- Mr. O'Shea. Please try to be as brief and concise  
21 as possible, even though this issue is very important.

22 Mr. O'Shea, please.

23 MR. O'SHEA: Yes, thank you, Mr. President, your Honours, good  
24 morning. I note from your Honour's comment just now that your Honour  
25 would like us to be as brief as possible, and of course I will. But may

1 I say that what's being put forward now is, as your Honour has rightly  
2 indicated, an important matter and, may I add, a difficult matter. The  
3 question of how an accused is identified in a courtroom is a matter  
4 which, your Honours will be aware, has been the subject of an enormous  
5 amount of jurisprudence, both at the national level and at the  
6 international level. And it is highly contentious or at least the modes  
7 of identification suggested by my learned friend are highly contentious.

8 And I suppose that the first thing that needs to be said is that  
9 it is unfortunate that a matter which is of such importance, not only  
10 with regard to this specific witness but with regard to the practice of  
11 the International Criminal Court as a whole, is raised on the afternoon  
12 before the submission, almost towards the end of the Prosecution  
13 examination-in-chief of the witness. Indeed, it would appear that this  
14 is effectively the next thing that's going to happen in the minds of  
15 Prosecution counsel, is that he's going to try to adopt one of these  
16 methods of identifying the accused in the courtroom today.

17 We feel that even the manner in which this question has been  
18 raised raises questions of fairness. When your Honours are considering  
19 whether it is appropriate under the Rules, and in particular under  
20 Article 69(4), which of course refers to prejudice and also refers to  
21 fair trial and, thirdly, refers to the fair evaluation of the evidence.  
22 When your Honours are considering those concepts in this particular  
23 context, in my submission it is important to consider how this issue has  
24 been introduced.

25 We are also, of course, halfway through the Prosecution case and

1       this very delicate issue is now being raised for the first time with  
2       regard to this specific witness.

3               Now, my learned friend has raised three possible alternatives.  
4       One has been referred to over the years as a dock identification, that is  
5       to say that the witness will be given an opportunity to see the accused  
6       in the courtroom itself. The second is the use of a video camera within  
7       the courtroom to show the accused within the courtroom. And the third  
8       involves the viewing of a video of the accused taken outside of the  
9       courtroom.

10              Now, with regard to the third option, the video taken outside of  
11       the courtroom, if your Honours are in any way seriously considering that  
12       option, I would like the permission of the Bench to review that video.  
13       I'll make my submissions now, but I would like to review that video to  
14       consider the position. But our position is that that video, the manner  
15       in which it is taken, effectively gives very little options before the  
16       person who's looking at the video and is not that much different from the  
17       first two options provided by my learned friend. In other words, if a  
18       video is placed in front of the witness which effectively shows one  
19       individual in a close-up pose, in our submission, the prejudice involved  
20       there for the accused is very similar to a -- what we have called a dock  
21       identification.

22              You see, whether one is dealing with any of these three options,  
23       one has to credit the witness with a minimum degree of intelligence.  
24       However the questions are framed, when the video is put in front of him  
25       there may be an overwhelming temptation to point that person out as being

1 the accused in the courtroom. It doesn't give much room for the  
2 possibility of mistaken identity, in the sense that the witness in the  
3 box may have a general idea of what the accused looks like, but not a  
4 very specific idea. But if the video accords with the general idea of  
5 what the witness has of what the accused looks like, as I say, there  
6 would be an overwhelming temptation on the part of the witness to accept  
7 graciously that the person in the video is in fact the accused.

8 We know from other trials, particularly involving -- particularly  
9 the trials, for example, involving the trial of former Nazi war criminals  
10 in recent years, where these individuals have of course aged quite  
11 significantly. There are great difficulties in the question of  
12 identification of an individual, and an individual may change over time  
13 but may also look like other individuals. And there have been situations  
14 in trials, including war crimes trials, where it's been really very, very  
15 difficult to discern with certainty whether the person in a photograph is  
16 the same person that the individual or the witness saw several years  
17 earlier.

18 One has to parallel those dangers with the dangers with regard to  
19 the initial sighting, the initial identification of the witness. In this  
20 particular instance, this witness has given evidence of very limited  
21 sightings of Mr. Katanga. And at the moment, we are pretty much unclear  
22 as to the exact circumstances of those sightings in the way in which this  
23 evidence has been given. The dangers associated with an initial  
24 sighting, evidence of an initial sighting of an accused, paralleled with  
25 the dangers of putting a photograph or a video of one individual in front

1 of a witness, in my submission, causes great potential prejudice to the  
2 accused.

3 Now, prejudice and fairness are not the only concepts which are  
4 raised in Article 69(4). Your Honours will be aware that obviously one  
5 has to look at the probative value. Now, we would say that the probative  
6 value of any of these three methods of identification is so minimal as to  
7 be close to zero. Even if your Honours would accept that there would be  
8 some probative value in such an exercise, which I would submit is not the  
9 case, that probative value must surely, surely be outweighed by the  
10 prejudicial effect of the manner in which the exercise is done. The lack  
11 of probative value of a dock identification, an identification within the  
12 courtroom, has been confirmed by a number of international decisions. I  
13 won't go into them too much because, first of all, I know that  
14 your Honours don't want to spend too much time on this; but also, I think  
15 that your Honours are likely or at least one of your Honours is likely to  
16 be familiar with these decisions.

17 In the very first judgement in international war crimes trial in  
18 modern history, the judgement of Tadic before the International Criminal  
19 Tribunal for the former Yugoslavia, the dangers associated with  
20 identifying an accused in the courtroom were highlighted. The very  
21 obvious nature of the exercise to the witness was highlighted. And I  
22 would refer your Honours to paragraph 546 of the judgement in Tadic. The  
23 lack of probative value of this kind of exercise has been repeated by the  
24 Appeals Chamber in the case of Limaj in the judgement of the  
25 16th of November, 2007, at paragraph 28, Limaj, L-i-m-a-j.

1 Kunerac, K-u-n-e-r-a-c, again an Appeals Chamber judgement, the  
2 12th of June, 2002, at paragraph 320. And again in the judgement in  
3 Kamuhanda, the Appeals judgment in Kamuhanda before the International  
4 Criminal Tribunal for Rwanda, Kamuhanda is spelled K-a-m-u-h-a-n-d-a, a  
5 judgement of the 19th of September, 2005, at paragraph 243,  
6 paragraph 243.

7 Now, in my respectful submission, the International Criminal  
8 Court is an advance on the ad hoc Tribunals, in the sense that the issues  
9 of admissibility of evidence, in my submission, were necessarily dealt  
10 with in a very liberal manner before those Tribunals in any event.  
11 Partly because of the nature of the exercise of setting up a Tribunal  
12 post facto and to deal with the facts on an ad hoc basis and partly  
13 because international jurisprudence was in a state of development. The  
14 State Parties to the International Criminal Court have taken great care,  
15 and we can see this in the provisions of the Statute, have taken great  
16 care to ensure that issues of fairness within the trial and fair  
17 evaluation of the evidence are treated with the greatest of care and  
18 seriousness.

19 The Prosecution in this case, as we know, has had a vast amount  
20 of resources and a vast amount of time to address the appropriate manner  
21 of identifying the accused during their investigations in this case.  
22 Your Honours will also be aware that there are other methods of  
23 identifying an accused which have been considered as much fairer within  
24 other jurisdictions.

25 In common law jurisdictions, for instance, a very specific

1 practice has developed which in most cases is specifically legislated  
2 upon in one way or another, whether with primarily or secondary  
3 legislation or practice directions, but a practice which would involve an  
4 identity parade, an identity parade where the accused is put together  
5 with individuals of a similar age, similar stature, similar appearance,  
6 similar ethnicity, in order to take into account these dangers of the  
7 temptation of identifying someone who might look like the person you saw  
8 several years ago, but might not actually be the same person.

9 Those procedures are laid down in advance. The prosecuting  
10 authorities, including the police, carry out these exercises with care in  
11 advance of the trial, and then that evidence is then evaluated during the  
12 course of the trial. Even in international criminal tribunals, in the  
13 case of Kamuhanda, for instance, which I've mentioned, the Prosecution  
14 has made an effort to try to put in place a method which doesn't simply  
15 show a very focused video of the individual, but involves an exercise of  
16 trying to put together various individuals which in principle should  
17 be -- can we say at least 12, to enable the witness to look at the issue  
18 in a manner which is fair to the accused. Those efforts have been made  
19 over the years by the prosecuting authorities in the other ad hoc  
20 Tribunals. It would not appear that such efforts have been made before  
21 this Court.

22 This is a Court which has been established with thought and care  
23 and designed to be a permanent institution for international criminal  
24 justice. It is a Court which there has been an enormous amount of  
25 political pressure around the world to try and get every member state of

1 the world to sign up to. It would, in our respectful submission, not be  
2 in the interests of justice nor in the interests of the image of such an  
3 important institution to allow this kind of exercise of a dock  
4 identification or the placing of a very focussed video in front of the  
5 witness with half a day's notice, most of the way through the Prosecution  
6 examination-in-chief having been completed, with Defence counsel focusing  
7 on the preparation of their cross-examination, and in a manner where the  
8 likelihood for error is very, very high.

