

1 INTERNATIONAL CRIMINAL COURT
2 SITUATION DEMOCRATIC REPUBLIC OF CONGO
3 Case No: ICC-01/04-01/06
4
5 Transcription No: ICC-01/04-01/06-T-47-EN
6
7 Tuesday, 28 November 2006 at 9.35 a.m.
8
9 OPEN SESSION
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11 Before: His Honour Judge Claude Jorda (Presiding Judge)
12 Her Honour Judge Sylvia Steiner
13 Her Honour Judge Akua Kuenyehia
14
15 PRE-TRIAL CHAMBER I
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1 [9.35 a.m.] ICC-01-04-01-06-T-47-EN

09:35:52 2 OPEN SESSION

09:35:52 3 THE USHER: All rise. The International Criminal Court is now

09:36:13 4 in session.

09:36:18 5 PRESIDING JUDGE JORDA (interpretation): The Court is in

09:36:19 6 session. Please be seated, and please bring in Mr Thomas

09:36:23 7 Lubanga Dyilo.

09:36:23 8 [9:36 a.m.]

09:36:24 9 [Mr Thomas Lubanga Dyilo entered the courtroom]

09:36:44 10 PRESIDING JUDGE JORDA (interpretation): Mr Dyilo, please be

09:36:47 11 seated. I would like to welcome the public, the audience in

09:36:52 12 the public gallery, and I would just like to deal with a

09:36:58 13 number of matters.

09:36:59 14 [9:36 a.m.]

09:37:01 15 Mr Withopf, I'd like to welcome you and your team. Before

09:37:05 16 handing the floor over to you for your closing statement, I

09:37:07 17 would just like to remind you that at the hearing of Friday,

09:37:10 18 24 November, we spoke of 33 documents which were covered by

09:37:16 19 Article 54(3)(e), and you were to give us an answer regarding

09:37:28 20 those 33 documents. And, in fact, my question is whether your

09:37:33 21 informers are going to give their authorisation for the

09:37:36 22 utilisation of those documents before 4 December.

09:37:40 23 I would remind you that you have a written brief to lodge by

09:37:44 24 4 December, and the Defence by 6 November [sic]. So could you

09:37:47 25 report on the current state of affairs, or perhaps you'd like

09:37:51 1 to wait and give us the answer in a moment.

09:37:56 2 MR WITHOPF: Good morning, Mr President; good morning, your
09:37:59 3 Honours. I can provide you with an answer. The answer may
09:38:03 4 not be entirely satisfactory. We have reviewed the status,
09:38:10 5 and the status is as follows, that the information providers
09:38:14 6 have not yet responded to our various requests. However, we
09:38:19 7 will remind them, and we will remind them certainly prior to
09:38:23 8 the 4th or prior to 6 December -- 6 December being of more
09:38:28 9 importance for the Defence, obviously.

09:38:35 10 PRESIDING JUDGE JORDA (interpretation): Yes, Mr Flamme.

09:38:42 11 ME FLAMME (interpretation): Yes, Mr President, I would like
09:38:43 12 to remind the Court that there was another question which was
09:38:46 13 put to the Prosecutor and which has remained unanswered, to my
09:38:50 14 knowledge, to date; that is to say, as regards the broadcasts
09:38:54 15 by Radio Candip. We asked the Prosecutor to provide us with
09:39:01 16 the transcripts which would prove that anti-ethnic language
09:39:06 17 had been used.

09:39:08 18 PRESIDING JUDGE JORDA (interpretation): We shall return to
09:39:09 19 that matter. As regards the documents, Mr Withopf, we would
09:39:12 20 like to have an answer one way or the other before the 4th --
09:39:15 21 that's in your interest if you want to make use of them in
09:39:20 22 your written brief. If they are available between the 4th and
09:39:23 23 the 6th, the Defence should use them also, so to ensure a
09:39:27 24 certain equality it's important that the informers give their
09:39:31 25 answer as soon as possible.

09:39:32 1 [9:39 a.m.]

09:39:33 2 As regards Radio Candip, indeed that was a second question

09:39:38 3 which was put to you through the Court, in fact -- the Court

09:39:42 4 asked you to provide that further detail. Are you in a

09:39:45 5 position to do so, or would you like to deal with the matter

09:39:48 6 in a non-public forum? In any case, you need to provide an

09:39:53 7 answer to that question.

09:39:54 8 MR WITHOPF: Mr President, your Honours, I can provide an

09:39:59 9 initial answer to the question and the initial answer is as

09:40:01 10 follows: the Prosecution at this stage is not in a position to

09:40:05 11 provide respective transcripts of such broadcasting.

09:40:16 12 PRESIDING JUDGE JORDA (interpretation): Well, in those

09:40:16 13 circumstances I think that we need go no further. The Defence

09:40:20 14 takes note that you are not in a position -- I won't say you

09:40:25 15 are not able to; I will say you are not in a position to --

09:40:29 16 I think that's a more objective term to use -- you are not in

09:40:32 17 a position to provide the transcript from Radio Candip which

09:40:37 18 was requested.

09:40:38 19 It is now 9.40, and you have one hour, and I'd just like to

09:40:43 20 remind the audience that the Prosecutor has one hour to make

09:40:47 21 his closing statement. He spent 30 minutes on his closing

09:40:52 22 statement yesterday, he has one hour left, so, Mr Withopf,

09:40:56 23 please take the floor.

09:40:59 24 [9:40 a.m.]

09:41:00 25 MR WITHOPF: Thank you, Mr President, and your Honours.

09:41:05 1 Mr President, your Honours, in reaching the end of this
09:41:09 2 confirmation hearing the Prosecution recalls the last sentence
09:41:14 3 of its opening statement, which reads as follows: "In
09:41:21 4 conclusion, Mr President, your Honours, the Prosecution's
09:41:24 5 evidence will establish substantial grounds to believe that
09:41:29 6 Thomas Lubanga Dyilo committed the crimes he's charged with."
09:41:36 7 Mr President, your Honours, in our view, we have succeeded in
09:41:40 8 doing so, and I will detail the reasons why.
09:41:44 9 [9:41 a.m.]
09:41:46 10 Prior to doing so, however, Mr President, your Honours, we
09:41:50 11 believe that it is necessary, in particular -- in particular,
09:41:56 12 in light of a number of Defence submissions, to go back to the
09:42:00 13 beginning of this hearing in order to recall, Mr President,
09:42:05 14 your Honours, what this hearing is about.
09:42:07 15 [9:42 a.m.]
09:42:10 16 I quote from the transcript of the first day of the hearing,
09:42:15 17 where you, Mr President, for the benefit to the participants
09:42:21 18 to the hearing and for the benefit of the public, where you
09:42:25 19 have outlined the following, and I quote: "I would now like to
09:42:32 20 bring up a certain number of points which, just by way of
09:42:36 21 introduction to this hearing, so that everything is very clear
09:42:40 22 between the participants in this hearing and, of course, the
09:42:43 23 public also will be able to understand what is at stake in
09:42:49 24 this confirmation hearing, which I would remind everyone"
09:42:56 25 -- and now comes the important part, Mr President, your

09:42:59 1 Honours -- "it is not a trial, and it is not 'the trial'
09:43:05 2 either."
09:43:07 3 Mr President, your Honours, this observation is important, and
09:43:14 4 this observation is crucially important because it
09:43:18 5 describes -- and I add it describes very accurately -- the
09:43:22 6 framework of this hearing. It is the confirmation hearing,
09:43:29 7 and I add "only" -- it is only the confirmation hearing; it is
09:43:34 8 not the trial and is not a mini-trial either.
09:43:39 9 [9:43 a.m.]
09:43:41 10 The purpose of this confirmation hearing, Mr President, your
09:43:44 11 Honours -- the limited purpose of this confirmation hearing --
09:43:47 12 is to enable the Pre-Trial Chamber -- and I quote the law,
09:43:52 13 Article 61(7) -- is to enable the Pre-Trial Chamber "on the
09:43:58 14 basis of the hearing, determine whether there is sufficient
09:44:02 15 evidence to establish substantial grounds to believe that the
09:44:05 16 person" -- and obviously in the instant case the person is
09:44:10 17 Mr Thomas Lubanga Dyilo -- "committed each of the crimes
09:44:13 18 charged."
09:44:14 19 [9:44 a.m.]
09:44:17 20 The honourable judges of the Pre-Trial Chamber have expressed
09:44:21 21 this view a number of times and early on in the proceedings,
09:44:25 22 and I refer to the decisions of 15 May and 19 May 2006, and
09:44:31 23 there are others, in which the Bench repeatedly emphasised,
09:44:38 24 and I quote, "the limited scope of the confirmation hearing".
09:44:38 25 [9:44 a.m.]

09:44:45 1 Mr President, your Honours, in the Prosecution's submission it
09:44:48 2 is necessary to recall this framework, because the Defence has
09:44:53 3 repeatedly called for the application of trial standards.
09:44:58 4 I recall the many ad hoc tribunals trial chambers' decisions
09:45:02 5 the Defence has referenced to in this confirmation hearing.
09:45:05 6 [9:45 a.m.]
09:45:08 7 And in this context, Mr President, your Honours, and, in
09:45:12 8 particular, the Defence has put forward a definition of
09:45:16 9 "substantial grounds" that, in the Prosecution's view, is not
09:45:20 10 supported by the applicable law.
09:45:23 11 [9:45 a.m.]
09:45:26 12 I quote from the Defence submission of 22 November 2006 where
09:45:31 13 the Defence referred to the "substantial grounds" standard and
09:45:36 14 stated that, and I quote: "The Pre-Trial Chamber should
09:45:40 15 consider this standard as being that if this case goes to
09:45:44 16 trial on this evidence, a Chamber -- a future Trial Chamber --
09:45:49 17 could convict, taking into account the objections to
09:45:52 18 credibility, authenticity and the Defence evidence that was
09:45:58 19 produced during the hearing."
09:46:02 20 Mr President, your Honours, end of the quote.
09:46:04 21 [9:46 a.m.]
09:46:06 22 And the Defence went on -- went on to define "substantial
09:46:10 23 grounds" as follows: "only if it" -- and reference was made to
09:46:17 24 the Pre-Trial Chamber -- "only if it is confident that a
09:46:20 25 future Chamber" -- obviously meaning a future Trial Chamber

09:46:25 1 -- "only if it is confident that a future Trial Chamber, if
09:46:28 2 presented with the evidence, could convict".

09:46:34 3 Mr President, your Honours, the introductory remark of the
09:46:37 4 Defence, combined with its definition of "substantial
09:46:42 5 grounds", suggests a standard that is almost identical to --
09:46:49 6 it indeed is the standard of conviction "beyond reasonable
09:46:54 7 doubt", the standard that is applicable only at the end, and
09:46:58 8 at the end of a trial.

09:46:59 9 [9:46 a.m.]

09:47:01 10 And we are not at the end of a trial; we are at the end of a
09:47:05 11 confirmation hearing. The basic distinction between a
09:47:11 12 confirmation hearing -- as repeatedly emphasised by the
09:47:14 13 Pre-Trial Chamber -- and a trial, however, that basic
09:47:19 14 distinction logically calls for different standards of proof.
09:47:24 15 Thus, the Prosecution opposes the Defence's definition, and
09:47:29 16 emphasises that it is not the Pre-Trial Chamber but the future
09:47:34 17 Trial Chamber, in the event the charges are confirmed, that
09:47:40 18 must be satisfied beyond reasonable doubt that the accused
09:47:43 19 person is guilty after all evidence has been presented at
09:47:48 20 trial.

09:47:48 21 [9:47 a.m.]

09:47:53 22 In our view, Mr President, your Honours, this is an important
09:47:56 23 distinction to be made, and it has serious implications, as
09:48:00 24 the Prosecution will show, and this distinction, Mr President,
09:48:04 25 your Honours, naturally relates to the probative value of the

09:48:09 1 Prosecution's evidence.

09:48:09 2 [9:48 a.m.]

09:48:13 3 The Defence has tried -- and I refer to the Defence's
09:48:18 4 submission on 22 November 2006, and I hasten to add, has
09:48:23 5 unsuccessfully tried -- to challenge the probative value of
09:48:27 6 the Prosecution's evidence. The Defence has tried to split it
09:48:34 7 into groups of evidence -- groups of evidence such as "live
09:48:39 8 witnesses"; "redacted witness statements"; "summaries of
09:48:46 9 witness statements"; "documents"; "video materials"; and other
09:48:50 10 evidentiary materials.

09:48:52 11 [9:48 a.m.]

09:48:56 12 The Prosecution submits, Mr President, your Honours, that such
09:48:59 13 an approach -- the approach taken by the Defence -- disregards
09:49:03 14 two fundamental principles in the evaluation of the evidence,
09:49:12 15 and I'm going to explain why.

09:49:13 16 [9:49 a.m.]

09:49:14 17 First, Mr President, your Honours, Article 61(5) explicitly --
09:49:21 18 and I repeat explicitly -- provides for the Prosecution to
09:49:25 19 rely on documentary and summary evidence, and furthermore
09:49:30 20 states that the Prosecution does not need to call the
09:49:34 21 witnesses to testify at trial.

09:49:37 22 [9:49 a.m.]

09:49:41 23 Second, Mr President, your Honours, the basis for the
09:49:46 24 evaluation of the evidence to determine whether there are
09:49:49 25 substantial grounds or not -- that basis is the totality of

09:49:56 1 the evidence, the complete universe of the evidence -- and, I
09:50:00 2 repeat, the complete universe of the evidence -- and not, as
09:50:03 3 the Defence suggest, the individualised pieces of evidence.
09:50:10 4 [9:50 a.m.]
09:50:11 5 Mr President, your Honours, whilst this is true for the trial,
09:50:16 6 this observation is even more applicable to the confirmation
09:50:21 7 hearing, taking into account the clear guidance given in
09:50:25 8 Article 61(5).
09:50:29 9 [9:50 a.m.]
09:50:29 10 The Prosecution has shown -- and the Prosecution will continue
09:50:33 11 to do so today -- the Prosecution has shown repeatedly the
09:50:40 12 interlink between the various pieces of its evidence which
09:50:45 13 corroborate each other, and thus add to the evidentiary value
09:50:49 14 of the pieces of evidence considered individually.
09:50:52 15 [9:50 a.m.]
09:50:57 16 Mr President, your Honours, this is the framework for the
09:51:04 17 evaluation of the evidence, and against this background the
09:51:09 18 Prosecution will now elaborate why, in its view -- why it has
09:51:17 19 established substantial grounds to believe that Thomas Lubanga
09:51:20 20 Dyilo has indeed committed the crimes he's charged with.
09:51:24 21 [9:51 a.m.]
09:51:28 22 In doing so, we will focus on the core areas of the case, on
09:51:35 23 the heart of the case, appreciating that the Defence, whilst
09:51:41 24 challenging many elements -- many elements of the document
09:51:46 25 containing the charges, has simultaneously -- or appears to

09:51:50 1 have simultaneously accepted others.

09:51:53 2 [9:51 a.m.]

09:51:56 3 Amongst the aspects the Defence has accepted are the portions

09:52:00 4 on the background of Thomas Lubanga Dyilo and the fact that

09:52:04 5 the crimes Thomas Lubanga Dyilo is charged with occurred in

09:52:07 6 the context of an armed conflict not of an international

09:52:12 7 character.

09:52:13 8 [9:52 a.m.]

09:52:16 9 Accordingly, Mr President, your Honours, I will keep this

09:52:19 10 portion of the Prosecution's submissions relatively short, and

09:52:25 11 I will spend more time -- significantly more time on the

09:52:28 12 aspects which are firmly disputed by the Defence, such as the

09:52:35 13 role Thomas Lubanga Dyilo played in the UPC and in the FPLC,

09:52:41 14 the recruitment policy and recruitment efforts of the UPC and

09:52:45 15 the FPLC and, of course, Mr President, your Honours, and most

09:52:52 16 importantly, on the role -- on the own role Thomas Lubanga

09:52:57 17 Dyilo played as co-perpetrator in the recruitment and in the

09:53:02 18 use of children.

09:53:02 19 [9:53 a.m.]

09:53:09 20 To start with the background of Thomas Lubanga Dyilo, Thomas

09:53:15 21 Lubanga Dyilo's personal details are proven by his own

09:53:18 22 statements in the context of the instant proceedings. In

09:53:24 23 addition, his curriculum vitae reveals literally -- literally

09:53:28 24 all details that are contained in the Prosecution's document

09:53:32 25 containing the charges, including all relevant details in

09:53:38 1 respect of his political career. The curriculum vitae, the
09:53:46 2 CV, is signed by Thomas Lubanga Dyilo himself, and the content
09:53:51 3 of the CV is corroborated by additional evidence, which I
09:53:57 4 believe I do not need to recall in every detail.
09:53:59 5 [9:53 a.m.]
09:54:02 6 Hence, against this background, the Defence did not even make
09:54:06 7 an effort to try to challenge the Prosecution's factual
09:54:10 8 submissions.
09:54:11 9 [9:54 a.m.]
09:54:16 10 In our view, Mr President, your Honours -- in our view the
09:54:19 11 very same observation applies to the Prosecution's statement
09:54:23 12 that during the time period relevant to the document
09:54:27 13 containing the charges, there was a conflict, and there was an
09:54:32 14 armed conflict in Ituri. The Defence has not disputed the
09:54:40 15 Prosecution's respective statement. To the contrary, it has
09:54:46 16 reinforced it, emphasising the aspect of self-defence -- and
09:54:53 17 I add alleged self-defence -- by tendering evidence that, from
09:54:59 18 the UPC's point of view, confirms the Prosecution's statement.
09:55:07 19 There is indeed no reason for doubt.
09:55:11 20 Both the United Nation's Secretary-General reports and
09:55:16 21 Security Council Resolutions, and the documents -- and, most
09:55:20 22 importantly, the documents emanating from the parties to the
09:55:23 23 conflict -- to the armed conflict tendered into evidence by
09:55:27 24 the Prosecution and the Defence provide sufficient evidence of
09:55:33 25 the existence of an armed conflict in Ituri between July 2002

09:55:37 1 and the end of the year 2003.

09:55:41 2 [9:55 a.m.]

09:55:44 3 Mr President, your Honours, in the interests of brevity,

09:55:49 4 I quote only the most important portions from the UN reports

09:55:54 5 and Resolutions as follows. In October 2002, the

09:56:02 6 UN Secretary-General made reference to the fact that "there

09:56:06 7 have been ethnic clashes since June", "intense fighting", and

09:56:12 8 "displacement of population".

09:56:14 9 [9:56 a.m.]

09:56:15 10 In February 2003, the UN Secretary-General described the

09:56:20 11 situation in Ituri as "characterised by widespread insecurity"

09:56:26 12 and "massive displacement", and referred to "almost continuous

09:56:34 13 fighting".

09:56:35 14 In late May 2003, the UN Security Council took measures under

09:56:41 15 Chapter VII of the UN Charter, in determining -- and this is a

09:56:47 16 quote -- "that the situation in the Ituri region and in Bunia

09:56:51 17 in particular constitutes a threat to the peace process in the

09:56:56 18 DRC".

09:57:00 19 The UN Security Council repeated these statements two months

09:57:05 20 later -- only two months later, in July 2003, by expressing

09:57:10 21 its deep concern in respect of, and I quote "the continuation

09:57:16 22 of hostilities in the eastern part of the DRC", making

09:57:20 23 reference, inter alia, to Ituri.

09:57:26 24 [9:57 a.m.]

09:57:27 25 In mid November 2003 the Secretary-General described the

09:57:31 1 situation in Ituri as being characterised by "killings, forced
09:57:38 2 disappearances, mutilations, rape, and systematic looting and
09:57:43 3 destruction of property".

09:57:48 4 This situation, Mr President, your Honours -- this situation
09:57:52 5 did not change in 2003. In March 2004 the Secretary-General
09:57:59 6 concluded that "volatility in Ituri has increased", meaning
09:58:04 7 that the armed conflict in Ituri until the end of 2003 -- that
09:58:14 8 it continued up until the end of 2003.

09:58:16 9 [9:58 a.m.]

09:58:20 10 As I mentioned earlier on, all these observations are
09:58:23 11 confirmed, and they are elaborated upon in great detail, and
09:58:29 12 the Prosecution has drawn the attention of the Pre-Trial
09:58:33 13 Chamber to these details in the MONUC "Special Report on the
09:58:38 14 Events in Ituri, January 2002 to December 2003". This report
09:58:45 15 leaves no doubt that there was an armed conflict in Ituri
09:58:48 16 during the relevant period of time.

09:58:49 17 [9:58 a.m.]

09:58:54 18 As the Prosecution has shown by tendering into evidence --
09:58:58 19 and, I add, as the most pertinent examples only -- as the
09:59:02 20 Prosecution has shown, not only the international community
09:59:05 21 came to the conclusion that there was an armed conflict in
09:59:10 22 Ituri during the relevant time period, but also the actors in
09:59:15 23 Ituri themselves had a clear understanding of this conflict
09:59:18 24 being an armed conflict.

09:59:19 25 [9:59 a.m.]

09:59:21 1 Thomas Lubanga Dyilo himself, in August 2002, described the
09:59:25 2 situation as, and I quote "un cycle infernal de violence",
09:59:34 3 demanding, in the same press release from which I am quoting,
09:59:38 4 the Iturian population, quote [in French]: "to stop the
09:59:42 5 massacres and all acts of destruction", a position he
09:59:46 6 reinforced by signing the Kampala Understanding between RCD-ML
09:59:51 7 and UPC, together with his counterpart, on 15 November 2002,
09:59:56 8 agreeing to, and I quote "cease all hostilities at all fronts
10:00:01 9 in Ituri" and "to promote pacification in Ituri" by ceasing,
10:00:07 10 and I quote again, "all military and political activities in
10:00:11 11 Ituri which may affect the pacification process".
10:00:16 12 Thomas Lubanga Dyilo himself made numerous references to the
10:00:20 13 armed conflict, summarising that the situation in the
10:00:26 14 north-eastern part of the DRC -- obviously meaning Ituri --
10:00:30 15 was characterised for four years, and I quote [in French]:
10:00:34 16 "by a rebellion and an ethnic war which -- of the most
10:00:48 17 atrocious and most inhuman kind".
10:00:48 18 Thomas Lubanga Dyilo, consistent with that statement in a
10:00:50 19 political declaration of 18 August 2003, repeated his
10:00:56 20 observation and he described the situation in Ituri -- and
10:01:01 21 I add, rightly -- in using the words "atrocities
10:01:10 22 indescriptibles", a situation which made him and his
10:01:13 23 counterparts from, inter alia, the FNI and the FRPI, in
10:01:19 24 mid-May 2004 sign the Acte d'Engagement de Kinshasa which, as
10:01:25 25 the signatories to this Acte d'Engagement emphasised, was

10:01:29 1 aiming, and I quote "at the pacification of Ituri".

10:01:36 2 [10:01 a.m.]

10:01:36 3 As a result of this evidence the Prosecution has tendered,

10:01:41 4 there's no doubt -- there's not the slightest doubt,

10:01:45 5 Mr President, your Honours, that Thomas Lubanga Dyilo was

10:01:48 6 aware of the existence of an armed conflict in Ituri.

10:01:51 7 [10:01 a.m.]

10:01:56 8 The Defence, Mr President, your Honours, appears not to take

10:02:01 9 issue with the characterisation of the armed conflict being

10:02:05 10 not of an international character. The Prosecution therefore

10:02:10 11 refers to its filing of 28 August 2006, and the Prosecution

10:02:17 12 adds that it maintains its view that the support -- the

10:02:24 13 significant support by both Uganda and Rwanda given to the UPC

10:02:29 14 and the FPLC in the form of weapons, ammunition, uniforms and

10:02:36 15 training, is not sufficient to establish that the involvement

10:02:41 16 of Uganda and/or Rwanda meets the criteria of the overall

10:02:48 17 control test as it was established by the ICTY's Tadic Appeals

10:02:55 18 Chamber decision of 15 July 1999.

10:02:57 19 [10:02 a.m.]

10:03:04 20 Mr President, your Honours, whilst the Prosecution's

10:03:08 21 statements in respect of the existence of an armed conflict

10:03:11 22 and Thomas Lubanga Dyilo's awareness of it appear to have been

10:03:16 23 accepted by the Defence, the Defence, whilst acknowledging

10:03:21 24 that Thomas Lubanga Dyilo was the President of the UPC, has

10:03:28 25 heavily -- has firmly disputed the role Thomas Lubanga Dyilo

10:03:33 1 played de facto in the UPC.

10:03:36 2 [10:03 a.m.]

10:03:38 3 The Defence tried, very interestingly mainly by bald
10:03:44 4 assertions to that effect by members of the Defence team
10:03:47 5 themselves -- and, Mr President, your Honours, I refer to my
10:03:52 6 yesterday's submissions addressing this issue -- the Defence
10:03:56 7 tried to portray the UPC as a multi-ethnic and as a democratic
10:04:03 8 organisation, which it was not -- and I add, by no means.

10:04:11 9 [10:04 a.m.]

10:04:14 10 Mr President, your Honours, the Prosecution has shown that
10:04:16 11 Thomas Lubanga Dyilo was not only -- and not only on paper the
10:04:22 12 UPC's leader. Thomas Lubanga Dyilo was the directing mind
10:04:29 13 exercising complete and exclusive control, operating in full
10:04:34 14 knowledge of all UPC activities, irrespective of them being
10:04:39 15 large or small.

10:04:40 16 [10:04 a.m.]

10:04:43 17 And the Prosecution has shown that the UPC was -- and it was
10:04:51 18 from its beginning -- a political military movement, a fact
10:04:55 19 that was heavily and surprisingly disputed by the Defence.

10:04:59 20 [10:04 a.m.]

10:05:02 21 In respect of Thomas Lubanga Dyilo's de facto power in the
10:05:07 22 UPC, the Prosecution recalls the statements of a series of
10:05:11 23 witnesses corroborating each other.

10:05:14 24 [10:05 a.m.]

10:05:18 25 The statement of witness 26 describes in clear terms -- in

10:05:23 1 very clear terms, and not leaving any room for
10:05:27 2 interpretation -- that Thomas Lubanga Dyilo had the last word,
10:05:31 3 and I quote from the statement [in French]: "but Lubanga had
10:05:38 4 the last word".
10:05:39 5 The same witness confirmed that there was no important
10:05:42 6 decision that could be taken by the UPC without
10:05:46 7 Thomas Lubanga Dyilo. The other organs in the UPC, they were
10:05:53 8 degraded and used as mere executioners of
10:05:58 9 Thomas Lubanga Dyilo's decisions.
10:05:59 10 [10:05 a.m.]
10:06:02 11 This observation is confirmed by the statement of witness 40.
10:06:07 12 The witness comes to the same conclusion using the following
10:06:11 13 language [in French]: "At the end of the day the final
10:06:17 14 decision on all matters fell to President Lubanga."
10:06:23 15 Not surprisingly, further witnesses provide very similar
10:06:27 16 evidence. I limit myself to one additional witness, namely to
10:06:31 17 witness 25, who stated, and who stated in clear language, as
10:06:36 18 the other witnesses I quoted, the following [in French]:
10:06:43 19 "There is no doubt in my mind but that Thomas Lubanga was in
10:06:48 20 control of the Council of Ministers and the UPC movement."
10:06:55 21 Furthermore, witness 21 states that nobody -- nobody could do
10:07:01 22 anything without Thomas Lubanga Dyilo's approval.
10:07:03 23 [10:07 a.m.]
10:07:06 24 And finally, Mr President, your Honours, the witness Peduto,
10:07:11 25 in responding to the question regarding who had the power in

10:07:14 1 Bunia in early September 2002 -- the witness Peduto summarised
10:07:22 2 the reality in one line, in one single line, and I quote from
10:07:26 3 her testimony as follows: "The UPC was in charge in Bunia.
10:07:36 4 Mr Lubanga."
10:07:37 5 The meaning of the witness Peduto's statement is clear. The
10:07:41 6 UPC, Mr President, your Honours -- the UPC was
10:07:46 7 Thomas Lubanga Dyilo and Thomas Lubanga Dyilo was the UPC.
10:07:52 8 And this fact -- this fact is further confirmed by video
10:07:57 9 footage presented by the Prosecution, and I refer to the video
10:08:01 10 <#EVD-OTP-58#> [sic], when the interviewee, asked by the
10:08:09 11 journalist what would happen to the UPC if Thomas Lubanga
10:08:13 12 Dyilo would leave Ituri and abandon the UPC, when the
10:08:16 13 interviewee answered, and I quote: "It would finish" -- the
10:08:26 14 UPC would finish.
10:08:27 15 [10:08 a.m.]
10:08:28 16 Here I add, in making reference to my earlier submission
10:08:31 17 today, that this is a perfect example of the Prosecution's
10:08:34 18 observation that only by considering the totality of the
10:08:37 19 Prosecution's evidence can the honourable judges fully assess
10:08:42 20 the important corroborating and interlinking facts from
10:08:47 21 documents, written statements of witnesses, live testimony
10:08:52 22 and, in this case, video footage, that provide the full
10:08:57 23 picture and allow an appropriate assessment of the evidence.
10:08:59 24 [10:08 a.m.]
10:09:03 25 In light of these clear statements made by various witnesses

10:09:09 1 independently from one another, the Prosecution is not
10:09:12 2 surprised -- not surprised at all that the Defence, in the
10:09:17 3 course of the court session of 23 November 2006 -- and I refer
10:09:23 4 to page 74 of the transcript -- that the Defence made the
10:09:26 5 following statement, and I quote from the transcript:
10:09:32 6 "In his political powers, Lubanga -- with his political powers
10:09:36 7 Lubanga regularly controlled that his instructions were
10:09:41 8 executed and applied."
10:09:46 9 Whilst the Prosecution realises that this statement was made
10:09:49 10 in respect of instructions to ban -- and I add allegedly
10:09:54 11 ban -- the enlistment of children under 18 years, the
10:09:58 12 Prosecution emphasises that this statement accurately -- very
10:10:03 13 accurately captures the reality, namely, that Thomas Lubanga
10:10:08 14 Dyilo was in power -- in power of the UPC and, as we will
10:10:14 15 show, in power of the FPLC and at all times relevant to the
10:10:20 16 Prosecution's charging document.
10:10:21 17 [10:10 a.m.]
10:10:25 18 The Prosecution is surprised, however, that the Defence tried
10:10:29 19 to negate the fact that the UPC was, from its beginning, an
10:10:34 20 organisation with a military component. I deliberately say
10:10:40 21 "surprised". I deliberately do so, because the UPC's own
10:10:44 22 documents reveal that the UPC was created in mid-September
10:10:51 23 2000 as, and I quote, "political-military movement".
10:10:57 24 [10:10 a.m.]
10:10:57 25 The Prosecution tendered into evidence the aide-memoire of

10:11:00 1 22 October 2002, on official UPC letterhead, and signed by the
10:11:07 2 UPC National Secretary for Foreign Affairs. Here, the UPC
10:11:15 3 states that it was founded, and I quote, as a
10:11:19 4 "political-military movement", and due to its clarity of this
10:11:23 5 statement, in respect of additional aspects for the
10:11:27 6 Prosecution's case, I quote it as follows [in French]:
10:11:35 7 "The Union des Patriotes Congolais pour la Reconciliation et
10:11:39 8 la paix, acronym UPC/RP, led by Thomas Lubanga is a political
10:11:49 9 military movement, established on 15 September 2000 in the
10:11:56 10 north-east of the Democratic Republic of the Congo, more
10:12:00 11 specifically in Ituri province, which is currently under its
10:12:06 12 control."
10:12:08 13 This statement, in our view -- this statement, which naturally
10:12:14 14 flows from the wording and the context of the statement --
10:12:17 15 this statement is a contemporaneous reference, essentially
10:12:21 16 meaning that since 15 September 2000 a political-military
10:12:25 17 movement was created.
10:12:31 18 This view is confirmed by another UPC document, and
10:12:35 19 I recall -- and I emphasise -- I refer to this document as
10:12:40 20 another example only -- I recall the UPC declaration of
10:12:44 21 15 May 2003 which describes in clear terms that the UPC was
10:12:51 22 created as a, and I quote again, "political-military
10:12:56 23 movement", and states that it was created as such on
10:12:59 24 15 September 2000.
10:12:59 25 [10:12 a.m.]

