

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 Monday, 5 July 2010

10 The hearing starts at 2.06 p.m.

11 (Open session)

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

14 PRESIDING JUDGE COTTE: (Interpretation) Court is in session.

15 Please be seated.

16 Before we begin, I'd just like to rectify a material error that
17 you pointed out to us - and we'll like to thank you for that. It is
18 contained in the order convening a Status Conference 2236 of the
19 2nd of July, 2010, and on page 4 of that order, in the paragraph
20 beginning with the letter (E) and small (b) there is a sentence:

21 "Does he intend to deposit filings from the 14th of July?"

22 I think that should be 19th July, 19th July, in the evening. So
23 this is page 4, paragraph (E), (b), you have to substitute "19" for "14"
24 just before "July." And right now we would like to inform you that next
25 Monday our hearing will end at 6.00 p.m. and not 6.30 p.m., so we would

1 like to inform you of that right now.

2 Mr. Hooper, during our last hearing you wanted to address the
3 Court on possible admissions, and if you do want to do that you can do it
4 right now.

5 MR. HOOPER: Yes. Thank you for reminding me, in fact, of that.
6 There are still some discussions I have yet to have with representatives
7 of Mr. Ngudjolo, so perhaps that can wait another time. Thank you.

8 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Hooper.
9 Mr. Prosecutor, please.

10 MR. MACDONALD: (Interpretation) I do not want to interrupt the
11 hearings, but regarding the admissions, I discussed with my learned
12 friend Mr. Hooper regarding what I had talked about in the presence of
13 the witness regarding the witness's identification of
14 Mr. Germain Katanga, and I will speak English now. (In English)
15 (Previous translation continues) ... to make an admission in relation to
16 the identification of his client by this witness. In other words, I
17 understand - and I'll leave Mr. Hooper to formulate it if you
18 prefer - but because the witness and Mr. Katanga saw each other on a
19 number of occasions as the witness will be detailing further, that the
20 identification is not an issue, that in other words when the -- Mr. --
21 the witness speaks about Germain Katanga, he's talking about
22 Germain Katanga, the gentleman that is sitting in this courtroom.

23 MR. HOOPER: Yes. I don't know what happened -- over the weekend
24 I, in fact, sent an e-mail, a personal e-mail, to Mr. MacDonald which he
25 acknowledges, just asking that he frame the admission that's being

1 sought. And I haven't had a response to that. But -- so if he -- unless
2 I've neglected to see something or if it hasn't been sent perhaps it can
3 still be sent.

4 PRESIDING JUDGE COTTE: (Interpretation) The Chamber felt that
5 you were going to be talking about several admissions, but Mr. Hooper has
6 now said that the admissions, in plural, are not yet final. So we are
7 going to wait and Mr. Hooper will address the Court in due course.

8 Now, Mr. MacDonald, you were talking about a very specific
9 admission concerning Mr. Hooper's team and your own team and which
10 relates to Mr. Katanga. And apparently Witness DRC-OTP-P-0267 knows him
11 very well because he met with him several times. Is there an oral
12 agreement on that right now or not?

13 MR. MACDONALD: (Interpretation) I apologise to my learned
14 friend. I saw Mr. Hooper's e-mail about two hours ago, and I thought
15 that I simply wanted -- had to remind him about that and not to actually
16 formulate an admission. I'm sorry for that misunderstanding. We will
17 discuss during the break and come out with an admission.

18 PRESIDING JUDGE COTTE: (Interpretation) So a solution will be
19 found during the break. We all hope so.

20 Court Officer, let us go briefly into closed session so as to
21 bring in Witness DRC-OTP-P-0267.

22 You will all remember the procedures that we adopted yesterday
23 with a list of names and organisations matched with figures and letters.
24 And when we are in open session, we will use the letters AA. We will
25 paraphrase so as to protect the identity of the witness to the extent

1 possible.

2 So, Court Officer, let us go into closed session to bring in the
3 witness.

4 (Closed session at 2.13 p.m.)

5 (Expunged)

6 (Expunged)

7 (Expunged)

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22 (Expunged)

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25 (Expunged)

1 (Expunged)

2 (Open session at 2.16 p.m.)

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

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you.

6 Good afternoon, Mr. Witness.

7 THE WITNESS: (Interpretation) Good afternoon.

8 PRESIDING JUDGE COTTE: (Interpretation) I see you can hear me
9 well. We will resume our proceedings from where we left off last
10 Wednesday. Please remember, Mr. Witness, that you have to speak slowly
11 and clearly. You did that last week, but try to speak very slowly and we
12 thank you.

13 Prosecutor, you can continue.

14 MR. MACDONALD: (Interpretation) Thank you, Mr. President,
15 your Honours.

16 Before I continue with my next questions, I think we should
17 present to the witness the document which has already been assigned an
18 EVD number and which lists the place and organisations.

19 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, can you
20 hand over the document to the witness which he used on Wednesday
21 afternoon. If you don't have a copy, I can give you one.

22 WITNESS: WITNESS DRC-OTP-P-0267 (Resumed)

23 (Witness answered through interpreter)

24 Questioned by Mr. MacDonald: (Continued)

25 Q. (Interpretation) Good afternoon, Mr. Witness.

Witness: Witness DRC-OTP-P-0267 (Resumed) (Private Session)
Questioned by Mr. MacDonald (Continued)

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1 A. Good afternoon, Mr. Prosecutor.

2 Q. Last week, at the time of the adjournment, we were talking about
3 your first visit to Mr. Katanga's fief. You told us that you went to the
4 camp where he had his general staff headquarters. I will ask you some
5 more questions about that first visit that you made there.

6 First question: To your knowledge, did that camp that you
7 visited have a name?

8 A. Mr. Prosecutor, there was nothing written at the entrance into
9 that camp that would indicate it was a military camp. There was just a
10 small hut and a gate to go into that camp.

11 Q. Very well. You also told us that you were accompanied by certain
12 people during that visit to that place?

13 A. Yes. I was in the company of the person at number 8 and also the
14 person at number 9 who were supposed to take me into Mr. Katanga.

15 MR. MACDONALD: (Interpretation) Mr. President, I would like us
16 to very briefly go into private session.

17 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, let us
18 go into a brief session, please, a brief private session.

19 (Private session at 2.20 p.m.)

20 (Expunged)

21 (Expunged)

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23 (Expunged)

24 (Expunged)

25 (Expunged)

Witness: Witness DRC-OTP-P-0267 (Resumed) (Private Session)
Questioned by Mr. MacDonald (Continued)

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Page 7 expunged. Private Session.

Witness: Witness DRC-OTP-P-0267 (Resumed) (Private Session)
Questioned by Mr. MacDonald (Continued)

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1 (Expunged)

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10 (Expunged)

11 (Open session at 2.24 p.m.)

12 COURT OFFICER: (Interpretation) We are in open session,

13 Mr. President.

14 PRESIDING JUDGE COTTE: (Interpretation) Perfect. Thank you,

15 Madam Court Officer.

16 Please proceed, Mr. Prosecutor.

17 MR. MACDONALD: (Interpretation)

18 Q. Witness, in private session you just mentioned the wife of
19 Mr. Katanga, and I believe that you met with her at one point. My
20 question concerns this aspect. Did that meeting with the wife of
21 Mr. Katanga take place, that is, during the first visit, during the first
22 time you visited the camp? Can you hear me?

23 A. Yes, I can hear you well.

24 Q. Let me repeat my question. Did you meet Madam Katanga, that is,
25 the wife of Germain Katanga, during your first visit to the camp?

Witness: Witness DRC-OTP-P-0267 (Resumed) (Open Session)
Questioned by Mr. MacDonald (Continued)

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1 A. Mr. Prosecutor, it was during that first visit, and after we
2 discussed for a while she handed me over -- or rather, this lady handed
3 us over to her two collaborators, and it was Mr. Katanga's wife who even
4 prepared food for us during that visit. And as I have explained, we had
5 come from far away.

6 Q. And during this meeting with Mr. Katanga, when he handed you over
7 to his two associates, where in the camp did this meeting take place,
8 which specific location in the camp?

9 A. In his residence. The meeting took place in his residence.

10 MR. HOOPER: (Previous translation continues) ... the English
11 transcript seems to have departed or I'm unclear. It has Denise Katanga
12 handing over this gentleman to her two associates.

13 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, can --
14 is it possible to look at the English transcript to clear things up? Is
15 there a particular difficulty or it is a specific difficulty?

