

1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation Democratic Republic of Congo, case number, ICC 01/04-01/06

4 Transcript ICC-01-04-01-06-T-4-CONF-EN

5 Monday, 24th April 2006 – Open session

6 The hearing starts at 2.07 p.m.

7 THE USHER: All rise. The International Criminal Court is now in
8 session. Please be seated.

9 JUDGE STEINER: Good afternoon. Please, could -- Madam Registrar
10 to call the case.

11 THE REGISTRAR: Yes, your Honour. Situation in the Democratic
12 Republic of Congo, case the Prosecutor versus Thomas Lubanga Dyilo,
13 number ICC 01/04-01/06.

14 JUDGE STEINER: Thank you very much. So let me first welcome
15 Mr. Thomas Lubanga Dyilo, who is present at this hearing. Let me also
16 welcome the Prosecution and Defence teams, as well as the Registrar, the
17 representatives of Court Management, and the Victims and Witnesses Unit,
18 and the members of the Officer of the Public Counsel for the Defence
19 assisting Mr. Flamme at this hearing.

20 I would like first the Prosecution, then the Defence, and then
21 the Registry to introduce themselves and their respective teams, please.

22 MS. BENSOUDA: May it please your Honour, Fatou Bensouda, Deputy
23 Prosecutor, Prosecutions. Appearing with me is Senior Trial Lawyer
24 Ekkehard Withopf; Julieta Solano, Associate Trial Lawyer; Sangkul Kim,
25 Associate Legal Advisor; Ramu Bittaye, case manager; and Michael Lees,

1 head of OTP's Knowledge Base Unit.

2 JUDGE STEINER: Thank you very much.

3 Mr. Flamme, please.

4 MR. FLAMME (interpretation): Yes, your Honour. So I would like
5 to save the time here today. Assisted by Veronique Pandanzyla, who is
6 the Judicial Assistant, as well as Ms. Melinda Taylor, who represents the
7 Office of Public Counsel for the Defence. Thank you.

8 JUDGE STEINER: Thank you very much.

9 Mr. Registrar.

10 MR. DUBUISSON (interpretation): Your Honour, with regard to the
11 Registry, we today have with us Simo Vaatainen, who is the Chief of the
12 VW, Victims and Witnesses Unit. There's Uros Mijuskovic, who is the
13 jurist within the Judicial Court Section and also within the court --
14 division of Court Services, and myself, Marc Dubuisson, who represents
15 the Registry, and who -- I'm also there with regard to the Director of
16 Court Services.

17 JUDGE STEINER: Thank you very much. So here from the Chamber, I
18 am Judge Sylvia Steiner acting as a single Judge according to
19 Article 57(2) of the Statute. I have here with me the Assistant
20 Associate Legal Officers, Ms. Jessica Lescs, Ms. Josyanne Pierrat, and
21 Mr. Hector Olasolo. Also present...

22 As a single Judge of the case against Mr. Thomas Lubanga Dyilo, I
23 am responsible for exercising the functions of the Chamber in this case,
24 and I have convened this hearing on the main features of the system of
25 disclosure as provided for in Articles 61(3), 67(1)(a) and (b), and 67(2)

1 of the Rome Statute, and Rules 76 to 84 of the Rules of Procedure and
2 Evidence. Also, on their relationship with the Rules on communication of
3 certain evidence to the Pre-Trial Chamber before the confirmation hearing
4 as provided for in Rule 121.

5 I am aware that there are two pending requests from the Defence.

6 The first concerns the Defence's request to have full access to the
7 record of the situation in the Democratic Republic of the Congo kept by
8 the Registry. This request is not the object of this hearing and will be
9 decided upon after the deadline for the Prosecution's response expires.

10 The Defence has also requested to have full access to the
11 Prosecution's file on investigation of the situation in the Democratic
12 Republic of Congo and on the case against Mr. Thomas Lubanga Dyilo. The
13 hearing of today is somewhat related to the request insofar as the Rules
14 on disclosure exclude full access by the Defence to the whole
15 Prosecution's file and regulate the extent, the time, and the manner in
16 which the Defence can access some of the materials contained in the
17 Prosecution's file. In any case, no decision will be taken at this
18 hearing. The Chamber is here to listen to the parties.

19 Disclosure is a key feature of criminal proceedings in common law
20 jurisdictions, which is usually unknown in civil law systems, and which
21 aims at providing the Defence with enough information about the
22 Prosecution's case and with potentially exculpatory materials in order to
23 place the Defence in a position to prepare adequately for the
24 confirmation hearing.

25 Communication to the Pre-Trial Chamber of certain evidence before

1 the confirmation hearing is a feature directly related to criminal
2 proceedings in civil law jurisdictions, which is usually unknown in
3 common law systems, and which aims at placing the Pre-Trial Chamber in a
4 position to properly organise and follow the confirmation hearing.

5 In interpreting the rules on disclosure and the rules on
6 communication to the Pre-Trial Chamber, the following principles should
7 be kept in mind: First, the interest of the Defence to learn as soon as
8 possible and as much as possible about the evidence the Prosecution
9 intends to rely on at the confirmation hearing and about potential
10 exculpatory materials or other materials that might help the Defence to
11 prepare the confirmation hearing.

12 Second, the Prosecution's right and duty to continue with his
13 investigation in relation to the case against Mr. Thomas Lubanga Dyilo
14 before the confirmation hearing.

15 Third, the need for guaranteeing the uniqueness of the criminal
16 procedure before the International Criminal Court, which is the result of
17 a delicate balance between common and civil law systems.

18 And fourth, the need for addressing possible tensions between the
19 relevant provisions in a manner which not only ensures consistency among
20 them but also guarantees that any of such provisions becomes fully
21 meaningful.

22 Being this the first opportunity for the Court to apply the rules
23 on disclosure and on communication to the Pre-Trial Chamber, I hope we
24 can work together in order to ensure that they are applied in a manner
25 which properly reflects the core principles regarding the fairness and

1 expeditious conduct of the proceedings as a whole.

2 As far as possible, the views and concerns of both Prosecution
3 and Defence will be taken into consideration in applying the relevant
4 rules on disclosure and communication to the Pre-Trial Chamber. However,
5 while a final decision on this matter is taken, the interim system of
6 disclosure, as shaped in previous decisions, will continue to apply.

7 In the Chamber's view, the first set of principles that should be
8 taken into account is stated in Articles 61(3), and Article 67(1)(a) and
9 (b), and 67(2) of the Statute. It deals with the minimum guarantees

10 Mr. Thomas Lubanga Dyilo is entitled to.

11 Among them, Mr. Lubanga Dyilo has the right to be informed
12 promptly and in detail of the nature, cause and content of the charge, to
13 be informed within a reasonable period of time of the evidence that the
14 Prosecutor intends to rely on in the confirmation hearing and to have
15 adequate time and facilities for the preparation of the defence.