10:13:04 1 In light of these clear statements by the UPC, the Prosecution
10:13:08 2 concludes that the paltry attempts by the Defence to tarnish
10:13:14 3 these clear statements have been unsuccessful -- they have
10:13:17 4 been wholly unsuccessful.
10:13:19 5 [10:13 a.m.]
10:13:20 6 Equally unsuccessful were the Defence efforts to disprove the
10:13:24 7 Prosecution's statement that the UPC was an exclusivist Hema
10:13:30 8 organisation, aiming at the control of Ituri and the
10:13:32 9 protection of the Hema interests. Here, I can limit our
10:13:36 10 observations to one statement, the statement made by
10:13:39 11 witness 12, and it does summarise, and it does so in clear
10:13:43 12 terms, the reality -- the reality as echoed by many other
10:13:48 13 witnesses, in outlining the following [in French]:
10:13:56 14 "The UPC is an exclusively Hema movement" --
10:14:00 15 and the witness continues to say [in French]:
10:14:05 16 "The UPC has always been known as a Hema movement."
10:14:10 17 And the witness -- I do not need to go into further detail
10:14:13 18 here, mindful of the time -- the witness made it also very
10:14:17 19 clear that there was a huge difference between what he said,
10:14:23 20 is written on paper -- and he meant the UPC Statute -- and the
10:14:27 21 reality.
10:14:27 22 [10:14 a.m.]
10:14:29 23 Mr President, your Honours, we come closer to the heart of the
10:14:34 24 case, and naturally to the aspects of the case the Defence as
10:14:41 25 firmly -- has heavily disputed.

10:14:44 1 [10:14 a.m.]

10:14:44 2 I start with the role Thomas Lubanga Dyilo played in the FPLC.

10:14:48 3 The Prosecution's submission, Mr President, your Honours --

10:14:54 4 the Prosecution's submission in this context is clear. He was

10:14:59 5 the Commander-in-Chief of the FPLC, both de iure and de facto.

10:15:08 6 And, in the Prosecution's view, the evidence tendered by the

10:15:11 7 Prosecution to support the statement is as clear as the

10:15:14 8 statement itself. Thomas Lubanga Dyilo was the FPLC's

10:15:19 9 Commander-in-Chief, he acted as such, and he was seen as such

10:15:23 10 by his subordinates.

10:15:28 11 Thomas Lubanga Dyilo signed orders to his subordinate

10:15:31 12 commanders as [in French] "Commander-in-Chief of the FPLC". I

10:15:39 13 refer to the 27 January 2003 order to his Chief of the General

10:15:41 14 Staff, Floribert Kisembo.

10:15:43 15 [10:15 a.m.]

10:15:44 16 His subordinate commanders, on the letterheads of the FPLC,

10:15:48 17 addressed Thomas Lubanga Dyilo, and I quote from the

10:15:54 18 21 November 2002 request of Floribert Kisembo, his subordinate

10:15:58 19 commanders addressed him as [in French]: "Commander-in-Chief

10:16:03 20 of the FPLC". And they equally referred to him in military

10:16:08 21 orders to their respective subordinates as [in French]

10:16:13 22 "Commander-in-Chief of the FPLC".

10:16:18 23 I make reference to the 5 June 2003 order of Floribert Kisembo

10:16:22 24 to all FPLC brigade commanders.

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

10:16:28 1 And Thomas Lubanga Dyilo, Mr President, your Honours, he
10:16:32 2 exercised the powers that came with his position as
10:16:35 3 Commander-in-Chief, and he did so, including during the time
10:16:39 4 he was in Kinshasa. And this is a very important point to
10:16:45 5 make. Instructive, in this respect -- very instructive is the
10:16:50 6 8 December 2003 order of Thomas Lubanga Dyilo suspending
10:16:55 7 Floribert Kisembo as Chief of the General Staff, and other
10:16:59 8 high-ranking military officers in the FPLC, and promoting
10:17:04 9 Bosco Ntaganda to the position Floribert Kisembo held
10:17:09 10 previously.
10:17:09 11 [10:17 a.m.]
10:17:10 12 As we know, Mr President, your Honours, this order was
10:17:14 13 implemented, and it was implemented immediately, showing that
10:17:19 14 Thomas Lubanga Dyilo, contrary to the Defence assertion --
10:17:25 15 showing that he, at any given point in time during his absence
10:17:28 16 from Ituri, was able to exercise effective control over the
10:17:32 17 FPLC.
10:17:32 18 [10:17 a.m.]
10:17:38 19 Mr President, your Honours, we heard the Defence submitting
10:17:42 20 that Thomas Lubanga Dyilo did not interfere in military
10:17:46 21 matters. We heard the Defence saying that
10:17:49 22 Thomas Lubanga Dyilo was a politician detached from the
10:17:54 23 battlefields, and we heard the Defence saying that
10:17:56 24 Thomas Lubanga Dyilo did not have military expertise. We
10:18:02 25 heard all of this, and we know that the evidence that the

10:18:06 1 Prosecution tendered paints a different picture -- a very
10:18:09 2 different one, and this, in the Prosecution's submission, is
10:18:12 3 the reality.
10:18:13 4 [10:18 a.m.]
10:18:15 5 Witnesses, and again here I wish to emphasise, Mr President,
10:18:19 6 your Honours, that a number of witnesses independently from
10:18:23 7 one another tell us the truth. Witnesses describe
10:18:28 8 Thomas Lubanga Dyilo's direct and intimate involvement in
10:18:33 9 FPLC military matters covering all aspects -- all military
10:18:39 10 aspects.
10:18:39 11 [10:18 a.m.]
10:18:41 12 Thomas Lubanga Dyilo intervened in the planning of military
10:18:45 13 operations. Thomas Lubanga Dyilo inspected military barracks,
10:18:53 14 and witnesses describe his involvement in the establishment of
10:18:57 15 a battalion, and the same witness also describes his
10:19:05 16 involvement of the military training camp in Mandro -- as we
10:19:12 17 know, a very pertinent training camp in respect of the
10:19:15 18 Prosecution's case.
10:19:15 19 [10:19 a.m.]
10:19:20 20 Witness 4 details the fact that Thomas Lubanga Dyilo was the
10:19:24 21 Commander-in-Chief of a well-structured and controlled army.
10:19:30 22 He describes the chain of command and he states that the chain
10:19:33 23 of command worked, and it worked well.
10:19:38 24 And, finally -- and here I come back to the observation I made
10:19:41 25 earlier on; namely, that the Prosecution's evidence must be

10:19:45 1 seen in its totality, and the various evidentiary materials
10:19:50 2 confirm each other -- and, finally, the Prosecution has shown
10:19:54 3 video-footage, video-footage that clearly -- clearly and
10:19:58 4 without any doubt -- shows Thomas Lubanga Dyilo as a military
10:20:02 5 commander, as the Commander-in-Chief of the FPLC.
10:20:05 6 [10:20 a.m.]
10:20:10 7 Mindful of the time, I'm moving on to the policy and pattern
10:20:14 8 portions of the charging document, and thus to the role
10:20:18 9 Thomas Lubanga Dyilo himself had in the recruitment and the
10:20:22 10 use of children under 15 years.
10:20:23 11 [10:20 a.m.]
10:20:28 12 Thomas Lubanga Dyilo was involved in the recruitment of
10:20:31 13 children from the early stages of the existence of the UPC;
10:20:37 14 that this practice, including the direct involvement of Thomas
10:20:43 15 Lubanga Dyilo in it, continued after the creation of the FPLC
10:20:45 16 throughout the time relevant to the charging document -- that
10:20:50 17 this practice was based on a policy of the UPC and the FPLC to
10:20:54 18 recruit and to use children to participate actively in
10:20:58 19 hostilities, and that both the UPC and the FPLC used a variety
10:21:03 20 of means to transform this policy into practice.
10:21:07 21 [10:21 a.m.]
10:21:09 22 This, Mr President, your Honours -- this is the Prosecution's
10:21:12 23 case and the evidence we have presented has corroborated the
10:21:18 24 Prosecution's case.
10:21:18 25 [10:21 a.m.]

10:21:21 1 The Prosecution will re-emphasise key components of its
10:21:26 2 evidence and will pay particular attention to the related
10:21:29 3 testimony of its "overview witness", Ms Peduto.
10:21:32 4 [10:21 a.m.]
10:21:35 5 We have drawn the attention of the honourable Bench to
10:21:39 6 portions of witness statements showing the presence of
10:21:42 7 children under 15 years in the FPLC as such, and I emphasise
10:21:47 8 -- here I am quoting from select examples only -- there are
10:21:52 9 more; there are many more. I quote [in French]: "There have
10:22:00 10 always been children under the age of 18 in the ranks of the
10:22:05 11 FPLC. The youngest were aged 12 or 13."
10:22:12 12 I refer to witness 0034 and another quote: "A large number of
10:22:18 13 children served as soldiers in the UPC militia. They were
10:22:24 14 called 'kadogo' which, in Swahili, means 'something small'.
10:22:32 15 From what I saw, the youngest of the armed children in Bunia
10:22:36 16 were aged 8."
10:22:39 17 Here I refer to witness 20, and another witness, witness 30,
10:22:41 18 confirmed in his statement that he has seen "kados" between
10:22:46 19 10 and 15 years inside the UPC headquarters.
10:22:50 20 [10:22 a.m.]
10:22:53 21 The Prosecution has presented, Mr President, your Honours,
10:22:56 22 witness statements that explained why the FPLC used children,
10:23:01 23 and this is one of the most shocking aspects of the instant
10:23:04 24 case. A witness, witness 40, explained -- and again we use
10:23:09 25 him as an example only -- he explained that the children were

10:23:13 1 liked by their commanders because they were more prepared to
10:23:18 2 follow orders of their commanders. And we do know,
10:23:21 3 Mr President, your Honours -- we do know that such orders
10:23:25 4 included orders to fight and they included orders to kill, and
10:23:31 5 we also do know that, following their FPLC commanders' orders,
10:23:37 6 children -- and very many children -- were killed, and they
10:23:41 7 were killed in military action.

10:23:42 8 [10:23 a.m.]

10:23:45 9 Witnesses have described, Mr President, your Honours, in great
10:23:49 10 detail the military change camps. Here, Mr President, I can
10:23:54 11 limit myself, mindful of the time, and I can do so because the
10:24:01 12 realities in the military training camps have been described
10:24:04 13 in the yesterday's submission of my colleagues Ms Struyven and
10:24:07 14 Ms Solano on the individual cases which also contribute to the
10:24:14 15 pattern of recruitment, training and use.

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

10:24:21 17 These submissions have also shown that Thomas Lubanga Dyilo
10:24:24 18 was very well aware of the recruitment, training and use of
10:24:29 19 children, including children under the age of 15 years. This
10:24:35 20 aspect is furthermore confirmed by the video-footage of
10:24:39 21 Thomas Lubanga Dyilo visiting the Rwampara training camp --
10:24:44 22 and important is the date -- on 12 February 2003. It is
10:24:52 23 important because the Defence tried to suggest that Rwampara,
10:24:55 24 at the time, was not an FPLC military training camp.

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

10:25:01 1 I am sure your Honours will recall that video which showed
10:25:05 2 Thomas Lubanga Dyilo addressing the trainees in the FPLC
10:25:09 3 Rwampara training camp, and amongst them, visibly children,
10:25:16 4 children under the age of 15 years, visibly by their physical
10:25:21 5 appearance. I invite my learned friends from the Defence, who
10:25:25 6 contest this observation, to have a closer look at the video
10:25:29 7 materials and, in particular, at the sequence at the end of
10:25:33 8 the video-footage where a boy -- apparently a very young boy,
10:25:39 9 in uniform and armed with what appears to be an AK-47 --
10:25:46 10 accompanies Thomas Lubanga Dyilo to his jeep.
10:25:49 11 [10:25 a.m.]
10:25:51 12 And I repeat as a side remark only -- I repeat "to his jeep",
10:25:57 13 and I do so because the Defence also contests that
10:26:00 14 Thomas Lubanga Dyilo had this particular means of
10:26:03 15 transportation at his disposal.
10:26:05 16 [10:26 a.m.]
10:26:06 17 The video materials shown by the Prosecution speak a clear --
10:26:11 18 they speak a very clear language, and thus -- and not only in
10:26:18 19 this context, I submit, President, your Honours, they do
10:26:21 20 dismantle the erroneous assertions of the Defence.
10:26:26 21 [10:26 a.m.]
10:26:27 22 Mr President, your Honours, witnesses have confirmed the use
10:26:30 23 of children by the FPLC to participate actively in
10:26:33 24 hostilities, and they have confirmed that no distinction was
10:26:37 25 made between child soldiers and adult soldiers. I refer --

10:26:42 1 and again as an example only -- to the statement of the
10:26:46 2 witness 38, who said the following, and I quote [in French]:
10:26:52 3 "There was no difference in the way adult soldiers and the
10:26:56 4 kadogo, who participated actively in combat, were treated."
10:27:02 5 It is needless to repeat that the statement of the six former
10:27:07 6 child soldiers, whose experience is detailed in the document
10:27:09 7 containing the charges, provide further details -- provide
10:27:13 8 further details on their own use, but also -- and this is
10:27:18 9 important to mention -- on the use of many other children, the
10:27:21 10 repeated use of many other children in combat and by the FPLC.
10:27:25 11 [10:27 a.m.]
10:27:28 12 And finally, the widespread use of children as bodyguards by
10:27:33 13 the FPLC commanders and, in particular, by the FPLC senior
10:27:37 14 commanders has been shown by a number of witness statements
10:27:41 15 the Prosecution tendered into evidence.
10:27:44 16 [10:27 a.m.]
10:27:46 17 Exemplary is the statement of witness 41, and I quote [in
10:27:51 18 French]:
10:27:53 19 "Many officers used minors as bodyguards. First,
10:27:58 20 Thomas Lubanga had young people aged less than 15 as
10:28:03 21 bodyguards. Floribert Kisembo had young guards, some of whom
10:28:10 22 were aged 11, and Bosco Ntaganda had more boys than girls --
10:28:18 23 more girls than boys [interpreter corrects] -- some of the
10:28:24 24 girls being less than 15 years old." [Overlapping microphones]
10:28:27 25 Defence was the Chief of the General Staff of the FPLC,

10:28:30 1 Bosco Ntaganda was one of his deputies in charge of military
10:28:35 2 operations and, needless to say, and to repeat, that
10:28:38 3 Thomas Lubanga Dyilo was the Commander-in-Chief of the FPLC.
10:28:40 4 [10:28 a.m.]
10:28:42 5 The top of the FPLC set an example, and it set a poor example,
10:28:51 6 and their subordinate commanders within the FPLC happily
10:28:54 7 followed the poor example. The use, or better the abuse, of
10:29:01 8 children as bodyguards was a widespread occurrence.
10:29:03 9 [10:29 a.m.]
10:29:06 10 In this context, I recall the testimony of the witness,
10:29:09 11 Peduto.
10:29:10 12 Ms Peduto, when informing the honourable judges of the Chamber
10:29:14 13 about her meeting with Thomas Lubanga Dyilo at the end
10:29:18 14 of May 2003, in respect of a meeting scheduled, inter alia, to
10:29:25 15 discuss the use of child soldiers within the FPLC, expressed
10:29:29 16 her views on Thomas Lubanga Dyilo's provocation of the
10:29:33 17 international community by displaying -- and by displaying
10:29:37 18 visibly -- a young child under the age of 15 years as one of
10:29:42 19 the guards of his residence in Bunia.
10:29:46 20 And Ms Peduto was able to describe that her observation had a
10:29:52 21 solid basis, because she has seen the child in a valid area
10:29:58 22 from a distance of one to two metres.
10:30:01 23 Ms Peduto did not only testify about Thomas Lubanga Dyilo
10:30:07 24 using children as guards; she also confirmed the widespread
10:30:12 25 use of children under the age of 15 years in the FPLC. She

10:30:17 1 was stating -- repeatedly stating, that this was a systematic
10:30:20 2 practice -- systematic for both boys and girls, and she
10:30:25 3 continued to state that most of what she called the UPC
10:30:29 4 commanders had children bodyguards rather than adults.
10:30:34 5 [10:30 a.m.]
10:30:36 6 Mr President, your Honours, the use and the abuse of children
10:30:39 7 as bodyguards by the FPLC was widespread and systematic,
10:30:44 8 because the UPC and the FPLC, as shown by the Prosecution, has
10:30:49 9 made significant efforts to recruit children.
10:30:53 10 Witness 40 referred to these efforts and showed that both the
10:30:56 11 UPC and the FPLC encouraged the Hema families to provide a
10:31:02 12 child for the FPLC. This observation was confirmed, and I
10:31:08 13 emphasise inter alia by witness 21, in providing evidence on
10:31:13 14 what he described, and I quote from the summary of his
10:31:16 15 statement, as [in French]: "a massive recruitment campaign".
10:31:23 16 The same witness provided further detail on this campaign, a
10:31:27 17 campaign by the General Staff of the FPLC -- he provided
10:31:31 18 further detail by outlining that emissaries were sent to all
10:31:37 19 areas controlled by the UPC with the mandate to convince the
10:31:41 20 young men, by way of force, to join the ranks of the FPLC.
10:31:46 21 [10:31 a.m.]
10:31:49 22 Mr President, your Honours, as I mentioned earlier on, in this
10:31:52 23 context, the witness -- the testimony of the witness,
10:31:58 24 Peduto -- Ms Peduto was instructive, and it was very
10:32:00 25 instructive. Ms Peduto testified, and she testified in detail

10:32:07 1 in the respect of the UPC and the FPLC's recruitment
10:32:12 2 campaigns, the training and the use of children by the FPLC.
10:32:16 3 [10:32 a.m.]
10:32:18 4 At this juncture, Mr President, your Honours, I wish to make a
10:32:21 5 number of general observations in respect to Ms Peduto's
10:32:25 6 testimony.
10:32:29 7 The Prosecution submits that Ms Peduto's testimony -- the
10:32:33 8 testimony of an "overview witness" -- supports the
10:32:37 9 Prosecution's case in its core aspects, and in all of its core
10:32:43 10 aspects.
10:32:44 11 [10:32 a.m.]
10:32:46 12 Ms Peduto, in the Prosecution's submission, is a credible
10:32:50 13 witness -- a highly credible witness. She has answered
10:32:54 14 questions honestly and has shown that she has no hidden
10:32:59 15 agenda, as can be observed by the fact that she freely
10:33:03 16 conceded that, on certain points, her memory of events from
10:33:07 17 three to four years ago is spotty.
10:33:11 18 As a footnote, but as an important footnote, I wish to mention
10:33:16 19 and I wish to draw the attention of the Pre-Trial Chamber to
10:33:20 20 the fact, that the portions in which Ms Peduto's memory lapsed
10:33:24 21 were largely -- they were very largely outside her field of
10:33:27 22 expertise, which is the protection of children.
10:33:33 23 [10:33 a.m.]
10:33:34 24 Ms Peduto, as I mentioned, showed no personal interest in
10:33:37 25 supporting the Prosecution's case, and it became very clear

10:33:41 1 from the beginning of her testimony, that her sole aim was to
10:33:46 2 assist the Pre-Trial Chamber in establishing the truth.
10:33:50 3 [10:33 a.m.]
10:33:53 4 And Ms Peduto's testimony is reliable, and it is in particular
10:34:00 5 reliable in respect of the core components of the
10:34:03 6 Prosecution's case.
10:34:05 7 Ms Peduto's testimony is reliable for the following reasons,
10:34:09 8 and these reasons also show why the Defence's numerous efforts
10:34:15 9 to discredit her testimony were unsuccessful, and they were
10:34:20 10 set to fail from the beginning.
10:34:21 11 [10:34 a.m.]
10:34:25 12 Ms Peduto testified that her written reports more concretely
10:34:31 13 the [in French]: "Individual stories" dated 12 April 2003, and
10:34:38 14 the portions on the recruitment of use -- and use of child
10:34:42 15 soldiers, at pages 20 to 25 of the June 2003 "Final Report of
10:34:47 16 the MONUC Special Investigation Team on the Abuses Committed
10:34:52 17 in Ituri from January to March 2003", that these reports were
10:34:57 18 drafted by her based on notes taken -- notes taken
10:35:03 19 contemporaneously during the various interviews she and her
10:35:07 20 colleagues, experienced colleagues, conducted with child
10:35:11 21 soldiers and that the reports I just mentioned reflect the
10:35:17 22 content of these interviews.
10:35:18 23 [10:35 a.m.]
10:35:20 24 The second aspect I want to highlight in stating that the
10:35:23 25 testimony of the witness, Ms Peduto, is reliable -- and in

10:35:27 1 this context I will address a major, though exaggerated
10:35:32 2 concern of the Defence, namely, the hearsay portions in her
10:35:36 3 testimony -- the second aspect is the following.
10:35:39 4 Ms Peduto testified that what she heard and what she was
10:35:45 5 informed of by various individuals conforms precisely to what
10:35:50 6 she, herself, witnessed. This is an important observation to
10:35:54 7 make, and whilst the Prosecution realises that Ms Peduto made
10:35:59 8 this statement in the context of her first mission to Bunia in
10:36:03 9 early September 2002, the Prosecution submits that this
10:36:07 10 statement does also apply and does apply naturally to
10:36:12 11 Ms Peduto's statements in relation to her subsequent
10:36:16 12 experiences in Bunia and in Ituri.
10:36:19 13 [10:36 a.m.]
10:36:20 14 To summarise, Mr President, your Honours, the Prosecution
10:36:24 15 witness, Ms Peduto, is credible and her statements are
10:36:27 16 reliable.
10:36:30 17 [10:36 a.m.]
10:36:30 18 On this basis -- on this basis I will now address in more
10:36:34 19 detail what Ms Peduto said in respect of the UPC's policy to
10:36:38 20 recruit children, and what she said about the children having
10:36:43 21 been trained and used by the FPLC to participate in
10:36:47 22 hostilities.
10:36:48 23 [10:36 a.m.]
10:36:50 24 She confirmed calls to mobilisation and recruitment, and
10:36:55 25 whilst she emphasised the recurrent nature of these calls,

10:37:00 1 she, in particular, provided evidence on the UPC recruitment
10:37:03 2 campaigns in summer 2002. She provided names -- names of FPLC
10:37:09 3 commanders which are in line with what witnesses said in the
10:37:12 4 statements the Prosecution has submitted. And Ms Peduto --
10:37:19 5 Ms Peduto added evidence that Thomas Lubanga Dyilo himself
10:37:23 6 reported -- that he himself was reported -- reliably reported
10:37:27 7 to have taken part in these calls -- calls which included
10:37:32 8 providing a cow or a child to the UPC.
10:37:35 9 [10:37 a.m.]
10:37:39 10 Ms Peduto testified, and she did so in great detail, about the
10:37:44 11 interviews she conducted with FPLC child soldiers, including
10:37:47 12 children under the age of 15 years. The content of these
10:37:52 13 interviews are reflected by the witness herself and based on
10:37:57 14 notes -- and I emphasise this again -- which were taken
10:38:01 15 contemporaneously in the "Histoires Individuelles" and in the
10:38:05 16 "Final Report".
10:38:05 17 [10:38 a.m.]
10:38:08 18 These reports have significant evidential value. They provide
10:38:12 19 details in respect of the recruitment, forcible and voluntary
10:38:19 20 recruitment of children by the FPLC and also including
10:38:22 21 children under the age of 15 years, their training in various
10:38:27 22 FPLC military training camps and their use to participate
10:38:30 23 actively in hostilities.
10:38:32 24 [10:38 a.m.]
10:38:35 25 It becomes clear that the UPC and the FPLC calls were

10:38:42 1 successful. They were successful, the UPC and the FPLC, in
10:38:46 2 their recruitment campaigns.

10:38:48 3 The reports describe in great detail the various cases of
10:38:53 4 children of the age of 11, 12 and 14 years, they detail them
10:38:57 5 with one -- one particular constant, namely the children were
10:39:01 6 recruited and used by the UPC. And your Honours, we know --
10:39:08 7 and the witness, Peduto, has confirmed this in
10:39:10 8 cross-examination -- that the UPC was considered to be a
10:39:14 9 political movement and a militia, a fact that made the
10:39:19 10 witness, Ms Peduto, conclude that for her it was one movement.

10:39:24 11 [10:39 a.m.]

10:39:26 12 The Defence has tried to diminish the evidentiary value of
10:39:30 13 these reports by challenging the way the interviews were
10:39:33 14 conducted; the Defence raised concerns in respect of the
10:39:37 15 language in which these interviews were taken; and also in
10:39:40 16 respect of the fact that some of the children that Ms Peduto
10:39:43 17 interviewed were allegedly interviewed under the supervision
10:39:47 18 of the UPDF.

10:39:48 19 [10:39 a.m.]

10:39:50 20 Both concerns were addressed by the witness and in the
10:39:54 21 Prosecution's view the respective testimony allows for the
10:39:56 22 conclusion that both concerns are not justified.

10:40:00 23 [10:40 a.m.]

10:40:02 24 Ms Peduto used interpreters that spoke the respective
10:40:05 25 languages of the children, and she also made the Defence

10:40:09 1 understand, and she was very firm in her statement, that the
10:40:13 2 interviews were in no way hampered by any language problems.
10:40:19 3 The Prosecution adds that this is a very natural explanation,
10:40:23 4 supported by the fact that the volume -- the volume and the
10:40:26 5 detail of information elicited from the children could not
10:40:30 6 have been provided in a situation in which the interviewers
10:40:34 7 and the interviewees would not have understood each other.
10:40:37 8 [10:40 a.m.]
10:40:39 9 In respect of the second concern, the witness has emphasised,
10:40:45 10 again in very clear terms, that the UPDF did not supervise or
10:40:50 11 monitor the interviews. The witness confirmed that the
10:40:53 12 children spoke based on their own free will.
10:40:57 13 [10:40 a.m.]
10:41:00 14 The reports by the witness also provide names of the
10:41:03 15 commanders -- the names of military commanders the children
10:41:07 16 named as the ones who took part, directly in their
10:41:11 17 recruitment, or who used them during military operations.
10:41:16 18 The children detailed names that are well-known -- well-known
10:41:20 19 amongst them commanders of the FPLC, who were named as
10:41:24 20 co-perpetrators in the Prosecution's charging documents, and
10:41:28 21 also, and not surprisingly, amongst them was
10:41:32 22 Thomas Lubanga Dyilo.
10:41:32 23 [10:41 a.m.]
10:41:36 24 Ms Peduto has also confirmed what other witnesses said in
10:41:41 25 relation to the so-called demobilisation efforts by

10:41:43 1 Thomas Lubanga Dyilo.

