

1 INTERNATIONAL CRIMINAL COURT

2 SITUATION DEMOCRATIC REPUBLIC OF CONGO

3 Case No: ICC-01/04-01/06

4 Transcription No: ICC-01/04-01/06-T-41-EN

5 Wednesday, 22 November 2006 at 9.36 a.m.

6 OPEN SESSION

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8 Before: His Honour Judge Jorda Her Honour Judge Steiner

9 Her Honour Judge Kuenyehia

10 PRE-TRIAL CHAMBER I

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25 OPEN SESSION ICC-01/04-01/06-T-41-EN.

1 [9:36 a.m.]

09:36:20 2 THE USHER: All rise. The International Criminal Court is
09:36:34 3 now in session.

09:36:38 4 PRESIDING JUDGE JORDA (interpretation): Please be seated.

09:36:44 5 And let Mr Lubanga Dyilo be brought into the courtroom. Thank
09:36:51 6 you.

09:36:51 7 [9:36 a.m.]

09:36:54 8 [Mr Thomas Lubanga Dyilo entered the Courtroom]

09:36:57 9 PRESIDING JUDGE JORDA (interpretation): Mr Roberts, is
09:36:59 10 Mr Flamme absent by design, or should we wait for him?

09:37:03 11 MR ROBERTS: Yes, Mr President, he is absent by design.

09:37:11 12 PRESIDING JUDGE JORDA (interpretation): I didn't quite
09:37:13 13 understand the translation -- I beg your pardon, what did you
09:37:16 14 say? All right, all right. We can begin without him. All
09:37:23 15 right. Thank you. I would like to welcome all the
09:37:28 16 participants. I will not ask them to identify themselves.
09:37:32 17 I would just ask the court officer to call our case and then
09:37:35 18 we shall move forward.

09:37:37 19 COURT OFFICER (interpretation): The situation in the
09:37:42 20 Democratic Republic of the Congo, the case of the Prosecutor
09:37:45 21 versus Thomas Lubanga Dyilo, case number ICC-01-04/01-06.

09:37:53 22 PRESIDING JUDGE JORDA (interpretation): Before I give the
09:37:55 23 floor to the Defence I would like to point out that yesterday
09:37:59 24 afternoon the Chamber received two written applications -- one
09:38:03 25 of which was an urgent one from the Defence. The first one is

09:38:06 1 from the Prosecutor. Mr Withopf -- can everybody hear me --
09:38:11 2 which is labelled ICC-01-04-01-06-721-CONF, which is
09:38:19 3 confirmation of charges in which the Prosecutor informs the
09:38:23 4 Chamber that he has realised that three potential exculpatory
09:38:28 5 documents were disclosed to the Defence -- were disclosed to
09:38:31 6 the Defence on 19 October 2006 in redacted form, without leave
09:38:37 7 of the Trial Chamber. So considering that the redactions by
09:38:41 8 the Prosecutor are similar to those that were already
09:38:45 9 authorised by Single Judge Steiner it has been decided to
09:38:50 10 authorise these redactions pursuant to Rule 82 and Rule 84, as
09:38:54 11 requested in the Prosecutor's application.

09:38:58 12 [9:38 a.m.]

09:39:00 13 So, no problems? Now, the Defence application labelled
09:39:05 14 ICC-01-04/01-06-0723, which is in relation to e-mail exchanges
09:39:12 15 between the Prosecutor and the Defence. If the Defence wishes
09:39:20 16 to refer to this correspondence, a hard copy of the
09:39:26 17 correspondence should be given by the Defence to the
09:39:28 18 Prosecutor to the Registry, and to the Chamber -- that is hard
09:39:34 19 copies -- during the hearing. Furthermore, in this motion
09:39:40 20 Mr Flamme was seeking to be allowed to refer to this
09:39:45 21 correspondence in open session without referring to the names
09:39:48 22 of the people working for -- in the Office of the Prosecutor.
09:39:52 23 We would like to hear the opinion of Mr Withopf in this
09:39:58 24 regard, without mentioning the names of the people working at
09:40:00 25 the Office of the Prosecutor.

09:40:03 1 [9:40 a.m.]

09:40:03 2 MR WITHOPF: Good morning, Mr President, good morning, your

09:40:06 3 Honours. We have received that urgent request as mentioned.

09:40:10 4 The Prosecution is not opposing the request under the

09:40:14 5 condition that the names of Office of the Prosecutor staff is

09:40:19 6 not mentioned in public session. For the information of the

09:40:24 7 Chamber, there was a further e-mail exchange yesterday evening

09:40:30 8 covering the same aspect, and I would like to hand over this

09:40:34 9 e-mail exchange to the Chamber, please. My learned friend

09:40:42 10 from the Defence got a paper copy already earlier on today.

09:40:56 11 [Document handed to the Court]

09:40:56 12 [9:41 a.m.]

09:41:00 13 PRESIDING JUDGE JORDA (interpretation): Everything should be

09:41:02 14 entered into evidence of course, so there is no opposition in

09:41:06 15 theory, so you know your obligations, Mr Roberts. All right.

09:41:10 16 That's fine. Thank you.

09:41:31 17 [9:41 a.m.]

09:41:32 18 At this point, we shall resume the proceedings. Mr Roberts,

09:41:40 19 you may address the Court.

09:41:42 20 [9:42 a.m.]

09:41:46 21 MR ROBERTS: Good morning, Mr President, good morning your

09:41:49 22 Honours. I will be speaking today about the admissibility,

09:41:52 23 relevance, weight and probative value accorded to the evidence

09:41:56 24 tendered by the Prosecution into the confirmation hearing and

09:42:01 25 will make submissions regarding the standard that this

09:42:03 1 evidence must reach for the Pre-Trial Chamber to confirm the
09:42:06 2 indictment against Thomas Lubanga Dyilo.
09:42:08 3 PRESIDING JUDGE JORDA (interpretation): Please slow down,
09:42:11 4 because the interpreters might have some trouble following
09:42:15 5 you. All right? Furthermore, the interpreters say that they
09:42:21 6 did not receive notes of your address, which makes their work
09:42:25 7 that much more difficult. Thank you. Court officer, was this
09:42:39 8 not received? The interpreters, from what the court officer
09:42:58 9 tells me, received the documents but they did not have notes,
09:43:01 10 so please speak more slowly. Thank you.
09:43:04 11 MR ROBERTS: Certainly, your Honour.
09:43:08 12 The standard that the evidence has to reach is that enunciated
09:43:12 13 in Article 61(7) of the Statute. I will read these terms
09:43:16 14 aloud, as the Prosecution conspicuously failed to detail or
09:43:20 15 elaborate on the evidence -- on the level of the evidence --
09:43:23 16 level that the evidence had to meet.
09:43:24 17 [9:43 a.m.]
09:43:26 18 Article 61(7) states that:
09:43:28 19 "The Pre-Trial Chamber shall, on the basis of the hearing,
09:43:34 20 determine whether there is sufficient evidence to establish
09:43:37 21 substantial grounds to believe that the person committed each
09:43:41 22 of the crimes charged."
09:43:43 23 [9:43 a.m.]
09:43:44 24 Now, I would just like to separate this disposition into its
09:43:47 25 constituent elements.

09:43:49 1 Firstly, the meaning of "sufficient evidence to establish

09:43:54 2 substantial grounds to believe".

09:43:59 3 The Defence submits that the Pre-Trial Chamber should consider

09:44:02 4 this standard as being that if this case goes to trial on this

09:44:06 5 evidence, a Chamber -- a future Trial Chamber -- could

09:44:12 6 convict, taking into account the objections to credibility,

09:44:17 7 authenticity, and the Defence evidence that was produced

09:44:20 8 during the hearing.

09:44:21 9 [9:44 a.m.]

09:44:24 10 The Pre-Trial Chamber must conduct a thorough investigation of

09:44:28 11 Prosecution evidence now. Only if it is confident that a

09:44:34 12 future Chamber, if presented with this evidence, could

09:44:37 13 convict, should it confirm the charges brought by the

09:44:40 14 Prosecution.