16 Article 67(1) refers to Rule 101 of the Rules of Procedure and
17 Evidence, according to which, in making any order setting time limits
18 regarding the conduct of any proceedings, the Court shall have regard to
19 the need to facilitate fair and expeditious proceedings, bearing in mind,
20 in particular -- Article 67(1) refer to Rule 101 of the Rules of
21 Procedure and Evidence, according to which, "In making any order setting
22 time limits regarding the conduct of any proceedings, the Court shall
23 have regard to the need to facilitate fair and expeditious proceedings,
24 bearing in mind in particular the rights of the defence...." Also,
25 taking into account the rights of the Defence, all those participating in

1 the proceedings to whom any order is directed shall make an effort to act
2 as expeditious as possible, within the time limit ordered by the Chamber.

3 From the general principles, I would like to listen to the
4 parties on their interpretation of Article 61(3), 67(1)(a) and (b), and
5 Article 67(2) of the Statute, and, *inter alia*, Rules 76, 77, 78, 79, and
6 121 of the Rules of Procedure and Evidence.

7 An agenda containing the main topics to be discussed has been
8 distributed previously. I would like to suggest that we follow the
9 agenda. Any issues directly derived from the topic under discussion can
10 be raised at any time.

11 I would propose that first the Prosecution and then the Defence
12 elaborate alternately on the topics one by one. On issues having an
13 impact on the role of the Registry, the Registrar and the representative
14 of Court Management Section will make their observations after the
15 Prosecution and the Defence have addressed the relevant item.

16 The parties can ask for the floor to intervene if any
17 clarification is deemed necessary. Dialogue between the parties is, in
18 principle, allowed.

19 The two final topics of the agenda will be discussed in closed
20 session due to their confidential content.

21 Afterward, the open session will resume, and the floor will be
22 given first to the Prosecution and then to the Defence to make its final
23 comments, observations, or requests.

24 This is the scheme proposed for this first hearing, and if it is
25 acceptable to the parties, we can start discussing Article 61(3) of the

1 Statute.

2 Is the agenda accepted by the parties?

3 MS. BENSOUDA: Agenda is acceptable to the Prosecution.

4 JUDGE STEINER: Thank you very much.

5 MR. FLAMME: Yes, we accept the agenda.

6 JUDGE STEINER: Thank you very much. So we can proceed.

7 MS. BENSOUDA: Your Honour -- disclosure of evidence, your
8 Honour, is a key component of the Court's procedural law to ensure
9 expeditious and fair proceedings, fair to both the parties. Disclosure
10 of evidence, your Honour, is, furthermore, an element of the Court's work
11 that is highly complex, complex in respect of the interpretation of the
12 applicable law which is a novelty in international criminal proceedings,
13 but even more complex in respect to the practical facets of disclosure
14 that have a significant impact on the success of the process.

15 Finally, your Honour, disclosure of evidence is resource
16 intensive, probably amongst the most resource intensive single aspects of
17 the Court's proceedings and in this context of the parties' efforts to
18 assist the Court in establishing the truth.

19 Your Honour, it is against this background, we believe, that the
20 Chamber is conducting the present hearing. We are sure that your Honour
21 is, as the parties, well aware that the decision of this Chamber
22 following the hearing will not only have significant impact on the case
23 of the Prosecutor versus Thomas Lubanga Dyilo, it will set the disclosure
24 standards for future cases. The decision, we believe, will shape an
25 important aspect of this Court's work. It will be key to the procedural

1 effectiveness and reliability of the Court.

2 The Prosecution, therefore, appreciates to have the opportunity
3 to fully address the comprehensive list of questions the Chamber has put
4 to the parties. The Prosecution, your Honour, in light of the short time
5 the Court has left to the parties to address all facets of the list of
6 questions, would also appreciate to be given an opportunity to expand on
7 its observations in writing within a time frame that deems adequate to
8 the complexities of the issue of disclosure.

9 Your Honour, if I may, with your kind permission, invite Senior
10 Trial Lawyer Ekkehard Withopf to answer some of the first questions as
11 raised by your Honour in the agenda. As your Honour pleases.

12 JUDGE STEINER: Mr. Withopf.

13 MR. WITHOPF: Good afternoon, your Honour; good afternoon,
14 counsel for the Defence, my learned colleagues; and good afternoon, the
15 representatives of the Registry.

16 In expanding, your Honour, the general remarks the Deputy
17 Prosecutor of Prosecutions has made, prior to answering the first
18 question, your Honour, please permit us to make a number of further
19 general remarks to set the framework of the Prosecution's answers to the
20 various questions.

21 The aim of today's submissions of the Prosecution is to ensure
22 expeditious proceedings, fair proceedings, and fair to both parties by
23 providing for effective disclosure in compliance with the applicable law.

24 The Prosecution, in preparation of this hearing, has noted the
25 single Judge's particular consideration of: "The lengthy negotiation

1 process in the working group on Rules of Procedure and Evidence on
2 the preparatory -- of the Preparatory Commission."

3 In light of this observation, your Honour, the Prosecution
4 submits -- submits that the instant discussion before this Court should
5 not, should not, be a continuation of the discussions of the working
6 group of the Prep Com, which was characterised by opposite, by very
7 opposite, views, one view advocating the concentration of the disclosure
8 process at the pre-confirmation stage and its placement under the
9 supervision of the Pre-Trial Chamber, and for another view - and it's the
10 submission of the Prosecution that the other view actually finally
11 prevailed - the other view in emphasising that the trial, the trial and
12 not the confirmation hearing, is the centre-piece, the centre-piece of
13 the court proceedings and in highlighting the possible delays of an
14 extensive disclosure process, advocating disclosure, disclosure of the
15 bulk of the evidential materials, should happen in the lead-up to the
16 trial after confirmation.

17 The Prosecution's of the view that the general principles of
18 interpretation of the law should be applied, including in respect to the
19 hierarchy of such principles in the following order: First, the language
20 of the law; second, the context, the context in which this language is
21 being used; third, if these two ways of interpretation fail, the
22 theological interpretation and - and that's now very important - as a
23 last resort only. And there's an exception, the negotiation history.

24 The Prosecution, in support of this submission, refers to
25 Article 32 of the Vienna Convention, which details that the:

1 "Preparatory work of the treaty is a supplementary, a supplementary,
2 means of interpretation," and I add, "only." Summarised, your Honour, as
3 a principle, the Prosecution will focus its comments to the questions to
4 follow on the law as finally adopted. It will not focus on the comments
5 that have been made during the Prep Coms.