10:41:46 2 Here it is worth recalling the statements of the witnesses 24

10:41:50 3 and 21 respectively. Witness 24 stated -- and I realise that

10:41:55 4 he said [in French] "I think", and the quote continues that:

10:42:02 5 "Thomas Lubanga Dyilo never wanted to demobilise child

10:42:05 6 soldiers", and witness 21 said -- and this witness, he said it

10:42:10 7 with all clarity, that, and I quote [in French]:

10:42:15 8 "Thomas Lubanga Dyilo never really wanted the projects to

10:42:19 9 demobilise child soldiers to be successful."

10:42:24 10 Ms Peduto confirmed the statements of these two witnesses,

10:42:27 11 thus reinforcing the reliability of their respective

10:42:30 12 statements when she testified and when she testified in great

10:42:34 13 detail, and I quote:

10:42:37 14 "The UPC's demobilisation efforts were a masquerade,

10:42:43 15 considering the ongoing recruitment in other parts of Ituri",

10:42:47 16 and she continued to testify as follows:

10:42:49 17 "The demobilisation was not serious".

10:42:56 18 Here I add that Ms Peduto maintained her views in

10:43:01 19 cross-examination by the Defence and reinforced her testimony

10:43:05 20 by again stating the children continued to be recruited at the

10:43:08 21 same time that the June 2003 order on the demobilisation of

10:43:14 22 child soldiers was issued.

10:43:19 23 Mr President, your Honours, in the Prosecution's view these

10:43:24 24 statements made by witnesses from the region and made by the

10:43:27 25 most competent person within MONUC on child soldier issues --

10:43:32 1 these statements are clear. The so-called demobilisation
10:43:35 2 efforts by Thomas Lubanga Dyilo were indeed, and I use the
10:43:39 3 language of the witness "a masquerade" -- a masquerade
10:43:45 4 designed to mislead the public.
10:43:47 5 [10:43 a.m.]
10:43:51 6 Mr President, your Honours, I deliberately --
10:43:54 7 PRESIDING JUDGE JORDA (interpretation): I'm sorry,
10:43:58 8 Mr Withopf, I don't want to abruptly stop you, but I just
10:44:03 9 wonder how long you still need -- how many minutes, because I
10:44:07 10 would like to remind you that you already used 30 minutes
10:44:11 11 yesterday -- and I recall this for the public too -- it's a
10:44:14 12 matter of procedure. Do you still need a lot of time? We
10:44:18 13 want to be flexible, but we need to be informed. How far have
10:44:21 14 you got to go?
10:44:23 15 MR WITHOPF: Well, your Honours, the Prosecution appreciates
10:44:26 16 that the Chamber is flexible and, in appreciation of this
10:44:29 17 flexibility I can assure you that my presentation will not
10:44:35 18 exceed 10 more minutes.
10:44:39 19 PRESIDING JUDGE JORDA (interpretation): Well, then, it's not
10:44:42 20 possible. You only have five more minutes. You started
10:44:46 21 yesterday already. You have five more minutes -- five minutes
10:44:52 22 -- five minutes. The same applies to the Prosecution as to
10:44:55 23 the Defence and to the Chamber. Continue, please.
10:44:59 24 MR WITHOPF: Thank you very much. I have taken note and I
10:45:02 25 will certainly adjust to what you said, Mr President.

10:45:08 1 [10:45 a.m.]

10:45:08 2 I'm going to address to the mens rea. The Prosecution has

10:45:16 3 shown evidence that proves Thomas Lubanga Dyilo's personal

10:45:18 4 involvement in recruiting children, that he regularly visited

10:45:23 5 FPLC military training camps in which children were trained by

10:45:28 6 FPLC officers, his subordinates and that he, himself,

10:45:33 7 encouraged families to provide children to the FPLC and that

10:45:36 8 he used children as bodyguards and as members of his personal

10:45:40 9 guard in Bunia.

10:45:41 10 [10:45 a.m.]

10:45:45 11 There's one particular area, and I do not need to go into any

10:45:49 12 further details, mindful of the time, Mr President, but

10:45:53 13 there's one particular area I want to briefly address, and

10:45:58 14 this is the role of Thomas Lubanga Dyilo coordinating the

10:46:04 15 infrastructure and the logistics necessary for the execution

10:46:08 16 of the common plan of the co-perpetrators.

10:46:12 17 I make reference to the statement of witness 4 -- a witness

10:46:17 18 who confirms that Thomas Lubanga Dyilo [in French]:

10:46:24 19 "Had approached traders and major Hema North families to fund

10:46:27 20 what he called 'an army' to make the Hema ethnic group safe".

10:46:34 21 And the same witness, as your Honours will recall -- the same

10:46:37 22 witness later on explained that the support of the

10:46:42 23 prominent -- prominent and healthy, wealth -- and wealthy Hema

10:46:46 24 families never ceased.

10:46:47 25 [10:46 a.m.]

10:46:50 1 Furthermore, as we have shown, Thomas Lubanga Dyilo was
10:46:55 2 active -- he was very active in negotiating the provisions of
10:46:58 3 weapons, ammunition and uniforms with Uganda and Rwanda, and
10:47:04 4 he did so, naturally, in his position as the
10:47:07 5 Commander-in-Chief of the FPLC.
10:47:08 6 [10:47 a.m.]
10:47:11 7 I quote one witness, witness 16, who said [in French:
10:47:17 8 "Thomas Lubanga Dyilo authorised expenditure and provided
10:47:21 9 funding for military operations."
10:47:26 10 And he did not only authorise the money, he, in person -- he
10:47:29 11 negotiated the respective materials, as shown by the statement
10:47:33 12 of the witness 3.
10:47:34 13 [10:47 a.m.]
10:47:36 14 And in this context I also recall the video that was shown by
10:47:40 15 the Prosecution, where the interviewee, in very clear terms
10:47:44 16 described, Thomas Lubanga Dyilo direct negotiations with the
10:47:50 17 Rwandan authorities.
10:47:51 18 [10:47 a.m.]
10:47:56 19 Mr President, your Honours, prior to concluding the
10:47:59 20 Prosecution's closing statement, I advise the Court that the
10:48:05 21 Prosecution in its written submissions, as you have mentioned,
10:48:08 22 Mr President, and which will be filed by the Prosecution on
10:48:11 23 4 December, will make detailed submissions on a number of
10:48:14 24 legal matters that pertain, inter alia, to the principle of
10:48:18 25 legality, the mode of liability, and the form of the document

10:48:22 1 containing the charges.

10:48:24 2 [10:48 a.m.]

10:48:25 3 And this will all be in line with the parameters of the

10:48:32 4 Court's 7 November scheduling order.

10:48:34 5 [10:48 a.m.]

10:48:34 6 In the Prosecution's view, Mr President, your Honours, and I

10:48:37 7 come back to what I said at the beginning of our submission --

10:48:41 8 in our view the Prosecution has provided sufficient evidence

10:48:45 9 to establish substantial grounds to believe that

10:48:48 10 Thomas Lubanga Dyilo committed the war crimes with which he is

10:48:52 11 charged, namely the war crime of enlisting children into armed

10:48:58 12 groups, the war crime of conscripting children into armed

10:49:02 13 groups, and the war crime of using children to participate

10:49:06 14 actively in hostilities.

10:49:08 15 [10:49 a.m.]

10:49:11 16 This observation, Mr President -- and I kept my promise to not

10:49:16 17 exceed a further five minutes -- this observation,

10:49:19 18 Mr President, your Honours, concludes the Prosecution's

10:49:22 19 closing statement, and I add -- and I add on behalf of all

10:49:27 20 members of the Prosecution team -- that it has been an honour

10:49:31 21 and it has been a privilege for all of us to represent the

10:49:35 22 Prosecution in this confirmation hearing. Thank you very

10:49:38 23 much.

10:49:45 24 PRESIDING JUDGE JORDA (interpretation): Mr Withopf, indeed,

10:49:47 25 you took only five minutes, so please be seated and just for

10:49:51 1 the public sake, I would like to explain, seeing as we are in
10:49:57 2 the day of closing statements, we now have to listen to the
10:50:00 3 closing statements of the victims' representatives. There are
10:50:04 4 two categories of victim representatives -- victim 5, and
10:50:09 5 victims 1, 2 and 3. Victims' representatives from -- all of
10:50:17 6 them together have an hour and a half. I don't know how they
10:50:20 7 have divided up their time -- 45 minutes, 50 minutes, but I
10:50:25 8 suggest not to interrupt -- for the representatives for 10
10:50:30 9 minutes. Seeing as Mr Withopf took an extra five minutes, I
10:50:35 10 suggest we have the break now and resume at 11.20 -- that will
10:50:43 11 give us half an hour's break -- and then, after the break,
10:50:45 12 listen to the victims. I believe victim 5 are on the first
10:50:51 13 row, so I guess they'll be the first to speak. I guess you
10:50:55 14 agreed this among yourselves. So we will now break for
10:50:59 15 30 minutes. The hearing is adjourned.
10:51:01 16 [10:51 a.m.]
10:51:01 17 [Short adjournment]
10:51:01 18 [11:26 a.m.]
11:27:23 19 THE USHER: All rise.
11:27:36 20 PRESIDING JUDGE JORDA (interpretation): The hearing is
11:27:40 21 resumed. Please be seated and please make Mr Thomas Lubanga
11:27:44 22 Dyilo enter the courtroom. Thank you.
11:27:44 23 [11:27 a.m.]
11:27:49 24 [Mr Thomas Lubanga Dyilo entered the courtroom]
11:27:59 25 PRESIDING JUDGE JORDA (interpretation): If everyone is

11:28:01 1 seated, we will continue for an hour and a half to listen to
11:28:07 2 the closing statements of the victims -- first, the closing
11:28:12 3 statement of victim 105, Madame Bapita, and then, depending on
11:28:19 4 how you decided to split up the work among yourselves, Madame
11:28:25 5 Massidda, Mr Mulenda. After Ms Bapita we will have Mr Mulenda
11:28:37 6 and then Mr Walley. n.
11:28:45 7 You know the President, and you know my ways, so you have an
11:28:50 8 hour and a half to deal with everything related to victims'
11:28:54 9 representation and we are listening to you very carefully,
11:28:59 10 because what you have to say is perhaps what is most
11:29:03 11 important, especially in view of the Statute of the ICC.
11:29:07 12 Madame Bapita the floor is yours.
11:29:13 13 ME BAPITA (interpretation): Thank you very much
11:29:15 14 Mr President, your Honours.
11:29:16 15 I am a/0105, as ordered by you, to protect my identity. Today
11:29:26 16 I am almost 15 years old. If each of you calculates at the
11:29:31 17 time the events occurred between 2002 and 2003, I was 10 and a
11:29:38 18 half years old. What were you doing when you were that age?
11:29:45 19 And, if you have children, what are they doing, or what did
11:29:50 20 they do when they were that age?
11:29:53 21 Well, I will tell you what I had to do. I joined the UPC
11:29:58 22 armed forces, because I followed a group of other children,
11:30:03 23 and the adults took us to war to defend Ituri, or their
11:30:09 24 interests.
11:30:09 25 [11:30 a.m.]

11:30:12 1 I carried arms on the orders given to me by adults who knew
11:30:18 2 very well what they were doing. Among these adults were
11:30:26 3 Papa Thomas, or Thomas Lubanga Dyilo, as you've called him
11:30:29 4 here at the Court.
11:30:31 5 [11:30 a.m.]
11:30:32 6 I would want everyone of you to ask themselves whether that
11:30:36 7 was allowed. I myself know today that it is not allowed to
11:30:42 8 recruit children as myself to go to war, and that it is even
11:30:48 9 less allowed to use them during hostilities, and that is why
11:30:54 10 I sincerely hope President, your Honours, that you will find
11:31:01 11 sufficient presumptions to confirm the document containing the
11:31:06 12 charges so that the trial of Thomas Lubanga Dyilo, whom I hold
11:31:12 13 responsible for the harm I suffered, does take place before
11:31:18 14 this high criminal court, which has given me the distinguished
11:31:23 15 honour of participating and maybe obtaining reparations for
11:31:28 16 the harm suffered.
11:31:32 17 [11:31 a.m.]
11:31:32 18 If victim a/0105 that we are representing was to speak before
11:31:40 19 you, we believe that this is what she would have said. As
11:31:49 20 legal representative, we have already recounted her story in
11:31:54 21 her file before you authorised her to participate in the
11:31:59 22 proceedings. We would like to recall some of the elements
11:32:03 23 without violating the protection you gave her -- that's point
11:32:11 24 number 4. But before we would like to go back to the
11:32:13 25 historical background, point number 2, and we would like to

11:32:17 1 already at this stage qualify one of the legal issues -- the
11:32:23 2 characterisation of the conflict. That will be our point
11:32:26 3 number 3, and then we will cover briefly the question of
11:32:31 4 language as was raised by the Defence, point 5, and end with a
11:32:36 5 brief discussion on the responsibility of Thomas Lubanga
11:32:40 6 Dyilo. That will be point 6. And with legal representative
11:32:44 7 of victims a/0001, a/0002 and a/0003, we agreed that our
11:32:58 8 speeches will be complementary and go into different points of
11:33:03 9 law -- different points to the ones I will be talking about
11:33:09 10 here.

11:33:11 11 So I'd like to move on to the point number 2, the historical
11:33:14 12 background.

11:33:14 13 [11:33 a.m.]

11:33:15 14 Your Honours, President, the historical background can be
11:33:18 15 divided into or simplified into four stages: first stage was
11:33:26 16 the advance of the alliance of the democratic forces, or
11:33:26 17 l'Alliance des forces democratiques pour la liberation du
11:33:36 18 Congo-Zaire, AFDL, of Laurent-Desire Kabila supported by the
11:33:43 19 Rwandan and Ugandan armies. Kabila Senior took up power
11:33:54 20 in Kinshasa in May 1997, but relations with Uganda and Rwanda
11:33:58 21 deteriorated, and in July 1998 the Democratic Republic of
11:34:03 22 Congo officially requested both States to withdraw their
11:34:06 23 troops, and that is the second stage in the historical
11:34:12 24 background.

11:34:14 25 [11:34 a.m.]

11:34:15 1 In turn, both States pretended to have done so, but far from
11:34:21 2 it. Their troops remained based in the east of the country
11:34:27 3 and you know that the district of Ituri is in the east.
11:34:31 4 Uganda and its army, the UPDF, the Uganda People's Defence
11:34:39 5 Force, supported the birth of the Mouvement pour la liberation
11:34:42 6 du Congo, the MLC, in 1999, but one year earlier Rwanda, with
11:34:47 7 its regular forces, the APR, Armee Patriotique Rwandaise, had
11:34:54 8 already done the same with the Rassemblement Congolais pour la
11:34:59 9 Democratie, or RCD, to counter the power of the Mzee,
11:35:05 10 Laurent-Desire Kabila. The RCD is characterised by its
11:35:09 11 duality. It is both a political and military movement, and
11:35:13 12 also characterised by its extraordinary tendency to fraction.
11:35:13 13 [11:35 a.m.]
11:35:21 14 And this brings us to our third stage. The RCD gave birth to
11:35:27 15 three other movements -- the RCD-Goma supported by Rwanda, the
11:35:31 16 RCD-K/ML, the Mouvement de Liberation Kisangani, with Nyamusi
11:35:42 17 and which formerly had -- or was about to -- by Kisangani --
11:35:45 18 and supported by Uganda and the RCD-N (national) of Lumbala
11:35:52 19 which had its base in Bafwasende. Thomas Lubanga Dyilo was a
11:35:58 20 member of the RCD-K/ML and this should be noted: he was
11:36:03 21 Ministry of Defence within his government. He left the
11:36:07 22 RCD-K/ML and, together with others, founded the UPC, and this
11:36:13 23 is our fourth and last turning point.
11:36:16 24 [11:36 a.m.]
11:36:16 25 The UPDF supported the UPC and its army for a while. The

11:36:27 1 FPLC, Forces Patriotiques pour la Liberation du Congo. It has
11:36:34 2 been shown that the Ugandan troops were still in Bunia and in
11:36:39 3 the district of Ituri in 2002.
11:36:42 4 [11:36 a.m.]
11:36:44 5 Uganda played tricks on the Congolese groups and vice versa.
11:36:52 6 In September 2002 the UPDF supported the UPC, with its Hema
11:36:58 7 majority, and took control of Bunia, which at the time was in
11:37:07 8 the hands of the RCD-K/ML. Six months later, in March 2003,
11:37:14 9 the UPDF supported another movement which was dominated by the
11:37:18 10 Lendu, the FNI, the Front des Nationalistes Integrationnistes,
11:37:22 11 and the UPC lost control of Bunia. Victim a/0105 was enlisted
11:37:31 12 during that period, and remained in the UPC until December
11:37:35 13 2003.
11:37:36 14 [11:37 a.m.]
11:37:38 15 President, your Honours, now I'd like to move on to the third
11:37:42 16 point, the characterisation of the armed conflict. Concerning
11:37:46 17 our third point, the characterisation of the armed conflict,
11:37:51 18 it should be noted that there are two types of armed
11:37:56 19 conflict -- international armed conflicts and
11:38:00 20 non-international armed conflicts. However, this distinction
11:38:04 21 has lost some of its meaning, as the common Article 3 to the
11:38:12 22 Geneva Conventions, which covers the second type of conflict
11:38:17 23 and which is currently a customary rule, is sufficiently
11:38:23 24 general to cover many of the specific facts that are
11:38:28 25 incriminated in various provisions of conventions on

11:38:34 1 international armed conflicts.

11:38:35 2 [11:38 a.m.]

11:38:36 3 As concerns in particular the three crimes that Thomas Lubanga

11:38:41 4 Dyilo is accused of, this distinction however does have some

11:38:47 5 importance, as in an international armed conflict the national

11:38:55 6 armed forces are concerned, whereas in an

11:38:59 7 international -- non-international armed conflict it is

11:39:01 8 sufficient to have a somewhat structured armed group.

11:39:08 9 [11:39 a.m.]

11:39:09 10 In our case, in his introductory statement on 9 November the

11:39:14 11 Prosecutor mentioned a non-international armed conflict

11:39:18 12 without adding any more precision, which could be debatable.

11:39:24 13 [11:39 a.m.]

11:39:25 14 The involvement of Uganda and Rwanda in the Congolese conflict

11:39:30 15 included in Ituri needs to no longer be proven, as we have

11:39:35 16 just shown in our historical background, and it's been

11:39:40 17 demonstrated by a number of documents presented during the

11:39:44 18 proceedings. And the Prosecutor is well aware of this.

11:39:50 19 However, the characterisation of the armed conflict must be

11:39:55 20 done on a case-by-case basis and not by generalising or in an

11:40:05 21 indetermined way.

11:40:09 22 [11:40 a.m.]

11:40:09 23 For the allegations of the conscription of child soldiers, you

11:40:12 24 have to set and determine when and where the facts happened

11:40:17 25 and then evaluate the specific circumstances in which the

11:40:24 1 armed conflict took place. Independently of the type of armed
11:40:32 2 conflict, whether international or national, it appears to us
11:40:37 3 that the Statute covers or offers the same type of protection
11:40:41 4 Article 8(2) (b) (xxvi) and 8(2) (e) (vii), and therefore the
11:40:54 5 relevance of the nature of the armed conflict is somewhat
11:40:57 6 reduced as we have mentioned.

11:41:01 7 [11:41 a.m.]

11:41:01 8 We believe that the UPC had set up a quasi State-like
11:41:09 9 structure and, even if it was an international armed conflict,
11:41:13 10 its forces have all the trappings of a national army, and the
11:41:18 11 protection under Article 8(2) of the Statute should be
11:41:25 12 applicable.

11:41:26 13 [11:41 a.m.]

11:41:28 14 President, I would like to move on now to my fourth point, the
11:41:33 15 enlistment of victim a/0105 and her involvement. It started
11:41:44 16 with the forced enlistment of the UPDF, or by the UPDF, the
11:41:50 17 Ugandan troops. Around May -- mid 2002 victim a/0105 was in
11:42:00 18 Ngote, Mahagi territory, Ituri district, with a group of
11:42:08 19 children. The Ugandan soldiers enlisted them to transport
11:42:16 20 arms and ammunition into Fatiki via Nioka, still in the
11:42:22 21 district of Ituri, approximately 100 kilometres further away.

11:42:32 22 [11:42 a.m.].

11:42:32 23 When they arrived in Fatiki they were abandoned. They were
11:42:36 24 distressed and confused and didn't know where to go. They
11:42:42 25 spotted another group of children in Bule, less than

11:42:46 1 10 kilometres away from Fatiki, and -- so victim a/0105 and
11:42:51 2 the other children decided to join them. So they ended up in
11:42:59 3 the UPC military camp in Bule. The circumstances in which the
11:43:07 4 victim a/0105 ended up in the camp is without any consequences
11:43:14 5 for the responsibility of the adults, which welcomed them,
11:43:18 6 trained them for war, and used them in hostility.
11:43:24 7 [11:43 a.m.]
11:43:24 8 This shows that the distinction between conscription and
11:43:27 9 enlistment seems not to have much importance.
11:43:34 10 [11:43 a.m.]
11:43:35 11 The existence of this training camp in Bule is confirmed by a
11:43:40 12 document that was presented by the Prosecutor,
11:43:49 13 <#DRC-OTP-0165-0774#>. Victim a/0104 [sic] was given military
11:43:58 14 training in this camp. She spent two months in the Fatiki
11:44:02 15 battalion in Ituri under the command of Commander Kpawa. She
11:44:12 16 spent two other months in the Mahagi battalion in Nyarambe, in
11:44:20 17 Ituri again, under the command of Commander Moyi, and
11:44:25 18 13 months in the Mahagi battalion, Baudouin camp, under the
11:44:35 19 command of Commander Dominic. The latter camp still exists
11:44:38 20 and is currently used by the military police.
11:44:40 21 [11:44 a.m.]
11:44:40 22 Some of these facts are partly corroborated by elements of the
11:44:44 23 record. We know that the Ugandan troops only left Bunia
11:44:50 24 in May 2003 -- see evidence <#EVD-OTP-00012#>.
11:45:00 25 [11:45 a.m.]

11:45:01 1 Witness Peduto confirms this also when she affirms having met
11:45:07 2 General Kalhe of the UPDF which brought her -- who brought her
11:45:14 3 into the Rwampara military camp to meet child soldiers. This
11:45:18 4 camp was controlled by UPC and the witness met Commander
11:45:24 5 Bahogo there. He was their military instructor. The
11:45:28 6 statement also confirms the relation between the UPDF and the
11:45:33 7 UPC, and in particular its armed forces, and it was recounted
11:45:39 8 that the UPC was given the support of the Ugandan armed
11:45:48 9 forces, see <#DRC-OTP-0130-1409#>.
11:45:53 10 [11:45 a.m.]
11:45:54 11 Participation of victim a/0104 [sic] in hostilities is beyond
11:46:02 12 doubt. The Prosecution spoke of several attacks in Bunia and
11:46:09 13 around Bunia between 2002 and 2003, including Fatiki, two --
11:46:17 14 four -- two times, see document <#DRC-OTP-0165-0779#>. Victim
11:46:24 15 a/0105 will give you more details if you need them when you
11:46:30 16 interview her.
11:46:31 17 [11:46 a.m.]
11:46:32 18 The region of Mahagi at the time was controlled by the UPC,
11:46:38 19 see document <#DRC-OTP-0165-0779#>. It has been recounted
11:46:47 20 extensively by witness Peduto that several calls for
11:46:52 21 recruitment were launched by both Thomas Lubanga Dyilo and by
11:47:00 22 his henchmen and intellectuals and religious people from the
11:47:05 23 region. We will only mention some of them -- Madame Lotsove,
11:47:13 24 Mr Tinanzabo, Professor Dhetchuvi, Abbe Aime and the priest of
11:47:20 25 the Catholic church of Nyakasanza, <#OTP-0102-0003#> and

11:47:32 1 <#EDV-OTP-00021#> [sic].

11:47:35 2 In one of the films that was presented by the Prosecutor with

11:47:39 3 evidence number <#EVD-OTP-00021#> we saw Thomas Lubanga Dyilo

11:47:48 4 calling the young people in a camp to take up arms to defend

11:47:55 5 the Hema community, which he said risked being exterminated.

11:48:00 6 [11:48 a.m.]

11:48:00 7 These children in this camp were aligned with sticks in their

11:48:06 8 hands and chanting slogans. They were recruits; they were not

11:48:12 9 onlookers, as the Defence tried to make us believe.

11:48:16 10 [11:48 a.m.]

11:48:16 11 President, your Honours, now I would like to move on to my

11:48:22 12 fifth point, the issue of the Kingwana language. Concerning

11:48:32 13 this fifth point, it should be noted that Kingwana in French

11:48:37 14 means of Muslim origin. It's the Swahili spoken by the

11:48:42 15 Arabised populations from Maniema, which imported it in Ituri

11:48:47 16 from Mambasa territory, Ituri district again. Currently,

11:48:58 17 Kingwana means the Swahili spoken by the -- in the north-east

11:49:04 18 of the Democratic Republic of the Congo and that is in

11:49:09 19 Orientale Province. The Swahili spoken in the North and South

11:49:12 20 Kivu regions is called Swahili Bora, so depending on the

11:49:18 21 regions the same Swahili is adapted somewhat, which doesn't

11:49:23 22 prevent the speakers, however, from understanding each other,

11:49:28 23 which means that a person speaking Swahili Bora perfectly

11:49:34 24 understands Kingwana, too, and vice versa. You could, by

11:49:39 25 analogy, refer to the French spoken by people of Quebec and

11:49:48 1 the French spoken in France. Both each -- both understand
11:49:52 2 each other, despite the different expressions due to the
11:50:00 3 cultural differences between the two people.
11:50:02 4 [11:50 a.m.]
11:50:05 5 President, I'd now like to move on to point number 6, the
11:50:10 6 accountability or responsibility of Thomas Lubanga Dyilo. To
11:50:16 7 confirm the charges, the Pre-Trial Chamber will look into not
11:50:22 8 only the facts but accountability for the facts, or
11:50:27 9 responsibility. In this case we are concerned with Thomas
11:50:35 10 Lubanga Dyilo's liability. We have some problems with the
11:50:44 11 legal arguments that were presented by the Prosecutor, but
11:50:47 12 before we mention these we would like to recall briefly who
11:50:53 13 Thomas Lubanga Dyilo was.
11:50:55 14 [11:50 a.m.]
11:50:55 15 You will see from his file that Thomas Lubanga Dyilo does not
11:50:59 16 have any deficiencies and participated in the establishment of
11:51:03 17 the UPC, of which he was the President, from its very
11:51:10 18 creation. Under his Presidency the UPC established armed
11:51:15 19 forces, the FPLC, and he was the Commander-in-Chief of these
11:51:21 20 forces.
11:51:23 21 [11:51 a.m.]
11:51:24 22 The evidence in support of this is very abundant. You have
11:51:31 23 seen the documents he signed as President of the UPC. There
11:51:37 24 are very many different sorts of documents signed and,
11:51:41 25 therefore, the extent of his authority cannot be challenged.

11:51:45 1 Some of these documents are from the Defence itself. It
11:51:51 2 should be recalled that the distinction between UPC and FPLC
11:51:58 3 was not really clear. The population and witnesses used "the
11:52:10 4 UPC" to speak both of the political and armed wing of the same
11:52:17 5 movement.
11:52:18 6 [11:52 a.m.]
11:52:19 7 The same were -- both were the same entity headed by Thomas
11:52:27 8 Lubanga Dyilo. The lack of precision that the Defence tried
11:52:30 9 to demonstrate during the cross-examination of witness Peduto
11:52:39 10 doesn't seem to us to be very important therefore. The same
11:52:45 11 goes for the fluctuating alliances, as the control of the UPC
11:52:52 12 over the whole region and their control of the camps where
11:52:56 13 victim a/0105 was trained has not been challenged.
11:53:02 14 [11:53 a.m.]
11:53:08 15 The Prosecutor argues that there is direct responsibility,
11:53:16 16 co-perpetration or subsidiarily indirect liability, indirect
11:53:27 17 perpetration. For us there is no doubt that Thomas Lubanga
11:53:34 18 Dyilo has direct responsibility in view of the evidence that
11:53:38 19 was presented to the Chamber for the confirmation of the
11:53:43 20 charges.
11:53:43 21 [11:53 a.m.]
11:53:44 22 Thomas Lubanga Dyilo contributed to the creation of a
11:53:49 23 political and military structure called the UPC. Its
11:53:56 24 political aim was to safeguard and protect the Hema
11:54:01 25 population, but, in practice, it violated laws and customs of

11:54:09 1 war, and Thomas Lubanga Dyilo must be held responsible for
11:54:16 2 this.
11:54:17 3 [11:54 a.m.]
11:54:17 4 Thomas Lubanga Dyilo encouraged the enlistment. Please see
11:54:27 5 <#EVD-OTP-00067#> and <#EVD-OTP-00066#>.
11:54:36 6 [11:54 a.m.]
11:54:36 7 Thomas Lubanga Dyilo encouraged the children to participate in
11:54:41 8 war. Thomas Lubanga Dyilo gave instructions to the military
11:54:50 9 administration in order to train children such as victim
11:54:58 10 a/0104 [sic] and Thomas Lubanga Dyilo sent these children to
11:55:02 11 the battlefields.
11:55:04 12 [11:55 a.m.]
11:55:05 13 In view of his own actions which demonstrate, by inference,
11:55:11 14 the mens rea of the alleged crimes, we find it difficult to
11:55:17 15 understand the logic of the so-called co-perpetration, or
11:55:26 16 alleged co-perpetration. However, if the Chamber looked into
11:55:33 17 this subsidiary proposal, we argue that it is not necessary to
11:55:40 18 show proof of a control on the perpetrators. It is sufficient
11:55:47 19 to share the intention or the common intention of the
11:55:50 20 perpetrators. This debate on Thomas Lubanga Dyilo's liability
11:55:57 21 as hierarchical superior could be seen in the context of
11:56:03 22 Article 28 of the Statute but the Prosecutor has not alleged
11:56:05 23 this, or only perhaps in the context of aggravating
11:56:12 24 circumstances, but the Pre-Trial Chamber will agree that we're
11:56:17 25 still far from this stage.