09:44:43 15 Now, the rationale for having an extensive and rigorous

09:44:47 16 procedure at the ICC to confirm an indictment rather than,

09:44:52 17 say, perhaps after the end of the Prosecution's case, as has

09:44:56 18 been the case with the 98bis procedure at other international

09:45:00 19 tribunals, is it will ensure that no cases are brought to

09:45:04 20 trial creating a use and some would say a waste of large

09:45:09 21 amounts of public money, and no end of stress for all those

09:45:13 22 concerned, especially the accused person, when the Prosecution

09:45:14 23 does not have in its possession sufficient evidence capable of

09:45:20 24 achieving a conviction.

09:45:21 25 [9:45 a.m.]

09:45:22 1 Now, as the Pre-Trial Chamber has made clear, the
09:45:25 2 investigation into Mr Lubanga for the crimes for which he has
09:45:30 3 been charged in this case must finish by the time of the
09:45:33 4 confirmation hearing. Although pursuant to a subsequent
09:45:38 5 decision of the Appeals Chamber there is some possibility for
09:45:40 6 the Prosecution to carry on investigating after the
09:45:44 7 confirmation of the indictment, the Prosecution must not be
09:45:49 8 permitted to imply that any shortfalls in the evidence
09:45:53 9 produced during the confirmation hearing will be resolved
09:45:57 10 during the trial. The evidence taken into consideration must
09:46:02 11 solely be that which is adduced by the Prosecution into the
09:46:06 12 confirmation hearing.
09:46:06 13 [9:46 a.m.]
09:46:11 14 Now, the second element of this Article is that the
09:46:15 15 substantial grounds to believe must relate to each and every
09:46:20 16 element of each and every crime that is charged by the
09:46:24 17 Prosecution. The Prosecution does not meet his burden by
09:46:29 18 adducing significant evidence on one element of the charge and
09:46:33 19 yet providing no evidence or insufficient evidence on another.
09:46:38 20 [9:46 a.m.]
09:46:39 21 The Chamber must carefully weigh the evidence to verify that
09:46:42 22 it does indeed establish the "substantial grounds in relation
09:46:45 23 to each and every one of these elements".
09:46:50 24 [9:46 a.m.]
09:46:51 25 I will now briefly like to address the procedure that the

09:46:54 1 Defence respectfully submits should be followed by the
09:46:58 2 Pre-Trial Chamber in evaluating the evidence presented to it
09:47:00 3 by the Prosecution.

09:47:03 4 Under Article 69(4) of the Statute:

09:47:06 5 "The Court may rule on the relevance or admissibility of any
09:47:11 6 evidence, taking into account, inter alia, the probative value
09:47:17 7 of the evidence, and any prejudice that such evidence may
09:47:20 8 cause to a fair trial or to a fair evaluation of the testimony
09:47:25 9 of a witness in accordance with the Rules of Procedure and
09:47:30 10 Evidence."

09:47:30 11 [9:47 a.m.]

09:47:37 12 PRESIDING JUDGE JORDA (interpretation): The interpreter
09:47:39 13 reminds you that you have been reading a little too fast, so
09:47:44 14 do be kind. Read more slowly. Thank you.

09:47:47 15 MR ROBERTS: Your Honour, my apologies, especially to the
09:47:49 16 interpreters.

09:47:50 17 It is clear from this provision that if the Chamber considers
09:47:53 18 evidence introduced by any party, to be completely lacking in
09:47:57 19 probative value, it must rule it to be inadmissible. Even if
09:48:03 20 it decides that the level of probative value is very low, it
09:48:08 21 should still accord it very little weight.

09:48:08 22 [9:48 a.m.]

09:48:13 23 The Defence does submit, though, that any ruling on
09:48:16 24 inadmissibility given by the Pre-Trial Chamber must obviously
09:48:19 25 give reasons for their decision under Rule 64(2).

09:48:25 1 Now, the Defence notes that these are merely general
09:48:28 2 provisions relating to the evidence that the Pre-Trial Chamber
09:48:31 3 is permitted to evaluate. They do not obviously in any way
09:48:36 4 predetermine the challenges to admissibility that will be put
09:48:41 5 forward by the Defence, and doesn't specifically answer the
09:48:47 6 challenge put forward to by the Defence in its motion
09:48:50 7 regarding the illegal seizure of documents.

09:48:53 8 [9:48 a.m.]

09:48:56 9 Now, if the Chamber considers that the evidence of the
09:48:58 10 Prosecution is admissible in whole or in part it can then
09:49:02 11 proceed to see whether this evidence is sufficient to
09:49:04 12 establish substantial grounds to believe that Thomas Lubanga
09:49:10 13 committed each of the crimes charged -- charged.

09:49:14 14 [9:49 a.m.]

09:49:14 15 The Defence therefore will challenge admissibility first, and
09:49:17 16 then comment on the relevance and weight given to the evidence
09:49:21 17 tendered by the Prosecution. However, just at this stage the
09:49:27 18 Defence would like to reaffirm the basic principle that the
09:49:31 19 burden of proof is squarely on the Prosecution to produce the
09:49:35 20 necessary evidence to meet the standard that I read out
09:49:38 21 earlier.

09:49:41 22 [9:49 a.m.]

09:49:41 23 There is no burden on the Defence to disprove any allegation
09:49:44 24 put forward by the Prosecution.

09:49:51 25 [9:49 a.m.]

09:49:59 1 Firstly, in relation to admissibility. There are two separate
09:50:05 2 sections that I would like to refer to here. Firstly is, if
09:50:09 3 I may refer it as such, the "Kisangani material".

09:50:13 4 Now, the Defence has made detailed submissions on this
09:50:17 5 evidence before, which the Defence submits has been obtained
09:50:21 6 in violation of Article 69(7) of the Statute. In your oral
09:50:27 7 decision your Honours stated that:

09:50:29 8 "The Chamber has decided to examine the matter, the merits of
09:50:33 9 the matter, and thus examine the matter after the confirmation
09:50:39 10 hearing. At this point, the Chamber orders the Prosecutor to
09:50:42 11 present to the Chamber a list of materials that were seized on
09:50:46 12 16 April 2005, and which now appears in the Prosecution's list
09:50:51 13 of evidence. The Chamber will examine the merits and the
09:50:56 14 Prosecutor can therefore present these materials."

09:51:00 15 [9:51 a.m.]

09:51:00 16 Now, the Defence has included the same list within its list of
09:51:03 17 evidence, and would simply like to request the court officer
09:51:07 18 to provide an evidence number for that. At present it has the
09:51:12 19 ERN <#DRC-D01-0002-0009#>.

09:51:29 20 COURT OFFICER (interpretation): The evidence number will be
09:51:37 21 <#EVD-D01-00019#>.

09:51:47 22 MR ROBERTS: Thank you. In conjunction with this list the
09:51:49 23 Defence would also like to tender the judgment from the Court
09:51:54 24 of Appeal from Kisangani, and again this was included within
09:51:56 25 the Defence list of evidence, and I would just like the court

09:52:00 1 officer to give an evidence number to this document, please.

09:52:04 2 Once again, the ERN is <#DRC-D01-0002-0013#>.

09:52:21 3 COURT OFFICER (interpretation): <#EVD-D01-00020#>.

09:52:36 4 MR ROBERTS: Thank you your Honours. Moving on to the

09:52:40 5 second section in this submissions on admissibility. I would

09:52:43 6 also like to refer to the materials seized by the Uruguayan

09:52:50 7 forces in -- at some point in 2003.

09:52:55 8 Now, the Defence requests the Chamber to declare inadmissible

09:53:01 9 for the confirmation hearing any material for which no

09:53:03 10 information pertaining to the chain of custody has been

09:53:06 11 provided. Now, the Defence makes this request in light of

09:53:11 12 information generated as a result of the information disclosed

09:53:14 13 to the Defence on 3 November 2006 pursuant to the decision of

09:53:19 14 the Pre-Trial Chamber.

09:53:20 15 [9:53 a.m.]

09:53:22 16 Now, in a statement provided to the Defence pursuant to that

09:53:26 17 decision, the Defence became aware of the information that at

09:53:32 18 some point after 6 March 2003 there were various items that

09:53:39 19 were taken by the Uruguayan soldiers of MONUC from the

09:53:45 20 Presidency of the UPC.

09:53:47 21 Now, by letter of 16 November the Defence requested that the

09:53:52 22 Prosecution provide any further information on this seizure,

09:53:56 23 and detail whether any of the documents on the Prosecution

09:53:58 24 amended list of evidence resulted from this seizure.

09:54:02 25 [9:54 a.m.]