6 If I may, your Honour, with your permission continue to address
7 another point the Prosecution wishes to make. In the context of the
8 present procedure in respect to the system of disclosure, it became
9 obvious, your Honour, it became obvious from the various filings of both
10 parties, the Prosecution and the Defence, that there is a high overlap of
11 the parties' concerns, the concerns of both parties, in respect of the
12 interim system of disclosure as it is currently imposed by the Pre-Trial
13 Chamber, by the decision of the single Judge of the 23rd of March and the
14 27th of March.

15 I wish to emphasise in particular that the common observations,
16 the common observations of the Prosecution and of my learned colleague,
17 counsel from the Defence, concern the core, concern the core of the
18 pre-confirmation hearing disclosure. Namely, one, the disclosure of
19 incriminatory evidence the Prosecution wishes to rely on at the occasion
20 of the confirmation hearing pursuant to Article 61(3)(b); and two, the
21 disclosure of potentially exculpatory evidence within the parameters of
22 Article 67(2) of the Rome Statute.

23 The representatives of both the Prosecution and the Defence, they
24 have gained experience. They have gained significant experience at the
25 two ad hoc tribunals, the ICTY and the ICTR. The representatives of both

1 the Prosecution and the Defence are very familiar, very familiar, with
2 the many practical issues that determine the effectiveness of disclosure
3 and the fairness of disclosure, fair to both parties, and the
4 representatives of both parties have gained significant experience in
5 respect to the issues and matters that determine the success of
6 disclosure.

7 The Prosecution acknowledges, as your Honour has emphasised at
8 the beginning of this hearing, that there are unique features in the law
9 of the ICC. And if I'm not completely wrong, my learned colleague from
10 the Defence does do so as well. However, the parties, and both parties,
11 strongly believe that their respective experiences in the disclosure
12 processes of the ICTY and of the ICTR allow them to assist, to assist the
13 Pre-Trial Chamber and the single Judge in ensuring a system of disclosure
14 that will finally serve its purposes.

15 There are very few additional observations, your Honour, the
16 single Judge, please allow me to make at this stage as introductory
17 remarks, the next one being a very important one, and this is actually
18 the principle we will repeat throughout the session on disclosure. The
19 Prosecution submits that disclosure by its very nature is first and
20 foremost the exchange of evidence between the Prosecution and the
21 Defence, and vice versa, between the Defence and the Prosecution. The
22 Prosecution is of the view that this opinion is very much reflected by
23 the law governing disclosure. I refer, in particular, as your Honour
24 already has mentioned, to Rule 121(2)(c), Rule 121(2)(c) dealing with
25 disclosure of incriminatory materials for the purposes of the

1 confirmation hearing. This Rule clearly, this Rule very clearly,
2 indicates that the evidence is to be communicated - and that's the
3 keyword in this Rule - is to be communicated to the Pre-Trial Chamber
4 only after, after, disclosure between the parties.

5 This is already clear, very clear, from the French version of
6 Rule 121(2)(c). It is, however, even more clear from the French
7 version -- sorry, I correct myself. It's clear from the English version,
8 but it's even more clear from the French version, which reads:
9 (Interpretation) "All of the information which has been exchanged between
10 the Prosecutor and the person --"

11 (In English) Please repeat it again.

12 THE INTERPRETER: "All of the information --"

13 MR. WITHOPF: I can repeat what I just said. I was making
14 reference to the English version of Rule 121(2)(c), and I was making
15 reference to the French version of 121(2)(c). The French version -- the
16 French version in saying (No interpretation), even more indicating that
17 communication takes place after disclosure between the parties.

18 If I may please proceed in drawing the attention of the Pre-Trial
19 Chamber to at least two further Rules which reaffirm and confirm the
20 position of the Prosecution. Namely, Article 67(2) covering disclosure
21 of potentially exculpatory materials states that: "...the Prosecutor
22 shall ... disclose to the defence...." Again, disclosure between the
23 Prosecution and the Defence. And finally as another example, Rule 76
24 says that the Prosecutor "...shall provide the defence."

25 Against this background, your Honour, I think the law very

1 clearly indicates that disclosure is a matter between the Prosecution and
2 the Defence and vice versa, and that the Pre-Trial Chamber at this stage
3 has only a role to play in terms of having communicated the materials to
4 the Pre-Trial Chamber.

5 Against this background, counsel for the Defence, my learned
6 colleague from the Defence, and the representatives of the Prosecution
7 over the last weeks since the surrender of Mr. Thomas Lubanga Dyilo had
8 discussions, had repeated discussions by exchange of letters and by way
9 of meetings on almost all aspects of disclosure, with the main aim to
10 ensure that disclosure is initiated and that disclosure is done in
11 compliance with the law for the purpose of ensuring that the main
12 purpose, as your Honour has mentioned at the beginning of this, today's
13 hearing, that the main purpose to ensure that counsel for the Defence and
14 Thomas Lubanga get to know the evidence the Prosecution wishes to rely on
15 at the confirmation hearing and any potentially exculpatory evidence as
16 soon as possible and at the early stages of the proceedings.

17 The discussions between the representatives of the parties have
18 resulted in the Prosecution being in a position to already now have set
19 up a system of disclosure, including its IT and any other technical
20 aspects, resulting in the Prosecution already now having disclosed two
21 packages of potentially exculpatory evidence, namely on 31st March and on
22 20th of April. In addition, one package of evidential materials that
23 fall within the parameters of Article 61(3)(b); namely, again on 20th of
24 April, 2006.

25 In addition, in discharging its ongoing obligation to disclose

1 potentially exonerating evidence, the Prosecution has provided the
2 Defence with a comprehensive list of keywords that allow for electronic
3 searches of potentially exculpatory materials. The aim of the provision
4 of the keywords, your Honour, is obviously to invite my learned colleague
5 from the Defence to carefully read the list of keywords and to add to the
6 keywords if counsel for the Defence so wishes, or if Mr. Thomas Lubanga
7 Dyilo so wishes, with the main purpose to ensure full discharge by the
8 Prosecution of its obligations under Rule 67(2). Furthermore, in order
9 to allow the single Judge to understand the extensive work that has been
10 done by the parties in respect of disclosure. Furthermore, the
11 Prosecution has provided counsel for the Defence with an initial list of
12 documents that fall within the parameters of Rule 77.
13 The Prosecution, as your Honour, the single Judge, knows, would
14 have provided for inspection of such materials if the Prosecution would
15 not be bound by the interim system of disclosure that imposes filing of
16 these materials an aspect of the interim system of disclosure the
17 Prosecution's fundamentally, and I repeat, fundamentally disagrees with.
18 The Prosecution wishes to emphasise from the outset that whenever
19 in the context of answering the questions that are related to the process
20 the Registry is entertaining in ensuring compliance with the interim
21 disclosure, we wish to emphasise from the outset that any difficulties
22 the Prosecution is going to raise in this context, difficulties the Court
23 management obviously has faced in the process of making an effort to
24 comply with the interim system of disclosure, does in no way, and I
25 repeat, does in no way intend to challenge the competence of the Registry

1 and the staff members of the Registry who are dealing with this aspect of
2 the work with disclosure-related matters.