9 And may I add to the issue of the likelihood of error. What I  
10 believe is perhaps the most significant point in this whole analysis,  
11 which is that this is the second trial before the International Criminal  
12 Court. It is a trial which has been the subject of a vast amount of  
13 publicity around the world. It is a trial which is shown across the  
14 internet. The accused's face is shown on the web site of the  
15 International Criminal Court. Everyone who comes into the public  
16 gallery, as far as I understand, is able to see a pamphlet which gives  
17 detailed information about the accused. There are photographs of the  
18 accused on the World Wide Web, on the Congolese TV. This witness has  
19 been assisted through demobilisation programmes designed specifically for  
20 child soldiers. This witness is likely to have -- to have been -- to  
21 have at least shown an interest ...

22 (Defence counsel confer)

23 MR. O'SHEA: Sorry, I have to correct myself. I'm wrong in  
24 stating that this witness has been subject to demobilisation procedures.

25 But the point is that the likelihood of this witness having seen

1 some of the great publicity of this trial and the pictures which are out  
2 there is high. This adds a significant element to the dangers of the  
3 exercise which Prosecution counsel is about to embark upon.

4 So for these reasons and because the prejudice severely outweighs  
5 the probative value of this kind of targeting of an individual in a  
6 specific image, we would submit that this is not an appropriate exercise.

7 (Defence counsel confer)

8 MR. O'SHEA: And I've just been reminded of two specific points,  
9 that in the United Kingdom the issue of dock identification is, in fact,  
10 prohibited by the case law. And that's not something which has been  
11 decided overnight; that's something which has been the subject of  
12 hundreds of years of development.

13 In the case of the International Criminal Tribunal, in the case  
14 of Limaj, it's been recognised that there is in fact no weight to that  
15 kind of exercise. We believe there is no or practically no weight to  
16 such an exercise, and we believe that there's very little difference  
17 between the three options which are being put forward by the Prosecution,  
18 and we believe that there are -- there were other alternatives which  
19 would have been available to the Prosecution if the Prosecution had, as  
20 it were, tried to deal with this matter a little bit fairly more in  
21 advance of the trial, with more notice to the accused.

22 (Defence counsel confer)

23 MR. O'SHEA: Okay. Those are my submissions.

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

1           MR. FOFE: (Interpretation) Good morning, Mr. President, good  
2 morning, your Honours. We are going to attempt to add to the submissions  
3 that have just been made by Mr. O'Shea. We fully subscribe to those  
4 submissions, and so we will simply try to underscore some specific  
5 points.

6           To begin with, we would like to point out that to carry out the  
7 identification of an accused in an efficient manner, the witness has to  
8 be shown several persons, 15 to 20, and even more. These people have to  
9 be presented in a neutral manner and I'm talking about this in general  
10 terms. Mr. O'Shea also talked about that. And when I talk about  
11 neutral, they should be wearing clothes that are not specific or  
12 characteristic, for example. And amongst those 15 to 20 persons, the  
13 witness would then be able to point out the person that he identifies as  
14 the accused.

15           It is not at all effective to show to the witness an image with  
16 only the accused or in a situation where the accused is in a prominent  
17 position. And, in fact, the three options that were suggested by the  
18 Prosecutor -- as I was saying, the three options proposed by the  
19 Prosecutor are not effective.

20           The first proposal involved asking the witness to look into the  
21 courtroom in order to identify the accused. In this present context, as  
22 we are seated here today, who wouldn't be able to identify the accused,  
23 as we are seated and as the accused are seated, the way they are dressed,  
24 they are dressed differently from all the other individuals in the  
25 courtroom. Who wouldn't be able to identify the accused? And this same

1 comment applies to the second option, which involved filming the  
2 courtroom to show the video of the courtroom to the witness. That would  
3 be pointless to proceed in that fashion. It would not be valid because  
4 we know what the response would be, we know it in advance, as we are  
5 seated here in the courtroom.

6 The third option involved showing certain extracts of videos to  
7 the witness, but in those videos the accused are in a prominent position.  
8 I'm not going to go into the substance of the videos, but from the point  
9 of view of method, the accused are in a prominent position, that is, when  
10 they're not seen alone, which is the case in one video.

11 Therefore, your Honour, your Honours, the three options suggested  
12 by the Prosecutor cannot be chosen because they simply are not effective  
13 and would not make it possible to have a neutral identification of the  
14 accused by the witness.

15 I'd like to close in emphasising what Mr. O'Shea stated.  
16 Mr. President, your Honours, we are here before the International  
17 Criminal Court, which is to be the model as regards the administration of  
18 justice and, in particular, as regards the identification of the accused.  
19 This Chamber must be constantly concerned that the procedures adopted be  
20 neutral, effective, and I have no doubt that that will be the case and  
21 that provide for a fair trial.

22 Thank you, your Honours.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you,  
24 Professor Fofe.

25 Mr. Garcia, one moment please.

1           Mr. Gilissen, Mr. Luvengika, do you have any comments on this  
2     discussion?

3           MR. GILISSEN: (Interpretation) Yes, your Honour. Thank you  
4     very much. I must say that we did consult, Mr. Luvengika and myself,  
5     aforehand, and we felt that it was not in our interest to take a stand on  
6     this issue. But given the discussion that's not only specific to this  
7     situation, I would like to thank my colleagues for the high quality of  
8     this discussion. I think that we could perhaps make a few comments of a  
9     general, even technical nature that are worth making. I do not intend,  
10    nor Mr. Luvengika who is allowing me to speak on behalf of both of us, we  
11    do not intend to attempt to influence the decision that you're going to  
12    be taking, hic et nunc, as regards the identification of Mr. Katanga or  
13    Mr. Ngudjolo, but I would like to comment on what Professor Fofe stated.

14           Indeed the ICC, indeed, is to be a model as regards the  
15    identification, but also as regards being realistic. We don't want to be  
16    talking about the gender of angels, so to speak. We have to avoid  
17    idealism, in particular as seen in the eyes of those who are suffering on  
18    site. That is reality.

19           We also have to avoid that there be this thinking that it's an  
20    advantage to be an accused in an international proceeding such as this  
21    one rather than being a mere thief. In fact, the more the crime -- the  
22    more serious the crime is, apparently the more rights you would have. If  
23    you're accused of crimes against humanity, should one have more rights  
24    than the ordinary thief? And I think we have to be careful that  
25    sometimes you may have good ideas but you can be mistaken and you may

1 even lead others into error.

2 Indeed Mr. Fofe is right and we need to emphasise the importance  
3 of the ICC, but we have to reason fully. We have to avoid that the men  
4 and the women throughout the world who are involved in identification, be  
5 it amongst police authorities or in the judiciary, we must avoid  
6 ridicule. At a given point in time I -- we have to avoid what I've heard  
7 with high-level intellectual reasoning, we have to avoid indeed the fact  
8 that someone who on several occasions saw the individuals wouldn't --  
9 would it be so ridiculous to ask a witness if he can recognise a person  
10 seen in a photograph. The police authorities and the investigators, are  
11 they as silly as what was suggested a few moments ago? I think that this  
12 is a matter that is worthy of analysis.

13 And even if I may look stupid in saying so, your Honour, I would  
14 like to say that it could be one element that the Judges will evaluate.  
15 I don't know if this kind of identification is reliable or not, but what  
16 I can say is that to say that obviously it would not be, that is going  
17 too far. And in fact, it goes against reality, it goes against  
18 day-to-day experience. I think, therefore, that it's a bit like  
19 consequentialism. It depends, it depends on what you're aiming for. Are  
20 we able to obtain the results we want?

21 And, your Honour, if I may say so - and in familiar  
22 terms - basically that's your job. That's the whole point. It's up to  
23 you to decide. It's not going to be a game of darts. You will have the  
24 opportunity to see how the witness reacts, whether or not he hesitates.  
25 That will be useful information that you can evaluate. And it's up to

1       you to decide whether it's reliable or not, whether it's credible or not.  
2       But to just brush it away, to brush it aside as if it were totally  
3       invalid, that it would have no point, no use in terms of evidence, that  
4       it would be just too rough, I think that's too simplistic.

5               And when I hear my excellent colleague Mr. O'Shea quote, and  
6       rightfully so - and I must congratulate him for the quality of his  
7       argumentation - but to quote case law that does not necessarily apply.  
8       Now, maybe I'm going to sound very naive and I'm willing to run the risk  
9       and perhaps I am naive, but I had not understood that  
10      Mr. Mathieu Ngudjolo suggested that he was not Mr. Mathieu Ngudjolo.  
11      Well, perhaps I was absent when something occurred, but I've never heard  
12      Mr. Germain Katanga claim not to be Mr. Germain Katanga. I don't believe  
13      that amongst the Defence my colleagues were suggesting that there was an  
14      error in the identity of the individual. I believe that we all agree  
15      that we have Mr. Mathieu Ngudjolo, Mr. Germain Katanga here before us in  
16      the Court.