16 (Trial Chamber and Court Officer confer)

17 PRESIDING JUDGE COTTE: (Interpretation) It would be better,
18 Mr. Prosecutor, to ask your question once again. I do not believe that
19 the issue raised by Mr. Hooper concerns the witness's answer about
20 Madam Katanga preparing food for them. It is the next sentence and in
21 the French transcript, line 19, page 11:

22 "Let us go back to your brief meeting with Mr. Katanga, when he
23 was handing you over to his two associates. Where specifically in the
24 camp did that meeting take place?"

25 That is what the in the French transcript. It would be important

Witness: Witness DRC-OTP-P-0267 (Resumed) (Open Session)
Questioned by Mr. MacDonald (Continued)

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1 for the English transcript to be consistent so that the words
2 "associates" should not be taken out of their context. And the witness
3 said: "In his residence." And that is where we are at right now.

4 MR. MACDONALD: (Interpretation)

5 Q. In order to avoid any ambiguity, Mr. Witness, my question
6 concerns the location that -- at which you have had your brief meeting
7 with Mr. Katanga. Was it at his residence?

8 A. Yes. That was my answer, Mr. Prosecutor.

9 Q. And when Mr. Katanga left you with Mr. Muhito and Mr. Sipu, to
10 your knowledge, did Mr. Katanga remain in another room of his residence
11 or did he leave the residence?

12 A. When he handed me over to discuss with his two collaborators, he
13 left us. He told us he had other things to do, but he did not tell us
14 where he was going in his camp.

15 Q. Before Mr. Katanga left his residence, did you have the
16 opportunity to say to him, to explain to him, what was the communique
17 that you were carrying by the --

18 MR. HOOPER: (Previous translation continues) ... we're drifting
19 into leading questions. The question surely is: What, if anything, was
20 discussed, rather than being led directly to the subject matter of what
21 my friend is suggesting was discussed.

22 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor.

23 MR. MACDONALD: (Interpretation) I understand the objection
24 raised by my learned friend. That's the first thing. Secondly, the
25 witness mentioned on Wednesday of last week that he was carrying a

Witness: Witness DRC-OTP-P-0267 (Resumed) (Open Session)
Questioned by Mr. MacDonald (Continued)

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1 message, he was bearing a message, he referred to two documents, and I'm
2 putting questions about those two documents and the meeting, albeit
3 brief, with Mr. Katanga, to know whether the two documents were broached
4 in any way. That was my question, your Honour.

5 PRESIDING JUDGE COTTE: (Interpretation) Yes, indeed, the
6 witness did raise this matter last Wednesday. You may proceed.

7 MR. MACDONALD: (Interpretation)

8 Q. Witness, did you discuss the contents of the ICC letter and the
9 1460 Resolution of the UN that you were carrying with you?

10 A. Yes, I did introduce these matters to him, and the documents that
11 were part of the message that I had to pass on to him; in other words,
12 the letter from the Prosecutor and also the banner that had been printed
13 by the MONUC from the child protection section. And this was done in
14 conjunction with Resolution 1460. And I presented those documents to
15 him. And as his two associates were there he said, "Please talk to the
16 associates about this because I have something else to do." So he left
17 me with the documents in the hands of his collaborators.

18 Q. And could you summarise what these documents actually stated?

19 A. The documents and the resolution, Resolution 1460, were about the
20 demobilisation of children in the armed forces. That was the message
21 that I was bearing to him. We had just concluded a training session for
22 trainers linked to disarmament and all of the community issues
23 surrounding the DRC process. So these were the messages that I was
24 bringing to him, and I had the documents to back this message up.

25 Q. Yes, let us talk about the presence of soldiers in the camp when

Witness: Witness DRC-OTP-P-0267 (Resumed) (Open Session)
Questioned by Mr. MacDonald (Continued)

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1 you went there for that first meeting. First of all, can you give us an
2 approximate number of soldiers that you saw at the camp?

3 A. Giving numbers, giving figures, is really too difficult because I
4 didn't have the time to count them. Because there were a lot of small
5 houses round about, but I noticed his -- the soldiers who were his guard,
6 the people who took me in to meet his secretary and then to meet Katanga.
7 So I can't give you overall numbers. I really cannot estimate how many
8 people were there.

9 Q. You cannot give us an estimate as to the number of soldiers who
10 might have been present between the moment when you came in and the
11 moment when you left the camp?

12 A. Well, it was a large camp, so I run the risk of making a mistake.
13 I didn't have the opportunity to count how many there were in each little
14 house, but there was several such houses in the camp.

15 Q. Let's talk about these houses. There's a Swahili expression,
16 Witness, to describe soldiers' homes or houses. It's called "minyata,"
17 is that what you're talking about, minyata, when you're talking about
18 these small houses in the camp?

19 A. In our language they're called Manyata.

20 Q. And is that what you saw?

21 A. Yes, indeed.

22 Q. For how long were you present between the moment when you entered
23 and the moment when you left?

24 A. On that first visit I spent three hours there. That was the
25 amount of time we spent discussing with the associates, the

1 collaborators, and during this time the wife of Germain spent time
2 preparing a meal for us. So three hours were spent there during that
3 first visit.

4 Q. The person identified under number 9 and the wife of Mr. Katanga,
5 according to your understanding when you were there at Mr. Katanga's
6 house, what was their relationship like?

7 A. The person identified as number 9 accompanied us to facilitate
8 things, and once we had succeeded, that person went off to do something
9 else because that person worked about 1 kilometre away. There was
10 1 kilometre between that person's usual place of work, office, and the
11 camp, Katanga's camp. So that person left us and went back. And at the
12 end of the discussion, the interview, we went to see that person to give
13 a feedback, to explain what had happened in the course of discussions
14 with Mr. Katanga's collaborators.

15 Q. Did you subsequently have that meeting with Mr. Katanga following
16 the discussion you had with the two advisors?

17 A. It was the start of a series of meetings. Once we had finished,
18 we went back to see person number 9, to report back on the meeting we'd
19 just had; and then we went back to Gety. But before that, before we went
20 back, we agreed with person number 9 that there would be a second mission
21 as soon as possible. That's because we noticed that person number 9 was
22 going to be extremely useful to us in this awareness campaign. I would
23 say that person number 9 was a key element in the discussions we were
24 having. Because it turned out that this person was the mother of a
25 commander of a military camp.

Witness: Witness DRC-OTP-P-0267 (Resumed) (Private Session)
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1 Q. Let me interrupt you, Witness.

2 MR. MACDONALD: (Interpretation) Could we, your Honour, very
3 quickly go into private session so that we can have the name of the
4 commander.

5 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, we shall
6 quickly go into private session.

7 (Private session at 2.40 p.m.)

8 (Expunged)

9 (Expunged)

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18 (Expunged)

19 (Expunged)

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21 (Expunged)

22 (Expunged)

23 (Expunged)

24 (Open session at 2.42 p.m.)

25 COURT OFFICER: (Interpretation) We are in open session,

Witness: Witness DRC-OTP-P-0267 (Resumed) (Open Session)
Questioned by Mr. MacDonald (Continued)

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1 your Honour.

2 PRESIDING JUDGE COTTE: (Interpretation) Please proceed,
3 Prosecutor.

4 MR. MACDONALD: (Interpretation)

5 Q. I have another question about the camp. You say you cannot
6 estimate the number of soldiers that you saw on that first visit, but on
7 that same occasion, during that first visit, can you tell us how old was
8 the youngest of the soldiers that you saw?

9 MR. HOOPER: Can I just rise at this stage to say that there's a
10 fundamental objection to the area which this question appears to be
11 leading. It's an objection that may take a little time to argue. The
12 argument will be conducted by Mr. O'Shea. And judging by the nature of
13 this particular question, this is the timely moment to raise the
14 objection. I should perhaps add that though this would be perhaps an
15 inconvenience to our witness, it's not an issue that should be discussed
16 in his presence.

17 PRESIDING JUDGE COTTE: (Interpretation) Mr. O'Shea, as you will
18 be presenting the objection, how much time do you need to develop the
19 argument? I should make it clear that if it's a short objection, it
20 should be presentable fairly quickly.

21 MR. O'SHEA: I have certain authorities that I have to back up my
22 submission with, which I submitted to your Legal Officer, Mr. President.
23 The line of argument itself might take about ten minutes, but the
24 reference to the authorities may add another ten minutes.

25 PRESIDING JUDGE COTTE: (Interpretation) I was putting that

1 question to you so as to give the witness an idea of the amount of time
2 he will have available to him.

3 (Trial Chamber confers)

4 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor, is this a
5 matter you wish to raise at this particular instance, in which case it
6 would justify the intervention on the part of Mr. O'Shea; or are there
7 other questions you could put? In other words, could we postpone it
8 until just before or just after the break? It really depends on the way
9 in which you intend to proceed in your examination-in-chief.