3 What these obvious difficulties -- what these obvious
4 difficulties, however, do show is that a system as the Pre-Trial
5 Chamber's interim system of disclosure, or a similar system, is likely to
6 create problems, is likely to create serious problems, the result of
7 which are detrimental to the purpose of disclosure and, in particular,
8 its effectiveness. In addition - and the Prosecution will make this
9 observation later on in more detail - these problems do show that there
10 is a danger, a danger in forcing the Prosecution to, in discharge of its,
11 the Prosecution's, legal obligation, to rely on a third party.
12 Your Honour, the single Judge, I'm coming to the end of my
13 general remarks. As I said at the beginning, these remarks or the
14 content of these remarks will allow your Honour to understand the
15 framework which -- in which the Prosecution is making its observations in
16 answering the various questions that will come.

17 Thank you very much.

18 JUDGE STEINER: I ask the Defence if he wishes to make some --
19 some initial statement like the Prosecution.

20 MR. FLAMME (interpretation): Thank you, your Honour. Clearly I
21 am entirely in agreement with my learned colleague that we find ourselves
22 here at the commencement of a hearing which is absolutely capital in
23 importance both for the Prosecution and the Defence and, indeed, for the
24 concept of a fair trial. Needless to say, disclosure of evidence between
25 parties is a key component at the outset to any fair trial, and we have

1 the good fortune to find ourselves in a setting where criminal
2 proceedings and international criminal providing provide us with a
3 certain number of instruments which correspond, to a large degree
4 felicitously, with the agenda which you have set out for us today, an
5 extensive agenda I would say.

6 And a point -- a point which is important, and here I agree with
7 the opposing party, and we have had the opportunity to meet on a number
8 of occasions, and I think that's a good way to approach the beginning of
9 proceedings, and we have been able to establish those points upon which
10 there is common ground between the Defence and the Prosecution.

11 Obviously, later there are -- we will be dealing with other points where
12 there will be great differences. However, on -- points where there is
13 agreement concern the organisation of these proceedings. These are --
14 these points are very important. And here I would agree with my learned
15 colleague that we, too, have the -- the impression that the interim
16 disclosure system could deprive the parties of initiative when it comes
17 to communication.

18 This is just an introductory point here. I am clearly
19 anticipating upon the agenda, but I think it is an important point that
20 it does deprive the parties of initiative when it comes to communication,
21 and it means that there is a mid-station in communication, which is the
22 Registry. The Registry thereby becomes a key player in communication,
23 which could cause considerable delays in the initial phase.

24 As we all know, proceedings are very much alive, and they change
25 day by day. You might have a hearing on a Monday, and on Friday the

1 Prosecutor, for example, might feel that one of the witnesses should say
2 more than what appears in the record of the proceedings and delivers to
3 the Defence -- a service upon the Defence will say -- as they call it, a
4 notification, and does this on the Friday. If this were to be channeled
5 through the Registry, clearly on the Monday the Defence will not have in
6 its position that, we'll say, because there will have been the weekend,
7 and this could lead to misunderstandings, particularly when we are at
8 those busy points in the proceedings.

9 There may be misunderstandings caused if information must
10 communicate via the Registry. It could happen that the Registry fails to
11 appreciate for times the urgency of certain communications. And I don't
12 mean to be derogatory *vis-a-vis* the Registry, but these types of
13 misunderstandings or different appreciations of the nature of a
14 communication can arise.

15 Now, I will return to this, but allow me just to say that I feel
16 that the role of the Registry, in the view of the Defence and of the
17 Prosecution, must be a passive role largely. That is to say that the
18 Registry should record a posteriori a communication which has already
19 been executed between the parties. I would also like to add that the
20 interim system could have the unfortunate consequence that it may lead to
21 the parties feeling less accountable, in that at a hearing either party
22 could easily say, "Well, once I provided the information to the Registry,
23 I have done all that could be asked of me," and therefore could claim to
24 be beyond reproach.

25 So to return to the agenda, my brief comments having been an

1 introduction, the agenda -- I have it here before me in English, so I'm
2 going to quote it in English and try to make life easier for the
3 interpreters by speaking slowly. If I don't speak specifically -- or
4 significant -- or sufficiently slowly, perhaps they will stop me.
5 You speak of the meanings of the expressions (In English) "for
6 the hearing --"

7 JUDGE STEINER: Mr. Flamme, I'm sorry to interrupt you. If you
8 allow the -- the Chamber first to listen to the Registry on the general
9 observations, and then we will start by the -- the specific items of the
10 agenda.

11 MR. FLAMME (interpretation): Yes. That's fine, your Honour. As
12 regards my introductory comments - and these comments are a matter of
13 urgency for the accused - it's important to realise that the Defence has
14 to be produced starting from zero. Somebody who is detained in prison,
15 you have the arrest itself, and you have the defence. Therefore, we, the
16 Defence, need full access to the -- the file produced by the Prosecutor.
17 And this is a matter of urgency, because we need to deal with two
18 matters, an arrest, that is to say deprivation of liberty, which is one
19 of the most serious aspects of criminal proceedings; and secondly, we
20 must address the matter of preparing a defence for the confirmation of
21 charges hearing.

22 The Prosecutor clearly has a major advantage over the Defence in
23 that not only does he have available to him much more considerable
24 financial resources and structures that are more considerable, but also
25 he has available to him much more time, much more time in light of the

1 point in time at which the Defence can begin its work. It is, therefore,
2 essential that the Defence have available to it immediately, and I would
3 underline the word "immediately," the file which has -- which had been
4 compiled by the Prosecutor in advance of the arrest.

5 As regards the arrest, I would like to inform the Pre-Trial
6 Chamber that we have doubts on the legality of this arrest, but that we
7 cannot speak of them if we have not had the opportunity to become
8 familiar with the file. For the Defence, it is absolutely essential to
9 be able to analyse the Prosecutor's file in order to judge whether the
10 arrest is legal. Secondly, we need to prepare for the confirmation
11 hearing, and here we are speaking of producing a true defence.

12 And before addressing each of the items which are set out the
13 detail in your agenda, it must be said in advance that the Defence, at
14 the outset of the proceedings, is considerably disadvantaged *vis-a-vis*
15 the Prosecutor. It is therefore essential that the Prosecutor disclose,
16 and I would say disclose as of the date of arrest. Let us remember that
17 the arrest took place one month ago. Therefore, today's proceedings are
18 absolutely essential.