17             In other words, have we ever -- has anyone ever claimed that they  
18      were not in the FNI or the FRPI? Did they run a restaurant in Bunia or  
19      that if they'd had some other job that they never had military functions,  
20      that they were on vacation, apparently, doing physical exercises? Now, I  
21      believe that if the Chamber is to be reasonable, I think if we all remain  
22      reasonable, I think we could proceed to this identification, with the  
23      understanding that it's accompanied by a certain level of hazard, so to  
24      speak. We all agree that it's worth what it's worth, and it's up to the  
25      Chamber to determine the validity of this identification. I believe that

1 at a given point in time the reservations expressed by the Defence, which  
2 have been expressed with great eloquence, I'm sure that these objections  
3 will be evaluated by the Chamber and the Chamber will examine -- the  
4 potential reliability of such an identification will be determined. But  
5 I don't think we can be told that simply because they're sitting in the  
6 seat of the accused, that they are already going to be identified. We  
7 could ask Mr. Luvengika to sit there. I can sit there as well, and I'm  
8 sure that that could have an effect.

9 Well, that's -- if you want to stop and analyse the situation, I  
10 don't really think such an argument is of great value. Ladies and  
11 gentlemen, yes, of course, they're going to be recognised, but they don't  
12 deny their own identity and they don't deny either that they had certain  
13 responsibilities. So what exactly -- what is the risk here? What  
14 potential prejudice for the Defence? None at all in my eyes, unless the  
15 quality of this identification is such that you believe that there is a  
16 problem, and if the Defence believes there is a problem, they will be  
17 free to emphasise that. But ahead of time, looking into a crystal ball  
18 to tell us that there will be problems, I just don't understand and I  
19 think it's important to say this, your Honour.

20 You know, the intermediaries who were on site often tell us that  
21 they have trouble understanding our proceedings, and that's perfectly  
22 normal. I myself have difficulties at certain points in time. But what  
23 I'm saying is that it's not that they don't understand that we're so  
24 demanding, it's just that they don't understand that things take place  
25 the way we understand it should be. You know, we're a bit like

1 professors and students. We need to explain things and make it  
2 accessible. But I do have the impression, and I'm sure that that will be  
3 the case, you will do so in your rulings, if we were to explain to people  
4 on site -- if we tried to explain that to have a witness identify the  
5 accused and say, yes, that's him or no, that's not him, that that would  
6 violate the rights of the Defence, it would be very difficult for us to  
7 do so and to remain credible.

8 I think we need to have justice for all. The victims do not  
9 expect to obtain a conviction of just anyone in any conditions, but they  
10 do expect that justice to be done. And if that is going to be the case,  
11 this justice has to be well understood, understood by all. Thank you.

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you.

13 Mr. Luvengika, would you like to add something?

14 MR. LUVENGIKA: (Interpretation) No, your Honour.

15 PRESIDING JUDGE COTTE: (Interpretation) Thank you.

16 Prosecutor, my first question is: Are you going to maintain your  
17 request?

18 MR. GARCIA: (Interpretation) Yes, your Honour. We maintain the  
19 request to proceed to the identification of the accused according to one  
20 of the three options that we presented earlier. And I would like to  
21 respond to the comments made by Mr. Hooper -- Mr. O'Shea, and Mr. Fofe.

22 PRESIDING JUDGE COTTE: (Interpretation) It was Mr. O'Shea.

23 MR. GARCIA: (No interpretation)

24 PRESIDING JUDGE COTTE: (Interpretation) It was Mr. O'Shea and  
25 not Mr. Hooper who spoke.

1           MR. GARCIA: (Interpretation) Your Honour, regarding the  
2 arguments that were presented, the submissions made by the Defence, it  
3 would seem that the real issue is the probative value of the  
4 identification of the accused by the witness. And the issue of the  
5 probative value is something that the Chamber must decide, taking account  
6 of all of the relevant elements, not just the testimony of the witness  
7 but also the cross-examination.

8           Mr. O'Shea stated in his submissions that he was surprised that  
9 we had asked, or rather, that we had made this request for identification  
10 somewhat late in the day. There are two specific reasons for proceeding  
11 with the identification of the accused at the end of the direct  
12 examination. It's perfectly logical, given the fact that the witness is  
13 vulnerable, perfectly logical not to do this at the beginning of his  
14 testimony. It was preferable to let the witness speak about the events  
15 and the facts before asking him to carry out such an exercise which could  
16 make him feel uncomfortable.

17           And secondly, and more importantly, when you identify -- when you  
18 have a witness identify the accused, you need to have a basis of fact  
19 upon which to organise such an identification. In this particular case  
20 with a witness who participated in the Bogoro attack, we mustn't forget  
21 that, and spent a considerable amount of time in the FNI militia where he  
22 saw Mathieu Ngudjolo, where he also saw Germain Katanga during the Bogoro  
23 attack, this is an important witness for the identification of the  
24 accused.

25           Your Honour, given the testimony of the witness regarding the

1 time, the period, and the circumstances where he saw Mathieu Ngudjolo and  
2 Germain Katanga, and taking account of the identification, it would be  
3 combining the two that the Chamber will be able to evaluate the validity  
4 of such identification.

5 I don't think we should make matters more complicated than they  
6 are. The situation is very simple. What is the probative value of such  
7 an identification of the witness several years after the facts at hand?  
8 Mr. O'Shea has said that this could be prejudicial given -- I believe he  
9 mentioned the fact that the image of the accused has already been  
10 publicised, but we mustn't forget that the witness indicated clearly that  
11 he lived in the Zombe camp, that is, Mathieu Ngudjolo's camp. It's not  
12 just a situation where a witness saw an accused for a few moments six or  
13 seven years ago and then is asked to identify that person, and that  
14 meanwhile there has been publicity of that person's image. In that case  
15 you might think there was contamination.

16 Here we're in a completely different situation. The witness  
17 lived in Zombe. He was in the company of Mathieu Ngudjolo on several  
18 occasions. He saw Germain Katanga not only before the attack but also  
19 during the attack. Therefore, the probative value is clear. Whether the  
20 identification took place right after the facts or now, we cannot set  
21 aside the fact that the witness lived with the two accused. I don't  
22 think there is a problem regarding probative value here. In particular,  
23 at this point in time, Mr. O'Shea's comments could have -- it could take  
24 place at the end of the direct examination or at the end of the  
25 cross-examination, and during the cross-examination indeed the Defence

1 will have an opportunity to examine the probative value.

2 I think it's too soon now to discuss the probative value. The  
3 Defence hasn't even had the opportunity to ask any questions, be it  
4 Mr. O'Shea, Mr. Hooper, or Mr. Fofe. They will have ample opportunity to  
5 ask the witness how many times the witness has seen Mr. Ngudjolo or  
6 Mr. Katanga, and those are relevant questions related to the  
7 identification by the witness of the accused. This matter, therefore,  
8 regarding the probative value of identification is premature at this  
9 point in time.

10 Mr. O'Shea would have us believe that the  
11 identification - perhaps I've misunderstood, he will correct me if I'm  
12 wrong - that the probative value of identification in a courtroom is of  
13 no value. This is not the case in every country. In the Canadian system  
14 and the American system, identification, dock identification, is used.  
15 And, your Honour, I'm sure Mr. O'Shea and Mr. Hooper know that. The  
16 Chamber will, of course, take account of this identification, but also  
17 all the other elements that led to the identification by the witness of  
18 the accused and will determine the probative value of such  
19 identification.

20 The important aspects are that -- well, first of all, how many  
21 times did the witness see the accused, how long of a period of time, in  
22 what circumstances did the witness see the accused, all of these elements  
23 which would have an effect on the identification made by the witness. It  
24 is true, as Mr. O'Shea stated, that sometimes an identification in the  
25 courtroom may not have probative value, but I believe that in this case

1 and given the relevant aspects, given the fact that the witness has lived  
2 in Zombe, I believe that there will be a probative value. It's not up to  
3 me to determine that at this point in time, but I believe that the  
4 probative value will be major, given all of the aspects that have been  
5 presented.

6 We mustn't forget -- is that there is no argument related to an  
7 alibi or that the -- there has never been a statement that the accused  
8 are not the individuals that were seen by the witness. All we're talking  
9 about here is the identification. We mustn't forget, your Honour, that  
10 it is up to the Prosecution to prove over and beyond a reasonable doubt  
11 that the accused, who are seated here in the courtroom here today, are  
12 those very men who are responsible for the crimes for which they are  
13 indicted. And indeed, we must prove that it is indeed Mr. Ngudjolo,  
14 Mr. Katanga, about which the witnesses are speaking. There is no  
15 contradiction on the part of Defence counsel, and therefore there's no  
16 reason for not going about identification, be it a dock identification,  
17 using video or other. There is no good reason for not doing so.

18 Your Honour, that's my submission. The main matter is probative  
19 value. We mustn't make it more complicated than it is. The witness is  
20 going to be present in the courtroom. I have a few preliminary  
21 questions, of course, before showing him the videos, and then it is up to  
22 the Chamber to determine the probative value of what the witness will be  
23 stating in light of his testimony.

24 We mustn't forget, your Honour, that amongst the witnesses that  
25 have already appeared before the Court, this witness is ideal for

1 purposes of identification because he was part of the FNI militia. We  
2 must, therefore, wonder why it is that the Defence objects to this  
3 identification of the accused in the courtroom.

4 Your Honour, that's my position.

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you. Thank you  
6 to all for the quality of your submissions. I would like to make a  
7 comment and I have two questions.