09:54:03 1 Now, in an initial response by the Prosecution, received on
09:54:08 2 17 November -- and this is the e-mail correspondence that your
09:54:14 3 Honours referred to earlier on -- I'm quoting from the e-mail.
09:54:18 4 It states that:
09:54:20 5 "The Office of the Prosecutor, during its first missions to
09:54:24 6 the DRC, asked MONUC officials whether it would be possible to
09:54:29 7 get to know more about the documents and/or computers that
09:54:32 8 they found. To the recollection and to the best knowledge of
09:54:38 9 the OTP investigators who collected the information, MONUC was
09:54:42 10 very vague in their answers, in mentioning that the former
09:54:49 11 MONUC staff who was involved in the operation had left, and
09:54:53 12 that it therefore could be difficult to retrieve any
09:54:58 13 information about it."
09:55:02 14 The e-mail proceeds to state that:
09:55:04 15 "The OTP did not further investigate this matter."
09:55:11 16 [9:55 a.m.]
09:55:12 17 Now, as the Prosecution has made the Chamber aware, there was
09:55:15 18 further correspondence on this issue, which was received
09:55:18 19 yesterday evening. However, the basic point that comes from
09:55:23 20 this correspondence is simply the same. That the failure of
09:55:27 21 diligence on the part of the Prosecution to establish where
09:55:31 22 the documents that it receives actually come from must
09:55:35 23 undoubtedly cast a substantial doubt on the chain of custody
09:55:40 24 for all documents used by the Prosecution.
09:55:44 25 [9:55 a.m.]

09:55:44 1 Now, this substantial doubt must also be combined with the
09:55:48 2 fact that the Prosecution has not even sought to introduce
09:55:52 3 into the confirmation hearing evidence on the chain of custody
09:55:56 4 on the majority, if not all, of the evidence on which it
09:55:59 5 intends to rely.

09:56:00 6 [9:56 a.m.]

09:56:02 7 Now, the Defence submits it's far too late now for the
09:56:05 8 Prosecution, after they've finished presenting their evidence,
09:56:11 9 to tender further information on the chain of custody of these
09:56:14 10 documents. It was their choice not to provide such
09:56:17 11 information, and they must live with the consequences.

09:56:20 12 [9:56 a.m.]

09:56:21 13 As the Defence stated earlier, the burden is simply on the
09:56:24 14 Prosecution, and they cannot seek to reverse it by tendering
09:56:28 15 evidence and then putting the burden of proof on the Defence
09:56:32 16 to disprove it, or disprove the chain of custody.

09:56:37 17 [9:56 a.m.]

09:56:37 18 Now, in relation to these two submissions, the Defence submits
09:56:41 19 that even if the Chamber in making its assessment decides that
09:56:45 20 these documents are all admissible, the circumstances in which
09:56:49 21 they were seized must affect the weight that they are
09:56:53 22 accorded. Therefore, the Defence respectfully submits, at a
09:57:02 23 minimum, that if any of the documents on the Kisangani list,
09:57:07 24 if I can call it that, are cited by the Prosecution in support
09:57:12 25 of an allegation included within the document containing the

09:57:17 1 charges, the Chamber cannot consider that there are
09:57:20 2 substantial grounds to believe this allegation unless the
09:57:24 3 document is further corroborated by one other document at
09:57:28 4 least that does not appear on the list.
09:57:32 5 [9:57 a.m.]
09:57:45 6 I would just like to move on now to the actual probative value
09:57:49 7 that can be accorded to different groups or types of evidence
09:57:54 8 within the Prosecution list of amended evidence. Now, these
09:57:59 9 different groups will sometimes overlap. I would like to make
09:58:03 10 objections on the form of some documents; I would like to make
09:58:07 11 other objections on the types of documents.
09:58:10 12 [9:58 a.m.]
09:58:11 13 Now, I do not believe it would assist the Chamber to read out
09:58:14 14 for the record each piece of evidence at this stage for which
09:58:18 15 a general criticism applies. It would be far quicker for the
09:58:22 16 Chamber and easier, I would submit, for the Chamber to review
09:58:27 17 this evidence in the context of the brief submitted at the end
09:58:30 18 of proceedings.
09:58:33 19 [9:58 a.m.]
09:58:34 20 Now, firstly, in relation to witnesses and witness statements.
09:58:40 21 The Defence has requested, and been given by the Prosecution,
09:58:44 22 pursuant again to a decision by the Pre-Trial Chamber,
09:58:48 23 information concerning its witnesses, namely, whether any of
09:58:52 24 them had committed criminal offences or were interviewed as a
09:58:56 25 suspect.

09:58:56 1 [9:58 a.m.]

09:58:57 2 Now, at the request of the Prosecution, these documents will

09:59:01 3 remain confidential, but I would like the court officer, if

09:59:05 4 possible, to provide an evidence number for both of these

09:59:08 5 documents, please -- the two relevant ERN numbers are

09:59:15 6 <#DRC-D01-0002-0001#>.

09:59:28 7 COURT OFFICER (interpretation): The reference will be

09:59:33 8 <#EVD-D01-00022#>.

09:59:40 9 MR ROBERTS: Thank you very much. And the second document,

09:59:41 10 equally confidential, is <#DRC-D01-0002-0005#>.

09:59:52 11 COURT OFFICER (interpretation): The reference for this

10:00:00 12 document will be <#EVD-D01-00022#>.

10:00:13 13 THE ENGLISH INTERPRETER: The first document was 21.

10:00:16 14 [10:00 a.m.]

10:00:16 15 MR ROBERTS: Thank you very much. Now, in relation to

10:00:20 16 statements or the summaries of statements of witnesses,

10:00:23 17 I would just like it -- to break it down into the different

10:00:25 18 subcategories. I'd firstly like to start by statements of

10:00:29 19 known witnesses where the statement has been provided largely

10:00:32 20 in full and the identity has been provided, but the statement

10:00:34 21 has been redacted.

10:00:39 22 Now, in the Prosecution amended list of evidence, there are

10:00:42 23 statements of 11 witnesses upon whom the Prosecution wishes to

10:00:45 24 rely.

10:00:45 25 [10:00 a.m.]

10:00:49 1 Now, from these 11 there are six witness statements, that my
10:00:54 2 learned friends from the Prosecution spoke about last week,
10:00:57 3 which have been provided to the Defence in their unredacted
10:01:00 4 form.

10:01:01 5 [10:01 a.m.]

10:01:01 6 Now, my colleague, Ms Pandanzyla will be addressing the
10:01:07 7 contents of these statements in closed session later on today
10:01:11 8 and I will make no more reference to them. However, there are
10:01:15 9 statements of a further five witnesses which -- known to the
10:01:17 10 Defence -- but which still do contain redactions.

10:01:22 11 Now, the Defence made detailed submissions about the effect
10:01:25 12 these redactions have on the Defence preparation and readiness
10:01:28 13 for the confirmation hearing, and I will not detail those
10:01:31 14 again here.

10:01:32 15 [10:01 a.m.]

10:01:33 16 I would like to add, however, that equally as it affected the
10:01:41 17 Defence being able to properly prepare for the confirmation
10:01:44 18 hearing, it must equally also affect the weight given to the
10:01:48 19 documents by the -- given to the statements, sorry, by the
10:01:52 20 Pre-Trial Chamber.

10:01:53 21 [10:01 a.m.]

10:01:55 22 Your Honours must carry out the very complex task of banishing
10:02:00 23 from your minds the evidence that you have authorised
10:02:02 24 redactions for and have consequently already reviewed, because
10:02:06 25 the only evidence that your Honours can rely on for the

10:02:09 1 purposes of confirming the charges is that which is presented
10:02:13 2 into the confirmation hearing.

10:02:14 3 [10:02 a.m.]

10:02:16 4 Now, I would just like to review one of the documents that's
10:02:20 5 tendered into the Prosecution list of evidence, because
10:02:23 6 I think it provides a good example of exactly the effect these
10:02:27 7 redactions have.

10:02:29 8 Now, the Prosecution referred to this the other day, and
10:02:33 9 I believe it's a public statement, but which they wished not
10:02:36 10 to show to everyone, so I would just like to refer to it and
10:02:40 11 I actually have paper copies of the specific sections to which
10:02:44 12 I wish to refer. So if I could hand it out, I believe that
10:02:48 13 would be the easiest way to proceed.