10 MR. MACDONALD: (Interpretation) It can be done now or later.
11 It will have to be dealt with because it is the very core of the
12 witness's testimony. That's the first thing.

13 Secondly, I agree with Mr. Hooper in that the witness should
14 withdraw.

15 And thirdly, I can say that we have received no notification
16 whatsoever as to this motion. We have not received any information as to
17 the arguments to be referred to. Mr. O'Shea has indicated that he has
18 drawn on certain legal sources for this. It's a verbal motion that is
19 being presented off the cuff, so to speak.

20 PRESIDING JUDGE COTTE: (Interpretation) Well, it would seem
21 that nothing has been received by the Chamber. Indeed, it would be
22 better to deal with this difficulty immediately and we do not need the
23 witness to be present if we're talking about this sort of matter.

24 So, Court Officer, we will go into closed session so as to allow
25 the witness to withdraw.

1 Witness, you will probably have a certain amount of time that you
2 will spend within the unit, the Victims and Witness Protection Unit, and
3 you will be asked to return once this matter has been sorted out.

4 THE WITNESS: (Interpretation) Thank you, your Honour.

5 PRESIDING JUDGE COTTE: (Interpretation) We will, Court Officer,
6 go into closed session so as to allow the witness to withdraw.

7 (Closed session at 2.47 p.m.)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

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13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Open session at 2.48 p.m.)

18 COURT OFFICER: (Interpretation) Your Honour, we are in public
19 session.

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

22 Mr. O'Shea, you have the floor, and we would ask you to set out
23 your objection very clearly and to try to limit it to the essential
24 aspects of the arguments and submissions you would like to make.

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

1 If I could just clarify before I proceed with regard to
2 Mr. MacDonald's last comment. We, of course, do anticipate problems with
3 questions of the Prosecution based upon the statements that we receive
4 from the witness, but we also trust in the Prosecution, as an independent
5 body, to make its own evaluation as what are fair questions to put during
6 the course of the trial and what are not fair questions. So I cannot
7 presume that because something is in a statement that the Prosecution
8 will necessarily go into that area.

9 But that having been said, they did come close at the end of the
10 last session last week, so we have researched the point. And I did
11 actually request that the authorities which I've brought to Court be
12 immediately taken to the Prosecution. But I think there's been some
13 misunderstanding somewhere. Can I assure myself that the Prosecution now
14 has copies of those authorities and that your Honours also have access to
15 them?

16 I think Mr. MacDonald is confirming that he does. And
17 your Honours also have the authorities in question, yes? Yes.

18 The issue which arises here is in relation to the question of
19 relevance and prejudicial effect, and it relates to evidence relating to
20 Mr. Katanga's control over children within his camp. Now, this witness
21 is obviously giving evidence in relation to the demobilisation process of
22 children. So in once sense his entire evidence relates to the issue of
23 children and the issue essentially of demobilisation of children. And
24 I've had to try to encapsulate in my own mind where the division lies
25 between what is permissible in this evidence and what is not.

1 I think we accept that the demobilisation process, as such, could
2 have some relevance to these proceedings to the extent that it can
3 enlighten the Chamber at least on the question of reparations for the
4 victims in this trial. What we have difficulty with is the part of this
5 witness's evidence which relates to or where the Prosecution seems to be
6 attempting to relate to the personal responsibility of Mr. Katanga for
7 the use of child soldiers.

8 The count which is being faced by Mr. Katanga in this trial is
9 Count 3. The count which involves the use of children to participate
10 actively in hostilities constituting a war crime within the meaning of
11 Article 8(2)(b) and Article 25(3)(a) of the ICC Statute. On or about the
12 24th of February, 2003, Germain Katanga and Mathieu Ngudjolo jointly
13 committed war crimes, namely the use of children under the age of
14 15 years to participate actively in hostilities during the attack of
15 Bogoro village in the Bahema Sud collectivite.

16 So that is the nature of the charge against Mr. Katanga and that
17 is the charge which the Prosecution must prove. It is not the
18 recruitment of child soldiers, it is not the presence of child soldiers,
19 but it is the use of child soldiers at the Bogoro attack on the
20 24th of February, 2003. Now we are dealing with a period of time of
21 June 2004 to November 2004. We are therefore post-dating the relevant
22 period of the charge in this case by some one and a half years.

23 Article 69(4) of the Statute addresses the Chamber's power with
24 regard to the admission of evidence, having regard to its relevance and
25 its fair evaluation. And in Decision 1665, your Honours have stated that

1 you will admit evidence which is clearly and directly relevant. So the
2 question which arises is: Is this evidence clearly and directly
3 relevant? The question which has just been put by my learned friend
4 seeks to adduce from this witness the existence of children or the
5 existence of child soldiers within the immediate control of Mr. Katanga
6 in June 19 -- June 2004.

7 I can take you to the first authority which I've drawn to your
8 Honours' attention which is a case before the International Criminal
9 Tribunal for Rwanda. And it is the case of the Prosecutor against
10 Theoneste Bagosora, B-a-g-o-s-o-r-a, et al. of the 18th of September,
11 2003, entitled: "The decision on admissibility of proposed testimony of
12 Witness DBY."

13 If your Honours go to paragraph 15 of that decision, there is a
14 short discussion about the concept of probative value and prejudice and
15 there is there, in my submission, a useful point of reference with regard
16 to what is relevant.

17 "Probative value is a second criterion of admissibility ..." it
18 reads "set out in Rule 89(C). It has been described simply as 'evidence
19 that tends to prove an issue' and is sometimes conceived as overlapping
20 with the concept of relevance: 'For one fact to be relevant to another,
21 there must be a connection or a nexus between the two which makes it
22 possible to infer the existence of one from the other. One fact is not
23 relevant to another if it does not have real probative value with respect
24 to the latter.'"

25 So in my submission, if the evidence is not deemed to be

1 relevant, then it cannot be admitted. It is as simple as that. But
2 there is another limb which I will come to in a moment which historically
3 derives from the common law, which is the question of similar fact
4 evidence. And just to contextualise what I mean by that, I'll take your
5 Honours to the same decision at paragraph 12, where it states:

6 "The exception can only be described in relation to the general
7 rule. A long-standing principle of common law jurisdictions, adopted by
8 the International Criminal Tribunal for Yugoslavia, is that 'as a general
9 principle of criminal law, evidence as to the character of an accused is
10 generally inadmissible to show the accused's propensity to act in
11 conformity therewith.'"

12 I'll come back to similar fact evidence in a moment, but this is
13 just to state that in determining whether we have an issue which is
14 relevant here, in other words, which tends to prove the matter which
15 needs to be proved, which is the use of children on the 24th of February
16 in Bogoro, one should take into account the prejudice of similar fact
17 evidence, having regard to this common law history. In other words, in
18 common law jurisdictions it's been a rule that evidence just to show the
19 propensity of a person to commit a crime is not admissible, although
20 there are exceptions to that.

21 Now, let me distinguish very clearly what this witness is talking
22 about to the charge. I've already stated that we're dealing with a
23 period which is one and a half years after the incident. The first thing
24 to note, your Honours, is that the evidence being given now relates to
25 the period after and not the period before. Your Honours will notice

1 that in the jurisprudence dealing with these issues, the area of
2 contention has usually been with regard to facts taking place well before
3 the crime. The difficulty with trying to adduce evidence which comes
4 well after the crime is that what a person does a long time after the
5 crime does not in any way shed any light on what he might have done a
6 year ago or a year and a half ago; whereas if a person does something
7 well before the crime, it might go to show a little more.

8 The next thing to note is that the circumstances, the structural
9 circumstances, of the combatants of the militia were substantially
10 different on the 24th of February, 2003, as opposed to June 2004. In
11 June 2004 the Defence would not dispute the nature of the association
12 between the FNI and the FRPI, whereas in -- whereas in 2003 that is a
13 matter of dispute. But what is clear is that the structural relationship
14 of these organisations developed, and the position in June 2004 is at
15 least potentially radically different from that in February 2003 from
16 that perspective.