8 First of all, my comment. The Chamber finds itself obliged to  
9 hand down an urgent decision on an important matter. As Mr. Gilissen as  
10 stated, this requires realism; and as the Defence counsel have stated,  
11 this also requires a bit of legal reflection. We have to be -- take care  
12 that there is no prejudice to any of the parties, given the mission of  
13 the various parties. I am expressing a certain amount of regret, and I  
14 believe I express the position of the Chamber. I think it would have  
15 been preferable that the matter be raised before the Chamber at the  
16 beginning of the direct examination, that the Prosecutor mention that he  
17 was considering an identification. We would have had more time to think  
18 about it. We have already begun this witness's testimony. We have seen  
19 that things evolve, and therefore we're going to have to decide rapidly.  
20 But as Mr. Gilissen rightly said, that's our job.

21 The first question is: Have you all been able to see these  
22 videos? Apparently Mr. Ngudjolo's team has.

23 Mr. O'Shea, have you been able to see these videos?

24 MR. HOOPER: Yes.

25 PRESIDING JUDGE COTTE: (Interpretation) Fine. Everyone has

1       responded.

2               Prosecutor, this is an important question, from the point of view  
3       of the Chamber, to understand this matter. Why wasn't there a  
4       photographic identification when the witness was -- when you took his  
5       statement on site, the six- or seven-page statement that has been  
6       referred to on several occasions? Why wasn't there an identification  
7       procedure carried out at a point in time which was even closer to the  
8       events than is the case today and which was all the more closer to the  
9       point in time when the witness had met with the accused? We'd like to  
10      have an answer to that question first before we deliberate.

11              Why did you wait until today? You have explained a number of  
12      facts, et cetera, but wouldn't it have been possible, as is the case in  
13      many legal systems when a police investigation is carried out or when an  
14      investigation is carried out by the Prosecution, why wasn't there an  
15      identification or recognition procedure early on in the phase of your  
16      on-site investigations? This is not meant to be a judgement. We just  
17      have -- we would like to have an answer to that question, please.

18              MR. MACDONALD: (Interpretation) I'm going to answer this  
19      question, your Honour. Where it concerns the issue of what's called the  
20      photo line-up, we have experience in the Lubanga case with regards to the  
21      identification of Vincent Otti. It's difficult to have photographs of  
22      the two accused which has a particular background, where each of the  
23      people who are going to be seen as neutral people who are around the  
24      photograph -- it is difficult to have such a type of photograph, such a  
25      type of line-up photograph, where a person such as Germain Katanga or

1 Mathieu Ngudjolo do not automatically stand out, which would make the  
2 exercise false, the exercise that we're trying to achieve.

3 Now, this -- this isn't an alibi dossier. When we talk about the  
4 president of the FNI, the president of the FRPI, or the head of the FRPI,  
5 that's named as Germain Katanga, there is only one. When  
6 Mathieu Ngudjolo is named as the person responsible for the Zombe  
7 soldiers, there is only one. So this is not an alibi case, it's not with  
8 regard to the person, while the Hooper team has identified  
9 Germain Katanga and recognised that it is Germain Katanga on a photograph  
10 of the (indiscernible) witness. So in the circumstances in the case, the  
11 Prosecution cannot make a line-up photo, if we want to follow all the  
12 rules that apply thereto, where the accused (as interpreted) has 10 or  
13 12 photographs shown to him, looks at all these different photographs,  
14 and the Prosecution has chosen not to use this type of identification  
15 during the investigation. The Prosecution, furthermore, never thought  
16 that there would be a debate that it would have to be carried out, while  
17 the two accused are identified when they appeared before the Court.

18 So for all these reasons, the Prosecution never anticipated that  
19 this could be subject to debate, particularly in light of the fact that  
20 we have videos, these two videos, in which the accused themselves have  
21 identified themselves.

22 PRESIDING JUDGE COTTE: (Interpretation) Please go ahead,  
23 Counsel O'Shea.

24 MR. O'SHEA: Mr. President, can I just comment on this -- on two  
25 issues which have been raised by the Prosecution. The first being the

1 issue of the lateness of raising this matter. I just want to be as  
2 specific about this from a technical angle, if I may, for one moment.  
3 Which is that it would appear that in your Honours' decision, 1665, it's  
4 clearly stated that the list of documents should be provided no -- in no  
5 circumstances less than three days before the scheduled hearing. And it  
6 would appear that this specific video was not in the list of documents.  
7 Now, that does not mean that we haven't seen the video before, but we  
8 need to know that the Prosecution intends to use the video in order to  
9 prepare for that eventuality. And I believe that's the reason for what  
10 your Honours had outlined in decision 1665, in order that the parties are  
11 not taken by surprise, because obviously we've seen a lot of evidence but  
12 it's important that we know what bits of evidence are going to be used  
13 during an examination-in-chief.

14 I'd like to secondly just briefly comment upon what Mr. MacDonald  
15 has just given as an explanation for the Prosecution not adopting a  
16 fairer procedure at an earlier time. It would appear, from what my  
17 learned friend says, that these are matters which were given thought --  
18 that these are matters which were considered. But the Prosecution chose  
19 not to place a variety of photos in front of the witness because -- and I  
20 won't -- I won't try to repeat what Mr. MacDonald said in actuality, but  
21 I'll try to express what I've understood from it, it seems to me that  
22 what he seems to be saying is that we didn't go through this exercise  
23 because it might not work. The person that we envisaged being identified  
24 might not be identified if we put photos in front of the witness, but  
25 isn't that the whole point of the exercise? To ensure that the

1 identification is done in the fairest manner possible, such that room for  
2 error is removed.

3 As I said earlier, and I will rephrase, this exercise is not  
4 premature, as outlined by Mr. Garcia, my learned friend for the  
5 Prosecution, because once the affirmation has been made by the witness,  
6 it's been made. The damage has been done, as it were. And there is  
7 damage because, as I say, and I rephrase, the room for error in that  
8 exercise far outweighs any probative value. So not only, in our  
9 submission, is the exercise useless and we would not encourage this  
10 Chamber to exercise in -- to enter into exercises which are useless, but  
11 it carries with it a degree of prejudice because of this enormous amount  
12 of room for error. Thank you.

13 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor, briefly,  
14 because I will have to give the floor back to the Defence before we  
15 finish. So very briefly.

16 MR. MACDONALD: (Interpretation) Very briefly, your Honour.  
17 When you have a line-up photo, you have to have identical people on the  
18 photograph with the same background of the photograph which is the same.  
19 It is difficult to have photographs of Germain Katanga and  
20 Mathieu Ngudjolo in a situation -- in investigation situation which have  
21 a background -- neutral background and to recreate the same clothing that  
22 they might have. That is the difficulty, and that's what I wanted to  
23 say. It's not that we didn't want to; it's the difficulty of doing so.

24 There's one -- there aren't two -- there aren't two of  
25 them who -- there aren't four Germain Katanga, there aren't four

1 Mathieu Ngudjolo in the region of Zombe leading the FNI. That's also the  
2 point.

3 And finally, in all the judgements which were made with regards  
4 to this issue by the Trial Chamber, there's a question not of  
5 admissibility of identification in the courtroom, but of the final value  
6 that that has in relation to the -- all the different evidence that the  
7 Bench has. In virtually all the decisions, this way of carrying out  
8 identification is permitted and the Chamber will evaluate the weight to  
9 be ascribed thereto when it looks at all the different evidence,  
10 testimony, documents, videos, et cetera. That is the point that I wish  
11 to make.

12 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Prosecutor.  
13 Professor Fofe.

14 MR. FOFE: (Interpretation) If you would allow me, your Honour,  
15 I would like to apply the principle that the Defence has a right to the  
16 last word. Now, I would just like to add a word in this regard as  
17 follows. The Defence does not refuse the principle of carrying out the  
18 identification of the accused. The problem that there is is a problem of  
19 method, a methodological problem. Because if you have to carry out the  
20 identification, then you have to adopt a fair procedure, which would make  
21 it possible to carry out this identification in a neutral way, in an  
22 efficient way. I don't want to go into further length with regard to  
23 what Counsel Gilissen stated -- rather, Counsel Gilissen, who has asked a  
24 question as to what the rights were that the accused -- that the ICC had  
25 and that apple stealers do not have. I'm not going to come back to that.

1           What I want to highlight before you withdraw for your  
2     deliberations, your Honour, honourable Judges, is that it is important to  
3     take into account the seriousness of the crimes for which the two  
4     accused -- or of which the two accused are accused. The more serious the  
5     crimes, the more serious the sentence faced by the accused, and all the  
6     more rigorous the respect of the principle of a fair trial has to be.  
7     And I would like to stress that we are before the International Criminal  
8     Court, which should be a model, a model in the administration of justice.

9           Thank you, your Honour. Thank you, Bench.

10           PRESIDING JUDGE COTTE: (Interpretation) Thank you. The Court  
11     would like to thank everybody for their contributions, their respective  
12     contributions.

13           We're going to withdraw. It's 10.45. We'll be back here in one  
14     hour, 11.45.

15           MR. HOOPER: (Previous translation continues) ... I'm very  
16     sorry --

17           PRESIDING JUDGE COTTE: (Interpretation) Please go ahead.

18           MR. HOOPER: -- a simple matter and that is one of authorities.  
19     And we mentioned a number of authorities, but because of the timing of  
20     this and there's other difficulties that we met with this morning, we  
21     haven't been able to produce them. We would have preferred to have done  
22     that. If the Chamber feels it would be assisted by any of the  
23     authorities, Limaj, for example, which I know is very well known in any  
24     event, Tadic, and the other authorities that were quoted, then we are in  
25     a position to provide them. It would take us just a few minutes to --

1 well, 15 minutes to run them off.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you,  
3 Counsel Hooper. If we need to call upon you, we shall do so. Thank you  
4 for your proposal.