10:02:48 14 [10:02 a.m.]

10:02:55 15 [Document handed to the Court]

10:03:06 16 COURT OFFICER (interpretation): Mr Roberts, is it possible
10:03:10 17 to have the reference which was attributed to this document --
10:03:15 18 MR ROBERTS: Certainly, the document has the ERN
10:03:23 19 <#DRC-0TP-0105-0085#> and I believe it's <#EVD-OTP-00002#>.

10:03:38 20 [10:03 a.m.]

10:03:41 21 Now, if the Chamber -- if the Chamber and the Prosecution
10:03:45 22 could just refer to paragraph 33 -- sorry, paragraph 133,
10:03:51 23 sorry, my apologies -- just at the bottom of the page.
10:03:57 24 Now, in this paragraph it states the following, and I'd just
10:04:01 25 like to read it in French [in French] : "There was blood

10:04:06 1 everywhere, and I remember that (redacted). I don't remember
10:04:13 2 having (redacted)." So far we know that the witness remembers
10:04:20 3 something, but doesn't remember something else.

10:04:23 4 [10:04 a.m.]

10:04:23 5 Now, the witness continues [in French]: "I remember perfectly
10:04:32 6 having (redacted). I -- I couldn't tell you (redacted)."

10:04:43 7 In terms of completely the evidence produced by the
10:04:47 8 Prosecution -- the witness remembers something, doesn't
10:04:50 9 remember something else, remembers something else perfectly
10:04:54 10 but ultimately is not able to tell us anyway.

10:04:57 11 [10:04 a.m.]

10:04:58 12 Now, the Defence is well aware that the redactions, or at
10:05:00 13 least most of them, have been -- carried out by the
10:05:03 14 Prosecution -- have been done with the authorisation of the
10:05:06 15 Chamber. By taking this example, the Defence simply wishes to
10:05:10 16 highlight that the probative value of the statement must be
10:05:14 17 considerably diminished by these redactions, notwithstanding
10:05:18 18 the fact that they may be justified under Article 81(2) or
10:05:26 19 81(4). The Prosecution has chosen to request these redactions
10:05:30 20 and is free to lift them at any time and so must bear the
10:05:34 21 consequences of the effect of these redactions on the weight
10:05:36 22 accorded to the statements concerned.

10:05:42 23 [10:05 a.m.]

10:05:42 24 The second point I would like to make in relation to witness
10:05:45 25 statements is that they have been subject to no

10:05:52 1 cross-examination. You cannot cross-examine a

10:05:56 2 statement -- you can cross-examine a person, but not a

10:05:58 3 statement.

10:05:59 4 [10:05 a.m.]

10:06:00 5 Now, there's been one witness at this -- at this confirmation

10:06:04 6 hearing, Ms Peduto, on whose evidence I will not make

10:06:11 7 submissions now. However, all I will say is that her evidence

10:06:15 8 under cross-examination may not have been as definite and

10:06:19 9 clear as it may have come across in her statement.

10:06:23 10 [10:06 a.m.]

10:06:24 11 Even when she was apparently sure of something, the Defence

10:06:27 12 was able to cross-examine her on the basis of her knowledge.

10:06:32 13 And as she, herself, admitted -- I believe on several

10:06:35 14 occasions, I was not in Court for the whole amount -- "Sorry,

10:06:38 15 I don't have a very good memory and I'm unable to confirm your

10:06:42 16 question."

10:06:43 17 [10:06 a.m.]

10:06:43 18 Now, the other statements relied upon by the Prosecution are

10:06:46 19 just that -- they're statements. They cannot provide a

10:06:52 20 sufficiently accurate reflection of what a witness will

10:06:58 21 testify about were the case to proceed to trial.

10:07:02 22 Now, the Prosecution has chosen, for its own reasons, to only

10:07:06 23 produce one witness at the confirmation hearing. It had the

10:07:11 24 right to bring several more, but chose not to.

10:07:14 25 [10:07 a.m.]

10:07:14 1 The Defence therefore has had, or would have -- sorry, has had
10:07:17 2 no opportunity to cross-examine the authors of these remaining
10:07:21 3 statements.

10:07:28 4 [10:07 a.m.]

10:07:29 5 Secondly -- or furthermore, I think it's probably thirdly now,
10:07:34 6 is that in relation to these statements, it's clear that the
10:07:37 7 evidence is not given under oath.

10:07:41 8 Now, witnesses generally make two statements or two admissions
10:07:47 9 in their statements -- generally in one of the introductory
10:07:52 10 statements there will be the following declaration, and once
10:07:56 11 again I'll be reading in French [in French]:

10:08:01 12 "It was said to me at the end of the interview that I would be
10:08:06 13 asked to sign a written statement, having had the possibility
10:08:13 14 to reread it, and to add any corrections or supplementary
10:08:21 15 information that I wished to." Then right at the end of the
10:08:25 16 statement, the following admission is made [in French]:
10:08:31 17 "I, the undersigned, declare on my honour and conscience that
10:08:42 18 the information figuring in this declaration, which I have
10:08:48 19 personally re-read, correctly reflect my examination. I gave
10:09:02 20 this statement on my behalf voluntarily and I was informed
10:09:10 21 that it could be used in legal proceedings before the
10:09:17 22 International Criminal Court and that I may be called to give
10:09:23 23 evidence in public before the Court."

10:09:27 24 [10:09 a.m.]

10:09:27 25 At no point in the statement does the witness ever swear that

10:09:31 1 the contents of the statement are true.

10:09:36 2 Now, when evidence -- written evidence is tendered by either

10:09:41 3 party in proceedings before other international tribunals it

10:09:46 4 is a representative of the Registry who takes the statement,

10:09:49 5 reads the person giving the statement his or her rights and

10:09:52 6 obligations -- it is not a Prosecution investigator. The

10:09:59 7 swearing of an oath is thus a central part -- a central part

10:10:02 8 of the Chamber's reliance on such evidence. Without an oath

10:10:06 9 there's no guarantee that the contents or the evidence

10:10:10 10 provided by the -- by the witness interviewed is true, and

10:10:14 11 also there are no evidence for providing false testimony in a

10:10:18 12 statement.

10:10:19 13 [10:10 a.m.]

10:10:20 14 Now, the difference between statements given to Prosecution

10:10:23 15 investigators and evidence given in Court is marked. And in

10:10:28 16 several recent cases before -- and several cases not just

10:10:32 17 recent ones actually -- before other international criminal

10:10:35 18 tribunals, witnesses have stated that they categorically did

10:10:38 19 not state what was written in the statement presented to them.

10:10:42 20 [10:10 a.m.]

10:10:51 21 Closely related to the point I've just made is that often an

10:10:57 22 interview with a witness is carried out in a language other

10:11:00 23 than spoken or understood by the interviewee.

10:11:05 24 [10:11 a.m.]

10:11:05 25 Now, I would like to take the example of the witness statement

10:11:08 1 <#DRC-OTP-0132-0079#>, which I believe has already been given
10:11:19 2 the evidence number of <#EVD-OTP-00087#>. Now, once again,
10:11:28 3 I believe this is a protected witness. I would just like to
10:11:31 4 distribute hard copies of the specific sections of the
10:11:35 5 statements to which I -- to which I wish to refer.
10:11:53 6 [Document handed to the Court]
10:11:53 7 [10:11 a.m.]
10:12:33 8 MR ROBERTS: As your Honours will see, I've provided the
10:12:36 9 front cover and the last two pages, because the point I'm
10:12:38 10 making doesn't relate to the content of the statement but more
10:12:41 11 to the way in which the statement was taken.
10:12:48 12 [10:12 a.m.]
10:12:48 13 Now, on the front page it's possible to see that the witness
10:12:52 14 is able to speak Swahili, Lingala and a little French. Sorry,
10:13:01 15 I didn't realise the Prosecution hadn't received it yet.
10:13:07 16 [10:13 a.m.]
10:13:08 17 Later on, however, the witness affirms that she has personally
10:13:13 18 read, or re-read the interview. This is not actually the
10:13:17 19 case. Now, in fact what happens, which is confirmed by the
10:13:22 20 interpreters at a station at page 16 of the document, which
10:13:27 21 has the ERN <#DRC-OTP-0132-0094#>, is that the statement was
10:13:37 22 written by the investigator and then translated back to the
10:13:41 23 witness by the interpreter and the witness subsequently signed
10:13:44 24 it.
10:13:45 25 [10:13 a.m.]