19 Now, I know that the Prosecutor, and I would not reproach -- I do
20 not have reproaches *vis-a-vis* the Prosecutor. I know that the Prosecutor
21 intends to disclose information as the law imposes, but needless to say,
22 we are awaiting a disclosure system, and this is a matter of extreme
23 urgency. The confirmation hearing has been scheduled, I believe, for the
24 27th of June, is it not? That is a date which will come soon. And it's
25 important that the Defence be able to, first of all, study the file of

1 the Prosecutor, all aspects of it, including the exculpatory aspects.

2 And then secondly, the Defence needs to go about organising the defence
3 for the trial before. We have the assistance of a legal assistant now,
4 but we also need to take on an investigator to go to the DRC to
5 investigate and reveal exculpatory information. Having carried out that
6 research, studies will be necessary in the field. It will be necessary
7 to contact exculpatory witnesses. And therefore, I would insist upon the
8 fact, your Honour, that we are running out of time at this point.

9 And this brings me to the end of my introductory comments.

10 JUDGE STEINER: Thank you very much, Mr. Flamme.

11 I would like to remind both parties or -- in this -- in this
12 hearing that we have agreed on an agenda, and I would like to follow this
13 agenda as far as possible. So you've made -- I allowed both parties to
14 make initial remarks, and some of these remarks went into the merits of
15 the discussion itself. But before starting the specific items to -- of
16 the agenda, I would like to give the floor to the representative of the
17 Registrar and ask him, please, to be as brief as possible but to make
18 your initial remarks on the initial remarks made by both parties.

19 MR. DUBUISSON (interpretation): Thank you, your Honour. I, too,
20 will make some introductory comments. In fact, four. The first concerns
21 the fact that when I speak to you, I will be speaking with two hats, as
22 Director of the Court Management Services, that is to say -- or, rather,
23 the division of Court Management which deals with several sections.
24 First of all, what is the role of the Registry? It is not
25 judicial in nature. It is very important, I believe, in the discussions

1 we are about to have that we remember that the Registry's role is
2 technical and operational.

3 Number two, we are responsible for ensuring that the proceedings
4 take place correctly. We are a channel of communication, and we are also
5 responsible for channeling information. Our role can be to facilitate
6 between the parties and coordinate.

7 Third point: What do we mean by communication of evidence? We
8 are speaking of audiovisual, testimonies, maps, objects, written
9 testimony. When we speak of these items of information and say that they
10 must transit by the Registry, that does not mean or does not preclude
11 that the parties can also exchange information between them. The record
12 must be maintained by the Registry, but there should not be any
13 impediment of contact between the parties. Similarly, filing a document
14 with the Registry does not preclude or mean that the Chamber is -- is
15 informed. It also does not necessarily mean that an item of information
16 will be admissible.

17 Today's discussions are taking place in front of one Judge
18 charged with the cases of one Pre-Trial Chamber. I would like to remind
19 you all that the record in its entirety will involve contributions of
20 various Chambers at various stages. It is important that the procedure
21 which we establish is uniform for all.

22 Allow me to remind you of the principles that governed not the
23 work of the Preparatory Commission but the Plenary, which produced the
24 Regulations of the Court, and that was to have fair and expeditious
25 proceedings. Regulation 26 says that electronic systems must be used,

1 and that is a very clear result.

2 And now my final point: One must envisage all, not parties but
3 participants. Let us remember that here today that one bench is empty.
4 That is the bench of the victims. The victims are absent today for known
5 reasons, but they have rights, rights which remain to be defined.

6 Therefore, it is important to conserve options for managing potential
7 victims at a later stage. Obviously one cannot make any determination on
8 that point now.

9 Various hypotheses are possible. And this is my absolute last
10 point. The Chamber has access to a list of documents. The documents may
11 be exchanged directly between the parties. That would be a minimalist
12 approach. Now, if the Chamber has access to all of the documents via the
13 Registry, that would be a maximalist approach. It might be possible to
14 have communication via the Registry, but it is certainly not the Registry
15 who decides who should have access to the documents. The Registry has no
16 power in this connection. A possible access to documents by the Chamber
17 is not necessarily established in advance.

18 I will now reserve my further comments to the items as they are
19 addressed through the agenda. Thank you.

20 JUDGE STEINER: Thank you very much.

21 And now just before we start, just some few observations, and
22 taking into account the agenda proposed and the scheme agreed by the
23 parties in the beginning of this hearing, the system will be giving the
24 floor to the Prosecution and the Defence alternatively in order to
25 comment one by one or in grouping some of the issues.

1 Second, the Chamber is not going to issue any decision after this
2 hearing. This hearing is being convened, as I said, to listen to the
3 parties. If there is any separate or different motion to be put by one
4 the parties, that will be -- has to be filed after the hearing in order
5 to have a formal decision of the Chamber on the specific request.
6 Just one word in relation to the use by the Chamber or the quote
7 by the Chamber of the works of the Prep Com as mentioned by the
8 Prosecution, and just to clarify that the reference the work of the Prep
9 Com, all references were made not as a sort of interpretation of the
10 Rules and the Statute on this matter of disclosure but only to show the
11 level of difficulties that we can -- we can find in the Statute and the
12 Rules in relation to this -- to this issue.
13 In the very same Article quoted more than once by the Prosecution
14 in its observation, it's very clear that the Statute -- that the Prep Com
15 has agreed that evidence disclosed on an *inter partes* basis before the
16 confirmation hearing should also be disclosed to the Pre-Trial Chamber in
17 order to assist the Pre-Trial Chamber to understand the issues, and has
18 seen its ability to make appropriate orders for disclosure or orders for
19 further investigations of evidence and the hearing itself. So therefore,
20 the delegations felt comfortable with the Pre-Trial Chamber seeing these
21 materials before the hearing, especially given that no finding of guilt
22 results from the confirmation of the charge. So this is quoted from the
23 very same Article. And reminding the parties that was on purpose that
24 the Prep Com has made what it's called this constructively ambiguous
25 outcome. So I'm very glad that the Prosecution feels able to absorb all

1 this ambiguity, but the Chamber still needs some clarification in order
2 to issue a decision on the definitive system of disclosure, and this is
3 the purpose of this meeting.

4 So now I would like to invite the Prosecution and then the
5 Defence, and in a more informal way, to start discussing the meaning of
6 the expressions "within a reasonable time before the hearing" and "be
7 informed" under Article 61(3) of the Statute.

8 MR. WITHOPF: Your Honour, if I understood you correctly, the
9 Prosecution is usually going first, so we will make our observations on
10 the meaning of the expressions "within a reasonable time before the
11 hearing" and to "be informed" under Article 61(3)(b) of the Rome Statute.