17 The other thing which has changed is Mr. Katanga's own position.
18 It's not so long after the period of June to November 2004 that
19 Mr. Katanga is made a general in the re-integration process. So when
20 we're dealing with June to November 2004, we're dealing with a period
21 where the militia are close to being reintegrated into the society or
22 brought closer to the government and the society in general and
23 Mr. Katanga is at the height of his authority; whereas in February 2004,
24 the position of Mr. Katanga's authority is at a different level. It's of
25 course at a matter of dispute at what level it was then. So

1 Mr. Katanga's position was also different. The degree to which it is
2 different is a matter of dispute.

3 The third difference is this, and this is very significant: In
4 June 2004 to November 2004 we are dealing with a period of relative
5 peace, whereas in February 2003 we are dealing with a period of war. So
6 if there were children at the camp in Aveba in 200 -- I don't know if
7 that word needs to be redacted. If there was a -- if there was -- if
8 there were children in 2004 present around Mr. Katanga, this was at a
9 time and in a context where there was no genuine possibility of those
10 children being used in combat.

11 And then finally, and most importantly, the allegation or the
12 charge in February 2004 is an allegation or a charge dealing with the use
13 of children in battle, the use of children at the Bogoro attack. So how
14 can Mr. Katanga's control or otherwise over children at his camp in June
15 to November 2004, some one and a half years later, with the differences
16 that I've outlined - how can that possibly have any probative value at
17 all as to Mr. Katanga using children in battle at the battle of Bogoro
18 one and a half years earlier? So we say there's no relevance.

19 I have to come back to the issue of similar fact evidence.

20 Also, Mr. Hooper draws to my attention and I think it is
21 important to note this, that this witness's evidence extends well into
22 2005. And as I've already noted, already at the end of 2004
23 Mr. Katanga's being integrated into the national army.

24 (Defence counsel confer)

25 MR. O'SHEA: Yes.

1 So if I could now refer your Honours to the separate opinion of
2 Judge Shahabuddeen in the media case, that is the case of Nahimana, which
3 is spelled N-a-h-i-m-a-n-a, Nahimana et al., which was a case before the
4 Appeals Chamber of the International Criminal Tribunal for Rwanda,
5 decided on the 28th of November, 2007, so it post-dates the Bagosora
6 decision. The Appeals Chamber was dealing with a situation which was a
7 little different from this one. They were dealing with the question of
8 temporal jurisdiction because the jurisdiction of the ICTR was limited to
9 January to December 1994, and the question arose: What are the relevance
10 of meetings which took place or distribution of arms or these kinds of
11 things or publications which took place before 1994, in the year 1993?
12 Just to give your Honours the context, the Appeals Chamber held that in
13 order for an accused to be found guilty of a crime, all the elements of
14 the offence must take place in 1994.

15 But the question remained: What is the relevance of this
16 prejurisdiction material? And it's a similar point to what we're dealing
17 with here. Although we're not dealing with jurisdiction, we're dealing
18 with the scope of the charge. And so we're dealing with something which
19 comes outside the period we're dealing with in this case. So although
20 it's a different scenario, it's a very similar one from the legal
21 perspective.

22 And the Appeals Chamber accepted that evidence pre-1994 could be
23 relevant in that it drew inferences as to the elements of crimes
24 committed in 1994. The Appeals Chamber also accepted that evidence
25 pre-1994 could provide a relevant context. It has to be understood that

1 in the context of the Rwanda genocide it would be virtually impossible to
2 understand the crimes in 1994 without understanding a certain amount of
3 the history of the genocide.

4 The other aspect that the Appeals Chamber mentioned was the fact
5 that evidence could demonstrate a deliberate pattern of conduct.

6 So when addressing these matters, if we go to the separate
7 opinion of Judge Shahabuddeen, it's enlightening, in my submission. If
8 one looks at paragraph 19, the learned Judge says:

9 "It will be recalled that the leading principle is that, to be
10 admitted at trial, evidence must be relevant."

11 Your Honours will see the same cover sheet twice because it's the
12 same decision. So you've got two documents there, one relating to the
13 Appeals Chamber decision, and the other document relating to the separate
14 opinion of Judge Shahabuddeen, but they both have the same cover sheet
15 because they relate to the same judgement. In paragraph 19 he says:

16 "It will be recalled that the leading principle is that, to be
17 admitted at trial, evidence must be relevant, that is to say, it must
18 tend to make credible a fact which has to be established at trial; if it
19 is not relevant, that alone suffices to exclude it."

20 And in this particular instance we say that control or otherwise
21 of Mr. Katanga over child soldiers within his camp in June to
22 November 2004 is not relevant as to whether he used child soldiers in
23 2003 February in the Bogoro attack.

24 "If it is relevant," the learned Judge goes on to say, "there is
25 an additional hurdle. It being recognised that all relevant Prosecution

1 evidence is prejudicial to the accused and the more probative the more
2 prejudicial, still it is possible in some cases to say that the probative
3 value of particular evidence is outweighed by its prejudicial effect."

4 This is a concept which I've raised before in this trial.

5 "In such a case, the evidence is to be excluded. If these
6 criteria are met, evidence of prior crimes committed by the accused may
7 be admitted for certain purposes. Such evidence may not be admitted
8 where the result would be to proceed upon suspicion rather than proof.
9 However, subject on the one hand to this caveat, and on the other hand
10 excluding cases in which the accused has put his character in issue, such
11 evidence is admissible in broadly two situations."

12 The two situations which the learned Judge then refers to are,
13 first of all, similar fact evidence and, secondly, background evidence.

14 With regard to similar fact evidence I would refer your Honours
15 to the next paragraph, paragraph 20, the last three lines, having quoted
16 an Australian decision the learned Judge says:

17 "In effect, in proper circumstances, evidence of prior offences
18 is admissible to prove a pattern, design or systematic course of conduct
19 by the accused where his explanation on the basis of coincidence would be
20 an affront to common sense."

21 Obviously if one is dealing with events prior to the crime, the
22 exception to the similar fact evidence rule is more easily satisfied than
23 in a situation like here, where the evidence sought to be elicited
24 relates to an event one and a half years after the commission of the
25 alleged crime. In our submission, the presence of children one and a

1 half years after the commission of the crime is in no way helpful to the
2 question of whether Mr. Katanga would have used children in battle in
3 2003. And this would not be -- this would show propensity but it would
4 not establish the commission of the crime by him. It would not tend to
5 show the commission of the crime by him.

6 And according to the way the law has been set out, propensity to
7 commit a crime is not enough. The facts have to be so similar and the
8 events so closely interrelated that it would effectively rebut any
9 suggestion that Mr. Katanga had, for example, changed.

10 The next issue of background evidence can be understood in the
11 context, first of all, of the quote at paragraph 21 where
12 Judge Shahabuddeen quotes:

13 "'Where it is necessary to place before the jury evidence of part
14 of a continual background of history relevant to the offence charged in
15 the indictment and without the totality of which the account placed
16 before the jury would be incomplete or incomprehensible, then the fact
17 that the whole account involves including evidence establishing the
18 commission of an offence with which the accused is not charged is not of
19 itself a ground for excluding the evidence.'"

20 So he's quoting there, obviously, a common law -- it's a common
21 law case. And the test with regard to this contextual type of evidence
22 is that the evidence would be incomplete or incomprehensible without it.
23 And this is re-emphasised in paragraph 23 of Judge Shahabuddeen's
24 separate opinion. He states:

25 "Proof of pre-planning is not legally required in a prosecution

1 for genocide, but evidence of that is admissible as part of the
2 background. In the case at bar, the genocide of 1994 did not come out of
3 the blue; it was not a disembowelled affair. Nor was it of limited
4 range. It is not comprehensible without reaching back into the past."

5 So I ask your Honours to ask yourselves this question: Is it
6 possible to understand the events of Bogoro in February of 2003 without
7 reaching forward one and a half years to June 2004, having regard to this
8 particular evidence which is being elicited?

9 Sorry, Mr. President, is there a problem with the transcript
10 or ...?

11 PRESIDING JUDGE COTTE: (Interpretation) I'm reading the French
12 transcript. Page 31, line 19:

13 "Is it possible to understand the events of Bogoro that occurred
14 in February 2003 without projecting into the future by one year to June
15 2004?"

16 Shouldn't it say: Is it not possible to understand the events
17 that occurred in Bogoro in February 2003 by projecting ahead to
18 June 2004? I just want to be clear that I understood correctly.

19 MR. O'SHEA: (Previous translation continues) ... because what
20 I'm submitting here is that in order for evidence outside the temporal
21 scope of the charges to have importance, it should be difficult or
22 impossible to understand the events at the time of the charge without
23 referring to that period outside the temporal period that we're dealing
24 with. Is that clearer, your Honour?