10:13:46 1 Now, although the witness has therefore signed -- the witness,
10:13:51 2 sorry, has therefore signed the statement, she is obviously
10:13:54 3 not able to re-read it personally. And so consequently the
10:13:58 4 Defence submits that she signed something that she could not
10:14:02 5 fully understand. Once again the Defence submits that this
10:14:05 6 must affect the weight accorded to these statements by the
10:14:09 7 Pre-Trial Chamber and to all statements given in a language
10:14:11 8 that is different from that spoken by the witness.

10:14:14 9 [10:14 a.m.]

10:14:16 10 Now, this issue was highlighted in the Defence response
10:14:20 11 regarding the proofing of a witness. Now, in that motion the
10:14:26 12 Defence observed that at the ICTY, during many early
10:14:31 13 investigative interviews, a language assistant would translate
10:14:35 14 what the witness was stating from Serbo-Croat -- Bosnian
10:14:41 15 Serbo-Croat into English and the investigator
10:14:43 16 contemporaneously transcribed what the witness said. The
10:14:48 17 witness eventually signed the English version.

10:14:51 18 [10:14 a.m.]

10:14:52 19 It was again a common occurrence for a witness to subsequently
10:14:55 20 deny the accuracy of these statements when confronted with a
10:15:00 21 Bosnian Serbo-Croat interpretation of the statement in Court.
10:15:10 22 Now, this ends the general remarks I'd like to make about the
10:15:14 23 statements tendered in evidence whose identities have been
10:15:18 24 provided by the Prosecution. The Defence simply requests that
10:15:21 25 all these factors are borne in mind by the Pre-Trial Chamber

10:15:27 1 in its assessment.

10:15:28 2 [10:15 a.m.]

10:15:29 3 The other big group of witnesses has obviously been the

10:15:32 4 anonymous witnesses. Now, in the decision of the Pre-Trial

10:15:37 5 Chamber of 24 May the Prosecution -- and by extension the

10:15:43 6 Pre-Trial Chamber -- recognised the importance to the Defence

10:15:45 7 of the identities of the witnesses upon whom it intended to

10:15:50 8 rely at the confirmation hearing.

10:15:52 9 [10:15 a.m.]

10:15:53 10 Now, the Chamber held the following:

10:15:57 11 "Considering that according to the Prosecution the Defence

10:16:02 12 must have access to the identities and the unredacted versions

10:16:07 13 of the statements of the witnesses referred to in the

10:16:10 14 Prosecution's submission, and the Prosecution's request,

10:16:16 15 because otherwise it will not be in a position to adequately

10:16:20 16 consider the evidence of these witnesses."

10:16:25 17 [10:16 a.m.]

10:16:26 18 Now, the decision proceeded to state that, "Considering that

10:16:30 19 the Single Judge agrees with the Prosecution in that the

10:16:37 20 identities of the said witnesses must be included in the

10:16:40 21 Prosecution charging documents and list of evidence and that

10:16:43 22 the Prosecution -- that the Prosecution must file 30 days

10:16:48 23 before the confirmation hearing."

10:16:50 24 [10:16 a.m.]

10:16:50 25 Now, due to subsequent developments in the case, which I won't

10:16:54 1 go into, in a later decision of 15 September, the Single Judge
10:17:00 2 held that non-disclosure of identity vis-a-vis the Defence,
10:17:04 3 for the purpose of the confirmation hearing, is currently THE
10:17:07 4 only available and feasible measure for the necessary
10:17:11 5 protection of many Prosecution witnesses.

10:17:14 6 [10:17 a.m.]

10:17:15 7 Notwithstanding this change, the Defence does submit that the
10:17:19 8 concerns and the statements of principle elaborated in the
10:17:24 9 24 May decision still hold true.

10:17:27 10 [10:17 a.m.]

10:17:28 11 Without the identities and unredacted versions of the
10:17:31 12 statements, in that sense it was the Defence, but in this case
10:17:36 13 it's the Chamber, "will not be in a position to adequately
10:17:39 14 consider the evidence of these witnesses."

10:17:40 15 THE ENGLISH INTERPRETER: May the speaker please slow down.

10:17:47 16 MR ROBERTS: Once again, my apologies.

10:17:53 17 [10:17 a.m.]

10:17:54 18 Now, a further later decision of 4 October in relation to the
10:17:58 19 summary evidence stated the following:
10:18:01 20 "In relation to the summary evidence on which the Prosecution
10:18:07 21 is authorised to rely at the confirmation hearing in the
10:18:11 22 present decision, the Prosecution cannot at the confirmation
10:18:18 23 hearing rely on any information which does not appear in the
10:18:22 24 summary evidence, such as the identity, position and other
10:18:28 25 identifying features of the relevant Prosecution witnesses;

10:18:32 1 that, moreover, summary evidence -- as opposed to redacted
10:18:41 2 versions of witness statements, transcripts of witness
10:18:45 3 interviews and investigators' notes and reports of witness
10:18:51 4 interviews -- is drafted by the Prosecution and that these
10:18:57 5 factors shall necessarily have an impact on the probative
10:19:01 6 value of the summary evidence authorised in the present
10:19:05 7 decision."

10:19:09 8 [10:19 a.m.]

10:19:09 9 Now, the Defence would like to take this opportunity to
10:19:14 10 explain the actual concrete effect that the provision of
10:19:18 11 summary evidence rather than full statements has had on the
10:19:24 12 relevance and probative value of these summaries produced by
10:19:29 13 the Prosecution.

10:19:29 14 [10:19 a.m.]

10:19:32 15 Firstly, the Defence has no access to the questions posed to
10:19:37 16 the witness. Therefore the Defence is unable to verify
10:19:43 17 whether the investigator perhaps suggested an answer, or, at a
10:19:48 18 minimum, asked a very leading question to solicit the
10:19:51 19 information from the witness being interviewed.

10:19:54 20 [10:19 a.m.]

10:19:58 21 Furthermore, in reviewing a summary, neither the Chamber nor
10:20:03 22 the Defence is in a position to assess the subtleties of
10:20:09 23 language used by the witness, which is often indicative of the
10:20:13 24 confidence with which the witness asserts a particular
10:20:17 25 position. Whether the witness is completely 100 per cent

10:20:25 1 certain of something or whether they merely think it might be
10:20:27 2 true is completely lost in a summary. Often, all the
10:20:34 3 information that is provided in the summary is that the
10:20:36 4 witness affirms that or confirms something.

10:20:46 5 [10:20 a.m.]

10:20:47 6 Now, secondly, without the identity of the witness, the
10:20:57 7 Chamber is completely unable to rely on the fact that the
10:20:57 8 person giving the information in the statement has any
10:20:59 9 suitable foundation for his knowledge. The Prosecution, and
10:21:06 10 subsequently the Chamber, cannot rely on the fact that they
10:21:09 11 know who this person is, as the Defence and the Chamber has
10:21:13 12 not been given this information.

10:21:14 13 [10:21 a.m.]

10:21:16 14 Without the identity, the Defence is unable to verify whether
10:21:20 15 the person giving the statement, or the summary of the
10:21:23 16 statement, has a motive to lie, to exaggerate, to emphasise or
10:21:29 17 minimise his or her role in events, or, indeed, any other
10:21:34 18 factor which could affect the relevance and probative value of
10:21:39 19 the statement.

10:21:40 20 [10:21 a.m.]

10:21:47 21 Thirdly -- and almost most importantly -- the summaries
10:21:51 22 constitute the impressions of members of the Office of the
10:21:55 23 Prosecutor as to the important information contained in these
10:21:58 24 statements.

10:22:01 25 [10:22 a.m.]

10:22:02 1 Now, as the Prosecution noted themselves in requesting an
10:22:07 2 extension of time to file these summaries, they had very
10:22:10 3 little time to prepare them. Now, the Defence would not
10:22:13 4 suggest it was a rush job, but would suggest that it's a very
10:22:17 5 complex task to work out exactly what is relevant for both the
10:22:23 6 Prosecution and Defence from a big statement and condense it
10:22:25 7 into a small summary in a small space of time.

10:22:28 8 [10:22 a.m.]