5 Now, the Chamber is going to break for one hour. If it needs  
6 more time, it will let you know. For now, however, we shall depart  
7 provisionally.

8 The session is now suspended.

9 Recess taken at 10.42 a.m.

10 On resuming at 12.02 p.m.

11 (Open session at 12.06 p.m.)

12 COURT USHER: All rise.

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

15 The accused are in the courtroom. Yes. In that case we can  
16 resume our discussions where we left off earlier, that is, regarding the  
17 proposal made by the Prosecutor to allow the witness to identify the  
18 accused according to three procedures that the Prosecutor proposed. The  
19 Chamber would like to read out Article 64(2).

20 "The Trial Chamber shall ensure that a trial is fair and  
21 expeditious and is conducted with full respect for the rights of the  
22 accused," in this case in the plural, "and due regard for the protection  
23 of victims and witnesses."

24 The Chamber would also like to read out Article 69(4) of the  
25 Statute:

1           "The Court may rule on the relevance and admissibility of any  
2 evidence, taking into account, inter alia, the probative value of the  
3 evidence and any prejudice that such evidence may cause to a fair trial  
4 or to a fair evaluation of the testimony of a witness ..."

5           Therefore, the Chamber must take care that the trial is a fair  
6 trial. This does not exclude, however, the possibility of there being  
7 recognition or identification at this stage in the procedure. This is  
8 not a priori excluded from the Statutes, but this kind of a procedure  
9 should -- would be far better if it took place during the investigation.

10           As regards fair trial, the Chamber has taken note of the fact  
11 that the presentation of this evidence occurs late in the day, late in  
12 the proceedings. The Chamber is nonetheless willing to discuss it. The  
13 Prosecutor has proposed an initial option which would mean a physical  
14 identification on the part of the witness of the two accused in the  
15 courtroom. The Chamber has ruled against that possibility, in the  
16 absence of there being any real choice given to the witness. The witness  
17 would simply be able to answer yes or no in that kind of process, and  
18 therefore it would be leading by definition.

19           The second proposal made by the Prosecutor involved asking the  
20 technicians here in the courtroom to project on the witness's screen a  
21 photograph of each of the accused and one after the other. The  
22 photograph would be presented to the witness.

23           Thank you, Madam Diarra, for correcting me.

24           The Chamber believes that this procedure should be excluded for  
25 the same reasons that were given regarding the first option.

1           As to the third option, the Prosecutor has suggested that the  
2 Chamber and the witness, and first and foremost the witness, be able to  
3 view two extracts of videos, videos which are included in the list of  
4 evidence. The Chamber has noticed, having viewed these videos, that  
5 these are indeed the extracts that have been presented by the Prosecutor,  
6 and in particular, one of the video-clips only shows Mr. Katanga in one  
7 case and Mr. Ngudjolo in another, which means that regarding this third  
8 option the Chamber is ruling in the same way as for the two previous  
9 options because we believe the procedure would be highly leading.

10           Perhaps there are other passages of the same video which would  
11 not put the accused in such a prominent position. But, Mr. Prosecutor,  
12 it is up to your office to select the appropriate video-clips and it is  
13 not up to the Chamber to do so on your behalf.

14           Therefore, the method proposed by the Prosecutor at this point in  
15 time in our proceedings do not make it possible to provide for the rules  
16 of fair trial. And the -- we believe that the probative value would be  
17 reduced under Article 69(4) of the Statutes that I read out a few moments  
18 ago. Therefore, this evidence will not be admitted.

19           We shall therefore proceed and introduce Witness 279 into the  
20 courtroom, but first of all, I would like to ask the security officers to  
21 take out the two accused for a few moments.

22           Then, Madam Court Officer, we shall go into closed session to  
23 allow the witness to be brought in discreetly and then we shall return to  
24 open session.

25           (The accused withdrew)

1               PRESIDING JUDGE COTTE: (Interpretation) Prosecutor. The  
2       accused are not in the courtroom.

3               MR. MACDONALD: (Interpretation) Just a question of  
4       housekeeping. We have received information regarding the availability of  
5       Witness 418, and perhaps at the end of this morning's hearing we could  
6       set aside a few moments so that we can give you the dates of the  
7       availability of that witness because it's not possible on the 11th.

8               PRESIDING JUDGE COTTE: (Interpretation) Please remind me at the  
9       end of our hearing so that we set aside five minutes for that purpose.  
10      Thank you, Mr. MacDonald.

11              (Closed session at 12.14 p.m.)

12      (Expunged)

13      (Expunged)

14      (Expunged)

15      (Expunged)

16      (Expunged)

17      (Expunged)

18      (Expunged)

19      (Expunged)

20      (Expunged)

21      (Expunged)

22              (Open session at 12.15 p.m.)

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

25              (The accused entered court)

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

3               Good morning, Witness. Can you hear me well?

4               I did not hear the interpretation of the witness's response. Is  
5     the system functioning?

6               Can you hear me well?

7               THE WITNESS: (No interpretation)

8               THE INTERPRETER: The English booth cannot hear the  
9     interpretation from Swahili into French.

10              PRESIDING JUDGE COTTE: (Interpretation) I did not hear the  
11     answer given by the witness, which seems to be yes, but can we check that  
12     everything is working.

13              THE INTERPRETER: The English booth confirms that we were not  
14     able to hear the interpretation from Swahili into French.

15              PRESIDING JUDGE COTTE: (Interpretation) Unfortunately, Madam  
16     Court Officer, I cannot hear the interpreters at all.

17              THE INTERPRETER: Everything seems to be functioning now,  
18     your Honour.

19              PRESIDING JUDGE COTTE: (Interpretation) It seems that  
20     everything is functioning. We can then proceed.

21              Good morning, Witness, we are very pleased to see you again this  
22     morning. We kept you waiting quite a long time. You might wonder why.  
23     We had a procedural discussion on legal matters that detained us, and  
24     that is why you were brought into the courtroom later than expected.

25              Before I give the floor to the Prosecution, I would like to

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1        remind you, as I often do, on my own behalf but on behalf of the Chamber  
  
2        as well, of the following. We must all be very careful as regards the  
3        fact that this is a public hearing. We realise, of course, that the  
4        necessity to protect the security of our witnesses requires that we go  
5        into private session, but we have to be very careful so that we not  
6        discover with disappointment after the fact that there were more closed  
7        sessions than open sessions. And we were discussing earlier this morning  
8        the role of the International Criminal Court. One of the essential  
9        characteristics is that the hearings are to be public. I know it's a  
10       very difficult exercise. Perhaps this is just a vain wish, but I think  
11       we have to continually remember that it's extremely important to have a  
12       private (as interpreted) hearing inasmuch as possible, and I thank you  
13       for keeping that in mind.

14            Prosecutor, you may proceed with your direct examination.

15            WITNESS: WITNESS P-0279 (Resumed)

16            (Witness answered through interpreter)

17            Questioned by Mr. Garcia: (Continued)

18        Q.    (Interpretation) Good morning.

19        A.    Good morning.

20        Q.    I have a few additional questions to ask you this morning.

21        During your testimony you spoke on several occasions of  
22        Mr. Mathieu Ngudjolo. In addition, you stated that Ngudjolo was present  
23        when you arrived in the camp. I'm referring to transcript 144, page 38,  
24        line 2.

25            My question is as follows, Witness: When did you know that it

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1 was Mr. Mathieu Ngudjolo?

2 THE INTERPRETER: Interpreter's correction: A few lines above,  
3 it was indeed public and not private.

4 THE WITNESS: (Interpretation) This is how I knew it was he.  
5 There were soldiers in our neighbourhood who said it was he.

6 MR. GARCIA: (Interpretation)

7 Q. Witness, do you remember the first occasion when you met  
8 Mr. Mathieu Ngudjolo?

9 A. I beg your pardon? Could you repeat.

10 MR. FOFE: (Interpretation) I would like to profit from this  
11 opportunity to ask my learned friend to be cautious as to the use of  
12 certain terms. I don't want to say more, but there is a word that was  
13 used that is not neutral, a verb to be very precise. Rather, I correct,  
14 it was a noun, not a verb.

15 PRESIDING JUDGE COTTE: (Interpretation) Thank you,  
16 Professor Fofe.

17 Please proceed, Prosecutor.

18 MR. GARCIA: (Interpretation)

19 Q. Witness, if you are able to answer my question, do you remember  
20 the first occasion when you met Mr. Mathieu Ngudjolo?

21 A. The day they took us for the first time to the mountain, we  
22 didn't meet. It was the next day that we saw him. We were told that the  
23 man we saw was indeed Mr. Mathieu Ngudjolo.

24 Q. You also mentioned in your testimony the name of Germain Katanga.  
25 And regarding that subject, you stated that you saw him on a road when

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1       you were guarding a position. Can you tell us how you knew that it was  
2       indeed Germain Katanga?

3           A. We were guarding a position and there were other soldiers who  
4       were already on the hill, and they knew the chiefs or the other military  
5       commanders. And while we were there at that position some soldiers told  
6       me that it was Germain Katanga.