11:56:18 1 [11:56 a.m.]

11:56:19 2 In conclusion, victim a/0104 [sic] believes that sufficient

11:56:27 3 presumptions have been brought to confirm the charges against

11:56:30 4 Thomas Lubanga Dyilo, and the arguments of the Defence could

11:56:34 5 not really counter this.

11:56:36 6 [11:56 a.m.]

11:56:38 7 It must be noted that the Defence challenges the receivability

11:56:45 8 of the evidence introduced and has criticised this evidence in

11:56:52 9 a way which could also be applied to the way it itself

11:56:56 10 produced evidence. The Defence spoke at length about this

11:57:04 11 during the public session of Wednesday, 22 November 2006. The

11:57:10 12 Defence, for instance, asserted that the Prosecutor had not

11:57:18 13 authenticated the documents produced. However, the Defence

11:57:24 14 spent a long time during the cross-examination reading

11:57:28 15 documents to the witness and asked questions about these

11:57:36 16 documents of a general nature, which only had a small relation

11:57:44 17 to the extracts read, and the Defence also presented emails

11:57:50 18 and did not prove the authenticity of these either.

11:57:50 19 [11:57 a.m.]

11:57:57 20 And to complicate the debate even more, the Defence produced

11:58:01 21 an appeals judgment from Kisangani, and the judgment will not

11:58:04 22 be binding until it is res judicata, which can only happen in

11:58:09 23 fact before a high Congolese court, the Supreme Court. But we

11:58:14 24 will not go on about all these issues and we will just repeat

11:58:19 25 what this Chamber itself has said and repeat it: this is not

11:58:24 1 the trial, but the confirmation of charges.

11:58:24 2 [11:58 a.m.]

11:58:27 3 Subsequently the threshold of receivability of evidence at

11:58:30 4 this stage is not that which will -- which it will be at the

11:58:36 5 trial, and we believe that the threshold has been reached. We

11:58:41 6 believe that our approach has been simple enough to give you

11:58:46 7 some guidance and your Honours, President, once you have gone

11:58:55 8 to the -- on to the deliberations, I hope you will remember

11:58:59 9 that, on top of my victim, millions of other victims would

11:59:05 10 also have liked to participate in these proceedings and I hope

11:59:09 11 you will remember that thousands of others will not be able to

11:59:14 12 even want to, as they died on the battlefield. I hope,

11:59:18 13 through the confirmation of charges, you will give us justice.

11:59:22 14 Thank you.

11:59:25 15 PRESIDING JUDGE JORDA (interpretation): I would like to

11:59:29 16 thank my colleague, and I give the floor to Mr Mulenda.

11:59:37 17 I think there will be structural changes, as it were, for the

11:59:50 18 benefit of the public, for whom you are speaking.

12:00:04 19 ME MULENDA (interpretation): Thank you, Mr President.

12:00:09 20 Mr President, Mr Prosecutor, your Honours, my dear learned

12:00:15 21 colleagues, when I was coming here I had a plan for my

12:00:25 22 address. I was going to start with the probative value of the

12:00:32 23 evidence under the confirmation hearing and as part of the

12:00:39 24 trial proper; secondly, I was going to examine the judgment of

12:00:46 25 the Kisangani Appeals Court regarding the search and seizure

12:00:51 1 challenged by the Defence; a summary of witness interviews
12:00:57 2 also challenged by the Defence; fourthly, the probative value
12:01:02 3 of the reports of non-governmental organisations and United
12:01:06 4 Nations organs; and, lastly, the civil status in the
12:01:12 5 Democratic Republic of the Congo.
12:01:13 6 [12:01 p.m.]
12:01:14 7 But the Prosecutor has discussed the first point in a very
12:01:18 8 good way, thus establishing the difference between the
12:01:22 9 confirmation hearing and the trial proper, so I shall not
12:01:26 10 return to that.
12:01:27 11 [12:01 p.m.]
12:01:27 12 I shall therefore consider the second point, which is now the
12:01:32 13 first; that is, the judgment of the Kisangani Appeals Court.
12:01:40 14 In the view of the Defence, the Kisangani Appeals Court
12:01:44 15 described as illegal the search and seizure carried out by the
12:01:50 16 judicial police officers Fetafeta and Paluku, and so the
12:01:58 17 Defence considers that all material coming from such a search
12:02:02 18 and seizure and tendered by the Prosecutor at the confirmation
12:02:06 19 hearing cannot be considered as evidence.
12:02:06 20 [12:02 p.m.]
12:02:10 21 Mr President, your Honours, the first question we must put is
12:02:16 22 to determine whether this judgment can have effect in the
12:02:21 23 Democratic Republic of the Congo before it is raised before
12:02:26 24 the International Criminal Court and specifically before this
12:02:28 25 Pre-Trial Chamber.

12:02:29 1 [12:02 p.m.]

12:02:30 2 The answer is no, and I am going to discuss this point.

12:02:45 3 First, at the Bunia High Court, as can be seen on page 2,

12:02:55 4 paragraph 6 of the judgment, the judge found that the civil

12:03:00 5 action -- action of the victim Chishibanji was well-founded

12:03:07 6 and valid. The victim is the civil party in Congo.

12:03:11 7 Consequently, he granted him \$2,000 American in Congolese

12:03:20 8 francs as damages. On paragraph 7 of the same page there is

12:03:28 9 information regarding the order on restitution of the Toyota

12:03:31 10 Starlette, blue in colour, to the same victim, or, in the

12:03:33 11 alternative, payment of the price of the vehicle, which was

12:03:35 12 estimated as \$3,000, in the form of compensation.

12:03:39 13 [12:03 p.m.]

12:03:41 14 The third page also indicates that the victim took part in the

12:03:48 15 High Court proceedings but did not appear at the appeal.

12:03:53 16 These are pages of the Appeals Court judgment which was

12:03:57 17 tendered by the Defence. Hence, the order or the judgment of

12:04:04 18 the Kisangani Appeals Court was made by default in regard to

12:04:09 19 the victim, because only the pleadings of Mr Balembo, who, by

12:04:17 20 some chance, is now my learned colleague on the other side,

12:04:20 21 and Counsel Likwala for the detainee, Colin Tinanzabo, were

12:04:31 22 entertained as we can see in paragraphs 1, 2 and 3 of the same

12:04:35 23 third page.

12:04:38 24 [12:04 p.m.]

12:04:39 25 The judgment on appeal, therefore, could be challenged before

12:04:44 1 the Appeals Court acting as a court of cassation. So,
12:04:51 2 Mr President, your Honours, the proceedings before the Supreme
12:04:54 3 Court of Justice is organised by the ordinance, order number
12:05:00 4 82-017 of 31 March 1982, see the Larciens Codes, Democratic
12:05:12 5 Republic of the Congo, volume 1, Civil and Judicial Law,
12:05:16 6 pages 319 and 321.
12:05:19 7 [12:05 p.m.]
12:05:21 8 Article 47 of this order provides in paragraph 1 that "the
12:05:30 9 time for entering an appeal is 40 clear days from the date of
12:05:37 10 delivery of the inter partes judgment". Paragraph 4 of the
12:05:42 11 same Article says, "For the person claiming damages and the
12:05:50 12 civilly liable party, the time limit shall come into effect on
12:05:54 13 the 10th day following the date of notification of the
12:05:57 14 judgment." That is what is of interest to us. For this
12:06:03 15 person claiming damages who was a party to these proceedings,
12:06:07 16 the time limit for lodging an appeal is 10 days with effect --
12:06:11 17 with effect of the notification of the judgment.
12:06:15 18 [12:06 p.m.]
12:06:17 19 Article 49 says that the time limit shall have suspensive
12:06:23 20 effect on the judgment for all parties.
12:06:27 21 [12:06 p.m.]
12:06:27 22 The consequence is that as long as evidence has not been
12:06:31 23 adduced that the civil party has received notification, the
12:06:39 24 time limit for lodging an appeal shall have suspensive effect.
12:06:43 25 It means that this judgment cannot be executed in Congo.

12:06:50 1 [12:06 p.m.]

12:06:51 2 If the judgment cannot be executed in Congo because it has

12:06:54 3 suspensive effect, then how can it be brought up in the

12:06:58 4 International Criminal Court? When there is a decision issued

12:07:05 5 by a court in Congo, in order to execute such a decision,

12:07:11 6 there has to be an attestation of failure to lodge an appeal

12:07:15 7 with a higher court. So this Court, which is notice or

12:07:21 8 certificate of failure to appeal, has not been filed, so the

12:07:25 9 judgment has no effect.

12:07:28 10 [12:07 p.m.]

12:07:29 11 As a subsidiary argument, the Defence allegation that the

12:07:36 12 evidence gathered during the Kisangani search and seizure was

12:07:41 13 obtained in violation of Article 69.7 of the Statute is not

12:07:48 14 founded. In its decision the Appeals Court of Kisangani only

12:07:54 15 says that: "The Court cannot take into consideration the

12:07:57 16 exhibits found in the home and/or the residence of the accused

12:08:01 17 Tinanzabo. In consequence, the court orders the restitution."

12:08:10 18 [12:08 p.m.]

12:08:10 19 So the court does not say that these documents are not valid,

12:08:14 20 especially as Thomas Lubanga himself does not challenge the

12:08:19 21 authenticity of these materials. So, this alleged illegality

12:08:34 22 of the search cannot be in line with the provisions of

12:08:40 23 Article 69.7 of the Statute regarding the violation of the

12:08:47 24 provisions of the Statute, and especially internationally

12:08:55 25 recognised human rights. In Congolese law, a national law

12:09:01 1 cannot establish an internationally recognised human rights,
12:09:06 2 because this is based on treaties.
12:09:08 3 [12:09 p.m.]
12:09:08 4 Mr President, your Honours, if we take account of these
12:09:14 5 materials, based on your absolute conviction under Rule 63(2)
12:09:24 6 you will determine that they have probative value. I am sure
12:09:27 7 that this is the conclusion you will reach.
12:09:31 8 [12:09 p.m.]
12:09:31 9 In this courtroom you have proven that it is absolute
12:09:36 10 conviction that is your guiding light when you entered into
12:09:44 11 evidence the birth certificates that were tendered by the
12:09:47 12 Prosecutor and challenged by the Defence.
12:09:53 13 [12:09 p.m.]
12:09:54 14 The Chamber accepted that these documents would be entered
12:09:59 15 into evidence for information.
12:10:02 16 [12:10 p.m.]
12:10:02 17 The third point: the Defence alleges that the summary of
12:10:11 18 interviews of witnesses could not be considered as having any
12:10:14 19 probative value, but I shall refer the Defence to Article 61.5
12:10:20 20 of the Rome Statute, which makes provisions. And I would like
12:10:26 21 to point out that I'm sad to say that the Defence has made an
12:10:30 22 effort to criticise the provisions both of the Statute, the
12:10:36 23 Rules of Procedure and Evidence, whereas what we're doing here
12:10:41 24 is seeking the implementation or application of these
12:10:45 25 provisions.

12:10:46 1 [12:10 p.m.]

12:10:46 2 Furthermore, Pre-Trial Chamber 1 itself asked the Prosecution
12:10:51 3 to provide summaries of witness statements to the Defence in
12:10:55 4 its first decision on the Prosecution motions and amended
12:11:01 5 motions for redactions under Rule 81 of the Rules of Procedure
12:11:09 6 and Evidence. And so the Pre-Trial Chamber cannot contradict
12:11:12 7 itself.

12:11:12 8 [12:11 p.m.]

12:11:16 9 The fourth point which becomes the third, as I have eliminated
12:11:20 10 the first: in regard to the absence of probative value from
12:11:25 11 the reports of NGOs and the United Nations to prove the merits
12:11:30 12 of the charges pending against Thomas Lubanga Dyilo and the
12:11:32 13 testimony they contain, considering that the witnesses are
12:11:37 14 anonymous, as the Defence has criticised, it should be pointed
12:11:44 15 out that anonymity of witnesses is provided for under
12:11:52 16 Article 68.5 of the Statute and this cannot be challenged.
12:11:56 17 When the Prosecutor proceeds as he has done, it is in keeping
12:12:00 18 with these provisions. Once more, the Defence even went
12:12:04 19 further. It criticised international and non-governmental
12:12:08 20 organisations, criticising United Nations organs, which, based
12:12:15 21 on neutrality, could not collaborate with the Prosecutor. And
12:12:22 22 in this case the Defence used the example of some
12:12:26 23 non-governmental organisations and said that others like
12:12:32 24 Lawyers Without Borders, FDH and so on and so forth, and he
12:12:38 25 said he did not understand why these organisations were

12:12:43 1 working for justice.

12:12:43 2 [12:12 p.m.]

12:12:44 3 The basis for this is Article 15(2) of the Statute,
12:12:48 4 Article 44(4) of the Statute, and Rule 104 of the Rules of
12:12:57 5 Procedure and Evidence. All of these provisions make
12:12:59 6 provision for collaboration mechanisms at investigation and
12:13:03 7 evidence level with the Prosecutor; that is, cooperation
12:13:06 8 between the Prosecutor and these institutions I'm referring
12:13:09 9 to.

12:13:09 10 [12:13 p.m.]

12:13:10 11 Therefore, the Defence submissions are irrelevant in this
12:13:17 12 regard. Whatever the case, these organisations, these
12:13:27 13 non-governmental organisations which are well organised, these
12:13:31 14 United Nations organs which are equally well organised, would
12:13:36 15 have no interest to have any -- in having anything against
12:13:41 16 Mr Thomas Lubanga Dyilo. The Prosecutor mentioned -- I shall
12:13:45 17 not return to this in detail -- that when Ms Peduto is giving
12:13:50 18 testimony, she cannot remember everything because it would
12:13:55 19 lead one to believe that she was prepared one day to give
12:13:59 20 testimony before the Court. She did so in a disinterested
12:14:02 21 manner.

12:14:03 22 [12:14 p.m.]

12:14:03 23 Furthermore, when we examine the reports of these
12:14:06 24 organisations, we see that these reports refer to periods that
12:14:12 25 are not within the temporal jurisdiction of the Court and

12:14:16 1 which also refer to this period of temporal jurisdiction.
12:14:20 2 [12:14 p.m.]
12:14:21 3 So this is proof of the objectivity or the objectiveness of
12:14:25 4 these reports. The Defence has to show what reason these
12:14:32 5 organisations -- what interest these organisations would have
12:14:39 6 in fighting against Mr Thomas Lubanga Dyilo, because all
12:14:41 7 through this confirmation hearing the Defence has belaboured
12:14:46 8 the point that everything must be proven, but when the Defence
12:14:49 9 alleges something, it should also prove it. For example, when
12:14:52 10 the Defence says that Thomas Lubanga had organised to prevent
12:15:00 11 a situation where Ugandan generals would loot Congolese
12:15:05 12 resources, this is an allegation. If you make such an
12:15:08 13 allegation, you must prove it, and so far the Defence has
12:15:11 14 failed to adduce any proof.
12:15:13 15 [12:15 p.m.]
12:15:14 16 The last point before Mr Luc Walleyne takes the floor is the
12:15:20 17 problem of age in the Democratic Republic of the Congo. The
12:15:24 18 sad fact which must be said, Mr President, your Honours, is
12:15:28 19 that in the Democratic Republic of the Congo age can be proven
12:15:34 20 by all legal means, including a declaration, or just a
12:15:40 21 statement.
12:15:42 22 [12:15 p.m.]
12:15:43 23 As the roads are washed out in Ituri and in Congo, as the
12:15:48 24 Defence pointed out -- and I shan't go into detail on that --
12:15:52 25 so is the civil status system in Congo. This sad and

12:15:58 1 well-known fact was mentioned during the 86th session of the
12:16:05 2 Human Rights Committee that was held in March 2006. The
12:16:09 3 report of this committee states that in -- many places in the
12:16:13 4 DRC do not have civil status services. The lack of
12:16:18 5 administrative authority can explain this.

12:16:23 6 [12:16 p.m.]

12:16:24 7 Also, the International Association of French-Speaking Mayors
12:16:28 8 and the Belgian Cooperation Agency are working to organise
12:16:32 9 and/or rehabilitate this civil status system. I have talked
12:16:38 10 about the public nature of the information. All embassies
12:16:43 11 know this. And today in Congo, if you want to obtain an
12:16:48 12 identity card, you just make a statement before the civil
12:16:51 13 status office, and they will issue the document to you.

12:16:56 14 Unfortunately that is how it is. So if that is true for the
12:16:58 15 entire Democratic Republic of the Congo, it is all the more
12:17:03 16 true for a province which experienced several wars, which was
12:17:06 17 the former Haut-Zaire, and currently the Orientale Province.
12:17:14 18 Think of the rebellion; think of the first Kabila war; think
12:17:19 19 of what -- the war that was described as the wars of
12:17:22 20 aggression, and think of the UPC phenomenon. Mr President,
12:17:25 21 your Honours, this means that Ms Peduto and all the other
12:17:30 22 inter-governmental organisations, all the United Nations
12:17:34 23 organs that work as they do, are right.

12:17:38 24 [12:17 p.m.]

12:17:39 25 I learned that there was a copy of an extract of a birth

12:17:43 1 certificate. This is provided for by law. It cannot be
12:17:47 2 challenged. That is what the law provides. But out in the
12:17:50 3 field that is not what is happening. You cannot go to Ituri
12:17:54 4 and find a hospital or a service that can help you for that
12:17:58 5 purpose. So at the risk of repeating myself I shall say that
12:18:03 6 this is a well known fact.
12:18:04 7 [12:18 p.m.]
12:18:05 8 Mr President, your Honours, I could have addressed some
12:18:10 9 matters, in particular in regard to victims a -- victims 1, 2,
12:18:18 10 3, but since Ms Peduto gave testimony here before the
12:18:22 11 Pre-Trial Chamber, our clients have been under threat. People
12:18:30 12 are trying to find out who it is who worked with Madame
12:18:39 13 Christine, as she is referred to back there, so it's a
12:18:45 14 manhunt. You have all the materials pertaining to our clients
12:18:49 15 in the case file, and I shall call on the Chamber to examine
12:18:54 16 these details, because we can only give one identification --
12:19:02 17 because we cannot give any single identification, because our
12:19:06 18 clients are in fear for their lives.
12:19:10 19 [12:19 p.m.]
12:19:11 20 I shall conclude with this point, Mr President: I heard
12:19:14 21 something that my learned colleague Mr Flamme said the other
12:19:19 22 day. He said, "At night I sleep, and during the weekends I am
12:19:26 23 with my children." Children are precious; they are angels, as
12:19:32 24 some people say, but these children, who were enlisted by
12:19:40 25 Mr Thomas Lubanga Dyilo, no longer have a future. The parents

12:19:45 1 of these children did not sleep for a long time, and it is
12:19:52 2 entirely possible that they are still not sleeping today, but
12:19:58 3 some of our clients are not with their parents; they are
12:20:02 4 elsewhere, because since the army changed them they have
12:20:09 5 become unbearable.

12:20:12 6 [12:20 p.m.]

12:20:12 7 And let us all think of a 12-year-old, a child of 11 or a
12:20:19 8 child of 14 for whom one has plans. Even if you are poor, you
12:20:24 9 can give a child a farm. Let us think of these children who
12:20:28 10 can no longer be borne by their parents. I ask the Chamber to
12:20:32 11 think, and what they expect of the Chamber is justice. Let
12:20:37 12 justice be done, and let it be done expeditiously. Thank you.

12:20:46 13 PRESIDING JUDGE JORDA (interpretation): Thank you very much,
12:20:47 14 Mr Mulenda, and I suggest that Mr Walleyne take the floor to
12:20:56 15 complete the submissions from the legal representatives of the
12:20:59 16 victims.

12:21:09 17 MR WALLEYN (interpretation): Mr President, your Honours, the
12:21:15 18 representatives of the victims have had the honour over the
12:21:19 19 last three weeks to participate in this first confirmation
12:21:25 20 hearing before your Court. We have listened at length. We
12:21:32 21 have listened far more than we have spoken, and we have
12:21:36 22 studied -- studied those materials we were allowed to examine,
12:21:42 23 and we have observed that, despite appearances, this world in
12:21:53 24 The Hague, with this high-tech court, and the world in Bunia
12:21:58 25 is really not -- they are really not so different, one from

12:22:04 1 the other.

12:22:04 2 [12:22 p.m.]

12:22:04 3 We have been surprised to see here Ms Christine, who was

12:22:14 4 approached by one of our clients for assistance when he was

12:22:20 5 abducted from a number -- from his class when he was in fifth

12:22:26 6 year at primary school along with some of his other school

12:22:30 7 mates. Now, we have learnt a lot, but we cannot say that the

12:22:36 8 way in which we see this case has changed much. It has not

12:22:46 9 been changed by the evidence presented by the Prosecution,

12:22:48 10 which is perhaps not surprising, but it has also not been

12:22:52 11 changed by what has been presented by the Defence.

12:22:55 12 [12:22 p.m.]

12:22:55 13 Our young clients were recruited as fighters by the UPC when

12:23:00 14 they were only 10, 11 years old. Before we became their

12:23:05 15 counsel we already know that militias from all sides in Ituri

12:23:09 16 were recruiting child soldiers en masse during the conflicts

12:23:14 17 in the district, and this often included under-aged children

12:23:21 18 under the age of 15 years. And any TV viewer or reader of the

12:23:27 19 international press will have read a report on the subject.

12:23:31 20 These events have been exposed by local and by big

12:23:36 21 international NGOs down the years.

12:23:39 22 [12:23 p.m.]

12:23:41 23 International institutions such as the United Nations

12:23:46 24 Observation Mission in the Congo, UNICEF, and the

12:23:53 25 Secretary-General of the United Nations organisation have

12:23:57 1 produced many reports on the topic. The Security Council has
12:24:00 2 also referred to the matter. One can simply state that
12:24:03 3 massive recruitment by [sic] child soldiers by the combatant
12:24:08 4 groups in Ituri was a fact of common knowledge in the spirit
12:24:12 5 of Article 69 of the Statute of Rome.
12:24:17 6 [12:24 p.m.]
12:24:18 7 The Defence says: well, it was those who went through the
12:24:22 8 Mobuto regime who gave a bad example, marching on Kinshasa
12:24:29 9 with an army of kadogo; kadogo who became heroes, became
12:24:34 10 models. And it is true that perhaps those kadogos did become
12:24:38 11 a model to be followed by some young people in Ituri.
12:24:41 12 The Defence also points out that other militias -- enemy
12:24:47 13 militias or splinter groups of the UPC and the Ugandan army
12:24:54 14 have recruited very young children, but, according to the
12:24:57 15 Defence, the UPC and its armed branch the FPLC were, however,
12:25:03 16 rather more the exception to the rule and that their
12:25:07 17 particular group never had that practice.
12:25:10 18 [12:25 p.m.]
12:25:11 19 We are also told that representatives of international
12:25:15 20 organisations, members of NGOs and journalists, who say that
12:25:20 21 they have seen young children wearing uniforms and bearing
12:25:23 22 arms in the streets of Bunia, are mistaken. These were short
12:25:29 23 stature young adults; they were young prisoners of war whom
12:25:33 24 the UPC did not disarm further to an explicit recommendation
12:25:39 25 of the principles of Cape Town.

12:25:40 1 Now, I have the principles of Cape Town here, I've looked
12:25:44 2 through them in vain and not found a recommendation along
12:25:47 3 those lines.
12:25:48 4 [12:25 p.m.]
12:25:49 5 Observers have said that they have seen child soldiers, but
12:25:53 6 perhaps these were simply students of the military academy, or
12:25:59 7 others. Our young clients have been through Bule military
12:26:06 8 camp, and the descriptions they have given is far from that of
12:26:11 9 being a military academy. One is not supposed to fight other
12:26:16 10 students and shoot bullets above their heads. It is also said
12:26:22 11 that these may have been Pygmies who somehow had found
12:26:27 12 themselves at a Hema militia.
12:26:28 13 [12:26 p.m.]
12:26:29 14 At all events, our young clients do not belong to any of these
12:26:32 15 categories, and it is highly unlikely that this was the case
12:26:35 16 for many of their former combat comrades.
12:26:39 17 [12:26 p.m.]
12:26:39 18 Now, the Defence -- according to the Defence Mr Lubanga has
12:26:43 19 always scrupulously complied with humanitarian law, and has
12:26:47 20 tried to ensure that they are respected by his troops. It is
12:26:53 21 said that it is a conspiracy between UN institutions, large
12:27:02 22 NGOs, and States who finance them; that the Prosecutor has set
12:27:09 23 himself against Mr Lubanga; and that the victims who have come
12:27:12 24 forward have done so fraudulently, and all of this with the
12:27:17 25 resources of Ituri at stake.

12:27:20 1 [12:27 p.m.]

12:27:20 2 Now, this allegation has been made by the Defence but we are

12:27:23 3 waiting in vain to hear the slightest piece of evidence to

12:27:27 4 support it. Now, other arguments have been put forward by the

12:27:30 5 Defence which the victims are more sensitive to, and it is

12:27:35 6 true that most of our clients were members of the same ethnic

12:27:40 7 group as Thomas Lubanga.

12:27:44 8 [12:27 p.m.]

12:27:46 9 They were members of his group. But I must say, when we speak

12:27:54 10 with them, they do not express hatred of Mr Lubanga. Even the

12:28:00 11 parents who were highly disappointed when the UPC decided to

12:28:09 12 recruit their children by force, if necessary -- even they

12:28:13 13 have supported this movement.

12:28:17 14 [12:28 p.m.]

12:28:20 15 Some of the children who have genuinely suffered and who have

12:28:27 16 been traumatised have maintained respect and even a certain

12:28:32 17 admiration for the man who was once their former

12:28:35 18 Commander-in-Chief.

12:28:36 19 [12:28 p.m.]

12:28:38 20 The Defence is confident that the victims are not solely

12:28:42 21 motivated by the hope of receiving a financial compensation

12:28:46 22 from the Court. The fact of the matter is that, at this stage

12:28:51 23 in the proceedings, the priority for the victims is that the

12:28:56 24 truth be established.

12:28:58 25 [12:28 p.m.]

12:29:03 1 There is no reason to say that their statements are suspect by
12:29:08 2 nature. If the Defence claims that we are knocking at the
12:29:14 3 wrong door, we are willing to listen to the arguments it puts
12:29:18 4 forward, but unfortunately we have not been convinced by the
12:29:21 5 evidence brought by it, despite the fact that it is better
12:29:24 6 placed to provide evidence of the internal workings of the UPC
12:29:29 7 than the Office of the Prosecutor.

12:29:30 8 The Defence suggests that Mr Lubanga was a leader in
12:29:33 9 appearance only and hostage to his subordinates and that
12:29:35 10 perhaps it was a Kahwa or a Kitembo who was -- were truly
12:29:42 11 responsible for recruitment of our clients, and that
12:29:45 12 Mr Lubanga, he tried in vain to prevent his officers from
12:29:49 13 committing war crimes.

12:29:53 14 [12:29 p.m.]

12:29:54 15 Now, some of the individuals in question, the subordinate
12:30:00 16 commanders, are still in the Congo and are indeed being
12:30:03 17 prosecuted by the military justice system for crimes against
12:30:07 18 humanity, and crimes -- war crimes in the spirit of Article 8
12:30:15 19 of the Statute of Rome.

12:30:16 20 [12:30 p.m.]

12:30:17 21 But the victims remain unsatisfied. The Defence has not
12:30:22 22 brought any evidence to substantiate the assertions it has
12:30:28 23 made, at least not in public session.