10:22:30 9 They are effectively rapidly compiled hearsay, because it's
10:22:36 10 the Prosecution's impressions obviously of a statement, which,
10:22:39 11 could, in itself, be hearsay. Once again, due to the format
10:22:42 12 of the summaries, the Defence is unable to tell.

10:22:42 13 [10:22 a.m.]

10:22:49 14 Fourthly, the information regarding the date, the time of the
10:22:53 15 interview, the name of the interviewer, the duration of the
10:22:59 16 interview are all elements that are significant for the
10:23:02 17 Defence in assessing, and logically the Chamber, in assessing
10:23:05 18 the credibility of the witness statement.

10:23:08 19 [10:23 a.m.]

10:23:08 20 Once again, these elements are all crucially missing from the
10:23:12 21 summaries that have been provided to the Defence, and to the
10:23:15 22 Chamber.

10:23:16 23 [10:23 a.m.]

10:23:19 24 Now, lastly, the summaries also mask what can simply be
10:23:24 25 referred to as "anonymous" or "thrice" hearsay.

10:23:29 1 Now, the Defence has previously raised an objection to this
10:23:32 2 type of evidence in relation to the -- to Ms Peduto who came
10:23:38 3 to give evidence in person, but at least in relation to her
10:23:41 4 the Defence was in a position to cross-examine her regarding
10:23:43 5 the foundation of her knowledge.

10:23:48 6 [10:23 a.m.]

10:23:48 7 However, in a summary, the Prosecution can simply cover up the
10:23:52 8 source of information, without even the Defence having an
10:23:56 9 opportunity to check the reliability or even know that there
10:24:03 10 was a source who provided that information. If a summary
10:24:04 11 states that the witness confirms something, the Defence -- and
10:24:08 12 by extension, the Chamber -- is unable to tell whether that
10:24:12 13 was because someone told him that or whether he knew or she
10:24:16 14 knew it from his personal knowledge.

10:24:19 15 [10:24 a.m.]

10:24:19 16 Now, I would just like to illustrate these criticisms by way
10:24:25 17 of one example. Now, if the court officer could display the
10:24:28 18 document number <#DRC-OTP-0164-0249#>. Now, this is included
10:24:40 19 within the Prosecution list of evidence, but as yet I don't
10:24:43 20 believe it's been given an evidence number.

10:25:00 21 COURT OFFICER (interpretation): The evidence number for this
10:25:11 22 document will be <#EVD-OTP-00084#> -- 89#>.

10:25:24 23 MR ROBERTS: And I believe, if this isn't a confidential
10:25:24 24 document, as it's a summary if the Court officer - oh, he has
10:25:30 25 published it.

10:25:32 1 PRESIDENT JUDGE JORDA (interpretation): Sorry, you gave a
10:25:34 2 number to it following the evidence of the Prosecutor, yes?
10:25:37 3 So does everybody agree on this formulation? Okay. Go ahead.
10:25:42 4 So it's number 89. Thank you.
10:25:47 5 MR ROBERTS: Now, this is a summary of nine lines -- nine
10:25:51 6 lines. Now, bearing in mind that none of the other witness
10:25:57 7 statements that have been provided to the Defence were less
10:26:00 8 than 10 pages, the Defence submits it's quite likely that a
10:26:06 9 large majority of the statement was not summarised.
10:26:08 10 [10:26 a.m.]
10:26:10 11 Now, the actual information in the summary provided by the
10:26:14 12 witness is also so general as to carry no or very little
10:26:18 13 weight.
10:26:20 14 [10:26 a.m.]
10:26:20 15 Now, the summary alleges, at the beginning, that the
10:26:24 16 information provided by the witness establishes that the UPC
10:26:29 17 had at its - had at its disposition an army of Hema soldiers
10:26:36 18 in the FPLC and that the FPLC was organised in a structured
10:26:41 19 way.
10:26:42 20 [10:26 a.m.]
10:26:42 21 Now, this is the Prosecution assertion of what the statement
10:26:46 22 says. Now, in the text of the summary, all six lines of it,
10:26:52 23 all that can be deduced is that the witness alleges he was
10:26:57 24 trained in Uganda, joined a Hema militia created to support
10:27:02 25 Mr Lubanga and, according to the witness, the FPLC was well

10:27:05 1 structured.

10:27:07 2 [10:27 a.m.]

10:27:07 3 Now, to the Defence this summary bears out all the problems

10:27:12 4 that I highlighted seconds ago. There's no indication of the

10:27:15 5 way this information was given by the witness in relation to

10:27:18 6 which statement or which question, whether the questions were

10:27:22 7 leading, or suggested. No information is given by the witness

10:27:29 8 as to the foundation of his knowledge and the allegations that

10:27:32 9 he makes and, also, I think it bears out that it completely

10:27:38 10 reflects the Prosecution's view of its evidence. The

10:27:43 11 introduction is what the Prosecution want it to show and it's

10:27:47 12 been phrased in such a way as to practically identically

10:27:54 13 reflect the evidence given within the text of the summary.

10:27:58 14 [10:27 a.m.]

10:27:58 15 Finally, no information has been provided again about who took

10:28:02 16 the interview, in what language, when, or all these other

10:28:06 17 issues.

10:28:08 18 [10:28 a.m.]

10:28:09 19 Now, that concludes my comments regarding the witnesses and

10:28:12 20 witness statements. But, in addition to the summaries and the

10:28:18 21 redacted witness statements, the Prosecution have also

10:28:22 22 included various other documents for which the relevance and

10:28:28 23 weight to be given by the Trial Chamber is extremely limited.

10:28:33 24 I would, once again, like to address these by category, as

10:28:37 25 I believe this is the easiest way to proceed.

10:28:40 1 [10:28 a.m.]

10:28:40 2 Now, firstly, reports of non-governmental organisations, or

10:28:44 3 NGOs.

10:28:49 4 Now, the lack of value of NGO reports, if used to support a

10:28:54 5 criminal charge, which is what the Prosecution is seeking to

10:28:56 6 do here, is borne out by a recent decision of the Pre-Trial

10:29:03 7 Chamber. Now, last Friday, in deciding whether the

10:29:07 8 Prosecution was under an obligation to provide NGO reports

10:29:11 9 that were not in its position -- possession, sorry, as

10:29:15 10 constituting prior statements under Rule 77, the Chamber held

10:29:20 11 that:

10:29:24 12 "The Defence request for materials does not refer to prior

10:29:28 13 statements within the meaning of Rule 76 of the Rules, because

10:29:34 14 it refers to notes taken by certain journalists, NGOs and

10:29:38 15 MONUC officials, of their interviews with witnesses included

10:29:43 16 in the Prosecution amended list of evidence, and the relevant

10:29:48 17 witnesses did not have an opportunity to re-read such notes

10:29:52 18 and did not sign them."

10:29:55 19 [10:29 a.m.]

10:29:56 20 Now, this part of the decision makes clear that NGO reports,

10:30:01 21 allegedly based on interviews, do not allow the person who was

10:30:05 22 being interviewed to check whether what was written down by

10:30:09 23 the investigator, or the NGO, genuinely reflected what they

10:30:14 24 had stated.

10:30:14 25 [10:30 a.m.]

10:30:18 1 Now, if the Chamber does not consider the information which
10:30:23 2 formed the basis of these reports to constitute prior
10:30:26 3 statements, then equally it cannot place any weight on the
10:30:31 4 reports gathered from these.

10:30:37 5 [10:30 a.m.]

10:30:37 6 Now, as I stated earlier, the Defence has already made
10:30:41 7 submissions -- extensive submissions on hearsay element in
10:30:45 8 relation to statements and in relation to the witness who
10:30:47 9 appeared here. But, once again, the same observations apply
10:30:53 10 to the NGO reports. These reports make repeated reference to
10:31:01 11 an interview with a witness, without specifying the name of
10:31:05 12 the person. It is also equally not clear whether the person
10:31:12 13 they interviewed witnessed the event themselves.

10:31:16 14 [10:31 a.m.]

10:31:16 15 The Defence submits that the reports of NGOs are therefore
10:31:19 16 often no more than a collection of rumour and speculation,
10:31:24 17 covered up by the cloak of anonymity to prevent anyone from
10:31:29 18 verifying the accuracy of the information contained therein.

10:31:31 19 [10:31 a.m.]