12 At the outset of our observations, your Honour, we wish to flag
13 that in the Prosecution's view there is doubt. There is doubt as to
14 whether Article 67(1) applies directly, and the emphasis lies on directly
15 to the confirmation hearing. Article 67(1) appears to be more a
16 provision covering rights of an accused during trial.

17 The Prosecution does -- the Prosecution does, however, your
18 Honour, agree that the sub-provisions (b) of the respective provision
19 stating that the Defence needs to have adequate time and facilities to
20 prepare does also apply at the current stage leading up to the
21 confirmation hearing.

22 What does "within a reasonable time before the hearing," and we
23 are referring to the confirmation hearing, what does it mean? The aim of
24 the provision is setting a deadline in terms of a reasonable time before
25 the hearing. The aim is to allow, in this instance, to the Defence

1 prepare -- to properly prepare for the confirmation hearing.

2 What is reasonable? There is a clear indication, in the view of
3 the Prosecution, provided in Rule 121(3) in respect to the list of
4 evidence where it says, "...no later than 30 days before the date of the
5 confirmation hearing...."

6 The Prosecution wishes to emphasise that in light of the current
7 scope of the charges and the anticipated evidence in support of these
8 charges, the Prosecution is of the opinion that 30 days prior to the
9 confirmation hearing are more -- are more than sufficient for the Defence
10 to prepare properly. Why do we say so? We say so because the Defence,
11 by way of the Prosecutor's obligation for arrest warrant which
12 comprehensively summarises the Prosecution's underlying evidence, is
13

14 already now informed about the main lines of the evidence the Prosecution
15 intends to rely on at the occasion of the confirmation hearing.

16 That was the first aspect of this agenda item. With the
17 permission of your Honour, I would also like to address the second
18 aspect, what is the meaning of "be informed."

19 "Be informed" does not necessarily -- necessarily, in the
20 Prosecutor's submission, include the provision of copies of the
21 evidentiary materials, in particular, witness statements and/or
22 documents. As my learned colleague from the Defence and the single Judge
23 is well aware, it could also entail the provision of summaries of such
24 materials only as can be seen from Article 61(5), allowing the
25 Prosecution to, at the occasion of the confirmation hearing, to rely on
26 summary evidence only. One could also argue that the provision of the

1 list of evidence as referred to in Rules 121(3), 121(4), and 121(5)
2 fulfils the requirement of information in the sense of Article 61(3)(b).
3 I wish to use this opportunity to clarify that in the instant
4 case, your Honour, in the instant case of the Prosecutor versus Thomas
5 Lubanga Dyilo, the Prosecution will, without prejudice to its right to
6 proceed differently in other cases, in future cases, the Prosecution will
7 provide the evidence, possibly with redactions, as is, for example,
8 foreseen in Rule 81 and Rule 82. The Prosecution - and I wish to
9 highlight this - in other cases, however, may use its discretion and may
10 provide summary evidence which is, as I mentioned, possible taking into
11 account the language of Article 61(5).

12 These were our observations to the first agenda item. Thank you
13 very much.

14 JUDGE STEINER: Mr. Flamme.

15 MR. FLAMME (interpretation): Yes, your Honour. The question,
16 therefore -- well, it's a formulation that is quite general, and it
17 concerns a time element, and it also has content element to it. So
18 within the text itself, I'll take up -- well, I see that there are
19 several different elements with regards to the time aspect. There are
20 different ways of presenting this. We read, for example, in Rule 76,
21 "sufficiently early." In Article 61(3), "in a reasonable time before the
22 hearing," and in Article 67, "in the shortest possible time limit," "in a
23 detailed way and in such a way such -- with respect to the nature, cause
24 of the charges, and the content of the charges."

25 And with regard to the Prosecutor on this subject, I think that

1 Article 67 of the Statute also applies to the proceedings before the
2 confirmation hearing. And if I -- if you allow me to refer to
3 Rule 121(1) on this particular subject, which is very clear, where it
4 says that: "A person subject to a warrant of arrest or a summons to
5 appear under Article 58 shall appear before the Pre-Trial Chamber, in the
6 presence of the Prosecutor, promptly upon arriving at the court. Subject
7 to provisions of Article 60 and 61, the person shall enjoy the rights set
8 forth in Article 67."

9 So it's indeed an Article which is in the Statute as well, and
10 this constitutes, if we may put it that way, the constitution the rights
11 of the Defence on this subject, and this is how it is conceived
12 because -- well, as I said before, we find ourselves before a proceedings
13 where the accused already, with regard to the confirmation hearing, has
14 the obligation to already contest these charges according to the Rules
15 which I have mentioned where he has or he must, if he wants to be in
16 logic with himself, if you like, he must already challenge these charges
17 and evidence and to have done a considerable investigative work as I
18 already spoke about.

19 So it's quite logical, I would say, to say that the communication
20 which should be carried out by the Prosecution be done in the shortest
21 possible time limit. For the Prosecutor there is no problem in doing it,
22 because they already have a dossier, a considerable dossier, which they
23 have -- they have been working on. They've asked that it be -- that
24 there be an arrest warrant. They have asked of somebody -- have their
25 liberty taken from them on the basis of this dossier. What is the

1 problem with the Prosecutor, from the time of arrest, as happens in most
2 systems with regards to criminal procedure, so that at least we can look
3 at the legality of this arrest and make it available to the accused and
4 put the dossier -- make it available in its entirety to the accused and,
5 in the opinion of the Defence, in the shortest possible time.

6 And the second point, and this is something that we will speak
7 about later in a more detailed way, when you put the question "What does
8 "be informed" mean with regards to 61(3) of the Statute?" then I think
9 that with regards to this subject, the Rule -- the Rules are quite clear.

10 And if you'll allow me, I'd like to refer to Rule 76, which concerns, in
11 the interpretation of the Defence, the information which refers to the
12 Prosecution witness. So the Prosecutor shall provide the names of
13 witnesses and a copy of their statements. It's not -- it's not a summary
14 evidence here. It is a copy of statements. And also, the statements of
15 Prosecution witnesses shall be made available in original and in a
16 language which the accused fully understands and speaks.

17 And here I'm raising the point which is very sensitive for most
18 of the Prosecution, which is the way in which this statement in their
19 entirety, and here we're speaking about -- we're not talking about
20 summary evidence here. Even if the Prosecutor wants to base himself on a
21 summary, there is an obligation to make it possible for the Defence to --
22 to communicate the statement, the entire witness statement. But there's
23 a very sensitive point as well. Do these statements in their entirety --
24 can they be -- can they be redacted if, for example, is as often the case
25 the Prosecutor is of the opinion that security measures are necessary?

1 And there we find we are in a conflict area, if you like, which is very
2 significant between, on the one hand, the rights to the protection of
3 witnesses and, on the other hand, the rights of the Defence.