25 PRESIDING JUDGE COTTE: (Interpretation) I hope so.

1 Please proceed, Counsel O'Shea.

2 MR. O'SHEA: What Judge Shahabuddeen was saying here is that --
3 what Judge Shahabuddeen was saying here is that there are cases like the
4 Rwanda genocide where you have to look prior to the events in order to
5 make sense of what happened at the time of the events. So I'm inviting
6 your Honours to ask yourselves the question: Is it necessary to look to
7 June 2004 and Katanga's relationship with children in June 2004 to
8 understand whether he used children in battle at Bogoro in February 2003?
9 That's the point.

10 So, essentially to summarise the submission - and it's gone on a
11 little longer because I didn't take into account the need to talk
12 slowly - but to summarise the submission, what we're saying is that
13 evidence of Mr. Katanga's responsibility with respect to children in
14 June to November 2004 or indeed after, since this witness's evidence may
15 even go further than that, that kind of -- that kind of evidence in that
16 temporal context has absolutely no relevance to the point which needs to
17 be proved, which is: Did he use children at the battle of Bogoro in
18 February of 2003? And for that reason alone the evidence should be
19 excluded.

20 And I note here that there would be a difference between the
21 witness having brought this evidence before your Honours and me trying to
22 have the evidence excluded post facto and a situation as present where
23 there's a timely objection. In our submission, if Defence counsel make a
24 timely objection to an attempt by the Prosecution to elicit this kind of
25 evidence, then it is appropriate and fair that it should be excluded.

1 The situation might be different if the evidence was already on the
2 record. And we say that to the extent that your Honours disagree with me
3 and feel that there is some probative value here - which we say there
4 isn't - but to the extent that your Honours feel there is some probative
5 value here, surely this is one of those situations where the prejudicial
6 effect outweighs the probative value.

7 The prejudicial effect here is the blackening of the character of
8 Mr. Katanga. The prejudicial effect is showing the propensity of
9 Mr. Katanga to make use of children, but not to use children in battle,
10 which is the real issue in this trial. Therefore, the prejudicial effect
11 outweighs the probative value. This -- the difficult part is defining
12 where the lines are drawn in the evidence of this witness.

13 And as I said at the outset, I think from our -- for our part we
14 can accept that this witness can give evidence on the demobilisation
15 process. This surely has some relevance for the victims -- the Legal
16 Representatives of the Victims, in particular. And there's no difficulty
17 with the witness talking about his general activities, the organisation
18 he worked for, even his conversations with Mr. Katanga. But what we
19 don't want the Prosecution counsel to do is to ask questions which were
20 designed to deliberately elicit from the witness statements demonstrating
21 Mr. Katanga's personal control or personal responsibility over children
22 at his camp. So I define the parameters of the evidence in that way.
23 Admittedly it's a difficult exercise, but I think the question which has
24 just been asked clearly illustrates where the line should be drawn; in
25 other words: How old were the militia that you saw?

1 So unless your Honours have any questions, those are my
2 submissions.

3 (Trial Chamber confers)

4 PRESIDING JUDGE COTTE: (Interpretation) Mr. Prosecutor, you
5 have the floor to share with us the views that you might have.

6 MR. MACDONALD: (Interpretation) Thank you, your Honour. There
7 are many things that come to mind when I hear the Katanga team at one
8 minute to midnight raise such a question. The Prosecution would like a
9 few moments, would like to have a break, in order to be able to give an
10 intelligent answer to the arguments that have just been presented. I'm
11 sure that the Legal Representatives of Victims also require a little bit
12 of time before responding. This would also enable the Chamber to look at
13 this matter and to review the filings and memos pertaining to the
14 challenges that should occur prior to trial. I'm sure that they will all
15 be brought up, as well as any responses pertaining to the substantive
16 matters. Since we are in open session we have to be very careful. There
17 may have been some comments made so far that go beyond the line that was
18 being imposed, but I think this is a fundamental issue with this witness.
19 I could certainly go on and ask questions on other matters, but since we
20 only have half an hour before the break we need a certain amount of time
21 to answer such an important matter at the -- at this midpoint in an
22 examination.

23 PRESIDING JUDGE COTTE: (Interpretation) Mr. Prosecutor, how
24 much time would you need? Because the Chamber will require some time to
25 reflect on what you are going to say as well as the Representatives of

1 Victims. We will have to look at all sides, and I'd like to know how
2 much time you will need.

3 MR. MACDONALD: (Interpretation) At least another hour.

4 PRESIDING JUDGE COTTE: (Interpretation) Which means that if we
5 resume at 1630, you will take the floor and then we will hear from the
6 Legal Representatives of Victims. So we will suspend and we will see at
7 that point whether we will continue with the proceedings this afternoon
8 or whether we will have to wait until tomorrow morning.

9 All right. So we will suspend the hearing. We will resume at
10 4.30, so that will be in one hour, in order to hear the response by the
11 Prosecution to the comments made by Counsel O'Shea.

12 The hearing is suspended. We will be back in one hour.

13 Recess taken at 3.31 p.m.

14 On resuming at 4.33 p.m.

15 (Open session)

16 COURT USHER: All rise.

17 PRESIDING JUDGE COTTE: (Interpretation) Court is reconvened.
18 Please be seated.

19 At the time of the break, Mr. O'Shea has summarised his
20 submissions in two small paragraphs. The notes that I took were as
21 follows. The evidence establishing the responsibility of Germain Katanga
22 between June and November 2004 are not relevant to establish that he used
23 child soldiers in February 2003. Secondly, even if the Chamber decided
24 that there is a probative value, the prejudicial nature of this evidence
25 would be more important than the probative value, that is, ensuring that

1 Germain Katanga potentially used children in the Bogoro attack. So I
2 believe the Prosecutor is going to react to those two paragraphs, and the
3 Legal Representatives also. So try to the extent possible to go to the
4 heart of the objections raised by the Katanga Defence which relates to
5 your possible attempt to establish the responsibility of Germain Katanga
6 with evidence from between June and November 2004. And the Defence feels
7 that this is irrelevant to the crimes charged in February 2003. So this
8 issue is once again raised and, Mr. Prosecutor, you can now address the
9 Court.

10 MR. MACDONALD: (Interpretation) Thank you, Mr. President.

11 Given the little time that the Prosecution had to prepare a
12 reaction to that ambush of the Defence - an ambush, so to
13 speak - regarding this testimony of Witness DRC-OTP-P-0267 which relates
14 to child soldiers and their demobilisation, I believe that there was a
15 summary disclosed in 2008 and another disclosure made on the 29th of May,
16 2009. I believe there was, lastly, the statement that was disclosed on
17 the 14th of August, 2009. I will revisit that later. We structured our
18 submissions in two parts. There is the procedural part and there will be
19 submissions on the merits to show that this witness should be allowed to
20 testify on these issues.

21 Now, the issue as pleaded by Mr. O'Shea, that is, based on the
22 French transcript, is how will the control of Mr. Katanga over the
23 children under his care in the camp in November 2004, how is it possible
24 that this issue will have a probative value in regard to the use of child
25 soldiers in the Bogoro battle which took place one and a half year

1 before. In our opinion it is not relevant. Well, Mr. President, in our
2 own opinion it is very relevant for the following reasons.

3 In paragraph 65 of the witness's testimony - and if I
4 inadvertently mention his name in open session, then that part of the
5 transcript should be redacted. In paragraph 65 of document
6 DRC-OTP-1000-0002, last sentence, and I will read it out:

7 "On average, the children have spent about two years in the
8 militia. In fact, it was from 2002 that the Ngiti community started
9 mobilising children, as I have already indicated."

10 The observations of the witness, whether in June 2004, August
11 2004, November or December 2004, or even January 2005, are quite relevant
12 in establishing a practice that was in existence during that period
13 concerning an exercise that had started in 2002. This is a continuous
14 offence of enlisting, and the use is a component thereof.

15 There is the effect of the enlistment. Why are children
16 enlisted? That is to fight. And children fought in Bogoro and
17 afterwards they were demobilised after international pressure. So all
18 those facts are taken together to corroborate what other witnesses have
19 already said, that is, confirming the presence of children in Bogoro
20 during the 2003 attack, and this has been confirmed by Witnesses
21 DRC-OTP-P-019 and Witness DRC-OTP-P-030.

22 So our first argument is procedural. This objection is belated.
23 It is therefore incredible that six months after the beginning of the
24 trial and even more we find that the Defence is presenting jurisprudence
25 to legal advisors even before the Prosecution is informed and that this

1 point being raised now is quite artificial when they say that we had to
2 wait and try to establish the link between -- with Mr. Katanga and so on.
3 There was a table of Prosecution evidence disclosed in May and
4 resubmitted in November.