10:31:35 20 Whilst this style of reporting may be sufficient to produce
10:31:40 21 reports for the general public, it is not suitable, and it
10:31:44 22 does not carry sufficient weight, to be used to support
10:31:47 23 serious criminal charges, which the Prosecution wishes to
10:31:51 24 bring in this case.

10:31:52 25 [10:31 a.m.]

10:31:56 1 Similarly, the Prosecution has relied upon, I believe,
10:32:02 2 30 press articles to support the charges in this case.
10:32:06 3 Now, the Defence doesn't wish to spend too much time on this
10:32:09 4 issue, because it appears to be somewhat self-evident that
10:32:14 5 information contained within press articles cannot be given
10:32:17 6 any weight at all in this context.

10:32:20 7 Newspaper articles are produced for the general public. The
10:32:24 8 information and the slant given to such information is often
10:32:28 9 dictated by political factors outside the control of the
10:32:32 10 person who writes the article. They are dictated by editorial
10:32:38 11 strategy or by the owners of the paper. Furthermore, the
10:32:46 12 information contained within the articles is also clearly not
10:32:50 13 of a primary nature; it is someone reporting on something
10:32:54 14 else.

10:32:57 15 [10:32 a.m.]

10:32:57 16 Now, often a report drafted by someone may be done when that
10:33:01 17 person has no particular experience of the issue involved but
10:33:05 18 is merely the one person in that area who can report on the --
10:33:10 19 on the specific issue as that news comes into play.

10:33:15 20 [10:33 a.m.]

10:33:16 21 Now, as we've heard from Ms Peduto over the last few days,
10:33:22 22 knowledge and experience in relation to the issues in this
10:33:25 23 case is not something that can be picked up over an hour or
10:33:30 24 two over an interview by a journalist.

10:33:35 25 [10:33 a.m.]

10:33:35 1 Furthermore, like much of the evidence produced by the
10:33:38 2 Prosecution, the media articles included within their list do
10:33:45 3 not support the alleged facts which they are adduced to do so.
10:33:51 4 And the Prosecution has provided no evidence as to why -- no
10:33:56 5 evidence extraneous to the articles as to why they do
10:33:59 6 constitute proof -- anything more than just the belief of the
10:34:03 7 person writing them.

10:34:05 8 [10:34 a.m.]

10:34:06 9 Now, once again, the burden of proof is squarely on the
10:34:09 10 Prosecution to check the accuracy of the material contained
10:34:11 11 within the newspapers. Instead, they have simply tendered
10:34:15 12 these articles into evidence, clearly as proof of their
10:34:18 13 contents without any further evidence supporting them.

10:34:21 14 [10:34 a.m.]

10:34:25 15 Now, I would just like to take an example, and that's document
10:34:29 16 <#DRC-OTP-0019-0075#>. Once again, this is within the
10:34:43 17 Prosecution list of evidence, but has not as yet been given an
10:34:47 18 evidence number.

10:34:53 19 COURT OFFICER (interpretation): The evidence number of the
10:35:07 20 document shall be <#EVD-OTP-00090#>.

10:35:19 21 MR ROBERTS: Now, this is I believe a German newspaper
10:35:28 22 article, and with all due respect to Mr Withopf, I won't try
10:35:31 23 and read German. However, I would like to state that the
10:35:36 24 article allegedly supports the fact that: "The children in
10:35:40 25 the FPLC training camps were subjected to strict military

10:35:46 1 discipline. A detailed system of severe sanctions for
10:35:51 2 misconduct was imposed on them, including beatings, detention
10:35:54 3 and execution." This is the allegation which this article is
10:35:58 4 alleged to support.
10:36:01 5 [10:36 a.m.]
10:36:02 6 Now, apparently the relevant section of the article does refer
10:36:06 7 to Mr Lubanga, but merely states -- merely repeats an
10:36:10 8 allegation that was put out by the UN-radio station Okapi.
10:36:19 9 This allegation was apparently Mr Lubanga forced households in
10:36:25 10 areas controlled by him to put a cow, money or a child at the
10:36:28 11 rebel militia's disposal. In fact, what the article does then
10:36:35 12 is merely repeating the news of Radio Okapi. It is not based
10:36:42 13 on any independent research carried out by the journalist
10:36:46 14 responsible. It's a -- it's far too general; it has no
10:36:51 15 mention of the radio programme; it has no name of who gave the
10:36:56 16 information and when, and, once again, it does not even
10:36:59 17 support the allegation that it's supposed to.
10:37:01 18 [10:37 a.m.]
10:37:05 19 Just moving on to e-mails, which are also included within the
10:37:08 20 Prosecution list of evidence. Now, there are two e-mails
10:37:12 21 included to support the charges against Mr Lubanga. If the
10:37:18 22 court officer could display the document number
10:37:27 23 <#DRC-OTP-0037-0078#>.
10:37:36 24 Once again, this is in the Prosecution list of evidence but
10:37:39 25 has not been referred to, and so has not had an evidence

10:37:42 1 number.

10:37:42 2 COURT OFFICER (interpretation): The reference number of this

10:37:50 3 document shall be <#EVD-OTP-00091#>.

10:38:00 4 MR ROBERTS: Firstly, in relation to this document, your

10:38:05 5 Honours will see that the name of the party that sent it, and

10:38:08 6 indeed who received it, has been redacted.

10:38:13 7 Now, secondly, just in relation to e-mails in general, they

10:38:17 8 can be modified by the sender, they can be modified by the

10:38:21 9 person who received the e-mail, or even anyone who intercepted

10:38:27 10 it. There is, at least on this e-mail, the absence of any

10:38:31 11 electronic signature to guarantee that it's been sent by the

10:38:35 12 person who claims to have sent it.

10:38:37 13 [10:38 a.m.]

10:38:43 14 Therefore, as a form of proof, especially to support a

10:38:47 15 criminal charge, the Defence submits that the e-mails, or the

10:38:50 16 inclusion of e-mails within the Prosecution list of evidence

10:38:54 17 should be accorded very little weight.

10:38:57 18 [10:38 a.m.]

10:39:00 19 Now, just finally in relation to documents, the one final

10:39:04 20 category which cuts across lots of other categories that I've

10:39:09 21 already spoken about, is that the Prosecution has relied on

10:39:12 22 several documents to support various allegations in the

10:39:17 23 document containing the charges, but yet none of these

10:39:21 24 documents have been shown to witnesses to confirm the

10:39:24 25 authenticity or the truth of their contents.

10:39:27 1 [10:39 a.m.]

10:39:29 2 The Prosecution has referred to documents without citing any
10:39:36 3 further evidence that they actually truthfully represented the
10:39:40 4 situation on the ground. Instead, the Prosecution tells us
10:39:44 5 and tells your Honours how to interpret these documents. They
10:39:46 6 do not trust the many witnesses that they have -- witness
10:39:50 7 statements that they have tendered into the hearing to be able
10:39:52 8 to do that job for you.

10:39:54 9 [10:39 a.m.]

10:39:55 10 Now, the Defence submits that the Prosecution has failed to
10:39:59 11 ask its witnesses to comment on these documents, to confirm
10:40:02 12 the truth of their contents, or indeed whether they are
10:40:05 13 authentic.

10:40:06 14 [10:40 a.m.]

10:40:11 15 Now, the Defence submits that if the Prosecution genuinely
10:40:15 16 wants to prove that these documents did carry the weight that
10:40:19 17 they should do, and that they were authentic, they should have
10:40:22 18 shown them to witnesses and they should have cited sections
10:40:26 19 within those witness statements to support the documents on
10:40:29 20 which they have relied.

10:40:31 21 [10:40 a.m.]

10:40:32 22 Now, the recent Oric judgment at the Yugoslav tribunal clearly
10:40:40 23 spells out the distinction that must be drawn between
10:40:43 24 documents that have been shown to a witness, and commented
10:40:45 25 upon, and those which have just been tendered by the

10:40:49 1 Prosecution without anyone commenting on them. This is
10:40:54 2 paragraph 29 of the Oric judgment of 30 June 2006.

10:41:01 3 [10:41 a.m.]