7           (Prosecution counsel confer)

8           MR. GARCIA: (Interpretation) Your Honour, if I may have just a  
9       brief moment and then I will have completed my direct examination.

10          (Prosecution counsel confer)

11          MR. GARCIA: (Interpretation)

12          Q. Witness, as regards Germain Katanga, you stated initially that  
13       you saw him when he was on the road. You also mentioned that you saw him  
14       after the attack on Bogoro. He was in a classroom. So my question is as  
15       follows: Did you see him afterwards, Mr. Germain Katanga?

16          A. Afterwards, a relative of mine showed me Germain Katanga, and I  
17       told my relative that I had already seen him. I had already seen  
18       Germain Katanga when we were guarding Zombe. And I told him that some  
19       soldiers had pointed him out. So when my relative showed me  
20       Germain Katanga, I had already fled. I was no longer carrying out those  
21       functions. I had gone back to my family in the village.

22          MR. GARCIA: (Interpretation) Your Honour, if I may, can we go  
23       into private session for the next questions?

24          PRESIDING JUDGE COTTE: (Interpretation) Court Officer, private  
25       session for a few moments, please.

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1 (Private session at 12.27 p.m.)

2 (Expunged)

3 (Expunged)

4 (Expunged)

5 (Expunged)

6 (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Open session at 12.29 p.m.)

21 COURT OFFICER: (Interpretation) We're in open session,

22 your Honour.

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

24 Court Officer.

25 Prosecutor, yes, you have just reminded me that at the beginning

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1 of the hearing each participant received a photocopy of the useful pages  
2 of the passport of this witness. Each party has had an opportunity to  
3 look at it. Is that indeed the case? Have the Defence teams been able  
4 to examine the photocopies of the first pages of this witness's passport?  
5 Apparently yes.

6 You wanted an EVD number, I believe, to be given to this  
7 document.

8 Court Officer, would you be so kind as to give us an EVD number  
9 to this official document. The Chamber has taken note of the fact that  
10 the Ngudjolo Defence has made a request, but we're still examining the  
11 facts of that request.

12 Court Officer, could we have an EVD number for this photocopy of  
13 the passport pages before the Prosecutor completes fully his direct  
14 examination.

15 COURT OFFICER: (Interpretation) Thank you, your Honour. The  
16 photocopy of the witness's passport shall bear the number EVD-OTP-00117  
17 and will be -- shall be confidential.

18 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much.  
19 Thank you, Prosecutor. You still had something else?

20 MR. GARCIA: (Interpretation) Just to reiterate the fact that I  
21 have no more questions for the witness. I just wanted to thank the  
22 witness for answering our questions.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you, therefore,  
24 Prosecutor for all this work which you have accomplished during the  
25 examination-in-chief.

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1                   Counsel Gilissen, Counsel Luvengika, which of you two is going to  
2     start? Perhaps Counsel Gilissen, given the previous status of the  
3     witness.

4                   MR. GILISSEN: (Interpretation) With your permission,  
5     your Honour.

6                   PRESIDING JUDGE COTTE: (Interpretation) You have the floor. We  
7     are in agreement, I shall not remind you of the framework for the  
8     questions to be perfectly linked to the victims that you represent, but  
9     apparently you are fully within your subject today.

10                  MR. GILISSEN: (Interpretation) It will appear so, but I will  
11     still be prudent nevertheless. And we also have to remember that we are  
12     in open session. It's in the interest of everyone that there's a public  
13     proceedings. I will do my best to ensure that sufficient prudence is  
14     taken, while taking into account any identifying elements that I might  
15     state.

16                  Questioned by Mr. Gilissen:

17                  Q. (Interpretation) Good morning, Witness. I am  
18     Jean-Louis Gilissen, and I am appearing as counsel for child soldiers who  
19     are considered before this Court as being victims. They are therefore  
20     young boys. I only represent boys who tell us that they were in a  
21     situation which is similar to the one which you have told us that you  
22     experienced.

23                  MR. GILISSEN: (Interpretation) Perhaps just to facilitate  
24     things for everybody, I would like to refer to page 23, lines 21;  
25     page 33, line 10; and page 34, line 4 of the first transcript of this

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1 witness or the statement of this witness, that is to say, the  
2 transcript 144.

3 Q. Witness, you stated to us that where we went -- or you said where  
4 they went to take you, other children were also taken, children under the  
5 age of 13. You say on page 23, on page 33 of the transcript. And on 34,  
6 you talk about children of 12 years. And it's particularly this person  
7 aged -- well, these children who were taken on the same day as you who  
8 have interest to me, taken on the same day in the same place.

9 I wish to know if all the children who were taken on that day did  
10 go to the same camp as you did.

11 And I propose, President, that I do not mention the name of the  
12 camp. I don't see any use in that. I think that the witness understands  
13 that everybody came to the same camp as you, in one sole convoy. Could  
14 you tell us what the situation was for them.

15 A. Yes, we arrived together in the camp.

16 Q. I would like to discuss with you also the conditions under which  
17 you were taken, you and these other children. You told us, and it was on  
18 page 23 of the same transcript, that you had been in a position of being  
19 able to resist. And I wanted to know if during this visit made to your  
20 visit -- made to your village, if other people resisted; and if this is  
21 the case, what exactly happened?

22 A. Yes.

23 Q. I think, Witness, I understand that some young people, some  
24 children, tried to resist being taken towards a military camp.

25 A. Yes. They didn't want to go there.

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1 Q. What happened in this case when one said no, when one tried not  
2 to go there?

3 A. When a child does not want to go there, they were taken by force  
4 and taken to the hill. The person who took them was not alone. So when  
5 a child doesn't want to go, you are put together and then you are taken  
6 to the camp.

7 Q. The attitude of the children's parents -- you spoke about your  
8 parents, you told us they didn't have anything to say. The attitude of  
9 the children of other parents -- or the attitude of parents of other  
10 children, was that the same? Was that a passive attitude? Or did some  
11 try to negotiate to impose their will? Can you tell us what -- or to  
12 oppose it. Could you tell us a bit more about that, please.

13 A. What I can say is that the parents of other children who did not  
14 want their children to go, the parents did not have any power either  
15 because at that time it was the fighters who had the power. They could  
16 do anything they wanted.

17 Q. And did they do everything they wanted? And by that I mean what  
18 did they do when there was opposition? Did they negotiate? Did they  
19 discuss? Did they act differently? Could you describe the scenario. We  
20 were not there and we would like to try and understand what happened. We  
21 can imagine it, but I think that nobody wants to imagine the things we  
22 would like to have a description thereof. Please could you help us by  
23 giving us more detail.

24 A. Everything that I can tell you with regard to what happened.  
25 They were taken -- people were taken by force to the hill. Even if the

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1 parents refused or did not refuse, they took the children, and they took  
2 them there.

3 Q. And the attitude of the mothers and fathers, was that taken into  
4 account? I don't want to lead anything here, but was there a motion,  
5 demonstration, or was it extremely passive? That's what I'm trying to  
6 understand, Witness.

7 A. Yes, yes. They screamed, they shouted, and they cried as well.  
8 So they were crying. They were crying with the way their children were  
9 being taken. This caused them considerable grief.

10 Q. And nothing was done. It was the rule of force?

11 A. Yes.

12 Q. To your knowledge of what you personally know, such visits or  
13 expeditions of such a nature with the same goal, namely, to take  
14 children, 13-year-olds, 12-year-olds, did this happen in other villages?

15 A. In other villages I did not see. I do not know with regard to  
16 the other villages. I don't know if in other camps there were child  
17 soldiers. I do not know that.

18 Q. You told us that when you arrived at the camp where you arrived  
19 there were other young people there, just as in another camp that you'd  
20 been to. And you said that in the other camp - it's in yesterday's  
21 transcript - there were few children in that camp. So you don't know how  
22 they got there?

23 A. Which village are you talking about? Please could you repeat the  
24 question.

25 Q. Undoubtably, I would ask you to please excuse me. What I'm

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1       trying to know here is if the visits or the operation to take children  
2       from your village, to your knowledge, was this an exceptional event,  
3       perhaps unique; or if you're able to tell us if, to the best of your  
4       knowledge, this is something that happened elsewhere once, regularly,  
5       often, from time to time. But in your knowledge is that -- was it a  
6       unique event?

7       A.    Yes. In my village, when we were taken, we found other children  
8       who were already in the camp on the hill.

9       Q.    And when you were in your camp, Witness, in the days, in the  
10       weeks, in the months which followed, did you see other children arrive?  
11       Did you see a new arrival of children?

12       A.    When we were taken to the camp, there were other children. I  
13       would say there were approximately nine or ten of them. When they were  
14       taken to the camp and when they wanted to -- or when they tried to get  
15       used to life in the camp, I started to speak to them. And I asked one of  
16       these children, "When you arrived, where did you come from, which  
17       village?" And one of the children told me that they had been taken from  
18       a village called Kindia. Kindia is (Expunged)  
19       (Expunged)

20       Q.    Do you know, Witness, could you tell us, Witness, if among the  
21       children who were there, to your knowledge, they were all in a similar  
22       situation to yours, that they had been taken, people had gone to take  
23       them, or some of them were there on a voluntary basis, if they had chosen  
24       to be there?

25       A.    They were all in the situation that I was in. Even friends who

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1        were in the same neighbourhood as myself, they told me that.