5 This table clearly stated the facts that were going to be dealt
6 with with the witnesses. The themes on the testimonies of those
7 witnesses were identified after the express request of the Chamber on the
8 7th of October, 2009, that is, in addition to the evidence table. We can
9 even go back to the Confirmation of Charges Hearing, during which the
10 admissibility and use required by Pre-Trial Chamber I, that is for the
11 confirmation of charges decision, decision 717, paragraphs 253 and 254,
12 as well as 261 and 262. There is no ambiguity as to what the testimony
13 that the witnesses are going to testify to as well as the use that the
14 Prosecution intended to make of that evidence.

15 In this Chamber's decision number 956, when you mentioned that
16 this table be produced - and I will quote in English: (In English)
17 (Previous translation continues) "... the question therefore is to
18 determine the most appropriate moment for the Chamber to consider any
19 questions relating to the admissibility of evidence. The Chamber notes
20 in this respect that Rule 64 determines that an issue relating to the
21 relevance or admissibility must be raised at the time when the evidence
22 is submitted to the Chamber."

23 (Interpretation) And later on, Mr. President, on the 2nd of
24 October, 2009, and I'm going to quote the Chamber, transcript number 72,
25 pages 37 and 38, and I read, that is specifically lines 3 and following

1 of page 38:

2 "Generally speaking, the Chamber would like to recall that in its
3 decision of the 30th of August on the postponement of the hearing, they
4 felt it was preferable and even indispensable that the Defence teams
5 should indicate at that time their request that they intended to make
6 regarding the admissibility or relevance of evidence."

7 And I seem to be going too fast. So, Mr. Hooper and Mr. Kilenda,
8 you have a table which is what it is and which is an overview of all the
9 evidence that the Prosecutor intended to rely on, and therefore the
10 objection that you have made is -- seems to be not possible. It was also
11 indicated that it was difficult for the Chamber to make a ruling in
12 abstracto.

13 So, Mr. President, this is a testimony. We are dealing with a
14 witness. We had 24 witnesses, almost half of them have already been
15 heard. And today it is after one day of testimony that the Defence is
16 raising this objection. They are using intellectual gymnastics to try to
17 justify their action for that delay and to justify the delay itself.

18 So, Mr. President, it is our submission that this application
19 could have been submitted a long time ago. In November 2009 we talked
20 about the admissibility of the evidence of deceased witnesses and other
21 evidence. Couldn't this issue have been raised at that time by
22 Mr. Hooper?

23 Also, when we submitted the themes on the 7th of October, 2009,
24 this issue could have been raised then also.

25 Regarding the merits, we respectfully submit that this is

1 circumstantial evidence which has probative value, considering that the
2 witness himself - as has been mentioned in paragraph 65 of his
3 statement - states that on average the children had spent two years in
4 the militia. So the children that were being demobilised or who were
5 being contacted in June/August 2004 and in early 2005 were children who
6 had been present in the militia groups at that time, that is, in 2002.

7 Furthermore, we submit that this is a continuing offence. The
8 elements that were there in 2004 constitute an example of what could have
9 happened regarding the presence of child soldiers in 2003. Even Witness
10 DRC-OTP-P-0273 came and testified about his visit to the field in Zombe
11 and even in Nyankunde in June and July 2003. There was no objection at
12 that time.

13 Mr. President, in our filing number 1645 of November 2009 on
14 certain elements, including the statements of deceased witnesses, we
15 analysed the case law of this Court. And amongst other things,
16 Trial Chamber I in the Lubanga case dealt with the interpretation of the
17 decisions of this Court. Case law actually exists here. We are not
18 compelled to refer to ICTY or ICTR decisions, whereas the systems are not
19 the same.

20 In that filing, that is, 1645, paragraphs 11 and following, there
21 is a description or reference to that decision of Pre-Trial Chamber I or
22 of Trial Chamber I. The system in this Court is different when it comes
23 to the admissibility of evidence, and I will read in English.

24 (In English) (Previous translation continues) ... Rule 63(2)
25 provide that a Chamber can "... assess freely all evidence submitted in

1 order to determine its relevance or admissibility ..."

2 The drafters intended that the Chamber be granted flexibility and
3 discretion when assessing the admissibility of any item of evidence.

4 (Interpretation) And further on, paragraphs 13 and 14 and I will
5 not read them, but these are the decisions of this Court. Essentially
6 our position, Mr. President, is that the fact that child soldiers were
7 present in Mr. Katanga's camp and the fact that child soldiers were
8 demobilised in the Walendu-Bindi collective and who were active in
9 Mr. Katanga's stronghold is a demonstration. It is important
10 circumstantial evidence that corroborates the testimony of Prosecution
11 witnesses, past and future, on this phenomenon of the use of child
12 soldiers and also their use during the Bogoro attack.

13 You are professional Judges. You are three professional Judges
14 who have more flexibility when it comes to admissibility criteria, and
15 that is what is different with the other Court systems. We are dealing
16 with the admissibility of this evidence and we are closer to the civil
17 law systems here, which means that at the end of the trial you will be in
18 a position to give the appropriate probative value to this part of the
19 testimony of Witness DRC-OTP-P-0267, that is, in light of the entire
20 evidence that you would have heard and admitted.

21 And so at this point in time, we respectfully submit that it is
22 very relevant to know what Witness DRC-OTP-P-0267 has to tell us. He was
23 present in the field. He spent time with those children. He discussed
24 with them what happened to them in those armed groups, what they were
25 subjected to. They told him how much time they spent in those armed

1 groups. He also provides us with information as to their environment,
2 their training, and what they experienced as child soldiers.

3 Despite the fact that this information goes back to autumn 2004
4 and early 2005, they are the continuation of a practice that started in
5 2002. So these are the main points of our submissions, that is, a late
6 submission of the motion. There is the issue of the possible prejudice
7 that this testimony may have on the accused, but you are in a position to
8 decide on the probative value. We are not in a system where you have to
9 protect a jury from the facts. There is a lot of informational elements
10 received from statements and so on and so forth that are never presented
11 to the witness. At the end of the trial you will be in a position to
12 categorise the element -- the evidence depending on their probative
13 value.

14 And so, in a nutshell, that was our submission, given the little
15 time that we had to prepare our response. Thank you.

16 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
17 Mr. Prosecutor. I think that we really need to agree on the fact that
18 the knowledge of the Chamber was not put into question. The full
19 testimony of the witness or the statement of the witness itself was not
20 opposed by Mr. O'Shea a short while ago, but it is rather the issue on
21 the use of child soldiers by Germain Katanga in 2004. That was the issue
22 that was at stake.

23 Now the Legal Representatives are going to comment. Who is going
24 to start first, Mr. Luvengika, Mr. Gilissen?

25 MR. GILISSEN: (Interpretation) With your leave, Mr. President,

1 I believe this is a joint submission. We have agreed with Mr. Luvengika.
2 Obviously, Mr. President, your Honours, it would have been necessary to
3 have a reflection on the part of the Representatives of the Victims in
4 the interest of the truth and transparency.

5 Mr. President, your Honours, it is quite troubling at this stage
6 to realise that there is an organisation of surprise or an ambush that is
7 of a nature to disrupt the serenity of the proceedings and the
8 presentation of submissions. This is a reproach that I'm making subtly
9 against my learned friends of the Defence, but I believe we agree on this
10 side that we really would have needed more time to come up with
11 submissions that would be useful.

12 Even with minimal preparation, your Honours, it can be confirmed
13 that there can be probative value to evidence presented at a point that
14 is subsequent in time. Should we in principle automatically decide that
15 it should be the reverse, when we are talking about a fact that is
16 subsequent to the event and exclude all those subsequent events from any
17 probative value that can be given by you, we do not think so,
18 Mr. President, your Honours, and why is this? Because everything depends
19 on the answers that are given to us regarding the link that could exist
20 between what is established to have happened subsequent to the facts, but
21 which has a link of necessity. And I think, in order to be concrete,
22 there are subsequent facts that may happen which necessarily required a
23 fact that happened before. And as the Prosecutor has said, for child
24 soldiers to have been demobilised, it is necessary for them to have done
25 something while they were in that militia. So what precisely did they do

1 while they were in the militia? I believe this information can be
2 provided to us by the witness and you will be able to make your
3 determination at the level of relevance and credibility.

4 But what is required or asked of you today, Mr. President, your
5 Honours, is to rule on the probative value. And I can see a problem here
6 and I want to say that in the position of the Defence there is prejudice,
7 there is supposition, and there is a negative anticipation there. It is
8 possible that the answers given might not have any credibility, but you
9 are the ones to make your determination. The ruling that you will make
10 will make it possible for the rights of the Defence to be respected.