4 And so it's the opinion of the Defence that the response, once
5 again, can be found in the Statute, more particularly in Article 68(1),
6 and 68(5), which mention -- as far as we're concerned, they go into the
7 protection measures that can be taken with regard to the rights of the
8 Defence. And here we have somebody who had his liberty taken from him,
9 and how can we -- we can't push the security measures to extreme limits
10 saying that they -- the rights of these victims and witnesses are
11 possibly so important that we can't at any stage disclose the protected
12 evidence that we've decided on, the redacted elements. The names of
13 victims, for example. The accused must be able to look at the
14 credibility of a witness, and at this point it's essential that he does
15 have the identity of the witnesses. And we would say that, just to sum
16 up, the content of the communication should be -- at least where it
17 concerns the witnesses, it should be the entirety of their statements and
18 non-redacted. Thank you.

19 JUDGE STEINER: Thank you, Mr. Flamme.

20 Maybe I've lost something, but the answer to the first question,
21 your interpretation of "reasonable time before the hearing," I could not
22 take note, so maybe you could very briefly, precise comment --

23 MR. FLAMME: Perhaps I can say directly in English, your Honour.

24 It has to be immediately, and, in any case, in a very short time. And I
25 think Article -- but I don't have the English text of Article 67 on this

1 point. Article 67 of the Statute says it very explicitly: "promptly and
2 in detail of nature -- of the nature, cause, and content of the charge."
3 "Promptly." And Article 67 is made binding upon this stage of the
4 proceedings by Article 121.

5 JUDGE STEINER: Thank you very much.

6 The Prosecution has already advanced on the second item of the
7 agenda. Would the Prosecution like to add something or ...

8 MR. WITHOPF: Yes, your Honour. We would like to say a few words
9 in response to what my learned colleague from the Defence has just put
10 forward.

11 The Prosecution has indicated to my learned colleague from the
12 Defence that we will, within a reasonable time from now on, disclose
13 materials that fall under 61(3)(b), the incriminatory evidence the
14 Prosecution wishes to rely on at the occasion of the confirmation
15 hearing.

16 My learned colleague from the Defence has addressed the issue of
17 redactions. I will refrain in an open session hearing to make further
18 submissions on this matter. I would, however - and I think it's more in
19 the context of the latest -- of the last agenda item - discuss this
20 matter, and I already now wish to say that the Prosecution would like to
21 discuss this matter on an *ex parte* basis.

22 My learned colleague from the Defence has quoted a number of
23 provisions, and has quoted and has drawn the attention of the Pre-Trial
24 Chamber to the fact of -- your Honour, the single Judge, to the fact that
25 there are different time frames. There's a reason for these different

1 time frames. Of course, 67(2) says "as soon as possible." Of course
2 there is a difference to 61(3)(b), which says "within a reasonable time."

3 And I want to say that 61(3)(b) is certainly *lex specialis* to the
4 provision that has been mentioned by my learned colleague from the
5 Defence in making reference to the language of "promptly."

6 These are the observations we make at this point in time, and,
7 again, we reserve our right, if the single Judge so permits, at the end
8 of this hearing to provide further submissions in writing on this matter.

9 JUDGE STEINER: So if the Prosecution so wishes, it could advance
10 on the third item of the agenda before we go to the Defence that --
11 because these two items can be analysed together.

12 MR. WITHOPF: Your Honour, I assume you are talking about agenda
13 item number 2, which is: "Scope of application to the disclosure process
14 before the confirmation hearing of the right 'to have adequate time and
15 facilities for the preparation...' under Article 67(1)(b).

16 JUDGE STEINER: You have already advanced on this topic. I'm
17 talking about topic number 3.

18 MR. WITHOPF: Okay. Very good. Topic number 3 addresses
19 questions related to the Prosecution's obligation under Article 67(2) of
20 the Statute to disclose potentially exculpatory evidence before the
21 confirmation hearing.

22 The first question the single Judge wishes to have addressed is
23 the question whether the material content of the Prosecution's obligation
24 under 67(2) of the Statute depend on the evidence on which the
25 Prosecution decides to rely on at the confirmation hearing.

1 The Prosecution emphasises that disclosure of potentially
2 exculpatory evidence is an ongoing obligation. It's ongoing, and it's
3 not limited to the stage leading up to the confirmation hearing as is
4 shown by the language of Article 67(2). The fact that disclosure of
5 potentially exculpatory evidence is an ongoing obligation has repeatedly
6 been confirmed by the respective jurisprudence of both ad hoc tribunals,
7 the ICTY and the ICTR.

8 The Prosecution at this occasion wishes again to mention that it
9 does not specifically disclose evidence of potentially exculpatory nature
10 that forms part of the incriminatory evidence in terms of
11 Article 67(3)(b) [sic]. We have been at a previous occasion my learned
12 friend from the Defence, and we also have informed the Pre-Trial Chamber
13 in one of our recent public filings.

14 It appears to me, and I am just told by my colleagues, that the
15 transcript is making reference to Article 67(3). I was making reference
16 to Article 61(3)(b). So if the transcript could please be clarified in
17 that respect.

18 I'm going to expand on the reasons why in this context the
19 Prosecution is not particularly highlighting the potentially exculpatory
20 portions. The Prosecution is bound by Article 51 -- by Article 54(1) to
21 investigate both incriminatory and exculpatory circumstances equally, and
22 the Prosecution indeed does so. Accordingly, in fulfilling its
23 respective obligation, many of the materials which are of incriminatory
24 *nature pelsai* will also include potentially exculpatory evidence,
25 at least elements of potentially exculpatory evidence.

1 The Defence will get these materials in due course anyway, and
2 the Defence will have sufficient time prior to the confirmation hearing
3 to identify potentially exculpatory elements in the incriminatory
4 evidence the Prosecution wishes to rely on at the occasion of the
5 confirmation hearing at this stage.

6 In discharging its obligation under Article 67(2), namely to
7 disclose potentially exculpatory evidence, the Prosecution will focus its
8 respective efforts to identify such evidence on the evidential materials
9 that go beyond, that go beyond, the incriminatory evidence the
10 Prosecution intends to use at the occasion of the confirmation hearing.

11 The Prosecution submits that its disclosure obligation concerns
12 both the charges and the underlying legal theory of the Prosecution's
13 case and the evidence presented by the Prosecution in support of its
14 legal theory.

15 Your Honour, this has been our observations on agenda item
16 number 3.

17 JUDGE STEINER: Thank you very much.

18 MR. WITHOPF: I wish to say that these were the Prosecution's
19 submissions in respect to agenda item 3(a).

20 JUDGE STEINER: I'm trying to see a way to make this -- this
21 consultation more expeditious to both parties, and so I would suggest, if
22 the Prosecutor agrees, in going at least to sub-items (b) and (c), and
23 then we could close this -- at least this aspect of obligation under
24 67(2).