10:41:01 4 "The Trial Chamber's position is that an exhibit that has been
10:41:06 5 put to a witness and commented upon cannot be treated the same
10:41:11 6 as one which has not been presented to any witness, or on
10:41:17 7 which there is no evidence. Consequently, it dealt with these
10:41:24 8 unused exhibits on a case-by-case basis, considering each time
10:41:29 9 if the Prosecution had met its obligation to prove both their
10:41:34 10 reliability and probative value. The great majority of these
10:41:40 11 documents are not used in this judgment, but when they are
10:41:44 12 used, it is because the Trial Chamber is convinced of their
10:41:48 13 relevance and probative value."

10:41:54 14 Now, even when these documents have been shown to a witness,
10:41:57 15 the witness has very often not been able to confirm the
10:42:00 16 authenticity or the truth of the contents.

10:42:02 17 [10:42 a.m.]

10:42:03 18 Now, I would just like to quote a section from the witness
10:42:07 19 statement <#DRC-OTP-0105-0085#>. Now, I passed around a part
10:42:23 20 of this statement earlier today -- I think I'll do the same
10:42:25 21 for this because, once again, it's a confidential statement.

10:42:34 22 [Document handed to the Court]

10:42:34 23 [10:42 a.m.]

10:43:01 24 MR ROBERTS: At paragraph 166 the witness states [in French]:

10:43:11 25 "I note that I have been presented with a document bearing the

10:43:15 1 reference number <#DRC-00037-264 to 265 entitled 'Official
10:43:41 2 Declaration'" -- that is, official declaration. I shall not
10:43:44 3 read out the number -- "and dated 14 September 2002" and
10:43:47 4 signed "Thomas Lubanga." "I have been given the opportunity
10:43:52 5 to read the document and am prepared to comment on it. I had
10:44:01 6 never seen the document before. I am not in a position to say
10:44:08 7 whether the signature is truly that of Thomas Lubanga."
10:44:15 8 [10:44 a.m.]
10:44:15 9 Therefore, even on the rare occasions when these witnesses --
10:44:19 10 when these documents are shown to witnesses, they are not able
10:44:23 11 to confirm the authenticity or truth of the contents of the
10:44:27 12 document.
10:44:27 13 [10:44 a.m.]
10:44:34 14 Consequently, as I stated earlier, the obligation and the
10:44:39 15 burden is squarely on the Prosecution to prove the
10:44:42 16 authenticity and reliability and truth of the contents of each
10:44:45 17 of its documents upon which it intends to rely. Those
10:44:50 18 documents which have not been confirmed by anyone else except
10:44:54 19 the Prosecution itself should, I respectfully submit, be
10:44:59 20 accorded substantially less weight by the Pre-Trial Chamber.
10:45:04 21 [10:45 a.m.]
10:45:07 22 Now, the final section of materials that I wish to address is
10:45:11 23 video materials. And I should be finished in five minutes.
10:45:18 24 Now, the Prosecution has made extensive use of video materials
10:45:22 25 in presenting its evidence. The Chamber has already rejected

10:45:27 1 a Defence request to exclude some of these materials, and

10:45:30 2 I won't go into the details of that. But the Defence submits

10:45:34 3 that the same basic principle that applies to the admission of

10:45:38 4 any document equally applies to video materials.

10:45:43 5 [10:45 a.m.]

10:45:43 6 The Prosecution must establish the authenticity and provenance

10:45:47 7 of the recording. Now, again, the Prosecution has failed to

10:45:53 8 meet this obligation. Out of the 18 videos that were included

10:45:57 9 within the Prosecution list of amended evidence, no source has

10:46:01 10 been provided for 10 of them.

10:46:05 11 [10:46 a.m.]

10:46:06 12 Now, in relation to several of these videos, there are no

10:46:08 13 dates on when the acts contained within the videos actually

10:46:13 14 occurred, where they occurred, or indeed the names of the

10:46:18 15 people being interviewed.

10:46:21 16 [10:46 a.m.]

10:46:21 17 Now, in a situation such as where we find ourselves here at

10:46:27 18 the ICC, where the majority of the evidence is entirely in the

10:46:31 19 possession and control of the OTP, and where the possibility

10:46:36 20 of executing Defence missions into the field to independently

10:46:40 21 investigate where videos came from, their authenticity,

10:46:45 22 reliability, the Defence is largely completely dependent on

10:46:49 23 the OTP fulfilling its duty to investigate, and therefore

10:46:55 24 provide incriminating and exculpatory evidence equally.

10:46:59 25 [10:46 a.m.]

10:46:59 1 The Defence has no other option than to request material on
10:47:03 2 the provenance of video materials or documents from the
10:47:08 3 Prosecution and hope they comply.
10:47:13 4 [10:47 a.m.]
10:47:13 5 Now, in relation to one specific video, that the Defence
10:47:19 6 requested information on the chain of custody, the Prosecution
10:47:22 7 stated in a letter of 7 November 2006 that:
10:47:27 8 "For reasons of witness security, the Prosecution cannot
10:47:30 9 provide identity" -- sorry, "cannot provide information on the
10:47:33 10 identity of the person who taped the video. So, consequently,
10:47:40 11 the redactions about which I spoke earlier affect not only the
10:47:43 12 documents themselves, but also the provenance of these videos.
10:47:50 13 Now, as the Chamber is aware, this video was played at length
10:47:53 14 by the Prosecution during its opening submissions. The
10:47:56 15 evidence number sorry is <#EVD-OTP-00067#> and the ERN is
10:48:06 16 <#DRC-OTP-0120-0293#>. It's not necessary to play the video,
10:48:16 17 but the point I'm making is that the Chamber -- for the
10:48:21 18 Chamber to be denied access to the source of this video must
10:48:25 19 consequently mean that the weight accorded to it must be
10:48:28 20 significantly diminished.
10:48:30 21 [10:48 a.m.]
10:48:35 22 Mr President, your Honours, the rest of the Defence team will
10:48:38 23 enter into the factual specific details of each document, or
10:48:43 24 each document or video that the Prosecution has produced which
10:48:48 25 we have time and resources to deal with -- to -- to address.

10:48:54 1 [10:48 a.m.]

10:48:55 2 Now, later on today you'll be hearing submissions on the
10:48:58 3 content of the statements provided by the six witnesses that
10:49:01 4 I spoke of earlier.

10:49:04 5 [10:49 a.m.]

10:49:05 6 Now, the Defence wishes purely to make clear that other
10:49:08 7 elements that I have spent the last hour discussing, such as
10:49:11 8 the form of the evidence, the procedure by which it was
10:49:14 9 obtained, the chain of custody, and indeed the type of
10:49:19 10 document relied upon by the Prosecution are all equally
10:49:23 11 important in establishing whether the evidence produced by the
10:49:25 12 Prosecution reaches the standard requires -- required by the
10:49:31 13 Statute for the indictment to be confirmed.

10:49:34 14 [10:49 a.m.]

10:49:35 15 The Defence simply requests that the honourable Chamber bear
10:49:39 16 all these factors in mind when assessing each piece of
10:49:42 17 evidence tendered by the Prosecution and verify whether the
10:49:48 18 Prosecution has satisfied its burden of proving the
10:49:51 19 authenticity and reliability of each of these documents. If
10:49:56 20 it has not, then clearly it's not met its obligation to adduce
10:50:02 21 sufficient evidence to establish substantial grounds to
10:50:04 22 believe that Mr Lubanga committed the crimes for which he is
10:50:10 23 charged.

10:50:12 24 [10:50 a.m.]

10:50:12 25 Your Honours, here ends my submissions for this morning.

10:50:15 1 I would simply request that for the discussion of the six
10:50:19 2 witnesses we have a closed session, which will -- I imagine
10:50:25 3 there's no objection from the Prosecution obviously -- which
10:50:27 4 hopefully would take place, to minimise the time spent
10:50:31 5 changing over tapes, straight after this break.
10:50:36 6 PRESIDING JUDGE JORDA (interpretation): Very good. I think
10:50:44 7 you've been an excellent Presiding Judge. It is indeed time
10:50:47 8 for the break, so I suggest that we take our 30-minute break
10:50:53 9 and this will allow the interpreters to take a break, because
10:50:56 10 they have been speaking at top speed. So we shall resume at
10:51:02 11 11.20 and then in closed session of course, as requested, and
10:51:09 12 the Prosecutor has accepted. Very good.
10:51:12 13 THE USHER: All rise.
10:51:12 14 [10:51 a.m.]
10:51:17 15 [Short adjournment to enable proceedings to continue in closed
10:51:17 16 session]

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