11 Apart from the frivolous nature of this procedure, there is a
12 problem on the merits. You are being asked to rule on the relevance of
13 the testimony of a witness which seems to us to be very interesting.
14 What is this witness coming to tell us? He's telling us about what he's
15 supposed to have seen, what he's supposed to have known, and this is his
16 personal experience of what happened in 2004 in the camp of Mr. Katanga.

17 Mr. President, I do not even want to talk about Mr. Katanga
18 because this is not my role when it comes to liability, so I prefer to
19 talk about the witness and what he saw in 2004.

20 It is obvious that if the person concerned, in 2004, based on
21 what the witness is telling us, did not have the potential to have done
22 anything in 2004 - and I repeat the expression of Mr. O'Shea - when he
23 was at the height of his powers, it is possible to know what he might
24 have done in 2003. The reverse is also interesting. It is possible that
25 Mr. Katanga's capacities in 2004 must have been obtained at one time or

1 the other. Would this be prejudicial in saying that this is the purpose
2 of the trial? And if that is the case, we cannot say that it is
3 prejudicial to Mr. Katanga himself.

4 And to come back to the heart of the matter, Mr. President, your
5 Chamber will make a determination also based on the answers that we will
6 receive. There will be the assessment of any prejudicial effect, but we
7 would have to know - and that is the principle itself of the
8 participation of the victims - we need to know. And what the witness has
9 to tell us is of capital interest to children who were demobilised within
10 the framework of a process that was explained to us by the witness or a
11 de facto demobilisation, that is, in the case of some of the child
12 soldiers who fled.

13 That is what we wanted to submit, Mr. President. We cannot be
14 more lengthy than that. Thank you.

15 PRESIDING JUDGE COTTE: (Interpretation) The Bench would like to
16 thank you, Mr. Gilissen, Mr. Luvengika, you have spoken jointly but with
17 one voice. We shall interrupt the hearing for around about 20 minutes.
18 It's five past 5.00 and we'll resume at 1730.

19 Mr. O'Shea, you wish to respond. I'd ask you to be as brief as
20 possible, bearing in mind the concern which is to recall the essence of
21 your objection. I suspect that the defining lines have been overshoot by
22 some of the previous speakers. You have the floor.

23 MR. O'SHEA: All right, then, Mr. President. I'll go directly to
24 the point which you, Mr. President, have just raised. I've been quite
25 careful to think about and to articulate what it is in the witness's

1 evidence that we are not demonstrating a difficulty with and what it is
2 which is problematic for us. And that's not an easy exercise and it's
3 one which is partly defined by the questions of the Prosecutor. The
4 questions of the Prosecutor help me to define the parameters of my
5 argument which goes to the issue of the timeliness of this objection.

6 The point which is being made by the Defence does not relate to
7 the whole issue of demobilisation which this witness is addressing; it
8 relates very specifically to the responsibility of Mr. Katanga in June to
9 November 2004 with respect to children, and the emphasis of my argument
10 is partly, indeed, on the fact that in that period we were in a period of
11 peace, not in a period of war, like in February 2004.

12 So that to come to my friend's argument about a continuing
13 situation, it's not the presence of children in 2003 that we're being
14 charged with; it's the use of children at the Bogoro attack. So the
15 presence of children in 2004 cannot possibly, in our submission, have
16 probative value for the use of children at an attack one and a half years
17 earlier. So that's the thrust of the submission within those specific
18 evidential parameters, as your Honour has pointed out.

19 And the real question is this: Can we from the presence of
20 children at Mr. Katanga's camp in 2004 infer in any way Mr. Katanga's
21 guilt with respect to the use of children at the Bogoro attack? Because
22 if we cannot in any way draw any inferences from that, then in my
23 submission it cannot have probative value.

24 Article 69(4) which my learned friend has raised -- yes, I agree,
25 this is where we agree, is different from Article 89(C) of the respective

1 Statutes of the two ad hoc Tribunals. But not only is it different, but
2 it is more careful. It makes -- unlike 89(C) it makes specific reference
3 to prejudice and specific reference to the fair evaluation of evidence.
4 So 69(4) invites caution on the part of the Chamber more than 89(C) ever
5 did, that is, 89(C) of the Statutes of the other Tribunals.

6 We have, in a broad sense, given notice of this argument because
7 in our submission 1558, on the invitation of this Chamber, this Chamber
8 was -- invited the Defence to make submissions on questions of
9 admissibility, and at paragraphs 106 to 114 of that motion which has not
10 yet been the subject of a decision, as far as I know, the Defence did
11 state that prima facie events which fall out of the temporal
12 time-frame -- outside the time-frame of what we are being charged with,
13 the Bogoro attack, prima facie, are not relevant. We made that point in
14 several paragraphs of that motion. So it's clear to everybody in this
15 room that that is a matter of contention. And it should be clear to
16 every counsel in this room that if they are going to go into areas which
17 go significantly outside the time-frame of what your Honours are
18 concerned with, that there may be objections of relevance.

19 But if I can use -- if I can use this analogy. When I'm sitting
20 in the second row here considering potential legal arguments, there are
21 many, and I have to be very careful to ensure that I only raise those
22 legal arguments which are worth raising. And what may seem to me to be
23 an argument which is worth raising today may not be an argument which is
24 worth raising tomorrow when I am faced with the concrete situation as
25 presented by the Prosecution. So if I have this little pond in front of

1 me, there are many fishes in it and I don't know which fish is going to
2 pop out of the water at which time. And I also have to be careful and
3 cautious about not wasting the Court's time with abstract arguments too
4 far in advance.

5 It would, of course, be nice to have, you know, arguments well in
6 advance of these issues being raised, but sometimes it's difficult to
7 know the right moment. And as I said, particularly with the definition
8 of this evidence, the course of the examination-in-chief assists me in
9 defining what are the appropriate parameters for my submission. So
10 sometimes even if it does cause a little bit of awkwardness in the
11 proceedings, there is an appropriate time to object and that is when the
12 Prosecution raises the issue. Because it's only at that time that the
13 fruit has reached maturity.

14 I had to say something about that because we're being accused
15 here of ambush and that's certainly not my intention.

16 And so far as the Legal Representatives of the Victims are
17 concerned, of course they have a very substantial interest in this whole
18 process of demobilisation; but for my part, I was just maybe a little
19 surprised that the Legal Representatives hadn't taken this opportunity to
20 demonstrate to the Defence that their interest is not necessarily the
21 conviction of Mr. Katanga. Because in my submission I quite clearly
22 distinguished between the process of demobilisation of children as a
23 whole, which it has clear and direct interest to the Legal
24 Representatives, and the responsibility of Mr. Katanga for criminal
25 behaviour in June to November 2004, which, in my submission, should not

1 have very great interest at least for the Legal Representatives of the
2 Victims. And that would have perhaps been an opportunity to show that
3 they could agree with us on occasion.

4 But I'm sorry, Mr. President, I've been a little bit longer than
5 I should have, but it was important to respond on certain points. Thank
6 you.

7 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor, please be
8 brief, because if not we'll be playing ping-pong and it will be
9 never-ending, and we must reach an end to this. Please proceed.

10 MR. MACDONALD: (Interpretation) Your Honour, there is no

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 There's an attempt here being made to compartmentalise this
18 question of admissibility and it's being confined to this particular
19 period so as to say, later on, when it comes to talking about the
20 demobilisation process and the procedure involved and everything that
21 happened as a result of it, that Mr. Katanga -- well, Mr. Katanga is
22 clearly involved in that part. Mr. Katanga made admissions on that score
23 to the witness in the context of demobilisation.

24 So the utilisation or the presence at the camp of children
25 indicates a practice, and yes, the Chamber can infer, if necessary, from

1 that at the end in the light of all the proof. But at this stage you
2 cannot say whether the probative value of that fact is such that it
3 causes prejudice. That is something that can only be done at the end of
4 the whole exercise, having heard all of the evidence. And that is what
5 is very important, to understand that the -- going into Bogoro to attack
6 Bogoro with, inter alia, child soldiers; and later in 2004 -- yes, the
7 Chamber can infer from the link, but that is something that can only be
8 done at the end and here we are at a preliminary stage. So it's too
9 early to do so.

10 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Prosecutor,
11 for that additional element.

12 Would you mind if we were to withdraw for 20 minutes and then
13 come back to you with an answer?

14 MR. O'SHEA: (Previous translation continues) ... Mr. President,
15 I --

16 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much.
17 We shall suspend for 20 minutes until 1740, 1745.