2            Q.    Thank you, Witness. You also described your arrival in the camp  
3        to us. You described a scenario, and this was page 36 and 37 of the same  
4        transcript, lines 24 and 2. There were people arriving -- waiting for  
5        your arrival. What makes it possible -- how can you tell us in the  
6        information that you give to us that these people were expecting your  
7        arrival? Did you have the feeling -- how can you say that they were  
8        expecting or waiting for you?

9            A.    I haven't understood this question very well.

10          Q.    I'm going to try and reformulate it. I'm going to try and be  
11        clearer and to try and help you in this regard. You told us that the  
12        people whose names you gave to us when you came, they were expecting you.  
13        Why do you say that they were expecting you? Did they say that to you?  
14        Did they have an attitude of people who would be expecting a group?  
15        Please could you tell us with regard to the situation why you say they  
16        were expecting you.

17          A.    I do not understand your question very well.

18          Q.    No matter. My words are not meant to try and lose you. I'll  
19        propose another subject with the leave of the Bench.

20                When you arrived, I would like to know if in your group there  
21        were only children or young people or if there were also adults within  
22        that group, other people taken or who might have come voluntarily?

23          A.    With regard to the adults, there were adults who wanted to become  
24        soldiers, but there were others who were forced into it. Those who  
25        didn't want to were also taken to the hill.

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1 Q. And where it concerns the children who were there, when you  
2 arrived were they together with the children on one side or were they  
3 mixed with adults?

4 A. Everybody was together in the same camp.

5 Q. Children and adults?

6 A. Yes.

7 Q. Those who wanted to be there and those who were taken by force?

8 A. Yes.

9 Q. In the same vein, Witness, everybody including children, did they  
10 do the same thing or was there a distinction?

11 A. Yes.

12 Q. Is it the same for training?

13 A. When there was training, training was done together at the same  
14 time.

15 Q. So still, Witness, the adults together with the children, they  
16 had the same training, at the same time?

17 A. Yes.

18 Q. The missions guarding positions, on pages 52 and following,  
19 lines 14, guarding positions, were these tasks shared between adults and  
20 children as well?

21 A. Yes, we were put together. The children and the adults.

22 Q. Is it still the case or -- at a certain time was a distinction  
23 made or was a different treatment accorded to children and adults?

24 A. Apart from the work of guarding position, there was no other work  
25 to be done.

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1 Q. Thank you. You spoke to us about punishment, Witness, and you  
2 described the punishment. Was it the same punishment accorded to adults  
3 and children?

4 A. For punishment, the children and -- whether you were children or  
5 adults, you had military work to carry out. That's what was told to you.  
6 And with regards to punishment, whether you were an adult or whether you  
7 were large or small, you had to be punished.

8 Q. I understand that those who didn't do what they were told to do  
9 were punished whether adult or children, whether they were adults or  
10 children. But the punishment that was inflicted on them, that was given  
11 to them, was the punishment the same or was a distinction made in  
12 accordance with whether they were children of 12 or 13 years old and  
13 adults -- or adults, rather?

14 A. The punishment was the same.

15 Q. When you guarded positions, when you went to Bogoro, in the  
16 fight -- to the fight in -- to the fighting that you told us about, when  
17 you were a bodyguard you told us that you had a weapon, a fire-arm, and  
18 you said that it was a rifle. Could you tell me who gave you this  
19 weapon? How did you obtain this weapon?

20 A. It was Commander Boba Boba himself who gave this rifle to me.

21 Q. I would like to correct my question. Did they have weapons in  
22 the camp? Was there a stock of arms in the camp -- stock of weapons,  
23 rather, in the camp? Were they not taken from the enemy?

24 A. There were weapons taken from the enemy.

25 Q. Who provided you with munitions?

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1           A.     Himself, Commander Boba Boba.

2           Q.     When you were provided with a weapon, Witness, were you  
3     thereafter responsible for it? Did you have to guard it, to maintain it?

4           A.     With regards to the responsibility guarding of the weapon, when  
5     we were on guard, we -- there were two of us. We had the responsibility  
6     for this weapon and even to dismount it -- or disassemble it and to  
7     maintain it and clean it and reassemble the weapon as well. And we also  
8     carried out the guard.

9           Q.     And I don't know if there's already been a case where somebody  
10    has lost a weapon, lost their weapon?

11          A.     In our group?

12          Q.     In your group or among the young people in your camp, to the best  
13    of your knowledge?

14          A.     If a person has lost a weapon, that's something I didn't see.

15          Q.     I will take the opportunity of closing this with regards to the  
16    loss of weapons.

17                 Now, you spoke about the laboratory, Witness, and you told us  
18    that that is a place where medicine was made and fetiches were made  
19    there. In Swahili, which is your language, is it the same word when you  
20    say medicine, or "medicament" in French, and fetich, is it the same word  
21    in your language?

22          A.     There are variants of Swahili. In this village where we received  
23    these products, the place was called Kodja (phoen), that's where we  
24    received this fetich, medicine, which was called madawa. And then the  
25    name of these products or fetiches was dondjini (phoen). It was to

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1 protect a person when that person went into battle.

2 Q. During the fighting, Witness, when you were getting ready to  
3 fight, did everybody keep their medicine or fetich with them? Did  
4 everybody receive medicine or a fetich?

5 THE INTERPRETER: The interpreter corrects.

6 THE WITNESS: (Interpretation) Yes, everybody received it, but  
7 certain people who were stubborn didn't.

8 MR. GILISSEN: (Interpretation)

9 Q. Who provided you with these fetiches? How did that happen?

10 A. Those who distributed those fetiches were the adults who handed  
11 them over to the soldiers. Those fetiches would produce an effect on the  
12 person receiving them. It was even possible to predict what was going to  
13 happen. That is what I realised.

14 Q. And the persons who distributed those fetiches or medicines, were  
15 these soldiers or not?

16 A. Were you referring to those who distributed those fetiches,  
17 Counsel?

18 Q. Just a moment. I am sorry.

19 A. I can say that they were soldiers.

20 Q. You say they were soldiers. Thank you very much. But do you  
21 know who prepared, who concocted those medicines or fetiches?

22 A. They were the ones.

23 Q. So if I understand you correctly, Witness, these would be  
24 soldiers from the camp?

25 A. Can you kindly repeat the question.

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1 Q. I will try to be much clearer. Witness, my aim is to be sure  
2 that I understand you correctly.

3 Those who prepared the fetiches and mixed them together, those  
4 who produced them, you are telling us that these were soldiers from the  
5 camp and not people coming from elsewhere?

6 A. There were people who came from outside the camp, but there were  
7 others who were inside the camps and who could have access to those  
8 products.

9 Q. Regarding these people who came from outside of the camp, do you  
10 know who they were? Were these people who had specific duties? Can you  
11 elaborate on that?

12 A. I did not quite understand your question.

13 Q. If I understand you correctly, Witness, these fetiches or  
14 medicines were prepared by people who were in the camp and you have told  
15 us that they were soldiers, but you also said that there were other  
16 people who came from elsewhere, from out of the camp. And talking about  
17 these people from outside who came to the camp to prepare fetiches, can  
18 you tell us what were their occupations, what were their duties at the  
19 place where they came from?

20 A. Those people lived somewhere outside of the camp.

21 Q. And those who prepared those fetiches inside the camp, that is,  
22 the soldiers, were these their duties or did they also have other tasks?

23 A. They didn't have any other duties.

24 Q. Are you telling us that they prepared the fetiches and the  
25 medicines and those were their sole duties?

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1           A.    I would say that they were responsible for distributing the  
2   fetiches.

3           Q.    Witness, were these people officers, high-ranking soldiers, or  
4   foot soldiers just like the others?

5           A.    These were simply foot soldiers without any rank. I realised  
6   that they were only responsible for distributing those fetiches and for  
7   producing them also.

8           Q.    How were they known? Did they have any specific titles or how  
9   were they referred to?

10          A.    Do you want to know whether there was a specific name for those  
11   who produced those fetiches?

12          Q.    Yes, indeed, Witness, that is what I wanted to know.

13          A.    They were referred to as "docta".

14                PRESIDING JUDGE COTTE: (Interpretation) Would it be possible to  
15   explain the word that has just been used, "docta"?

16                Witness, you said they were known as doctas. Can you spell that  
17   word for us?

18                THE WITNESS: (Interpretation) The equivalent of "docta" in  
19   English is "doctor".

20                PRESIDING JUDGE COTTE: (Interpretation) That is perfect,  
21   Witness. So the spelling is d-o-c-t-a.

22                MR. GILISSEN: (Interpretation)

23          Q.    Thank you, Mr. Witness. I'm making an effort to elicit the  
24   information without giving the impression that I'm leading the witness.

25                Now, this distribute of fetiches, did it take place only before

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1 the battles or were the fetiches distributed on other occasions?

2 A. Those fetiches were distributed to the soldiers if they wanted to  
3 have them, but the distribution was done mainly before the soldiers went  
4 to battle.

5 Q. And you yourself, Mr. Witness, did you ever ask for a fetich to  
6 be given to you?

7 A. In order to go and fight, I also needed to have a fetich. That  
8 is because I was afraid. I was afraid that a misfortune would befall me.