12:30:32 24 Thomas Lubanga's counsel have, using a lot of imagination,
12:30:37 25 compared him to Churchill, De Gaulle, King Lear, or even the

12:30:43 1 King of Belgium. Now, in Congo, some Belgian kings exercised
12:30:50 2 true power, but I'm sure what the Defence meant was to allude
12:30:53 3 to a constitutional system in which the head of State only has
12:30:56 4 a symbolic function and limits his activities to cutting
12:31:00 5 ribbons, promulgating laws, and signing off decrees voted by
12:31:06 6 government.
12:31:06 7 [12:31 p.m.]
12:31:07 8 The image of the UPC which has been confirmed here is very far
12:31:14 9 from that of a constitutional State. Thomas Lubanga may have
12:31:18 10 believed himself to be a head of State, but that State was a
12:31:21 11 party State, and I would ask the interpreters to be careful --
12:31:26 12 I'm not saying a State party, as in a signatory to the
12:31:30 13 Statute, but, rather, a party State.
12:31:34 14 [12:31 p.m.]
12:31:35 15 That is to say that the legislative and executive power were
12:31:39 16 held in a single hand -- the hand of the single party and of
12:31:43 17 its leader, its President.
12:31:46 18 [12:31 p.m.]
12:31:48 19 The Lubanga government was made up of what Mr Lubanga himself
12:31:57 20 called presidential advisers, and it emerged after a military
12:32:04 21 coup d'etat. All of these factors are totally incompatible
12:32:08 22 with democratic internal mechanisms and, in any case, such
12:32:12 23 mechanisms are relatively rare in Congolese political culture,
12:32:19 24 and certainly very difficult to achieve and maintain in times
12:32:24 25 of war. Despite the appearance of a classic government, with

12:32:24 1 ministries of tourism, sport, and culture, and, of course,
12:32:29 2 reconciliation, the UPC power in Ituri had all of the features
12:32:31 3 of what we would generally call a dictatorship, and its
12:32:36 4 leader, those of a warlord.
12:32:37 5 [12:32 p.m.]
12:32:40 6 Until proven otherwise, we have no reason to believe that our
12:32:46 7 clients, like the rest of the community in Ituri, were
12:32:50 8 mistaken in their impression that this was the case, and that
12:32:56 9 is to say, that were mistaken that it was Thomas Lubanga Dyilo
12:33:01 10 who controlled the UPC and its army. Quite rightly, the
12:33:06 11 indictment refers to the direct participation of Thomas
12:33:12 12 Lubanga as perpetrator, co-perpetrator and as acting through
12:33:16 13 another person in the spirit of Article 25(3)(a) of the
12:33:20 14 Statute. We believe that acts committed through another
12:33:24 15 person include the execution of orders given by a superior,
12:33:29 16 and even if that form of participation is more explicitly
12:33:35 17 covered by Article 25(3)(b).
12:33:37 18 [12:33 p.m.]
12:33:37 19 The Office of the Prosecutor has tendered sufficient evidence,
12:33:40 20 in our eyes, to demonstrate that Thomas Lubanga Dyilo was the
12:33:44 21 President of the UPC and the Commander-in-Chief of the FPLC,
12:33:48 22 and that he exercised authority within the party and the
12:33:52 23 movement, and that he therefore committed the crimes with
12:34:01 24 which he is charged, either through action jointly with
12:34:05 25 others, or through orders given to them.

12:34:07 1 [12:34 p.m.]

12:34:08 2 The representatives of victims 1 to 3 believe -- or would

12:34:13 3 submit, however, respectfully, that the Pre-Trial Chamber is

12:34:18 4 not bound by the terms of the charging document as regards the

12:34:22 5 precise forms of participation in the crimes committed.

12:34:26 6 Regulation 55 of the Regulations of the Court gives the Trial

12:34:31 7 Chamber power to change the legal characterisation of facts.

12:34:36 8 It does not speak to the definition of participation. Rather,

12:34:40 9 the Regulations seem to leave this open to the appreciation of

12:34:42 10 the Chambers.

12:34:43 11 [12:34 p.m.]

12:34:44 12 The victims' representatives do not share the position of the

12:34:49 13 Defence, who would like to see the hearing suspended if

12:34:57 14 unclarity persists on the forms of participation in

12:35:02 15 application of Article 61(6)(c). However, that Article, on

12:35:07 16 the contrary, provides only for adjournment of the hearing to

12:35:12 17 consider amending a charge because the evidence submitted

12:35:15 18 appears to establish a different crime.

12:35:19 19 [12:35 p.m.]

12:35:20 20 In the case in hand, and at all events, various forms of

12:35:24 21 participation relate to the same crime.

12:35:27 22 [12:35 p.m.]

12:35:28 23 Now, if the Court were to feel that some of the conduct does

12:35:32 24 not fall under Article 25 paragraph (3)(a) but, rather, under

12:35:38 25 another paragraph of the same Article, to our minds there is

12:35:42 1 nothing to stop the Chamber specifying that certain proofs
12:35:51 2 correspond more to other forms of participation which may be
12:35:56 3 less important -- for instance, forms of complicity. This
12:36:00 4 would, furthermore, be in the interest of the Defence.
12:36:02 5 [12:36 p.m.]
12:36:03 6 Let's take the example of the video of the visit to Rwampara
12:36:06 7 camp. The Defence will contest, I am sure, that this proves
12:36:12 8 joint enterprise, but in any case it does demonstrate that the
12:36:18 9 suspect encouraged at that place the recruitment of children,
12:36:25 10 even if those children were not yet young recruits but kadogo,
12:36:30 11 as referred to by paragraph 3(b) -- 25(3)(b).
12:36:35 12 [12:36 p.m.]
12:36:35 13 The Court may also consider that certain items of evidence
12:36:41 14 tend to indicate that the officers of the UPC
12:36:49 15 contributed -- the actions of the officers of the UPC were
12:36:54 16 facilitated and the criminal activity facilitated -- even if
12:37:01 17 it has failed to prove that this is the result of an order or
12:37:04 18 of consultation.
12:37:05 19 [12:37 p.m.]
12:37:06 20 It might also be held against Thomas Lubanga that -- that his
12:37:16 21 subordinates committed crimes at a time when their leader
12:37:22 22 failed to exercise control properly over his forces or
12:37:25 23 subordinates. Allow us to refer to Article 28 of the Rome
12:37:30 24 Statute, which does not limit responsibility for inaction or
12:37:33 25 negligence to military leaders, but, rather, extends it to any

12:37:39 1 superior who may exercise effective control. So any
12:37:44 2 discussion about the military or civil responsibilities of
12:37:47 3 Thomas Lubanga are therefore entirely ungrounded.
12:37:50 4 [12:37 p.m.]
12:37:51 5 The Defence makes much of the decree to demobilise children as
12:37:55 6 exonerating Mr Lubanga from all responsibility. Such a
12:38:01 7 measure is not enough to exonerate him. Article 28 indeed
12:38:07 8 states that the superior must also repress the commission of
12:38:10 9 the crime, or submit the matter to the competent authorities
12:38:15 10 for investigation and prosecution.
12:38:18 11 [12:38 p.m.]
12:38:22 12 We have not heard any evidence of misdoings by subordinates
12:38:30 13 being -- being prosecuted or punished for recruitment of
12:38:39 14 children. No, we are told that these children may simply have
12:38:45 15 been prisoners of war.
12:38:48 16 [12:38 p.m.]
12:38:55 17 The Defence also refers to another ground for excluding
12:38:59 18 criminal responsibility, without further elaborating. It
12:39:03 19 refers to danger of genocide against the Hema ethnic group.
12:39:08 20 Now, we feel that this is a message directly for our clients;
12:39:14 21 that is to say: If we recruited children it was for their
12:39:20 22 good, to save them from death and to save their families and
12:39:23 23 to save them from extermination.
12:39:26 24 [12:39 p.m.]
12:39:26 25 This argument convinces us neither in fact nor in law. Very

12:39:32 1 little evidence has been tendered by the Defence to document
12:39:37 2 the existence of a plan of genocide. On this point, however,
12:39:41 3 we are less sceptical than the Office of the Prosecutor.
12:39:45 4 Relatives and other persons close to our clients have indeed
12:39:49 5 been savagely massacred owing to their ethnic origins. Our
12:39:55 6 clients, too, have had reason to fear extermination of the
12:40:04 7 Hema group.
12:40:05 8 [12:40 p.m.]
12:40:05 9 However, none of them has said that they felt that recruitment
12:40:10 10 of children under the age of 15 years was the only way to
12:40:13 11 avoid genocide. In reality, the military operations of the
12:40:19 12 UPC were not limited at all to simply defending the community,
12:40:24 13 and even if that was the case, participation in a purely
12:40:28 14 defensive operation does not consist in itself a ground for
12:40:34 15 excluding criminal responsibility, according to the Statute of
12:40:39 16 Rome, Article 31(c) [sic].
12:40:42 17 [12:40 p.m.]
12:40:43 18 There is another argument put forward, which is perhaps of
12:40:48 19 less interest to the victims themselves, but certainly one
12:40:53 20 which strikes the legal representatives, and this is the
12:40:55 21 principle of legality. This is a principle close to our heart
12:40:59 22 as lawyers.
12:41:00 23 [12:41 p.m.]
12:41:00 24 The Defence invokes or alleges that, at the time of the
12:41:06 25 events, these crimes were not criminalised because the State

12:41:12 1 had not yet ratified the Statute of -- sorry, had ratified the
12:41:16 2 Statute of Rome but had not incorporated it into its national
12:41:21 3 penal law.
12:41:22 4 [12:41 p.m.]
12:41:22 5 However, it couldn't be said that the authors of the
12:41:27 6 Rome Statute did not create new crimes but, rather, simply
12:41:34 7 made an inventory of those acts which international custom
12:41:42 8 already considered to be contrary to humanitarian law. When
12:41:48 9 the Special Tribunal for Sierra Leone was set up in October
12:41:54 10 2000, the Secretary-General in his report stated that the
12:42:01 11 prohibition on the recruitment of children below the age of
12:42:05 12 15, a fundamental element of the protection of children was
12:42:08 13 for the first time established in the 1977 additional
12:42:14 14 Protocol II to the Geneva Conventions, Article 4,
12:42:19 15 paragraph 3(c), of which provides that children shall be
12:42:19 16 provided with the care and aid they require, and that, in
12:42:23 17 particular, children who have not attained the age of 15 years
12:42:26 18 shall neither be recruited in the armed forces or groups nor
12:42:30 19 allowed to take part in hostilities.
12:42:32 20 A decade later the prohibition on the recruitment of children
12:42:36 21 below 15 into armed forces was established in Article 38
12:42:40 22 paragraph 3 of the 1989 Convention of the Rights of the Child.
12:42:44 23 And in 1998 the Statute of the Court criminalised the
12:42:48 24 prohibition, and qualified it as a war crime, but while the
12:42:56 25 prohibition on child recruitment has by now acquired a

12:42:59 1 customary international law status, it is far less clear
12:43:04 2 whether it is customarily recognised as a war crime entailing
12:43:08 3 the individual criminal responsibility of the accused. That
12:43:13 4 was in 2000.
12:43:16 5 [12:43 p.m.]
12:43:17 6 However, the Appeals Chamber of the Special Court for
12:43:20 7 Sierra Leone has, in the meantime, pronounced itself on the
12:43:24 8 prohibition regarding the enlistment and conscription of
12:43:27 9 children under the age of 15 years. The Defence has presented
12:43:32 10 the same argument as was put there -- put forward the same
12:43:37 11 argument as is being put forward today by the Defence of
12:43:41 12 Mr Lubanga, that is to say, violation of the principle of
12:43:49 13 nullum crimen sine lege owing to the fact that enlistment and
12:43:52 14 conscription of children under the age of 15 years was not a
12:43:54 15 provision of law at the date when the crimes are alleged to
12:43:59 16 have been committed.
12:43:59 17 Now, having studied in detail the international treaties and
12:44:03 18 customary law [in English]: "Child recruitment was
12:44:08 19 criminalised before it was explicitly set out as a criminal
12:44:12 20 prohibition in treaty law and certainly by November 1996 the
12:44:15 21 starting point of the time frame relevant to the indictment."
12:44:19 22 [12:44 p.m.]
12:44:19 23 That was a quotation from the Appeals Chamber 1996, but here
12:44:27 24 we are speaking of events in 2002, 2003. In the meantime
12:44:34 25 there has been a major development in terms of international

12:44:39 1 customary law, and that is the entering into force of the
12:44:43 2 Statute of Rome itself which has done away with any ambiguity
12:44:48 3 on this count.
12:44:49 4 [12:44 p.m.]
12:44:49 5 The Defence furthermore does not differentiate between the
12:44:52 6 jurisdiction of Congolese courts and this Court. It may be
12:45:06 7 that the prohibition by international custom is not enough for
12:45:11 8 a Prosecution under Congolese law, but your Chamber referred
12:45:19 9 to this problem complex in its decision of 24 February. The
12:45:22 10 inability of a State party to prosecute a crime covered by the
12:45:26 11 Statute in no way prohibits the International Criminal Court
12:45:34 12 from initiating proceedings. Quite on the contrary, it may
12:45:38 13 have as an effect -- it may in fact do away with the
12:45:42 14 inadmissibility problem. The problem of the legality
12:45:46 15 principle has been resolved by Article 22 of the Statute,
12:45:50 16 which clearly provides that criminal responsibility is
12:45:59 17 relevant if the conduct in question constitutes, at the time
12:46:02 18 it takes place, a crime within the jurisdiction of the Court.
12:46:06 19 [12:46 p.m.]
12:46:07 20 Article 23(1) [sic] refers to non-retroactivity, and this is
12:46:13 21 another criteria which refers explicitly to the criterion of
12:46:18 22 entering into vigour of the Statute of Rome. Furthermore,
12:46:23 23 although part of the Congolese population still doesn't know
12:46:29 24 that the ICC exists and knows nothing of the Statute of Rome,
12:46:33 25 or the fact that the DRC has ratified it, a large section of

12:46:37 1 the population in Ituri has followed the entering into force
12:46:40 2 of the Statute and has welcomed it with relief, as have
12:46:45 3 international organisations, non-governmental organisations,
12:46:48 4 who have spoken a lot of it in the area.
12:46:52 5 [12:46 p.m.]
12:46:53 6 For members of the government, of course, it is no secret that
12:46:56 7 these developments have taken place. It can safely be said
12:47:00 8 that the entering into force of the Statute of Rome could not
12:47:05 9 have gone unnoticed by Thomas Lubanga, who presents himself as
12:47:09 10 a politician and a head of State, and who was involved in an
12:47:14 11 armed conflict directly himself.
12:47:17 12 [12:47 p.m.]
12:47:18 13 To conclude -- and you see, Mr President, that we have in fact
12:47:25 14 not even exhausted the time allotted to us -- the
12:47:32 15 representatives of victims 1, 2, 3 are convinced, on the basis
12:47:37 16 of the evidence presented over the last two weeks in public
12:47:40 17 session, both by the Prosecution and the Defence, that
12:47:44 18 Mr Thomas Lubanga Dyilo must bear criminal responsibility for
12:47:49 19 the recruitment of their under-aged clients before they had
12:47:54 20 even reached the age of 15 years.
12:47:56 21 [12:47 p.m.]
12:47:57 22 As a result, we call upon you to confirm the charges which
12:48:05 23 have been presented to you here by the Prosecution, and we
12:48:13 24 call upon the Court to ensure that the trial which the greater
12:48:19 25 community -- and, in particular, the victims -- anticipate

12:48:24 1 does indeed take place. It is -- would be inconceivable that
12:48:30 2 after all of these years of investigation, of suffering, and
12:48:35 3 after -- after all the mass of evidence collected and
12:48:39 4 presented here today has been put to this Court, that this
12:48:44 5 Chamber would decide that, in fact, nothing had happened;
12:48:48 6 there were no crimes in Ituri, or at least no crimes committed
12:48:52 7 by the UPC and that there's nothing to reproach Mr Lubanga
12:48:57 8 with -- Mr Lubanga, who was transferred to this Court straight
12:49:03 9 from his prison in the Congo, where he was imprisoned for
12:49:08 10 crimes against humanity and war crimes.

12:49:10 11 [12:49 p.m.]

12:49:10 12 PRESIDING JUDGE JORDA (interpretation): Thank you very much.
12:49:11 13 This brings us to the end of the closing statements by the
12:49:15 14 representatives of the victims in support of their assertions.
12:49:21 15 We shall now adjourn. It is 12.50. The Defence will be
12:49:27 16 presenting its closing statements for a two-hour period this
12:49:33 17 afternoon. We shall therefore resume at 2.15 -- I repeat 2.15
12:49:38 18 and not 2.30.

12:49:38 19 [12:49 p.m.]

12:49:42 20 [Luncheon adjournment]

12:49:42 21 [2:18 p.m.]

14:18:14 22 THE USHER: All rise.

14:18:26 23 PRESIDING JUDGE JORDA (interpretation): The hearing is
14:18:29 24 resumed. Please be seated. Please ask Mr Thomas Lubanga
14:18:32 25 Dyilo to come back into the room.

14:18:34 1 [2:18 p.m.]

14:18:35 2 [Mr Thomas Lubanga Dyilo entered the courtroom]

14:18:43 3 PRESIDING JUDGE JORDA (interpretation): Mr Flamme, I just

14:18:54 4 wanted to mention that we have an hour and a half, then we

14:18:59 5 will break for 30 minutes and you will finish your last

14:19:04 6 30 minutes after the break. The floor is yours.

14:19:07 7 ME FLAMME (interpretation): Thank you, President.

14:19:07 8 [2:19 p.m.]

14:19:15 9 President, your Honours, before moving on to the pleadings, I

14:19:25 10 would like to address, as one would say in English, a problem

14:19:35 11 which is more a problem of housekeeping than anything else,

14:19:43 12 but it does pose a problem to me, and I would like to say, not

14:19:49 13 really to Mr Mulenda but more to the Prosecutor, that I heard

14:19:54 14 Mr Mulenda address the issue of the age of the children and

14:20:07 15 also heard him address the question of the birth certificates

14:20:11 16 the Prosecutor included in his files -- or birth attestations.

14:20:22 17 [2:20 p.m.]

14:20:25 18 I believe, if I remember correctly, that this should have been

14:20:31 19 something addressed in closed session, because it concerns

14:20:37 20 cases of individual children, and that we had to ascertain the

14:20:44 21 age of these children and, therefore, I would like to oppose

14:20:55 22 the fact that the Prosecutor displays his record whenever he

14:21:05 23 wants in all kinds of ways, whereas we aren't allowed to do

14:21:11 24 so. And this means that the protection measures don't apply

14:21:17 25 any more.

14:21:17 1 [2:21 p.m.]

14:21:18 2 The Defence agreed with the Chamber and with the Prosecutor
14:21:24 3 that it was necessary to have a closed session to discuss
14:21:28 4 certain things, and I can't accept the fact that once the
14:21:39 5 closed sessions are over we allow these matters to be
14:21:42 6 discussed in public.

14:21:43 7 [2:21 p.m.]

14:21:45 8 Therefore, I am here stating not only that I am surprised, but
14:21:53 9 I am rather shocked, because the rules are here for everyone
14:21:58 10 and should be respected.

14:22:01 11 PRESIDING JUDGE JORDA (interpretation): I don't want us to
14:22:03 12 spend too much time on this incident, as there was one. The
14:22:07 13 Chamber will check the transcript. I don't know if Mr Mulenda
14:22:11 14 said "I was told that" or "the Prosecutor told me that", but I
14:22:16 15 will check the transcript.

14:22:18 16 [2:22 p.m.]

14:22:19 17 What Mr Jean Flamme said is in the transcript, too, but,
14:22:23 18 Mr Mulenda, if you want to reply, please just reply for one
14:22:26 19 minute, because it will -- your reply will lead to a rejoinder
14:22:31 20 and then another reply, so just 30 seconds.

14:22:37 21 MR MULENDA (interpretation): Yes, of course, President. I
14:22:42 22 noted the observations of my eminent colleague Jean Flamme,
14:22:48 23 but I believe they are ill-founded. But I noted the fact that
14:22:54 24 the Defence handed in a motion for the birth attestations to
14:23:04 25 be filed in the record and I therefore deduced that it

14:23:08 1 was -- the problem involved was a problem related to age and,
14:23:14 2 therefore, the Prosecutor can't be involved.
14:23:15 3 [2:23 p.m.]
14:23:16 4 It was my own initiative; it was my own reflex.
14:23:20 5 Mr Jean Flamme now can concentrate on proceeding in the way he
14:23:27 6 believes most fit.
14:23:30 7 PRESIDING JUDGE JORDA (interpretation): You don't have to
14:23:31 8 tell Mr Flamme how to spend his time. The President is here
14:23:36 9 to regulate everything. We noted your comments and your
14:23:42 10 intuition. The Chamber has observed what has gone on, but we
14:23:47 11 would now like you to move on to your closing statements and
14:23:52 12 for you to tell us how you wish to proceed this afternoon.
14:23:56 13 ME FLAMME (interpretation): Thank you for handing the floor
14:23:58 14 back to me.
14:23:58 15 [2:23 p.m.]
14:23:59 16 I would like to proceed as follows: as all Defence lawyers,
14:24:14 17 in my pleadings I am free to show the Court the image and the
14:24:24 18 reality about one's client, and one is free to tell the truth.
14:24:33 19 And I said, not in the introductory remarks, but I said on
14:24:38 20 Friday, 10 November, when you gave me the floor for my
14:24:44 21 introductory remarks, that I was bound by time. I think
14:24:56 22 everybody will probably feel the time, or the clock in their
14:25:01 23 stomachs by the end of this hearing, but I understand it is a
14:25:06 24 confirmation hearing, as the Court has repeated on several
14:25:11 25 occasions. And the scope of the hearing is therefore somewhat

14:25:20 1 limited.

14:25:20 2 [2:25 p.m.]

14:25:21 3 However, this should not mean, as the Prosecutor is trying to

14:25:28 4 insinuate, that you can also reduce the burden of proof. I

14:25:36 5 would like to first start by saying that I heard the

14:25:40 6 Prosecutor and the victims say that Defence has not proven or

14:25:48 7 demonstrated anything. From the outset, I would like to

14:25:53 8 remind everyone that my client seated behind me is presumed

14:26:00 9 innocent, which means that he is innocent until proof of the

14:26:06 10 contrary. And the burden of proof, Mr Prosecutor, is on you.

14:26:14 11 I do not need to prove anything.

14:26:15 12 [2:26 p.m.]

14:26:16 13 So I think you are wrong when you say that the Defence hasn't

14:26:20 14 proven anything. The Defence is going to do what I would have

14:26:30 15 liked to do at the very first hearing; it's going to give you

14:26:36 16 an historical background which we will try to give in a very

14:26:45 17 complete manner, because we have tried to explain the context

14:26:53 18 to the Court. Facts can't be isolated in time; you have to

14:26:59 19 place them back in their context. You have to look at the

14:27:03 20 preceding history and the accompanying circumstances.

14:27:06 21 [2:27 p.m.]

14:27:09 22 But I never heard the Prosecutor give this context. However,

14:27:15 23 it is his responsibility to do so, and I would like to remind

14:27:19 24 us all that we are here at a first -- this hearing is a first.

14:27:32 25 We are constructing the case law, if you may, from zero. And,

14:27:41 1 therefore, the Prosecutor has the prime responsibility to
14:27:49 2 investigate exonerating facts equally.
14:27:54 3 [2:27 p.m.]
14:27:55 4 I come from a country where this tradition does exist. Often
14:28:01 5 it is not the Prosecutor himself who has to investigate
14:28:05 6 exonerating circumstances, but the examining judge. But we
14:28:11 7 know about the existence of this obligation and I need not
14:28:14 8 re-explain it here. The Statute gives you the obligation to
14:28:19 9 establish the truth; not "a truth", not "your truth", or not
14:28:27 10 "some people's truth", but "the truth".
14:28:32 11 [2:28 p.m.]
14:28:33 12 Your investigators could be compared to the investigators of
14:28:40 13 the detective division of the police. They have to be
14:28:47 14 certified, they have to have the right qualifications and they
14:28:51 15 must be able not to hear only one side of the truth. And I
14:28:57 16 have said from the outset, and repeated, that you have not
14:29:01 17 fulfilled this obligation, that you only demonstrated the
14:29:08 18 truth that you wanted to see, and one day you decided you were
14:29:13 19 going to accuse a person for the reasons I will give you later
14:29:18 20 on, and that on these premises you created a record -- a
14:29:29 21 personalised record of the case of this man whom you want to
14:29:38 22 prosecute, and you have tried to accuse him of a lot of
14:29:41 23 things.
14:29:41 24 [2:29 p.m.]
14:29:42 25 You want to accuse him, as we are in Ituri, and as

14:29:47 1 several -- not several thousands, but tens of thousands, if
14:29:50 2 not hundreds of thousands of people died -- you have an
14:29:56 3 obligation towards the international community, as I have
14:29:59 4 already said, to find the killer and, on behalf or in the name
14:30:07 5 of the people of Ituri, you have to bring him to justice.
14:30:10 6 Because a Prosecutor is a person who represents a
14:30:17 7 community -- the international community, and not governments.
14:30:21 8 [2:30 p.m.]
14:30:22 9 You have the obligation to preserve the interests of this
14:30:27 10 community. So you chose someone, but you did not prove the
14:30:37 11 accusations that are held against him for the massacres. You
14:30:46 12 would like to accuse him of this. However, this is not done.
14:30:50 13 You brought him to the Court with the charges we all know.
14:30:58 14 [2:30 p.m.]
14:30:59 15 Now I'd like to move on to the more general part of my
14:31:02 16 presentation. What are the credentials of this person you
14:31:08 17 brought here? You used a national arrest as -- at the time of
14:31:18 18 your arrest of Mr Thomas Lubanga. The person concerned was
14:31:23 19 already in Kinshasa, and had been so for 31 months. He had
14:31:28 20 been cut off from his family, relatives and from his country.
14:31:36 21 You know the circumstances in which this occurred and you
14:31:39 22 rooted your arrest on this previous arrest.
14:31:41 23 [2:31 p.m.]
14:31:42 24 As you know, Mr Thomas Lubanga Dyilo is 46 years old. He is
14:31:46 25 married, the father of seven children between 4 and 15 years,

14:31:52 1 and was detained for the second time from 13 August 2003 in
14:31:57 2 Kinshasa and has since lived separated from his family, and
14:32:03 3 this for more than three years.
14:32:04 4 [2:32 p.m.]
14:32:07 5 He comes from Ituri district, Orientale Province in the
14:32:12 6 north-east of the Congo -- more specifically, from the Djugu
14:32:18 7 territory and the Bahema North chefferie of the Hema ethnic
14:32:25 8 group.
14:32:25 9 [2:32 p.m.]
14:32:27 10 He went to primary school in the Jiba parish and went to
14:32:32 11 secondary school in the petit seminaire of Fataki. Later on
14:32:39 12 he obtained a degree in occupational psychology at
14:32:45 13 Kisangani University. His father was a primary school teacher
14:32:50 14 and has now passed away. His mother lives in Bunia with eight
14:32:56 15 children, two of which are passed away. One of the
14:33:01 16 child -- children lives with her, but his wife fled to Goma in
14:33:08 17 the north of Kivu with the other children.
14:33:09 18 [2:33 p.m.]
14:33:10 19 After university, Mr Thomas Lubanga Dyilo organised a medical
14:33:15 20 centre and then he became a shopkeeper in Bunia. He also
14:33:20 21 became a political activist in the UPDS [sic],
14:33:30 22 Etienne Tsiijisekedi, and was one of the main protagonists in
14:33:34 23 Ituri for the UPDS [sic].
14:33:39 24 [2:33 p.m.]
14:33:40 25 The Ituri district has 15 ethnic groups from different

14:33:45 1 origins -- the Bantoue, Soudanaise, Pygmoide, including the
14:33:54 2 Logo, Lendu, Lendu-Ngiti, the Hema, the Alur, the Kaliko, the
14:33:54 3 Yima, the Kakwa, the Bira, the Lese, the Lugbaras, the Ngalis,
14:33:57 4 and the Pygmes.

14:34:11 5 [2:34 p.m.]

14:34:13 6 Since the colonial period these ethnic groups have been rather
14:34:20 7 balanced. A lot of vicinities were multi-ethnic. When there
14:34:27 8 were problems, the State always managed to control the
14:34:30 9 situation and avoid the occurrence of violence.

14:34:33 10 [2:34 p.m.]

14:34:35 11 Currently, the Bahema are spread over eight rural chiefdoms,
14:34:44 12 four of which in Djugu territory -- the chiefdoms of
14:34:48 13 Bahema North, Bahema Badjere, Bahema Banywagi and
14:34:52 14 Bahema Baguru, and four in Irumu territory, Chiefdoms
14:35:01 15 Bahema South, Bahema Mitego, Bahema Irumu and Bahema Baguru.

14:35:01 16 [2:35 p.m.]