18 Break taken at 5.17 p.m.

19 On resuming at 5.43 p.m.

20 (Open session)

21 COURT USHER: All rise.

22 PRESIDING JUDGE COTTE: (Interpretation) The hearing is resumed.
23 Please be seated.

24 The Chamber is now going to shed some light on the discussion
25 that occurred this afternoon, and after making some clarifications it is

1 going to suspend the hearing until tomorrow morning. We are not going to
2 call back the witness just for a short half-hour. He will be with us
3 tomorrow morning at 9.00 a.m.

4 Counsel O'Shea, the Chamber would first like to note that it was
5 predictable that questions would be asked such as those that gave rise to
6 your objection at the beginning of the hearing. Therefore, it would be
7 remiss in saying that it regrets that you are a little bit late, and
8 since you were fully aware of the statements of the witness and the
9 topics that were going to be broached by the Prosecution, the Chamber
10 thinks that it would have been wise to tell the Chamber with a specific
11 filing on this point.

12 With this preamble, the Chamber plans to limit the objection that
13 you presented to the strict framework that you planned to give it. It is
14 important to bear in mind that it pertains to the use that
15 Germain Katanga may have had of child soldiers in 2004. That is the
16 stricter framework of your objection. The Chamber would also like to
17 remind you that it is seized with facts pertaining to events that
18 occurred in Bogoro in February 2003.

19 The Chamber listened to your arguments, Counsel O'Shea. It is
20 fully aware of the fact that the situation in 2004 is not exactly the
21 same as it was in 2003, that there were combats, fights, in 2003; that
22 the situation was perhaps more appeased in 2004. The Chamber is fully
23 aware of the fact that Germain Katanga may have in 2004 not exactly
24 exercised the same duties as he did in 2003. It is fully aware that in
25 2004 Germain Katanga may have had different authorities from those he had

1 in 2003. Those are statements that you presented by developing your
2 objection earlier on, but it is clear that there would not have been any
3 demobilisation if there had not been any child soldiers.

4 The Chamber notes that Witness DRC-OTP-P-0267 in 2004 - at least
5 this is a statement that was made before the investigators of the
6 Prosecutor and this is what he has been saying since he has been
7 here - had met with child soldiers in (Expunged) and had been directly
8 associated by listening to a demobilisation process of child soldiers.
9 At the time Witness DRC-OTP-P-0267 had probably identified those child
10 soldiers. Perhaps he had garnered information on the time during which
11 those child soldiers had been mobilised; in other terms, on the duration
12 of their demobilisation. He may have collected information on the places
13 to which they were mobilised. He may have collected information on the
14 fights that they were involved in.

15 There are many questions that could be asked. The answers that
16 the witness will give could perhaps be corroborated by other testimony,
17 but -- or could also -- the information provided by the witness could
18 also corroborate other testimony.

19 The question pertaining to the use of child soldiers in 2004 by
20 Germain Katanga, on the possible use of child soldiers in 2004 by
21 Germain Katanga does not enter into the scope of this Chamber, and so it
22 appears that these questions should not be asked. This is according to
23 the Chamber. On the other hand, the questions that would allow us to
24 better determine whether the child soldiers who were in (Expunged) in 2004
25 and who had been part of the demobilisation process had been child soldiers

1 in February 2003, and if they had possibly participated in the Bogoro
2 attack, those are questions that could not not be of interest to the
3 Chamber if the witness is in a position to answer those questions and to
4 give some clarification on that. The Chamber will appreciate at the end
5 of the testimony and in light of what has just been said, the use of
6 child soldiers by Germain Katanga in 2004 -- well, the Chamber will then
7 determine whether there is probative value and will determine the
8 relevancy of everything that was said.

9 But for you, Mr. Prosecutor, this discussion is important because
10 it shows that you must be extremely attentive to the questions that you
11 ask. I'm sure you were thrown off by the objection made to the question
12 that you asked, but you said yourself that it is better to answer right
13 away because otherwise the objection would come up later.

14 In the questions that you are going to ask in your
15 examination-in-chief, please be very clear on the scope of the issues
16 that this Chamber can deal with and the fact that the use of child
17 soldiers by Germain Katanga in 2004 does not come into question, and you
18 should ask questions that the Chamber sees as appropriate to be asked.
19 So this is what we are asking of you, so that the discussion is useful
20 and so that it will enable us to shed some light on this question of
21 child soldiers, and to ensure that there aren't any questions asked that
22 will lead to objections. That will better enable us to set a framework
23 for the questions that are asked.

24 And so this is the summary to the objection that was raised
25 somewhat late.

1 All right, we will resume again tomorrow -- Mr. Prosecutor.

2 MR. MACDONALD: (Interpretation) Just before we suspend,
3 Mr. President, Counsel Hooper has given me the filing that could be read
4 by the Court Officer or I could read it as well if there aren't any other
5 copies of this. Perhaps I could read it. It pertains to the
6 identification.

7 PRESIDING JUDGE COTTE: (Interpretation) All right. We have
8 three minutes or so to hear the admission. All right. If you could read
9 it slowly.

10 MR. MACDONALD: (Interpretation) Counsel Hooper, I was wondering
11 if I should read it or whether you would prefer to read it.

12 PRESIDING JUDGE COTTE: (Interpretation) Counsel Hooper is
13 giving you the authorisation to read it. Please read slowly.

14 MR. MACDONALD: (Interpretation) In English.

15 (In English) The Defence admits that when the Witness
16 DRC-OTP-P-0267 refers to Germain Katanga he refers to the accused.

17 (Interpretation) A free translation: It is admitted that when
18 the Witness DRC-OTP-P-0267 talks about Germain Katanga he is referring to
19 the accused.

20 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much,
21 Prosecutor.

22 Counsel Hooper.

23 MR. HOOPER: (Previous translation continues) ... just a few
24 minutes left, so can I say this, that in the course of this witness's
25 testimony, obviously it's not just a question of Mr. O'Shea peering into

1 his pond for fish and seeing which fish emerge. There are issues, of
2 course, that we anticipate may arise and we fully accept and take on
3 board your comments in respect of this particular matter, but it's one
4 that did concern us and one that we discussed at some length amongst
5 ourselves last week. I'm not going to revisit that. But, for example,
6 nowhere as I recall in this witness's statement, the process by which
7 statement, of course, we're put on notice as to what he's going to say,
8 coupled with other references that the Prosecutor have made, nowhere does
9 this witness ever say: Such and such a child soldier told me this is
10 what happened to him or that he was at Bogoro or anything like that. And
11 that, despite very many days of interview. So we will strongly object to
12 any question that went to that because it's an issue that this witness
13 has never been led to by the Prosecution and we've never been put on
14 notice about.

15 Another area that this witness may touch on are areas of what I
16 referred to last week - and indeed I seem to have got a positive response
17 from Mr. MacDonald, at least at that time - and that is what I referred
18 to as tertiary hearsay, some general comments about stuff he may have
19 picked up or heard about, during his sejour in (Expunged) in the mid-2004
20 onwards. So those are two areas where we may necessarily be objecting in
21 the course of evidence, but again these are in any event appropriate to,
22 I hope, a short, succinct, and pointed oral submissions and needn't be
23 the subject of the kind of lengthier written submissions that I know have
24 plagued you, the Chamber, as much as from time to time they've plagued
25 us. So I hope that dealing with it in this way, they're matters that

1 have to be dealt with, they're matters that in being dealt with already
2 don't necessarily take more, perhaps less, time. So we hope that the
3 Court will look not too unfavourably on any interjections in this area
4 that we might make, but of course we'll limit our objections to those
5 matters that are of true concern to us. Thank you very much.

6 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
7 Counsel Hooper. It is quite obvious that everyone must play his role and
8 fulfil the mission that he has. The Chamber has indicated that when the
9 time comes we have to exercise at least a minimum amount of
10 professionalism. It will treat everything that was said here in a fair
11 manner. And in the questions that you ask later, Mr. Prosecutor, during
12 your examination-in-chief I would ask you not to create any surprise that
13 will lead to an objection. And so what you will be prone to ask the
14 witness must normally be restricted to what the Defence teams expect.
15 You know that, you're a professional. I think that everyone has
16 understood what this is all about, and the purpose of this is to find the
17 truth. We are trying to be fair to the accused and the victims and we
18 are trying to be diligent in our work. And this means that we have to
19 act as professionally as we can.

20 I would like to thank you for this exchange and for the
21 clarification that we have been able to shed on this matter, and this
22 hearing is adjourned.

23 The hearing ends at 5.58 p.m.
24
25