9 Q. Thank you, Witness. You would have gone to fight without a  
10 fetich?

11 A. This is what I told you. When someone did not have a fetich  
12 during the war, he could be killed or suffer some kind of injury.  
13 Someone could be hit by a bullet if they did not follow the directives  
14 relating to the fetich.

15 Q. Based on the knowledge that you have about the young children who  
16 were with you in the camp at one point or the other, were some of them  
17 wounded or killed while taking part in fighting or after being involved  
18 in other incidents?

19 A. Yes.

20 Q. If this is a very painful topic, just tell me and we will stop.  
21 But if you had a young child of about 10 years, as you said, in Bogoro,  
22 that is transcript 145, pages 9 and 53, line 18, so if people who were  
23 10 years, for example, and killing each other, if such a child was  
24 injured, what happened? Did they receive assistance? Were they treated  
25 or were they left to their own devices? Can you explain that to us?

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1           A.    There were health centres in Zumbe village where the military  
2    camp was located.

3           Q.    And during the Bogoro attack, were there any health centres  
4    there?

5           A.    Which centres are you referring to?

6           Q.    This is not something I know, Witness. This is something that I  
7    want to know. When you and your colleagues went to Bogoro, were you told  
8    or did you see -- in other words, in the instructions given to you prior  
9    to the attack, did you observe that there were units being set up to  
10   treat those who would be wounded?

11          A.    The health centres in question were located in Zumbe. We found  
12   them there. I do not know whether they had been set up to serve the  
13   soldiers or the members of the civilian population.

14          Q.    And amongst your fellow soldiers - and I'm referring here only to  
15   the children, not the others, that is, those who were in Bogoro - were  
16   some of them injured or wounded?

17          A.    Yes. Some of them were even killed.

18          Q.    And in order to receive treatment, did these children have to  
19   return to the camp?

20          A.    Yes, they would return to the health centre.

21          Q.    Witness, how long did it take an injured child to return to the  
22   health centre in the camp?

23                I will try to assist you --

24                MR. FOFE: (Interpretation) I would like to intervene,  
25   Mr. President.

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1                   PRESIDING JUDGE COTTE: (Interpretation) Please address the  
2     Court.

3                   MR. FOFE: (Interpretation) I would simply want to point out to  
4     the Chamber that our colleague is casting his net much wider than the  
5     scope set out by the Chamber. I do not know whether that is the same  
6     impression that you have.

7                   PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe, when we  
8     talked about the issue of fetiches, which was mentioned unexpectedly by  
9     the witness, we agreed that it was important to clarify and we would see  
10    what the situation is at the end of the cross-examinations.

11                  Right now Mr. Gilissen, who is counsel for victims who are child  
12    soldiers, is trying to understand what was the status of those young  
13    combatants, what was -- what were their living conditions, and what were  
14    the specific measures that could have been taken for the benefit of those  
15    very young combatants in case of injuries or any other acts of violence  
16    that they could have suffered. This allows us to fully understand some  
17    of the charges.

18                  Right now we are not talking about the liability of one or the  
19    other of the accused persons; we are simply trying to better understand  
20    the situation of those child soldiers. And in this particular case,  
21    Mr. Gilissen was not trying to assist the witness too much. So he's  
22    asking questions that the witness can answer, at least 85 per cent of  
23    them. So with a view to enabling the Chamber to better understand a  
24    situation that they do not fully master, it is important to do that  
25    during this direct testimony. And it is important that he should do it

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1 with the necessary tact and precautions.

2 Mr. Gilissen, you have barely five minutes. You can continue  
3 tomorrow if you wish, but we had to receive some information about  
4 Witness 418. You can continue, but thank you for your intervention.

5 MR. GILISSEN: (Interpretation) Professor Fofe was probably  
6 right, Mr. President, because I used the expression "I'm going to help  
7 you," and that would have led people to fear the worst. So my intention  
8 was not really to emphasise that point.

9 Q. Witness, when you are in Bogoro centre or in Bogoro, can you give  
10 us an idea how long it would require to return to your camp on foot?

11 A. Are you referring to the situation of someone who is injured or  
12 someone who is fully fit?

13 Q. Let us put ourselves in the position of someone who is injured or  
14 someone who was fit and who is wounded and who can no longer walk  
15 normally.

16 A. From Zumbe camp to Bogoro camp, one would have needed about three  
17 to three and a half hours.

18 MR. GILISSEN: (Interpretation) Mr. President, I think not to  
19 eat into anyone's time, I will stop here. I really have no further  
20 questions because my intention is not to cast my net too wide.

21 Q. Thank you very much, Mr. Witness.

22 PRESIDING JUDGE COTTE: (Interpretation) Maybe the expression to  
23 cast the net much wider was in answer to the notion of apple thieves that  
24 was mentioned earlier.

25 Prosecutor, it is not indispensable that the witness be with us

1       when we discuss the issue of Witness 418 because he's not concerned by  
2       that, but the accused persons need to be here.

3               So, security officers, please briefly escort the accused persons  
4       outside and they will be brought back in immediately after the witness  
5       leaves.

6               Court Officer, let us go into closed session to allow the witness  
7       to leave.

8               And thank you, Witness, for your answers to the Prosecutor's  
9       questions and to Mr. Gilissen's questions. We will meet here again  
10      tomorrow morning at 9.00 a.m. for the continuation of the questions from  
11      Mr. Gilissen and then the questions of Mr. Luvengika. We will have some  
12      questions for you too and then the cross-examinations will begin.

13              (Closed session at 1.22 p.m.)

14      (Expunged)

15      (Expunged)

16      (Expunged)

17      (Expunged)

18      (Expunged)

19      (Expunged)

20      (Expunged)

21      (Expunged)

22      (Expunged)

23              (Open session at 1.23 p.m.)

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

1               PRESIDING JUDGE COTTE: (Interpretation) Thank you.

2               Security officers, please escort the two accused persons back  
3 into the room.

4               (The accused entered court)

5               PRESIDING JUDGE COTTE: (Interpretation) Thank you.

6               Mr. Prosecutor. Mr. MacDonald, Witness 418 will not be able to  
7 come on the 11th of June as planned. Is that correct?

8               MR. MACDONALD: (Interpretation) Yes, indeed, Mr. President. We  
9 were informed by the Registry that Witness 418 unfortunately, for  
10 personal and important reasons that I will not tell you here, cannot be  
11 available on the 11th of June. However, he will be available on the 8th,  
12 9th or 10th, or on the 15th, 16th, or 17th. So the Chamber can choose a  
13 date that is convenient to all the participants. I will defer to you on  
14 that.

15              PRESIDING JUDGE COTTE: (Interpretation) Mr. Kilenda.

16              MR. KILENDA: (Interpretation) Since we are talking about this,  
17 Mr. President, we re-read the additional report that was submitted by  
18 Dr. Baccard, and at least the team of Mr. Ngudjolo felt that there is  
19 need to consult another expert. So our motion is to have this other  
20 expert appear and even be able to follow the continuation of the  
21 cross-examination of Dr. Baccard when he does appear. And if the  
22 Registry can be requested to send us the list of the experts at the ICC,  
23 that would be good.

24              And, Mr. President, our case manager, who is our hard drive, is  
25 telling us that that list is already available. So I withdraw my

1 application.

2 PRESIDING JUDGE COTTE: (Interpretation) You will have to submit  
3 a written application for the authorisation of that other expert, and we  
4 will have to make a determination because the concern of the Chamber is  
5 to have Dr. Baccard re-appear before the end of the month of June.

6 (Trial Chamber confers)

7 MR. MACDONALD: (Interpretation) With your leave, Mr. President,  
8 on this last point.

9 PRESIDING JUDGE COTTE: (Interpretation) Judge Van den Wyngaert  
10 is proposing that we resume this tomorrow if necessary, but it could be  
11 during your own witnesses that this expert is called.

12 MR. MACDONALD: (Interpretation) That is what we thought, but  
13 there are videos that can be available if that expert is not present  
14 during the cross-examination of Dr. Baccard.

15 PRESIDING JUDGE COTTE: (Interpretation) In principle, we are  
16 not refusing the possibility for you to call another expert to add to the  
17 expertise of Dr. Baccard. I do not think we can have a debate with two  
18 experts in the room at the end of June.

19 MR. KILENDA: (Interpretation) You are quite right,  
20 Mr. President, but there is case law in this Court that authorises us to  
21 have in the same courtroom an expert who directly follows the  
22 explanations given by another expert. But you are quite right, we will  
23 file a motion with all the necessary documentation to allow you to make  
24 your determination. We are not carrying out a counter-expertise, but we  
25 simply wanted our own expert to be in the courtroom to listen to the

1 first expert.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Kilenda.  
3 Please file that application as soon as possible so that we should be  
4 able to decide on a date between the 8th and the 17th of June, and we are  
5 supposed to sit during those days. So we are awaiting your filing and we  
6 will decide on another date.

7 And, Court Officer, in spite of the difficulties that have  
8 prompted Dr. Baccard to change the date, he should be able to reserve one  
9 of those six dates, 8, 9, 10, 15, 16, 17 June.

10 The Bench would like to thank all those who participated in this  
11 hearing, those who assisted us, particularly our interpreters, court  
12 reporters, and technicians, despite all the difficulties. We will meet  
13 here again tomorrow at 9.00 a.m.

14 The hearing is adjourned.

15 The hearing ends at 1.29 p.m.

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