14:35:08 17 According to the 1984 count, they were 398,347. Historically,
14:35:23 18 at the time of the kings, before colonisation, the Great Lakes
14:35:30 19 region had a lot of kings and, in part, Bahemas, and there was
14:35:36 20 also the Hima that you have to distinguish from the Hema. The
14:35:42 21 Hema-Gegere ethnic group did not exist, contrary to what the
14:35:48 22 Prosecutor has been asserting quite wrongly. This name
14:35:53 23 "Gegere" has been created with malicious intent to name the
14:36:04 24 Bahema of the Djugu territory and it serves to insinuate that
14:36:10 25 this ethnic group was not from the Congo, but from Uganda and

14:36:15 1 Rwanda originally, and that they had to be chased out of Ituri
14:36:21 2 with the Lendu -- which belonged to the Lendu and, if
14:36:27 3 necessary, be massacred.
14:36:28 4 [2:36 p.m.]
14:36:29 5 If you look at the map, you can see that this map is entitled
14:36:35 6 "Tribal Areas of Ituri". It is a United Nations map. It is
14:36:41 7 from the -- it is available to the Court and you will see that
14:36:45 8 it does not mention this ethnic group. I asked the Witness
14:36:57 9 and Victims Section if I could produce it, however, they would
14:37:01 10 not give me a copy of it, so I got in touch with the Registry,
14:37:10 11 which advised me to show you my copy of it to show you what
14:37:17 12 I'm talking about.
14:37:18 13 [2:37 p.m.]
14:37:19 14 It is a MONUC map. I was told that they didn't know whether
14:37:22 15 the MONUC would agree to the Defence using this map to
14:37:28 16 challenge what the Prosecutor said yesterday, because I was
14:37:32 17 surprised by a number of documents, among which a report from
14:37:36 18 a university professor from my own town, Ghent, whom I don't
14:37:42 19 know. But how can I have an opinion if I don't have time to
14:37:46 20 study the material?
14:37:49 21 There were also NGO reports produced. We will talk about this
14:37:52 22 later.
14:37:52 23 [2:37 p.m.]
14:37:53 24 But, anyway, I'd like to show you a map that shows you all the
14:37:57 25 ethnic groups of Ituri. It is a map that was created by the

14:38:02 1 MONUC, the United Nations, and which does not mention this
14:38:06 2 so-called ethnic group.
14:38:07 3 [2:38 p.m.]
14:38:09 4 The Defence, therefore, holds that it is unacceptable for the
14:38:14 5 Prosecutor, which has sufficient resources, not to be aware of
14:38:22 6 the historical realities and not to get the opinion of an
14:38:28 7 anthropologist, and not of a legal person, because the person,
14:38:34 8 the professor from the Ghent university referred to, is a
14:38:37 9 lawyer. But I am a lawyer, and I can't study the ethnic
14:38:42 10 groups of the Congo. Everybody is specialised in their own
14:38:46 11 area, but the Prosecutor didn't do this and, therefore, he
14:38:50 12 shouldn't come and submerge us with reports that mention the
14:38:55 13 existence of a Hema-Gegere ethnic group.
14:38:59 14 [2:38 p.m.]
14:39:00 15 I didn't want to say this when I invited you to prove your
14:39:07 16 thesis, because the burden of proof is on you, but I wanted to
14:39:11 17 say that perhaps you could have given us an in-depth study of
14:39:14 18 this problem, as is always done in every court of whatever
14:39:20 19 size. Normally you bring in an expert, an anthropologist, but
14:39:25 20 you didn't do so.
14:39:26 21 [2:39 p.m.]
14:39:28 22 And this contradicts your obligation to examine exonerating
14:39:34 23 circumstances to establish the truth. You adopted a
14:39:44 24 genocidaire argument, and I referred also to other worrisome
14:39:50 25 facts which helped you create this record which I mentioned

14:39:53 1 previously.

14:39:54 2 [2:39 p.m.]

14:40:01 3 So I am of the opinion that as you have not investigated

14:40:06 4 exonerating circumstances, that the only sanction applicable

14:40:11 5 could be to nullify the procedure. I would also like to say

14:40:18 6 that the Hema you will see on the map, President and your

14:40:24 7 Honours -- this map which shows eight administrative

14:40:28 8 divisions -- all belong to the same ethnic group. The only

14:40:31 9 difference you can make is that between the southern and

14:40:38 10 northern Hema, because the northern Hema originally were not

14:40:53 11 faced with this ethnic hatred, but there are other important

14:40:59 12 points. These northern Hema had taken over the Lendu's

14:41:05 13 language. The northern Hema were perhaps more mobile and

14:41:13 14 thrifty than the southern Hema and started speaking the other

14:41:16 15 language, whereas the southern Hema continued speaking their

14:41:20 16 own language, Kihema.

14:41:20 17 [2:41 p.m.]

14:41:24 18 And I spoke to you already previously about languages in the

14:41:26 19 Congo, there are more than 450 of them -- sometimes different

14:41:30 20 languages, but we will come back to this later if we have an

14:41:33 21 opportunity to do so.

14:41:34 22 [2:41 p.m.]

14:41:34 23 So why this word "Gegere"? Well, there is a royal group that

14:41:42 24 still exists today of descendents of the former king, called

14:41:49 25 Mhere Mghere, and "Gegere" is a neologism that serves to call

14:42:02 1 those who have a lot of children -- money, I beg your pardon.

14:42:07 2 [2:42 p.m.]

14:42:10 3 Since 1980, there have been a lot of problems in Ituri related

14:42:16 4 to malnutrition and this has led to a lot of problems among

14:42:22 5 the population -- physical and psychological -- and, quite

14:42:26 6 interestingly, because Madame Peduto mentioned this in her

14:42:31 7 testimony and you will find this in other documents, this led

14:42:38 8 to an under-average growth and this, again, brings me back to

14:42:46 9 the burden of proof on the Prosecutor alleging that my client

14:42:52 10 enlisted children under 15.

14:42:55 11 [2:42 p.m.]

14:42:58 12 I will challenge you to find a child that you believe to be

14:43:03 13 less than 15 and belong -- first, that they belong to the FPLC

14:43:07 14 army, and then challenge you to assess their age. And here,

14:43:14 15 again, I think we'll find that the Prosecutor did not do this.

14:43:16 16 [2:43 p.m.]

14:43:18 17 And now I'd like to come to the origins of this conflict. On

14:43:25 18 6 April 1994, in the neighbouring Rwanda, there was an ethnic

14:43:31 19 cleansing of the Tutsis and some Hutus that led to genocide on

14:43:42 20 a large part of the population which was planified and

14:43:42 21 orchestrated by part of the government in place at the time.

14:43:46 22 The genocide, which had been planified for a long time, took

14:43:54 23 place without the international community intervening.

14:43:58 24 [2:43 p.m.]

14:44:03 25 The community -- I'm not talking about governments, but the

14:44:08 1 community -- was passive and watched. The UN troops and, more
14:44:12 2 specifically, the Belgian Battalion, which, by the way, was
14:44:18 3 best equipped and had the best knowledge of the field, was
14:44:22 4 withdrawn just before the massive occurrence of violence, and
14:44:28 5 one could say that this withdrawal actually seriously
14:44:33 6 contributed to the possibility for the violence to take place.
14:44:40 7 [2:44 p.m.]
14:44:42 8 The stocks of arms in Kigali for the extermination, and which
14:44:48 9 the UN knew about, were not seized, and this despite the
14:44:51 10 operation was prepared by General Dallaire. New York opposed
14:44:56 11 it. The violence -- ensuing violence on the whole of the
14:45:01 12 national territory led to more than a million and a half
14:45:05 13 deaths in Rwanda alone.
14:45:07 14 [2:45 p.m.]
14:45:09 15 The Rwandan army in part aided by the militia that were
14:45:15 16 prepared for this, called the Interahamwe -- one could call
14:45:21 17 them "those who fight together" -- carried out the genocide,
14:45:27 18 often under threat of their own arms by the other part of the
14:45:33 19 population. And we'll come back to the Interahamwe, because
14:45:36 20 the name has already been mentioned several times. I'm just
14:45:39 21 not -- I'm not just saying things for your general
14:45:41 22 information, but all this has a direct repercussion in the
14:45:46 23 record.
14:45:46 24 [2:45 p.m.]
14:45:48 25 A large part of this Rwandan army and the Interahamwe

14:45:51 1 succeeded in fleeing Rwanda through the humanitarian -- the
14:45:57 2 French humanitarian operation called "Turquoise", which had
14:46:04 3 established a humanitarian corridor in Rwandan territory,
14:46:08 4 whereas the troops of General Kagame were taking over the
14:46:11 5 whole country. France, therefore, continued into the period
14:46:16 6 after the genocide in support of the previous Rwanda regime.
14:46:22 7 [2:46 p.m.]
14:46:23 8 This army and these fleeing people, running up to hundreds of
14:46:31 9 thousand of people, with women and children, crossed the
14:46:33 10 Congolese border in Goma under the protection of French
14:46:37 11 weaponry and gathered in the refugee camps at the foot of the
14:46:43 12 Nyarogongo volcano. Very quickly, the Interahamwe who had
14:46:48 13 kept their -- and the ex-soldiers who had kept their weapons
14:46:53 14 began to terrorise the Kivu region persecuting, amongst other
14:47:01 15 people, the Banjamulenge, people of Tutsi origin, who had
14:47:05 16 lived in Kivu for a long time, sowing death, destruction and
14:47:08 17 looting.
14:47:08 18 [2:47 p.m.]
14:47:09 19 Armed groups scattered all over the territory, going towards
14:47:14 20 the south down to Burundi where they fanned the flames of the
14:47:18 21 rebellion, and towards the north to the edge of Ituri, first
14:47:22 22 destabilising large parts of Congo and creating chaos therein
14:47:28 23 while introducing their logic of violence -- of blind violence
14:47:30 24 and terror.
14:47:31 25 [2:47 p.m.]

14:47:32 1 The Congolese army failed to protect its people. At the end
14:47:37 2 of the regime of General Mobutu, who was weakened and
14:47:42 3 floundering, this regime welcomed these armed bands on its
14:47:48 4 territory. It is in the course of all this chaos that the
14:47:53 5 army of Laurent-Desire Kabila, a long-term guerrilla fighter,
14:48:03 6 supported by Rwanda, which did not want danger at its border,
14:48:06 7 was born.

14:48:06 8 [2:48 p.m.]

14:48:06 9 This army was basically composed of child soldiers who were
14:48:11 10 called kadogos, and it began to march on Kinshasa, going
14:48:16 11 through Ituri, too. These kadogos were welcomed as
14:48:21 12 liberators, and there was a myth that was created amongst all
14:48:26 13 the youths of Congo at the time when this phenomenon, which is
14:48:34 14 as old as the world -- we do not seek to justify it -- was not
14:48:38 15 an old one.

14:48:39 16 [2:48 p.m.]

14:48:41 17 Kabila tried to repress political parties so that
14:48:48 18 Etienne Tsjisekedi's party was unable to operate and was cut
14:48:51 19 off from Ituri because of this banning of political parties
14:48:54 20 and the lack of communication. Furthermore, Kabila was
14:49:00 21 increasingly forced to distance himself from his Rwandan
14:49:03 22 support in Kinshasa where he had taken power. The criticism
14:49:09 23 of this Rwandan and Tutsi presence was growing.

14:49:13 24 [2:49 p.m.]

14:49:14 25 On 2 April 1998, the RCD was born in Goma. The RCD is the

14:49:22 1 Rassemblement Congolais pour la Deomocratie, which was
14:49:24 2 supported by Rwanda, which felt betrayed and by Uganda. This
14:49:29 3 was the start of the rebellion and the second war of Congo,
14:49:36 4 which was 10 times more devastating than the Rwandan genocide.
14:49:41 5 It was also the coming into force of Rwandan and -- Ugandan
14:49:45 6 and Rwandan armies on Congolese territory.
14:49:51 7 [2:49 p.m.]
14:49:54 8 In order to fight the rebellion, in August 1998, in Kinshasa,
14:50:01 9 the Minister Yerodia called on the people to oppose the major
14:50:08 10 Hema-Tutsi empire which has been planned, and to crush the
14:50:14 11 vermin that wanted to dominate others. This raised sad
14:50:20 12 memories and this was complained about, if I remember
14:50:24 13 correctly.
14:50:24 14 [2:50 p.m.]
14:50:26 15 The people were called upon to oppose this great empire and
14:50:31 16 this had an immediate effect in Ituri, specifically in
14:50:37 17 Djugu territory, and immediately contributed to the ongoing
14:50:40 18 hostility against the Bahema.
14:50:40 19 [2:50 p.m.]
14:50:46 20 An incident between a Hema farmer and his Lendu workers became
14:50:51 21 very serious, and the farmer had to flee as a consequence.
14:50:55 22 [2:50 p.m.]
14:50:56 23 The Lendus felt that they were supported by the central
14:51:01 24 government, and this turned out to be true, and very quickly
14:51:06 25 all of Djugu territory fell into a conflagration. The Lendu

14:51:16 1 people attacked the Bahema with bladed weapons and chased them
14:51:20 2 out, thus causing the first movement of refugees into Bunia.
14:51:24 3 [2:51 p.m.]
14:51:25 4 This is also linked to economic factors. Private ownership
14:51:29 5 does not exist in Congo. In terms of land use, land is used
14:51:38 6 by individuals or corporate bodies by a system of concessions
14:51:43 7 which can be ordinary -- that is, lasting five years -- or
14:51:47 8 everlasting. It so happened that the Hemas had more
14:51:50 9 concessions than the Lendus, and in fact it is these
14:51:54 10 concessions which belonged to the Belgian colonisers which the
14:52:00 11 Congolese government had redistributed after they were
14:52:04 12 abandoned by the colonists.
14:52:04 13 [2:52 p.m.]
14:52:08 14 In June 1999, the province of Ituri was formed.
14:52:17 15 Mrs Adele Lotsove, who was then Vice-Governor of the
14:52:22 16 Orientale Province, who was appointed by the RCD, was placed
14:52:27 17 as the -- at the head of the province. A provincial assembly
14:52:31 18 was established and Lotsove became the Governor and proclaimed
14:52:37 19 the Ituri independent province. The state of Congo and its
14:52:44 20 army were not represented there.
14:52:45 21 [2:52 p.m.]
14:52:47 22 In the meantime, there had been divisions within the RCD.
14:52:53 23 After that, the RCD split into RCD-Goma, supported by Rwanda,
14:53:03 24 and RCD-Kisangani -- that is RCD-K -- which was supported by
14:53:08 25 Uganda. So the rebellion was divided into two camps.

14:53:14 1 [2:53 p.m.]

14:53:15 2 After the defeat of Uganda, in the battle of Kisangani, where

14:53:20 3 Rwanda was victorious, RCD-K, led by Professor

14:53:29 4 Wamba dia Wamba, was installed in Bunia at the end of 1999.

14:53:35 5 Mrs Lotsove, who was opposing this installation, had been set

14:53:41 6 aside from power and taken to Uganda. The RCD-K army -- that

14:53:47 7 is, the APC -- reduced in size after the division of the RCD.

14:53:54 8 Professor Wamba, who came from Bas-Congo, had close contacts

14:54:00 9 with the Lendu and carried out selective recruitment amongst

14:54:05 10 them, especially in Irumu territory in the south. He trained

14:54:11 11 his troops in Nyaleke and deployed them mostly in the airport

14:54:18 12 in Bunia and in the town.

14:54:19 13 [2:54 p.m.]

14:54:20 14 This battalion was called Usalama. In the meantime, a power

14:54:29 15 struggle began within the RCD-K -- that is, things are never

14:54:33 16 simple. The power struggle was between Professor Wamba and

14:54:38 17 Mr Mbusa Nyamwisi, who was himself from North Kivu.

14:54:43 18 [2:54 p.m.]

14:54:46 19 Thanks to a mutiny of the Usalama Battalion, Mr Nyamwisi

14:54:53 20 seized control and launched an assault on the home of Wamba,

14:54:57 21 who was, however, rescued by members of Mobutu's former

14:55:04 22 presidential guard and the Ugandan army, the UPDF, so much so

14:55:09 23 that Wamba was evacuated to Kampala and taken to

14:55:16 24 Dar Es Salaam.

14:55:16 25 [2:55 p.m.]

14:55:17 1 Mbusa Nyamwisi proclaimed the fall of Wamba and a creation of
14:55:21 2 the RCD-K/ML -- that is, RCD Kisangani Liberation Movement, of
14:55:35 3 which we have discussed the victims.
14:55:37 4 [2:55 p.m.]
14:55:38 5 The massacres of the Hema by the Lendu had continued in the
14:55:42 6 meantime and in some villages Hema self-defence groups had
14:55:48 7 been formed. In Wamba's APC there were some young Hema.
14:55:55 8 Since it was known that their massacre was being planned, they
14:56:02 9 fled into the bush.
14:56:03 10 [2:56 p.m.]
14:56:04 11 This is when Thomas Lubanga Dyilo was approached by the
14:56:08 12 parents of these young people. These parents asked him to
14:56:15 13 intercede for them with the President of Uganda, which he did.
14:56:20 14 This was his first political act. Kisembo is amongst these
14:56:29 15 young people.
14:56:29 16 [2:56 p.m.]
14:56:30 17 Thomas Lubanga negotiated with President Museveni regarding
14:56:36 18 support by Uganda for these young people who were transferred
14:56:39 19 there. On 15 September 2000, the independent political
14:56:46 20 movement, the Union des Patriotes Congolais, the UPC, was
14:56:54 21 created in Ituri. This pacification movement had the mission
14:56:59 22 to act as a counterweight to the RCD-K/ML regime of
14:57:05 23 Mbusa Nyamwisi, which tolerated disorder and massacres, and
14:57:12 24 this movement, both by its own description and in fact, was
14:57:18 25 multi-ethnic.

14:57:19 1 [2:57 p.m.]

14:57:20 2 All we need to do is refer to documents, and with all the
14:57:25 3 means at his disposal, I do not think I have seen anything in
14:57:29 4 his documentation regarding to -- regarding the composition of
14:57:35 5 this party at its inception, because, amongst its founders, we
14:57:41 6 find members of various different ethnic groups of Ituri,
14:57:45 7 which I have mentioned. You cannot just claim that it is not
14:57:50 8 a multi-ethnic party; you must prove it.

14:57:52 9 [2:57 p.m.]

14:57:53 10 On 7 September 2000 the members of the general secretariat of
14:57:58 11 the UPC were appointed.

14:57:59 12 [2:57 p.m.]

14:58:02 13 Once more, this was multi-ethnic. The movement, which was
14:58:08 14 peaceful, had no military objective -- I repeat, no military
14:58:15 15 objective. The Prosecutor has claimed this. He has alleged
14:58:19 16 this; he must prove it. The Prosecutor alleges that this is a
14:58:25 17 two-faced party. He must prove it -- he should.

14:58:29 18 [2:58 p.m.]

14:58:30 19 In the meantime, during clashes between the APC of
14:58:36 20 Mbusa Nyamwisi and members of the former presidential guard,
14:58:43 21 some soldiers of the Usalama battalion broke off and mixed
14:58:48 22 with the population. From that time, the character of the
14:58:56 23 inter-ethnic war changed. The Balendu suddenly appeared with
14:59:02 24 weapons, whereas the other Hema self-defence groups were still
14:59:07 25 using bladed weapons.

14:59:07 1 [2:59 p.m.]

14:59:09 2 After the Balendu were armed, there were more refugees moving

14:59:13 3 towards Bunia, and Bunia had to take in these refugees. The

14:59:19 4 Ngiti also attacked the Bira in Kakalaza.

14:59:23 5 [2:59 p.m.]

14:59:24 6 This is to show that this inter-ethnic problem, which was

14:59:28 7 growing in scope, was not limited, as Ms Peduto said, contrary

14:59:35 8 to what the Prosecutor is saying -- was not limited to the

14:59:39 9 Lendu and the Hema. Thomas Lubanga returned from Uganda

14:59:44 10 in January 2001, when the FLC, or the Front de Liberation du

14:59:52 11 Congo, was created under the auspices of Uganda.

14:59:52 12 [2:59 p.m.]

14:59:56 13 What was the FLC? The FLC was a platform created between the

15:00:02 14 MLC of Jean-Pierre Bemba and the RCD-K/ML of Mbusa. The FLC

15:00:11 15 had control over a large part of Congolese territory,

15:00:16 16 including the Orientale Province, which is already huge, and

15:00:25 17 Equateur. Thomas Lubanga became Vice-Commissioner for youth

15:00:30 18 and sports in this Bemba government, and this was his first

15:00:33 19 political office. During the short life of that government,

15:00:36 20 the massacres practically stopped.

15:00:38 21 [3:00 p.m.]

15:00:40 22 Mbusa Nyamwisi was not satisfied with this government, and was

15:00:43 23 living mainly in South Africa. He was therefore deprived of

15:00:49 24 the significant revenue that he had been sharing up til then

15:00:53 25 with Ugandan generals because he was no longer controlling the

15:00:57 1 borders. I heard today that the Defence was alleging the
15:01:04 2 looting by the Ugandans of Congo's wealth -- timber, gold and
15:01:09 3 diamonds. There is enough wealth there, but we were told that
15:01:12 4 we had to prove it.
15:01:13 5 [3:01 p.m.]
15:01:14 6 Well, I don't think I need to prove it. All we need do is to
15:01:21 7 look at the judgment of the International Court of Justice in
15:01:24 8 regard to this, and, from what I know, this is res judicata.
15:01:35 9 Uganda put an end to the FRC -- FLC after some months, and an
15:01:41 10 RCD-K/ML was -- government was created in Beni at the end of
15:01:45 11 2001.
15:01:45 12 [3:01 p.m.]
15:01:46 13 Thomas Lubanga became its Minister of Defence. He was quickly
15:01:51 14 sabotaged by Mbusa Nyamwisi, who did all in his power to
15:01:56 15 ensure that Lubanga's orders were not followed. I do not
15:02:00 16 think the Prosecutor is disputing the fact that very quickly
15:02:05 17 Thomas Lubanga was forced to leave Beni and seek refuge in
15:02:09 18 Bunia, where he was assailed by the new military Governor, as
15:02:17 19 he was called. This is a name we know -- this is a fairly
15:02:23 20 chilling name; this is Jean-Pierre Lopondo Molondo, who had
15:02:28 21 escaped from Goma prison, thanks, if I may say so, to the
15:02:34 22 eruption of Nyarogongo, and who became commander of operations
15:02:40 23 in Ituri in February 2002. I said that Thomas Lubanga's life
15:02:45 24 was in danger and he was forced to flee. The widespread
15:02:48 25 massacres all over Ituri began.

15:02:48 1 [3:02 p.m.]

15:02:51 2 Mbusa Nyamwisi and Lopondo drew up lists of people to

15:02:58 3 exterminate and prepare the genocide of the Hema using the

15:03:03 4 chilling example of Rwanda, and, to this end, I shall return

15:03:08 5 to the documents I tendered -- that is, <#EVD-D01-0002#> to

15:03:18 6 0005. The Prosecutor thought that he would surprise me by

15:03:27 7 filing a report which we have not been able to peruse. This

15:03:33 8 is a report of the French police services and, naively, when I

15:03:43 9 saw this report on my table I said, "I do admire the

15:03:48 10 Prosecutor for having such services on a weekend, to be able

15:03:54 11 to get a report from the French police services in this

15:03:57 12 manner; this is probably important," I said to myself.

15:04:02 13 [3:04 p.m.]

15:04:03 14 And this was a study of the mails that we were

15:04:10 15 submitting -- the emails, that is. You can imagine my

15:04:13 16 surprise then when one of my assistants observed in the

15:04:16 17 evening that this report did not date from the weekend, but

15:04:19 18 that it dated from 2005, and that the Prosecutor's application

15:04:27 19 to the French police services dated from 23 December 2004.

15:04:32 20 [3:04 p.m.]

15:04:34 21 So, Mr Prosecutor, you know these emails, because it is on

15:04:41 22 that -- for that reason that you apply to the French police

15:04:43 23 services. We understand from your submissions that you did

15:04:47 24 not deny that these mails were sent. The President of the

15:04:50 25 Pre-Trial Chamber put very precise questions to you, which you

15:04:54 1 failed to respond to. So you do not deny that these mails
15:04:57 2 were sent. All you are saying is that, in your opinion, they
15:05:02 3 were fakes that had been concocted, as you may suggest, on the
15:05:10 4 side of my client in order to put someone else at issue.
15:05:16 5 [3:05 p.m.]
15:05:17 6 Mr Prosecutor, I'm sure you were surprised to have heard a
15:05:23 7 while ago that Mr Lopondo was living in Goma, where he said he
15:05:27 8 was a member of the RCD as a spy -- as a spy of the Kinshasa
15:05:31 9 government, and that since at the time in Goma there was not
15:05:39 10 even a telephone line belonging to Congo, everything belonging
15:05:46 11 to Rwanda, it was logical for Mr Lopondo to have a Rwandan
15:05:51 12 email address, which he kept when he escaped from prison and
15:05:57 13 returned to Bunia.
15:05:58 14 [3:05 p.m.]
15:05:59 15 So thank you for confirming my thesis and thank you for
15:06:06 16 authenticating the provenance of these documents which are
15:06:11 17 in the case file and which are overwhelmingly in my favour, as
15:06:17 18 you will agree. Thomas Lubanga was reduced to silence and the
15:06:24 19 bloodbath began with unprecedented barbarity.
15:06:24 20 [3:06 p.m.]
15:06:30 21 At the invitation of the Ugandan government, Mr Thomas Lubanga
15:06:34 22 went to Kampala on 20 May 2002 with a delegation of
15:06:39 23 distinguished personalities and some officials of the UPC.
15:06:43 24 The official aim of the visit was the situation created by the
15:06:48 25 relieving from his duties of Mr Thomas Lubanga and his dispute

15:06:54 1 with the government of Mbusa.

15:06:54 2 [3:06 p.m.]

15:06:57 3 On 7 June 2002, without a meeting between the protagonists

15:07:02 4 taking place, Colonel Otafire escorted Mr Thomas Lubanga by

15:07:10 5 force to Kinshasa in the company of seven people. The next

15:07:13 6 day he was imprisoned in the offices of the military

15:07:17 7 police -- the DMIAP.

15:07:17 8 [3:07 p.m.]

15:07:20 9 Lopondo was immediately released because he had been locked up

15:07:23 10 there in Kinshasa, since he was the man in Kinshasa, whereas

15:07:28 11 Thomas Lubanga, who was already a cause for grave concern with

15:07:34 12 Uganda and Kinshasa, was imprisoned. It must be said that

15:07:41 13 Lopondo had been imprisoned in Goma as a spy of the Kinshasa

15:07:47 14 government itself -- this very government.

15:07:50 15 [3:07 p.m.]

15:07:51 16 The link between RCD-Goma supported by Uganda, and his stay in

15:07:57 17 Goma, is the linchpin that explains the series of, as the

15:08:02 18 Prosecutor would have us believe, email.

15:08:09 19 [3:08 p.m.]

15:08:12 20 I would like to add this: I would like to say that if the

15:08:18 21 Prosecutor who does not challenge the fact that these emails

15:08:21 22 were sent and therefore, in part, confirms their

15:08:26 23 provenance -- if he says that these are forgeries, then there

15:08:30 24 is a Latin proverb that says reus excipiendo fit actor, "he

15:08:37 25 who asserts must prove". The burden of proof is on the

15:08:42 1 Prosecutor. You must prove your allegations. So I am noting
15:08:50 2 that the Prosecutor admits that these emails were sent on the
15:08:55 3 dates indicated in the document.
15:08:56 4 [3:08 p.m.]
15:08:58 5 Lopondo returned to Bunia and organised the massacres. All
15:09:02 6 the Hema population was concentrated in Bunia and Lopondo had
15:09:08 7 shells fired on the town. His genocidal activities are proven
15:09:11 8 by the emails.
15:09:11 9 [3:09 p.m.]
15:09:13 10 In August 2002, when Thomas Lubanga was in prison in Kinshasa,
15:09:19 11 a new mutiny took place within the APC forces -- a new mutiny.
15:09:28 12 Under the command of Kisémbu the mutineers took power in Bunia
15:09:34 13 and chased out Mbusa Nyamwisi and Lopondo, who withdrew to the
15:09:39 14 south. In the meantime, in Kinshasa, there were peace talks
15:09:44 15 and some Ituri dignitaries were present within the framework
15:09:50 16 of the Ituri peace conference. The Human Rights Minister,
15:10:01 17 Mr Ntumba Luaba, asked Thomas Lubanga, whom he took out of
15:10:04 18 detention, to accompany him to Ituri in order to convince
15:10:07 19 other dignitaries to come to Kinshasa also to attend the
15:10:10 20 conference.
15:10:10 21 [3:10 p.m.]
15:10:12 22 When they arrived in Bunia on 28 August 2002, Thomas Lubanga
15:10:19 23 was welcomed generally by the population which had come in its
15:10:25 24 numbers. Mr Thomas Lubanga and minister Ntumba Luaba were
15:10:31 25 detained upon their arrival and the liberation of the minister

15:10:35 1 was exchanged for the freeing of the other prisoners in
15:10:40 2 Kinshasa. The Prosecutor knows this.
15:10:42 3 [3:10 p.m.]
15:10:43 4 In order to fill the power vacuum the military junta demanded
15:10:50 5 that, in exchange for his freedom, Thomas Lubanga should form
15:10:54 6 a government, because Chief Kahwa, who was running this
15:11:03 7 military junta, knew fully well that he had no popular
15:11:08 8 support. The only person in Ituri who had popular support was
15:11:13 9 in fact Thomas Lubanga, and this was one of the reasons why so
15:11:16 10 many people didn't like him, obviously.
15:11:19 11 [3:11 p.m.]
15:11:22 12 And Thomas Lubanga, who had no intention at all of taking
15:11:26 13 power -- how could he have wanted to when he was in prison in
15:11:32 14 Kinshasa at the time? But he accepted the responsibility and
15:11:37 15 he formed a government. It must be added that because Uganda
15:11:45 16 was much concerned by what was going on at its border, had
15:11:49 17 even sent Mrs Lotsove to negotiate.
15:11:53 18 [3:11 p.m.]
15:11:53 19 So, on 11 September 2002, the decrees establishing the UPC-RP
15:11:59 20 was issued. The UPC-RP is the Union des Patriotes
15:12:06 21 Congolais/Reconciliation Paix. Mr Prosecutor, don't you think
15:12:11 22 this name is rather odd? But you will say that this is a
15:12:14 23 masquerade. This is a word that we have heard on several
15:12:18 24 occasions both from you and from the witness. Perhaps it is
15:12:25 25 pure chance, who knows. The provincial executive was formed

15:12:28 1 as long as the army headquarters -- in addition to the Peace,
15:12:33 2 Truth and Reconciliation Commission.

15:12:33 3 [3:12 p.m.]

15:12:35 4 And, in this case, Mr President, your Honours, your decision
15:12:39 5 will say whether this is also a masquerade, but I should like
15:12:46 6 to point out that this Truth, Peace and Reconciliation
15:12:54 7 Commission was the handiwork -- the most important piece of
15:13:00 8 work planned by this government.

15:13:01 9 [3:13 p.m.]

15:13:02 10 Mr Lubanga, who, in the country was called the pastor -- I
15:13:07 11 will explain this, and this is repeated by the first -- the
15:13:16 12 only witness which, given the time constraints -- whose
15:13:21 13 statement, given the time constraints, we were able to give
15:13:24 14 you.

15:13:26 15 [3:13 p.m.]

15:13:27 16 There were armed militias that were spying on him, that were
15:13:30 17 tracking him. They were saying, "Oh, there you are, the
15:13:36 18 pastor, he wants peace, this pastor." So, as I said, this was
15:13:41 19 peace and pacification. A pastor is a shepherd who cares for
15:13:46 20 his sheep. So, this is how Thomas Lubanga was referred to in
15:13:52 21 his country. This was the man who cared for his flock and the
15:13:59 22 people knew this very well.

15:14:00 23 [3:14 p.m.]

15:14:02 24 On 17 September 2002, the executive met for the first time.

15:14:07 25 This was also the beginning of the activities of the UPC

15:14:12 1 government. I say this because at the first visit of
15:14:15 2 Ms Peduto to Bunia, this government was not yet in place,
15:14:20 3 contrary to what she had stated beforehand. We shall return
15:14:23 4 to Madame Peduto in due course, perhaps. Uganda recognised
15:14:27 5 the government, but still remained in the field with its army,
15:14:31 6 so this was acceptance which was mixed with distrust.
15:14:34 7 [3:14 p.m.]
15:14:35 8 For its part, the UPC had inherited an armed force which it
15:14:42 9 had to manage. This was the FPLC, the Front Patriotiques pour
15:14:49 10 la Liberation du Congo. It is erroneous to present matters as
15:14:53 11 the Prosecutor does -- that is, that the FPLC was allegedly
15:14:58 12 created by the UPC. This was a fait accompli, which was
15:15:04 13 imposed on the UPC by the mutineers of the APC. However, the
15:15:11 14 rest of the APC, under Mbusa Nyamwisi and Lopondo, certainly
15:15:17 15 did not disarm.
15:15:18 16 [3:15 P.M.]
15:15:18 17 In the meantime, the National Congolese Army was, very
15:15:23 18 strangely, on their side, supporting the rebellion. Ituri and
15:15:31 19 its people were attacked not only by the APC, and its
15:15:37 20 genocidaire, but also by the Congolese army and soon by the
15:15:41 21 Ugandan army and the new rebel movements that it created to go
15:15:47 22 against the UPC -- the FNI, PUSIC, FAPC, FPDC and we could go
15:15:55 23 on and on.
15:15:56 24 [3:15 p.m.]
15:15:57 25 At the beginning of the time within the temporal jurisdiction

15:16:00 1 of the Court, Mr Thomas Lubanga was in prison in Kinshasa, and
15:16:05 2 was therefore not in a position to commit the acts that are
15:16:11 3 charged on him. He was in prison.

15:16:13 4 [3:16 p.m.]

15:16:18 5 The Prosecutor is obliged to investigate exonerating
15:16:23 6 circumstances also, but perhaps he didn't have an opportunity
15:16:26 7 to look into this state of affairs. I would point out that in
15:16:32 8 the documents which we have tendered as regards the
15:16:39 9 jurisdiction of this Court, the Prosecutor has adopted a very
15:16:44 10 vague position. He hasn't really challenged it. He simply
15:16:51 11 says it's up to the Defence to prove it.

15:16:53 12 [3:16 p.m.]

15:16:54 13 Mr Prosecutor, you have been to the field. You have had the
15:16:57 14 opportunity to establish that these incarcerations and these
15:17:01 15 detentions -- I'm sure that at that time you visited
15:17:07 16 Mr Lubanga. Therefore, I think you should say simply what you
15:17:10 17 know. It's as simple as that. Indeed, it is -- you are
15:17:16 18 obliged to speak the truth.

15:17:16 19 [3:17 p.m.]

15:17:22 20 Furthermore, it has been falsely claimed by the Prosecutor
15:17:26 21 that Mr Thomas Lubanga has had military training. That has
15:17:31 22 never been the case. Thomas Lubanga has never been a military
15:17:34 23 man, has no rank in any army, and when he was arrested in 2003
15:17:45 24 he was described as a politician. I would refer you to the
15:17:49 25 Prosecutor's file and the Prosecutor of the DRC proceedings.

15:17:53 1 [3:17 p.m.]

15:17:54 2 The Prosecutor fails to prove these allegations. The
15:17:56 3 Prosecutor not only doesn't prove them, but doesn't provide
15:18:00 4 any specific information. It's not sufficient just to say
15:18:02 5 that Thomas Lubanga has military training. When, where, how,
15:18:07 6 what was he taught? Was it a secret service training; was it
15:18:12 7 training in the use of heavy weapons? I don't know; do tell
15:18:16 8 us. You are so vague.

15:18:18 9 [3:18 p.m.]

15:18:19 10 When one is vague, one is less credible, I would say. I
15:18:23 11 therefore think that the Prosecutor is wrongly claiming that
15:18:31 12 Mr Thomas Lubanga was a warlord or a rebel lord. The photo
15:18:39 13 which one sees constantly in the media of Thomas Lubanga
15:18:42 14 dressed in camouflage fatigues proves nothing. There have
15:18:47 15 been many official occasions where the whole government has
15:18:51 16 been dressed in such clothing, and in Africa this is often to
15:18:58 17 be seen, and my African colleagues can confirm that.

15:18:58 18 [3:18 P.M.]

15:19:02 19 I didn't mean to compare Thomas Lubanga to Churchill or any
15:19:06 20 others. What I meant to say was that when Churchill wore
15:19:10 21 military dress, that didn't mean he was a member of the
15:19:12 22 army -- no, that meant it was a time of war; it was the Second
15:19:17 23 World War and that he wanted to give a robust appearance and
15:19:20 24 to show his support of his army. That's the difference.

15:19:23 25 [3:19 p.m.]

15:19:26 1 This state of affairs did not change in September 2002 at the
15:19:31 2 point in time when the FPLC was created -- created, as I said
15:19:35 3 before, as a fact through developments.
15:19:40 4 [3:19 p.m.]
15:19:41 5 I would refer you to the emails and to the genocidal intent of
15:19:46 6 the Mbusa government. I have had indeed the opportunity to
15:19:50 7 say that when Thomas Lubanga, on one of the videos, speaks,
15:19:57 8 speaks of defending one's self. Of course, there is no talk
15:20:04 9 of attacking a Lendu or any other community, but, rather, he
15:20:08 10 is talking about the right to self-defence of his people who
15:20:16 11 are under siege, not only by Ugandan forces but also militias
15:20:22 12 and the APC, but also by its own -- his own government, the
15:20:26 13 troops of his own government. Just imagine. So, perhaps it
15:20:31 14 would have been a good idea just to allow one's self to be
15:20:34 15 massacred? Is that it, Mr Prosecutor?
15:20:34 16 [3:20 p.m.]
15:20:37 17 Thomas Lubanga's government appointed Kisembo as the
15:20:41 18 Commander-in-Chief and it is he who directed the military
15:20:44 19 operations. I would like to underline that Thomas Lubanga,
15:20:46 20 even if he had wanted, would not have had the time to do so.
15:20:49 21 He was the head of State.
15:20:51 22 [3:20 p.m.]
15:20:57 23 Furthermore, it is worrying to note that the Prosecutor
15:21:11 24 accuses Mr Thomas Lubanga as part of a co-perpetration, to use
15:21:24 25 a multi-syllabic role. This is stated also in the indictment.

15:21:37 1 In the indictment it says that he allegedly committed these
15:21:43 2 crimes together with others. These "others" are not named.
15:21:50 3 Occasionally there is a name that crops up here or there, but
15:21:54 4 it's very worrying to observe that the Chief of General Staff,
15:22:03 5 who did lead military operations, is not the subject of
15:22:11 6 charges brought by this Prosecutor.
15:22:14 7 [3:22 p.m.]
15:22:15 8 This seems to me to be a tremendous contradiction. Who could
15:22:21 9 be a better co-perpetrator than the Chief of General Staff?
15:22:27 10 His subordinates are named as being co-perpetrators,
15:22:31 11 strangely.
15:22:31 12 [3:22 p.m.]
15:22:33 13 The Defence is much troubled by this. There were no children
15:22:39 14 under the age of 15 years in the FPLC, and the Prosecutor does
15:22:42 15 not prove the contrary. The directors of the government in
15:22:47 16 this connection were strict -- clear prohibition on the
15:22:51 17 enrolment, enlistment of children as soldiers in the FPLC.
15:22:56 18 The Prosecutor manages his evidence very selectively. He who
15:23:04 19 collected this evidence should know these facts well.
15:23:07 20 [3:23 p.m.]
15:23:09 21 I would also refer to the abandoning of the charges against
15:23:13 22 the Chief of the General Staff. In June 2003, in tempore non
15:23:30 23 suspecto that, as I have said before -- certainly in tempore
15:23:29 24 non suspecto in 2002 -- because it is difficult to imagine
15:23:38 25 that, as part of the masquerade evoked by the Prosecutor, that

15:23:42 1 Thomas Lubanga could have anticipated possible charges before
15:23:49 2 a court which didn't even exist at that time. It would have
15:23:53 3 been quite an amazing visionary gift, I think, to have done
15:23:58 4 so. So when the Prosecutor alleges that Thomas Lubanga is a
15:24:03 5 two-faced man, well, proof must be brought of this second side
15:24:07 6 to him. I have not seen it.
15:24:09 7 [3:24 p.m.]
15:24:11 8 When you say that you see child soldiers in the videos you
15:24:16 9 showed -- well, I didn't see them. I would like to repeat to
15:24:19 10 you once again: show them to me, play the video, freeze-frame
15:24:25 11 on the view of the child soldiers to which you refer.
15:24:29 12 [3:24 p.m.]
15:24:31 13 Clearly we saw a different video. You, Mr Prosecutor, and I
15:24:34 14 seem to live in different planets.
15:24:36 15 [3:24 p.m.]
15:24:42 16 The Lubanga government, as I said, was largely
15:24:46 17 focused -- centred on pacification. It had a multi-ethnic
15:24:49 18 make-up, as did the UPC itself. We have been able to refer to
15:24:56 19 at least two prominent individuals in the government, two
15:25:00 20 ministers, who were of a different ethnic origin -- not Hema.
15:25:04 21 Of course, we will be told that these ministers had nothing to
15:25:07 22 say. These were, however, the two most important ministers,
15:25:13 23 Mr Jean Tinanzabo, the Minister of Pacification -- your
15:25:16 24 Honours, Minister of the Pacification. I don't know if there
15:25:19 25 are many governments who have such a minister. Come to me and

15:25:22 1 tell me that it is a masquerade, although this Minister of
15:25:29 2 Pacification carried out a pacification campaign, which is not
15:25:33 3 contested. In the video you see footage of a meeting of the
15:25:38 4 Pacification Commission. This is in evidence which has been
15:25:41 5 tendered by the Prosecutor.
15:25:42 6 [3:25 p.m.]
15:25:44 7 That process concluded after a number of months. I believe at
15:25:49 8 the end of February, at the protestant chapel in Bunia, it
15:25:56 9 concluded -- it ended in a pacification agreement between all
15:25:59 10 of the ethnic groups of Ituri. A signed document -- a signed
15:26:04 11 document, Mr Prosecutor, but please do show us this document,
15:26:07 12 because we haven't seen it, because all of these UPC documents
15:26:11 13 have been seized. I'm sure it must be down in your cellars.
15:26:17 14 I have made the comparison with the cellars of The Vatican,
15:26:20 15 but your cellars must be immense. We would be delighted to
15:26:24 16 see that document. It does exist, in agreement between all of
15:26:27 17 the communities before MONUC.
15:26:30 18 [3:26 p.m.]
15:26:31 19 The only community which did not sign the agreement was the
15:26:35 20 Lendu of the north. The political objectives set by the
15:26:47 21 government to the FPLC were simple: that was protect the
15:26:51 22 population, not to attack, to ensure that there would be no
15:26:56 23 attacks and no acts of vengeance, and a formal prohibition on
15:27:01 24 the enlistment of children. All of these decisions were taken
15:27:05 25 collectively in the Council of Ministers. Correspondence was

15:27:09 1 sent to Kisembo to ensure that he would follow up on these
15:27:13 2 guidelines and exert the necessary control.
15:27:15 3 [3:27 p.m.]
15:27:15 4 I'm sure that that correspondence is also in the possession of
15:27:21 5 the Prosecutor. Uganda, for its part, had agreed -- had
15:27:27 6 accepted the Lubanga government, but had remained present in
15:27:30 7 the field, had tried to continue its lucrative activities and
15:27:36 8 keep an eye on Lac Albert, where the oil -- where there are
15:27:40 9 substantial oil reserves.
15:27:41 10 [3:27 p.m.]
15:27:43 11 Uganda plundered the forests and its generals cut down the
15:27:49 12 timber and transported it had to Uganda. The generals became
15:27:52 13 wealthy trading in gold and precious stones. One can
15:27:58 14 obviously refer here to the judgment of the
15:28:00 15 International Court of Justice, but also reports of the
15:28:04 16 United Nations. Thomas Lubanga had a very clear position here
15:28:08 17 as one of the only Congolese.
15:28:12 18 [3:28 p.m.]
15:28:13 19 The resources and wealth of the Congo belonged to the
15:28:16 20 Congolese people. He couldn't agree with the practice which
15:28:25 21 had been established by Mbusa Nyamwisi and Uganda in this
15:28:29 22 connection. Furthermore, he tried to reorganise the
15:28:33 23 administration. To be brief, after -- within a short period
15:28:38 24 of time, a large part of Ituri was living in peace, despite
15:28:43 25 threats from the APC and incursions from the south.

15:28:46 1 [3:28 p.m.]

15:28:47 2 Thomas Lubanga's discourse did not -- was not to everybody's

15:28:51 3 liking. Armed groups called him, ironically, the pastor. At

15:28:56 4 the end of 2002 and at the beginning of 2003, two major

15:29:00 5 mutinies took place within the FPLC. When working with

15:29:10 6 mutineers, or former mutineers, as soon as there is a

15:29:15 7 disagreement, of course, the risk of a further mutiny is not

15:29:22 8 far off. And I have had the opportunity to also put forward

15:29:26 9 that the fact that these mutinies took place contradict the

15:29:30 10 Prosecutor who says that Lubanga had full control of all

15:29:33 11 things.

15:29:34 12 [3:29 p.m.]

15:29:36 13 This mutiny was with the complicity of Uganda, which was

15:29:40 14 fanning the flames and putting them out at the same time.

15:29:43 15 Chief Kahwa created PUSIC -- Chief Kahwa, that was at the head

15:29:52 16 of the first mutiny, whereas Commander Jerome Kakwavu created

15:29:56 17 the FAPC. The latter controlled the territories of Aru and

15:30:04 18 Mahagi in the north. Uganda was clearly in control, based on

15:30:09 19 the old motto "divide et impera".

15:30:09 20 [3:30 p.m.]

15:30:16 21 At the same time these mutinies at the instigation of Uganda

15:30:21 22 had brought into being two armed groups -- there was the FNI,

15:30:23 23 an armed Lendu grouping led by Floribert Ndjabu, and the FDPC,

15:30:29 24 which was an armed Alur movement. All of these militias

15:30:36 25 caused the FPLC to lose control of large portions of the Ituri

15:30:42 1 territory and fought against the UPC government.

15:30:44 2 [3:30 p.m.]

15:30:45 3 Now, Mr President, your Honours, I am arriving at the end of

15:30:49 4 this historical overview, which I see as being capital in

15:30:53 5 attempting -- in attempting to understand this conflict. I

15:30:58 6 must admit that they were chaotic times and Mr Lubanga found

15:31:05 7 him -- found -- in which Mr Lubanga found himself living. He

15:31:11 8 was living in Bunia with his children at the time. He was a

15:31:16 9 businessman, but felt obliged to take action.

15:31:19 10 [3:31 p.m.]

15:31:21 11 Mr Lubanga, during his -- the existence of his brief

15:31:26 12 government, had an opportunity to travel abroad on a couple of

15:31:29 13 occasions. From 7 October to 13 October 2002 he travelled to

15:31:35 14 Kampala at the invitation of the Ugandan government, who

15:31:38 15 seemed to be visibly pre-occupied by the oil surging from

15:31:49 16 Lake Albert.

15:31:49 17 [3:31 p.m.]

15:31:51 18 From 23 October 2002 to 7 November 2002, he had a second trip

15:31:57 19 to Kampala organised by President Museveni, where there was a

15:32:00 20 meeting between the UPC delegation and the delegation of the

15:32:03 21 Kinshasa government, presided over by the Ministry of the Home

15:32:08 22 Office of the time. The discussion was on the

15:32:12 23 Ituri Pacification Commission and a presentation of the terms

15:32:17 24 of reference. There was also a meeting with the

15:32:20 25 Ugandan President at Gulu.

15:32:20 1 [3:32 p.m.]

15:32:23 2 From 14 November to 25 November 2002 -- this was a 10-day
15:32:28 3 visit -- in the wake of Ugandan mediation, there was a
15:32:33 4 discussion with Mbusa Nyamwisi on the criminal involvement of
15:32:38 5 its movement in Ituri. At that time an agreement was signed
15:32:42 6 between the RCD-K/ML and the UPC regarding the withdrawal of
15:32:46 7 the RCD-K/ML troops from Ituri. There was a meeting with the
15:32:51 8 Ugandan President. The UPC asked the latter to facilitate
15:32:55 9 direct dialogue with the leaders of the Lendu combatants who
15:33:01 10 were under the supervision of Colonel Peter Karim, a
15:33:07 11 Ugandan Colonel, at his army.

15:33:07 12 [3:33 p.m.]

15:33:09 13 On 13 December 2002 to 2 January 2003 -- and this was towards
15:33:15 14 the end of the life of the government -- there was a journey
15:33:18 15 to Goabolite in response to an invitation from MONUC. A
15:33:23 16 meeting took place at which ambassadors of the USA, Belgium,
15:33:29 17 France, South Africa and Great Britain attended, as well as
15:33:31 18 the special representative of MONUC. Also present,
15:33:34 19 Mr Jean-Pierre Bemba, Mr Mbusa Nyamwisi and Mr Roger Lumbano.

15:33:39 20 [3:33 p.m.]

15:33:40 21 Mr Thomas Lubanga was not received at the meeting. He was
15:33:48 22 left outside. He had to return to Bunia without participating
15:33:52 23 in the meeting.

15:33:52 24 [3:33 p.m.]

15:33:53 25 From 4 to 8 January 2003, a journey to Goma and the signing of

15:33:59 1 a political alliance between the RCD and the UPC. During this
15:34:05 2 journey, Mr Thomas Lubanga travelled to Kigali in Rwanda at
15:34:11 3 the request of the RCD-Goma in order to meet the Minister for
15:34:16 4 Foreign Affairs of Belgium, Mr Louis Michel. The latter,
15:34:21 5 however, refused to meet with him and at the formal request of
15:34:26 6 the Kinshasa government -- at the formal request of the
15:34:31 7 Kinshasa government, which had long since chosen sides, as
15:34:36 8 indeed had Belgium. Mr Louis Michel would go on to meet
15:34:42 9 Mr Mbusa Nyamwisi in Beni, thereby clearly choosing his camp,
15:34:48 10 the camp of the genocidaire, and I think that that was a very
15:34:52 11 clear signal.

15:34:53 12 [3:34 p.m.]

15:34:54 13 From 10 to 16 February 2003, there was a journey from Kampala
15:35:00 14 to Dar Es Salaam, where there were discussions with the heads
15:35:03 15 of states of Tanzania, Uganda, the Congo and the Minister of
15:35:08 16 Foreign Affairs of the Congo on the establishment of an
15:35:12 17 Ituri Pacification Commission.

15:35:13 18 [3:35 p.m.]

15:35:16 19 In the wings at this meeting, President Joseph Kabila secretly
15:35:23 20 received, in his hotel room, the Presidents of the FNI, PUSIC
15:35:30 21 and FPDC. The meeting -- the objective of the meeting was to
15:35:40 22 resume hostilities in Ituri. President Kabila undertook to
15:35:46 23 provide the financial means required to that end, and invited
15:35:50 24 the other individuals at the meeting to come to Kinshasa
15:35:55 25 within 48 hours.

15:35:56 1 [3:35 p.m.]

15:35:57 2 In Kinshasa, President Joseph Kabila released the necessary

15:36:01 3 funds to enable the war to resume. As regards the logistic

15:36:08 4 means, he sent Mr Seraphin Ngewej, who was then the General

15:36:13 5 Commissioner responsible for relations with MONUC, to Kampala

15:36:18 6 to transmit to the Ugandan President a memorandum requesting

15:36:24 7 the provision of armed -- of armaments to the armed groups.

15:36:29 8 The same scenario -- this same scenario took place at the

15:36:33 9 meeting in Dar Es Salaam in May 2003, Mr Lubanga being present

15:36:43 10 at that meeting.

15:36:44 11 [3:36 p.m.]

15:36:47 12 So, as I said, it's important to realise that Ituri is an area

15:36:55 13 that was under control of the FPLC first, but was then caught

15:36:58 14 in a pincer movement by its enemies -- enemies which had been

15:37:03 15 created by Uganda, but also that the National Congolese

15:37:06 16 Government and the Ugandan army itself were working with those

15:37:12 17 forces, the whole matter coming to a head in Bunia on 6 March

15:37:20 18 2003, in the wake of very clear preparations which had taken

15:37:26 19 many weeks and which had involved consultations between

15:37:28 20 the government -- or with the government of Mr Thomas Kabila.

15:37:28 21 [3:37 p.m.]

15:37:34 22 I put questions to Ms Peduto regarding these matters and

15:37:37 23 regarding her visit to Uganda, and regarding the secret

15:37:39 24 services of the MONUC, all of which -- all of whom should have

15:37:47 25 known of this.

15:37:48 1 [3:37 p.m.]

15:37:51 2 To put an end to the FPLC, the Ugandan army that day not only
15:37:59 3 took under its wing the Lendu militias, but also the Lendu
15:38:03 4 population -- women, children and old people.

15:38:05 5 [3:38 p.m.]

15:38:07 6 There were horrendous massacres at that time. The FPLC was
15:38:11 7 obliged to withdraw, abandoning the town, and from that day on
15:38:17 8 there were many children to be found in the roads on the
15:38:22 9 streets of Bunia, armed and in great numbers. Those are the
15:38:25 10 children who had -- were taken on, used in hostilities, but
15:38:29 11 the Ugandan troops and their allies, and which were presented
15:38:32 12 to Ms Peduto, as being children belonging to the FPLC.

15:38:36 13 [3:38 p.m.]

15:38:36 14 And that is why, when guided through the streets of Bunia and
15:38:42 15 elsewhere with the general -- Ugandan General, she herself
15:38:48 16 recognised that it was a public relations
15:38:52 17 initiative -- exercise. That is what she said, and she
15:38:57 18 diagnosed the situation rightly. But apparently, since then,
15:39:00 19 she has turned and has expressed other views.

15:39:05 20 [3:39 p.m.]

15:39:06 21 Mr President, your Honours, I'm slowly arriving, I believe, at
15:39:15 22 the end of my submissions. It's important to know that the
15:39:27 23 attack by Uganda on Bunia on 6 March 2003, which triggered, as
15:39:34 24 I said, probably the largest massacre in the wake of those
15:39:45 25 organised by the RCD-K/ML, had, as a consequence, until the

15:39:56 1 Ugandan troops left on 6 May 2003 -- withdrawal from
15:40:03 2 Bunia -- at the time Thomas Lubanga became a hunted animal.
15:40:07 3 He and his companions, who I would call his companions in
15:40:13 4 peace, were hunted. The FPLC dispersed, no longer existed,
15:40:21 5 and it was only at the end of May that Thomas Lubanga managed
15:40:28 6 to return to Bunia.
15:40:29 7 [3:40 p.m.]
15:40:36 8 Let me tell you more about this return at the end of May
15:40:40 9 2003 -- a return to total chaos. The witness, Ms Peduto, told
15:40:47 10 us -- and -- well, I think you saw that I was a bit
15:40:57 11 exasperated at times by her patchy memories, but there were
15:41:04 12 certain things which were recalled very precisely, and I must
15:41:09 13 say that surprised me, because generally one has a good memory
15:41:13 14 or one does not. But suddenly she remembered a very specific
15:41:18 15 date, 30 May 2003.
15:41:21 16 [3:41 p.m.]
15:41:22 17 Now, why; why did she remember that date? Well, she told us
15:41:26 18 that that was the date on which MONUC asked to see Mr Thomas
15:41:32 19 Lubanga in his residence. And she told us about that meeting.
15:41:44 20 In her testimony here she was less extensive than in her
15:41:51 21 written testimony. In her written testimony she said that
15:41:53 22 when entering the residence of Mr Thomas Lubanga she saw him
15:41:57 23 for the first time, and she said that she had the impression
15:42:02 24 that he was an evil man, a cruel man. That struck me, because
15:42:20 25 I think it's most unusual to decide at first sight that

15:42:24 1 somebody is cruel. Generally, one might come to a conclusion
15:42:29 2 like that if one had been able to observe various actions.
15:42:34 3 [3:42 p.m.]
15:42:35 4 So I can't shake off the impression that Ms Peduto was
15:42:43 5 remitted with a particular task as regards Mr Lubanga and that
15:42:50 6 she was encouraged to consider him in a certain way and that,
15:42:56 7 in fact, this wasn't the reality but, rather, she was tasked
15:43:06 8 in this way.
15:43:06 9 [3:43 p.m.]
15:43:08 10 So Mr Lubanga was not only a hunted animal -- not only by
15:43:16 11 Uganda and various other protagonists, but also by MONUC.
15:43:21 12 Let's not be blinkered. MONUC is a very substantial force
15:43:26 13 with a large presence in the Congo. It has its own
15:43:29 14 administration, its offices, its civil servants, its army. It
15:43:35 15 is a force which adopts certain positions, and here has very
15:43:45 16 clearly taken a position against the UPC and the hunted
15:43:49 17 animal, who is my client.
15:43:51 18 [3:43 p.m.]
15:43:57 19 What is also surprising is that the day after this meeting,
15:44:05 20 Thomas Lubanga issued the only decree that he could still
15:44:11 21 issue as a politician, because at that time his government in
15:44:16 22 fact didn't exist any longer, but perhaps he still had a
15:44:20 23 degree of credibility amongst the persons surrounding him,
15:44:27 24 and -- so this non-existent government issued a decree. What
15:44:31 25 does the decree say? It says that armed soldiers must be

15:44:35 1 demobilised. When Ms Peduto was asked if she was aware of
15:44:42 2 that decree, she said yes, but it was -- it only concerned 70
15:44:51 3 children.
15:44:51 4 [3:44 p.m.]
15:44:52 5 When I presented her with the decree, she had to concede that
15:44:55 6 there was no limitation in the decree in terms of its wording.
15:45:02 7 Furthermore, she conceded that she had never seen it, she had
15:45:06 8 never read it. So this lady was speaking of texts, the
15:45:11 9 content of which she had never read. The Prosecutor says -- I
15:45:17 10 think he said it was an overview witness.
15:45:21 11 [3:45 p.m.]
15:45:24 12 Yes, he did say that, from the start. He said that this
15:45:26 13 witness would talk about everything. I have always been wary
15:45:30 14 of witnesses who know everything, Mr President, your Honours,
15:45:33 15 but I think that Ms Peduto knows rather more than she ought to
15:45:38 16 on some occasions, especially when she talks about decrees
15:45:42 17 that she has never read.
15:45:43 18 [3:45 p.m.]
15:45:44 19 What is more, she also described the decree as a masquerade --
15:45:51 20 a masquerade, she said. This is a word that is oft repeated.
15:45:58 21 So is the word "chain of command". We have heard this -- even
15:46:03 22 from the mouths of children we have heard it. All right, so
15:46:07 23 it's a masquerade. We all know what a masquerade is. But
15:46:11 24 when I challenged the witness with our own testimony -- our
15:46:17 25 only testimony, a testimony from a serious man whom she knows,

15:46:21 1 who was there, a man she was unable to criticise, the witness
15:46:28 2 said that following the decree, CARITAS set up the CTO -- that
15:46:38 3 is, the transit and orientation centre, which is still in
15:46:42 4 existence today, and through which hundreds of children passed
15:46:47 5 before they rejoined their families, and this is a masquerade.
15:46:52 6 [3:46 p.m.]
15:46:53 7 She said here before this Court during the cross-examination
15:46:57 8 when I put a question to her in that regard that she confirmed
15:47:02 9 that she met the person who was in charge of CARITAS and the
15:47:08 10 CTO on a weekly basis to talk about children who were supposed
15:47:11 11 to go through the CTO before they were reunited with their
15:47:16 12 families. So what is the credibility of such a witness?
15:47:20 13 PRESIDING JUDGE JORDA (interpretation): Perhaps we could
15:47:23 14 take the break now, if this is the right time.
15:47:26 15 ME FLAMME (interpretation): Yes, it is.
15:47:29 16 PRESIDING JUDGE JORDA (interpretation): Yes, for the benefit
15:47:30 17 of the public, we shall break till 4.15 and then we shall work
15:47:36 18 for 30 further minutes. Court is adjourned.
15:47:39 19 [3:47 p.m.]
15:47:40 20 [Short adjournment]
16:04:48 21 [4:20 p.m.]
16:20:08 22 THE USHER: All rise.
16:20:25 23 PRESIDING JUDGE JORDA (interpretation): Court is in session.
16:20:27 24 Please be seated and please bring in Mr Thomas Lubanga Dyilo.
16:20:30 25 [4:20 p.m.].

16:20:32 1 [Mr Thomas Lubanga Dyilo entered the courtroom]

16:20:50 2 PRESIDING JUDGE JORDA (interpretation): Mr Flamme.

16:20:57 3 ME FLAMME (interpretation): Thank you, Mr President.

16:21:01 4 [4:21 p.m.]

16:21:02 5 Mr President, your Honours, before I conclude I would like to

16:21:07 6 say that I do not have much work left. I would like to

16:21:13 7 briefly address before the Court some matters that were raised

16:21:22 8 both by the Prosecutor and my learned colleagues who represent

16:21:28 9 the victims.

16:21:29 10 [4:21 p.m.]

16:21:30 11 First, the Prosecutor mentioned the document which I shall ask

16:21:38 12 the court officer to bring up on the monitors, this is

16:21:50 13 <#DRC-DO1-0001#>. The evidence number is <#EVD-D01-0001#>.

16:22:02 14 This is the first document we tendered. It is the Save the

16:22:05 15 Children report.

16:22:05 16 [4:22 p.m.]

16:22:07 17 I referred extensively to this report in cross-examining the

16:22:11 18 witness and I did it because, in my view, this was a very

16:22:22 19 detailed report which gives a very good overview of the

16:22:32 20 problem of children -- child soldiers as a whole. And this is

16:22:41 21 a report from an organisation that knows what it is talking

16:22:43 22 about.

16:22:43 23 [4:22 p.m.]

16:22:44 24 So, the Prosecutor did not criticise the way we referred to

16:22:54 25 this report; he merely said that this report is not relevant

16:22:59 1 in that it does not talk of Ituri because it talks of North
16:23:04 2 and South Kivu. So I shall ask the court officer to go to
16:23:10 3 page 8 of that report -- that is, paragraph 2, the second
16:23:15 4 paragraph of that page.
16:23:17 5 [4:23 p.m.]
16:23:23 6 I would like to go to the third sentence, which refers to the
16:23:27 7 fieldwork [in English]: "The fieldwork for the evaluation
16:23:31 8 focused on the relatively long-running work with children
16:23:36 9 associated with fighting forces in North and South Kivu, but
16:23:42 10 included a short comparative mission to Bunia in the disputed
16:23:49 11 Ituri district of Province Orientale."
16:23:59 12 There you are. I also pointed out and provided clarification
16:24:08 13 in this regard that, on page 6 of this report -- a report
16:24:15 14 which also confirms that Ituri was also at issue -- when
16:24:21 15 reference is made to armoured groups, there is mention of the
16:24:30 16 RCD. If the court officer would be so kind as to show us
16:24:34 17 page 6 of the document.
16:24:35 18 [4:24 p.m.]
16:24:41 19 Towards the middle of the page you have "RCD" -- that is,
16:24:47 20 Rassemblement Congolais pour la Democratie -- "supported by
16:24:53 21 Rwanda". If the report was limited to issues in the Kivu, it
16:25:00 22 would have stopped there, but mention is also made of
16:25:07 23 RCD-Kisangani, and Mouvement de Liberation, "supported by
16:25:14 24 Uganda".
16:25:14 25 [4:25 p.m.]

16:25:19 1 I am quoting these passages for two reasons. First, the
16:25:22 2 report does mention the forces present in Ituri; it does
16:25:30 3 mention the support of the Kinshasa government, as we pointed
16:25:35 4 out, for these rebel and genocidal movements. It does not
16:25:43 5 refer to the FPLC. So, Mr Prosecutor, once more is this not
16:25:52 6 some cause for concern?
16:25:52 7 [4:25 p.m.]

16:26:01 8 Now, regarding this report, I would like to return to a matter
16:26:06 9 about which questions were put in cross-examination. The
16:26:12 10 witness and I found that the preparation of a demobilisation
16:26:22 11 project is no small task; that you can't just say, as
16:26:29 12 Ms Peduto did, that we have observed that in a given region
16:26:36 13 the armed children -- but that preparatory work should be
16:26:46 14 carried out in the course of which it is necessary to contact
16:26:52 15 the military authorities and convince them of the need for
16:26:56 16 demobilisation, to convince these officers and teach these
16:27:03 17 officers the new international rules, so as to raise their
16:27:09 18 awareness of the problem.
16:27:10 19 [4:27 p.m.]

16:27:12 20 That is a first condition and that, furthermore --
16:27:21 21 PRESIDING JUDGE JORDA (interpretation): I beg your pardon,
16:27:23 22 Mr Flamme, there seems to be some background noise. What is
16:27:26 23 going on? You may proceed, Mr Flamme.

16:27:46 24 ME FLAMME (interpretation): Furthermore, we must set up
16:27:50 25 networks, as described by the report, which means that all

16:27:57 1 stakeholders in a certain segment of the population, a
16:28:03 2 community or a village, must be approached to form a committee
16:28:09 3 where children themselves are represented in order to assess
16:28:12 4 the situation.
16:28:12 5 [4:28 p.m.]
16:28:13 6 This is because the situation varies with the community and
16:28:21 7 the people -- the citizens themselves must be involved in the
16:28:26 8 planned effort. It is only after this preparatory work has
16:28:30 9 been done -- work which requires significant funding which
16:28:37 10 must be found -- that you have to demobilise. So you can't
16:28:45 11 just say we are going to demobilise; you have to have the
16:28:50 12 wherewithal to shelter these children before you are able to
16:28:53 13 send them back to their communities after giving them
16:28:58 14 training, and so on.
16:28:59 15 [4:28 p.m.]
16:29:00 16 This report also tells us that we must be very careful because
16:29:07 17 children targeted by this programme can pretend to be child
16:29:13 18 soldiers in order to enjoy the very obvious benefits of the
16:29:20 19 project -- that is, education, training and a certain
16:29:27 20 well-being, if it might be said in that way.
16:29:30 21 [4:29 p.m.]
16:29:32 22 So what we are driving at is that this problem is infinitely
16:29:37 23 complex and it is not by spending a few days in Bunia
16:29:43 24 in September that Ms Peduto, if she was able to identify
16:29:48 25 matters in a useful way, could have solved the problem.

16:29:52 1 [4:29 p.m.]

16:29:53 2 In addition, we observe that, as opposed to Kivu in the north,
16:29:59 3 in Ituri in the south there was no such project, because the
16:30:04 4 report said there was a comparative study only in the disputed
16:30:11 5 Ituri region. Ms Peduto did say this herself, because she had
16:30:16 6 the opportunity to do so in her examination-in-chief when,
16:30:20 7 amongst other things, there was a discussion of the 1 June
16:30:26 8 2003 demobilisation decree, that there were no funds available
16:30:30 9 at that time to establish these very complex projects, as we
16:30:37 10 have said.

16:30:38 11 [4:30 p.m.]

16:30:39 12 So that is the situation. I would like to now return to some
16:30:47 13 matters that were raised by my learned colleagues, the
16:30:51 14 representatives of the victims. They talked of the NGOs and
16:30:55 15 the Prosecutor, in his file -- we have pointed this out, we
16:31:01 16 have challenged it -- uses reports from NGOs as evidentiary
16:31:09 17 material. We said that these NGOs are not independent.

16:31:09 18 [4:31 p.m.]

16:31:18 19 The first thing that must be said from the outset is that
16:31:23 20 major NGOs like Save the Children and other famous examples,
16:31:29 21 like the Red Cross, Doctors Without Borders, observe what the
16:31:40 22 Save the Children report says -- that you cannot take sides in
16:31:45 23 the conflict if you want to maintain your neutrality and
16:31:47 24 credibility.

16:31:47 25 [4:31 p.m.]

16:31:49 1 Their core business is to help the civilian population; that
16:31:53 2 is why they are NGOs. If they take a stand, they lose their
16:31:59 3 neutrality. In addition, NGOs are funded by States like
16:32:06 4 the -- and -- the European Union. We will see that many of
16:32:10 5 those States have their own interests in the region -- their
16:32:13 6 own financial interests. This is nothing new. There was
16:32:17 7 colonisation, then there was the post-colonisation era, and
16:32:25 8 this is where we are today. I'm afraid I must say this.
16:32:27 9 [4:32 p.m.]
16:32:28 10 When I see the way in which some States take a stance and look
16:32:32 11 after their financial interests which are vested in mines and
16:32:39 12 oil and so on -- so these NGOs are funded by these countries,
16:32:43 13 and we know that you cannot bite the hand that feeds you in
16:32:49 14 the case of an NGO.
16:32:52 15 [4:32 p.m.]
16:32:53 16 So I will ask the NGOs to stay on your turf, help the people,
16:32:59 17 but do not support a Prosecutor who is desperately looking for
16:33:04 18 evidence. I do not want to see the spectre of the new justice
16:33:11 19 of the NGOs rise before us which would involve private
16:33:16 20 organisations standing as judges who can go out without any
16:33:22 21 rules to question people to establish their truth.
16:33:27 22 [4:33 p.m.]
16:33:28 23 I will tell you a story about someone whom I met in the field.
16:33:31 24 The person was approached on several occasions by an NGO. We
16:33:39 25 are not going to name names here, but I was approached on

16:33:42 1 several occasions by an NGO that -- that this person was
16:33:50 2 approached on several occasions by an NGO that was looking for
16:33:53 3 witnesses. "I tried to talk with this person on several
16:33:56 4 occasions", says my informer, and the NGO said to me, to this
16:34:03 5 person, "Madame, I am sorry, but this is not the story that we
16:34:08 6 want." And the lady said, "But I am telling the truth." And
16:34:13 7 the NGO said, "I'm sorry, but this is not the policy." So
16:34:17 8 that is the truth of the NGOs.
16:34:19 9 [4:34 p.m.]
16:34:21 10 As one of the victim's representatives said in reference to
16:34:25 11 Article 15 of the Statute, the Prosecutor may gather
16:34:28 12 information, but he must, as this Article says, also examine
16:34:35 13 the reliability of the informations he is offered, and, with
16:34:39 14 Ms Peduto, we saw how some international organisations prepare
16:34:44 15 their reports -- important international organisations like
16:34:49 16 the United Nations, which -- some of whose reports are built
16:34:55 17 on sand -- I am sorry for the expression.
16:34:55 18 [4:34 p.m.]
16:35:00 19 Ms Peduto went to Bunia for one or two days in Bunia to
16:35:05 20 collect information, but what can you do in two days in Bunia
16:35:07 21 in a place you don't know -- people who speak another
16:35:11 22 language, who are another ethnic group, who are another people
16:35:15 23 altogether.
16:35:15 24 [4:35 p.m.]
16:35:16 25 Now, talking of language, since the representatives of the

16:35:19 1 victims mentioned this, there was some talk of Swahili. We
16:35:24 2 have raised this thorny issue of problems in -- of languages
16:35:30 3 in Congo and the problem of interpreters who interpret. I do
16:35:36 4 not know who assisted Ms Peduto; we do not know. If this is a
16:35:41 5 judicial inquiry, this has to be a sworn interpreter who can
16:35:46 6 be trusted to have a mastery of both languages spoken by the
16:35:52 7 investigator and the person who is being questioned.
16:35:52 8 [4:35 p.m.]
16:35:55 9 We mentioned Kingwana. My learned colleague confirmed that in
16:36:01 10 Kivu, I believe, there are two Swahilis, and very wisely made
16:36:09 11 the comparison between the French of France -- which is, I
16:36:16 12 suppose, the basis -- and I was saying, for example, that you
16:36:24 13 can't say Ms Madame la Juge French, because this is not as
16:36:31 14 clear -- because I have always said Madame la Juge in
16:36:38 15 French --
16:36:38 16 PRESIDING JUDGE JORDA (interpretation): Perhaps everyone is
16:36:39 17 quite overwhelmed by this, Mr Flamme. Please proceed.
16:36:46 18 ME FLAMME (interpretation): I was making a comparison
16:36:49 19 between various kinds of French -- Belgian, Swiss and French,
16:36:54 20 and also Canadian French. Well, I was told that a Canadian
16:36:59 21 speaks French and, as Francophones, you will understand each
16:37:01 22 other. I am sorry, my colleague, my dear colleague, I spoke
16:37:06 23 with many Canadian colleagues in Arusha -- with some other
16:37:12 24 colleagues in Arusha, but I am afraid I could not understand a
16:37:16 25 thing. Sometimes I would pretend to understand, but I didn't.

16:37:19 1 I did make an effort because I was close to these people for
16:37:24 2 weeks, but I really couldn't get to understand them.
16:37:26 3 [4:37 p.m.]
16:37:26 4 So this is the same thing with our dialects. You know that if
16:37:30 5 someone who is Flemish -- you know that our country is a small
16:37:37 6 one -- very few inhabitants if you compare it to Holland, for
16:37:43 7 example, to the Netherlands, for example, which has four times
16:37:45 8 our population, then it is difficult to understand our
16:37:49 9 dialect. If I speak to someone from the north of Holland and
16:37:52 10 I come from the south of Flanders, we don't understand each
16:37:57 11 other.
16:37:57 12 [4:37 p.m.]
16:37:58 13 So I have my questions; I have my doubts about these
16:38:02 14 interpreters who understand everything, who can translate from
16:38:08 15 Aru or Alur -- I think this is a different language -- and
16:38:12 16 Swahili, which is a trading language which was developed along
16:38:16 17 the east African coast, which does have influences from other
16:38:20 18 languages, but it is a trading language. This Swahili differs
16:38:29 19 depending on where it is spoken.
16:38:29 20 [4:38 p.m.]
16:38:32 21 I also wanted to talk about Papa Thomas. He was referred to a
16:38:37 22 while ago. It was -- it was said a way that the children knew
16:38:44 23 that Thomas Lubanga was being discussed. Mr President, your
16:38:47 24 Honours, he was not the only Thomas present in the field.
16:38:51 25 There was another commander, a real militia commander, who was

16:38:56 1 called Mr Thomas Unencan -- which is U-N-E-N-C-A-N. The
16:39:04 2 Prosecutor will surely not deny this, because he is more
16:39:08 3 informed than I am of what was going on on the ground. So
16:39:11 4 what "Papa" were they talking about? Could it have been Papa
16:39:20 5 Thomas Unencan?
16:39:20 6 [4:39 p.m.]
16:39:22 7 So this evidence that is adduced, is this not a swamp -- a
16:39:32 8 quagmire where, if the impossible happens and we go to trial,
16:39:39 9 the trial might sink into -- Commander Moi that my colleague
16:39:48 10 referred to -- this is a new name, new things happen every day
16:39:51 11 in court, you learn everything every day in court -- what
16:39:54 12 happened in Ituri's infinitely complex. Commander Moi was
16:39:59 13 never a member of the FPLC. He was a member of the RCD-K/ML
16:40:04 14 which you, yourself, referred to -- that is, RCD-Kisangani
16:40:11 15 Mouvement de Liberation. So that is the infinite complexity
16:40:16 16 of these militias, all these people with no distinct insignia
16:40:21 17 or uniforms. They all wear -- wore the same uniform which you
16:40:25 18 can find everywhere, and not only in Africa. I am referring
16:40:28 19 to the camouflage, or tache tache, as it is called in Africa,
16:40:32 20 without external insignia, without rank indications, and they
16:40:37 21 tell us that of course these people wearing these uniforms
16:40:42 22 were FPLC members. Do you think so?
16:40:42 23 [4:40 p.m.]
16:40:49 24 I would like to address briefly, because this is of
16:40:59 25 unmeasurable importance -- in any case, I must say that I am

16:41:14 1 flabbergasted that the Kinshasa government itself and its
16:41:15 2 conduct -- we saw through testimony that the Prosecutor did
16:41:20 3 not challenge that, at the earliest -- that the Kinshasa
16:41:26 4 government -- or the military apparatus of President Kabila at
16:41:32 5 the time in Ituri was carrying out its personal war in
16:41:36 6 Ituri -- not directly, but through the EMOI -- that is, the
16:41:44 7 integrated army staff headquarters -- which brought together a
16:41:50 8 certain number of militias which used small airports to convey
16:41:55 9 weaponry using its own funds -- that is, government coffers, I
16:42:00 10 suppose -- to fund the purchase of arms and food for the
16:42:09 11 militias and so on and so forth.

16:42:12 12 [4:42 p.m.]

16:42:12 13 We also saw that people were even sent out on mission to
16:42:16 14 Kampala to ensure the supply of materiels and equipment.
16:42:25 15 Mr Kabila, as we have seen, continued to fund these militias
16:42:31 16 while he was sponsoring peace talks. Is that not
16:42:35 17 double-faced, or is it a masquerade, Mr Prosecutor? And with
16:42:40 18 Uganda he was scheming to destroy the fragile peace that
16:42:45 19 Mr Lubanga had obtained after a few months in office.

16:42:47 20 [4:42 p.m.]

16:42:48 21 As I said, Ituri was attacked by allied forces, including its
16:42:54 22 own government. And why was Mr Lubanga a problem? We should
16:43:01 23 ask ourselves this question. He was a problem because he
16:43:07 24 expressed the identity of the Congolese and he had the
16:43:11 25 interests of his people before all else. He was interested in

16:43:15 1 protecting it -- protecting its wealth and its independence.

16:43:19 2 [4:43 p.m.]

16:43:20 3 It gives us really bad memories. We know about the Lumumba

16:43:29 4 affair. At that time people were killed, and I have referred

16:43:36 5 to some events, and I shall refer to others.

16:43:41 6 [4:43 p.m.]

16:43:46 7 During his government, Mr Lubanga was waiting for

16:43:50 8 medicine -- a consignment of drugs for his people and he said,

16:43:55 9 "We can't, because the medicine is expired." And he went to

16:44:00 10 the airport with the people of the NGO in question that were

16:44:05 11 in charge of this drug consignment, whose name I shall not

16:44:09 12 mention because I do not wish to have useless discord. These

16:44:13 13 people observed that this medicine was expired and they

16:44:17 14 said -- and he said to them, "You are coming to treat my

16:44:20 15 people with expired drugs?" And he sent the consignment back.

16:44:25 16 [4:44 p.m.]

16:44:25 17 The same thing happened with contraband -- cigarettes this

16:44:32 18 time. When NGOs came to provide food, he said, "That's all

16:44:37 19 very well, it could be useful for immediate needs, but help us

16:44:42 20 revive our agriculture. The soil is fertile here. If we

16:44:48 21 plant something, we shall have results in a month and we have

16:44:52 22 several harvests a year, so please help us. Let's -- just

16:44:57 23 please help us to revive this agriculture."

16:45:01 24 None of this was popular. The pastor, the good shepherd, was

16:45:10 25 a problem. As the witness said, the witness -- the only

16:45:13 1 witness in a statement that we have tendered into evidence,
16:45:16 2 the problem with Thomas Lubanga was that he was a peacemaker.
16:45:20 3 What it means is that chaos, war and disorder was beneficial,
16:45:26 4 as always, to many people.
16:45:27 5 [4:45 p.m.]
16:45:29 6 Did he make money? Did he enrich himself? I am afraid he
16:45:34 7 didn't. Mr President, I would like to see the result of the
16:45:45 8 assets that were frozen. The Registry should have a report on
16:45:50 9 this. I have already applied for that report. I am very keen
16:45:53 10 to see the results of that report. Where are the assets of
16:45:59 11 Mr Lubanga? The fact is that Mr Lubanga and his family, and
16:46:02 12 his seven children, don't have a single franc or a euro, or a
16:46:09 13 Congolese franc for that matter.
16:46:09 14 [4:46 p.m.]
16:46:13 15 Did he preach racial hatred? Mr Prosecutor, where are these
16:46:17 16 supposed broadcasts by Radio Candip whose transcripts you are
16:46:23 17 unable to find? Isn't this a problem? Do you think that you
16:46:25 18 can make unfounded charges like that because you are the
16:46:29 19 Prosecutor of the International Criminal Court? Do you not
16:46:32 20 think that you must adduce proof? Did he enlist children?
16:46:38 21 We saw it. We -- did we prove it? No.
16:46:38 22 [4:46 p.m.]
16:46:43 23 Mr Prosecutor, if we go to trial, I promise you witnesses, and
16:46:49 24 I promise you many witnesses.
16:46:51 25 [4:46 p.m.]

16:46:59 1 The Defence believes that as the Prosecutor has not presented
16:47:03 2 evidence regarding massacres connected with my client, has
16:47:11 3 chosen charges which could be put against hundreds of people
16:47:16 4 in the Congo. In the army and the militias of the Congo there
16:47:22 5 are today large numbers of child soldiers. I think that here
16:47:27 6 there has been confusion between the child soldiers of the
16:47:31 7 Congolese army, or by the militias which were created by them
16:47:35 8 or supported by them.
16:47:36 9 [4:47 p.m.]
16:47:37 10 Did he have child soldiers participate in combat? Where are
16:47:46 11 the charges for war crimes under 8(2)(b) of the Statute?
16:47:52 12 Where are the attacks on the population that you allege with
16:47:55 13 much gusto?
16:47:55 14 [4:47 p.m.]
16:47:57 15 You say that these children were used in attacks on civilian
16:48:03 16 populations. Where is the logic in what you claim? Did you
16:48:07 17 bring to this Court a credible witness?
16:48:07 18 [4:48 p.m.]
16:48:14 19 President, your Honours, I would like to refer to the
16:48:21 20 contra -- or, rather, the cross-examination in summary.
16:48:26 21 Prosecutor -- and here I am coming to the end of my
16:48:28 22 submissions -- the Defence put a question to you at the
16:48:36 23 beginning of this hearing. It asked you: where are the
16:48:43 24 killers, Mr Prosecutor? And you did not answer.
16:48:46 25 [4:48 p.m.]

16:48:47 1 Well, I can tell you, Mr Mbusa Nyamwisi is the Minister of
16:48:52 2 Cooperation in the government of the Congo. Mr Lopondo is the
16:48:55 3 head of security, Joseph Kabila is the President of the
16:48:58 4 republic. Mr Prosecutor, I accuse you of conducting a
16:49:07 5 political case and entangling the International Criminal Court
16:49:18 6 in a political -- in political proceedings. This is entirely
16:49:25 7 unacceptable for us, because the man you have imprisoned is an
16:49:30 8 innocent man, but you will go down in history for giving Congo
16:49:33 9 its Nelson Mandela. It's already done.
16:49:38 10 [4:49 p.m.]
16:49:39 11 Mr President, your Honours, I often walk along the
16:49:49 12 coast -- the North Sea coast wondering what it is I am
16:49:53 13 seeking. Undoubtedly it is in preparation for a face-to-face
16:49:58 14 with my God. The sea, a force of nature, one day may have its
16:50:07 15 way with us. I am an actor for justice; I'm a representative
16:50:13 16 of the conscience of our society -- not the justice sought by
16:50:19 17 this Prosecutor, but the justice of the judges -- your
16:50:23 18 justice.
16:50:23 19 [4:50 p.m.]
16:50:24 20 I have always thought that this justice and this conscience
16:50:29 21 can have one concern, and one only, and that is to establish
16:50:32 22 the truth. In the same way that that force which is nature
16:50:42 23 itself, god is our law; beware he who does not respect him.
16:50:54 24 [In French]: "I would also refer to that great Flemish poet
16:51:05 25 Emile Verhaeren who, undoubtedly referring also to the people

16:51:12 1 of Ituri, wrote, 'There are thus poor hearts who hold within
16:51:15 2 them lakes of tears who cannot speak, or are like the stones
16:51:25 3 of a cemetery, people with sad eyes, humble but good, full of
16:51:29 4 worries, with the sorrow of beasts before a storm. There are
16:51:38 5 such people -- such people on whom a storm of miseries is
16:51:45 6 wrought on the planes of the earth".
16:51:47 7 [4:51 p.m.]
16:51:51 8 Your court is here for those people, for no-one else. Give
16:51:55 9 them their justice. Give them this innocent man who is their
16:52:00 10 only hope. Release him, give him his freedom, he has suffered
16:52:05 11 enough and his children are waiting for him.
16:52:05 12 [4:52 p.m.]
16:52:11 13 That justice does not necessarily mean holding a trial of
16:52:15 14 Thomas Lubanga, as the victims request. Already two years
16:52:21 15 have been spent on these proceedings; huge financial means
16:52:25 16 have been expended by the Prosecutor. Justice must be seen to
16:52:29 17 be done, and that means that this high court must ensure that
16:52:37 18 it is not misused for political ends in a prolongation of
16:52:44 19 States. And here I would allude to General De Gaulle who said
16:52:51 20 similar words in relation to international organisations.
16:52:57 21 PRESIDING JUDGE JORDA (interpretation): Thank you,
16:52:58 22 Mr Flamme. We are arriving at the end of these proceedings.
16:53:04 23 I would just like to remind you that you, like the Prosecutor,
16:53:07 24 have been authorised to -- Mr Withopf, would you like to take
16:53:11 25 the floor? Would you like to take the floor?

16:53:13 1 MR WITHOPF: With your permission, yes, I would like to take
16:53:16 2 the floor. I have noticed with great concern --
16:53:20 3 PRESIDING JUDGE JORDA (interpretation): Excuse me, do you
16:53:24 4 wish to take the floor on a matter of a procedural point?
16:53:28 5 Remember that you cannot speak after the Defence. The
16:53:30 6 submissions are complete and final.
16:53:34 7 MR WITHOPF: I make one remark, and I make the remark in
16:53:38 8 respect to what my learned colleague said. He is accusing,
16:53:45 9 and I quote from the transcript -- he says, "I accuse you of
16:53:49 10 conducting a political case and entangling the ICC in
16:53:53 11 political proceedings."
16:53:55 12 Mr President, your Honours, on behalf of the Prosecutor, I
16:53:58 13 oppose such a statement.
16:54:01 14 PRESIDING JUDGE JORDA (interpretation): I will put a stop to
16:54:03 15 this, Mr Withopf. The Defence has a fundamental right here.
16:54:11 16 There will be no defamation within this courtroom. The
16:54:14 17 Defence took the floor; spoke in the terms in which it wished.
16:54:18 18 I think that the submissions were perfectly clear. I think
16:54:21 19 that we should now conclude. And I wouldn't like these
16:54:25 20 proceedings to end on an incident which seems to be not to be
16:54:30 21 proper.
16:54:30 22 [4:54 p.m.]
16:54:31 23 If I look back over these weeks -- I know that the audience
16:54:37 24 here today were not here for all of the proceedings, but there
16:54:40 25 have been many interruptions between -- by the Defence and the

16:54:46 1 Prosecution, and I -- that has been a substantial part of
16:54:50 2 these proceedings, it seems to me. But, I would remember both
16:54:53 3 participants -- or all participants, that they have an
16:54:58 4 opportunity to submit written comments on the oral submissions
16:55:04 5 of each party.
16:55:05 6 [4:55 p.m.]
16:55:06 7 Now, as regards these written submissions, Mr Withopf, I would
16:55:10 8 remind you that you have until 4 December to submit yours and
16:55:14 9 the Defence until 6 December. As regards the number of pages,
16:55:21 10 the Chamber has deliberated. Normally the page limit is
16:55:25 11 20 pages. We are mindful of the wealth of substance which has
16:55:31 12 been presented in the courtroom and, therefore, we would like
16:55:40 13 to extend an opportunity to the victims' representatives also
16:55:44 14 to make written submissions, and that by 6 December, and we
16:55:48 15 set the page limit at 40 pages for the legal representatives
16:55:53 16 of the victims, for the Defence and for the Prosecution.
16:55:56 17 [4:55 p.m.]
16:56:02 18 Now, as regards the language to be used, I would ask you to
16:56:08 19 make your written observations in French. Now, I would like
16:56:13 20 to end on a specific point. I would say that your work has
16:56:21 21 been exemplary here before this Court. I would like to
16:56:27 22 congratulate you on this. These are the first such
16:56:30 23 proceedings before this Court. I know that occasionally I
16:56:33 24 have had to intervene harshly, but a presiding judge has his
16:56:37 25 role to play, but I would like it to be said, and I would like

16:56:41 1 to now state that the hearing is adjourned and the Chamber now
16:56:47 2 has a 60-day period to deliberate on these matters and
16:56:52 3 therefore has as its deadline 29 January for the submission of
16:56:58 4 its decision. I would like to thank all of the interpreters,
16:57:01 5 all who are present here today, those who are not present
16:57:05 6 today, those who have been writing the transcript of these
16:57:09 7 proceedings, I would like to thank representatives of the
16:57:14 8 general public, representatives perhaps of the States parties
16:57:18 9 of this Court who are in the city of The Hague this week, for
16:57:21 10 having attended. Now, the hearing is over.

16:57:30 11 [4:57 p.m.]

16:57:31 12 [At 4.57 p.m. the hearing adjourned accordingly]

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