25 MR. WITHOPF: Certainly, your Honour, we can do so. If I may

1 first address sub-item (b) concerning the timetable for the Prosecution's
2 discharge of its obligation under Article 67(2) before the confirmation
3 hearing.

4 As I mentioned, disclosure of potentially exculpatory evidence is
5 an ongoing obligation. As has already been mentioned a number of times,
6 Article 67(2) of the Rome Statute says "as soon as practicable," which
7 implies, in the view of the Prosecution, that there is no obligation of
8 the Prosecution to have disclosed all potentially exculpatory evidence
9 prior to the confirmation hearing. This view of the Prosecution, your
10 Honour, is supported, supported by the fact that in respect to
11 potentially exculpatory evidence there is no regulation setting deadlines
12 as Rule 121(3) regulates for the disclosure pursuant to Article 61(3).

13 To date, as we already said, we have started. We have already
14 initiated the disclosure of potentially exculpatory evidence. Two
15 packages of such materials have been disclosed to my learned colleague
16 from the Defence on two different occasions.

17 The Prosecution has indicated to the learned colleague from the
18 Defence that we envisage, and we are very optimistic to be in a position
19 to keep our promise that we envisage during intervals of two weeks
20 disclose potentially exculpatory evidence. And I also want to say and to
21 re-emphasise that we have developed a very comprehensive keyword list in
22 an effort, in a aggravated effort to discharge our respective obligation,
23 and that keyword list forming the basis for the electronic searches of
24 potentially exculpatory evidence. This keyword list has been handed over
25 to the colleague from the Defence, and he has been invited to comment on

1 that keyword list and to make, if he so wants, his suggestions, and we
2 would add, and we are very much prepared to do so, to add further
3 keywords to that list.

4 Your Honours, these were our observations in respect to agenda
5 item 3(b). If, with your permission, I could continue on now with 3(c).
6 3(c) raises the question whether, when, and how the evidence
7 disclosed before the confirmation hearing under Article 67(2) of the
8 Statute is to be communicated to the Pre-Trial Chamber under
9 Rule 121(2)(c) of the Rules of Procedure and Evidence. If I may please
10 first address the question as to whether in respect to that question the
11 Prosecution is of the view that Rule 121(2)(c) applies to evidence on
12 which the Prosecution intends to rely at the confirmation hearing only.
13 The English version very strongly supports that view. The French
14 version, again, is even stronger in supporting the view of the
15 Prosecution. It says: (No interpretation). This view implies -- your
16 Honour, this view implies that answers to the questions as to when and
17 how are redundant.

18 These were our answers to the agenda item 3(c).

19 JUDGE STEINER: Thank you very much.

20 I would invite the -- Mr. Flamme to make his comments to item --
21 if any, to item 2, because you have already advanced some, but mainly on
22 item 3(a), (b), and (c) of the agenda.

23 MR. FLAMME (interpretation): Thank you, your Honour. Indeed as
24 regards items 3(a), (b), and (c), which are items of capital importance
25 to the Defence because they concern disclosure of information by the

1 Prosecution of an exculpatory nature, in civil -- in civil law context,
2 an investigating magistrate must investigate both incriminating and
3 exculpatory circumstances equally, and here in this case it is the
4 Prosecutor who has the -- the means, financial and otherwise, to
5 investigate on both sides certainly in advance of the trial.
6 So the Prosecution's obligation to disclose exculpatory
7 information to the Defence, does it depend on the material which he
8 intends to use for his Prosecution? I think that the answer must
9 definitively be no, it does not depend at all upon what he intends to use
10 for Prosecution and prosecutory -- prosecution information, that is to
11 say incriminatory information. For instance, there may be reasons to
12 exonerate someone of criminal responsibility based on information outside
13 of those which are relied upon directly for the charges, and that may
14 well be the case here given that we are dealing with the conflict in the
15 DRC, which is not a national conflict but which is a conflict which has
16 very important repercussions internationally.
17 This is yet one more reason to advance that it is in the
18 interests of the Defence to have available to it exculpatory information
19 and material of the widest possible type. It cannot be left to the
20 Prosecutor to judge the exculpatory nature and to do so alone and thereby
21 to restrict the definition more than a necessary. In other words, to
22 allow the -- in other words, to allow the Defence to judge as to whether
23 information is exculpatory or not, rather than leaving it up to the
24 Prosecution to judge or to decide when he has doubts as to whether
25 information is exculpatory or not.

1 Certain moral aspects may be very important and may be included
2 as potentially exculpatory material. And here I would cite some case law
3 which is widely used in the ad hoc tribunals, that is from Blaskic, which
4 is used in Akayesu: "The Prosecutor must faithfully make
5 judgements to establish the truth and provide to the accused and to his
6 Defence all," and I repeat, "all information of a nature to exonerate
7 him."

8 That would be my comments on (a).

9 As regards (b) here, we return to the temporal aspect of
10 disclosure. And here the Defence is of the opinion of -- is of the
11 opinion that this disclosure must be done as soon as the Prosecutor has
12 in his possession the exculpatory information. We are on the same
13 wavelength as the Prosecution when the Prosecution states that this is an
14 ongoing obligation. It is indeed a continuing obligation. That is to
15 say even during the trial if exculpatory information becomes available,
16 it must be provided to the Defence by the Prosecution.

17 Let me remind you that we are talking about deprivation of
18 liberty and/or freedom. Any item of information that may have a pending
19 upon the reasons for that deprivation of liberty must be provided to the
20 Defence.

21 As regards sub-question (c), it seems clear to me that as regards
22 communication to the Pre-Trial Chamber and, therefore, to the Registry,
23 to my mind this should be done. And I believe that this is the practice
24 which hitherto has been used by the Prosecutor. Information should be
25 provided to the Registry and to the Pre-Trial Chamber at the same point

1 in time as it is provided to the Defence, so that the Registry can play
2 its role as the notary, the recorder of what has taken place between the
3 parties. I believe this is the best definition or description of the
4 role of the Registry, an notorial role, to note that which has taken
5 place.

6 JUDGE STEINER: Thank you very much. I would consult the
7 parties. If we could leave item (d) and (e) for the final observations,
8 taking into account that the *inter partes* system or the interim system
9 has already been done in the opening remarks. And the parties seem to
10 agree in the convenience of the *inter partes* system of disclosure. So in
11 order to follow them, the most important topics of the agenda, I would
12 suggest that the general items, as item (d) and (e), could be left for,
13 if convenient, for the final observations. Then we can continue on the
14 most practical ones. If it is acceptable by both.

15 MR. WITHOPF: I think, your Honour, this is acceptable to the
16 Prosecution. If I can make an observation to the comments just provided
17 by my learned colleague from the Defence where he said, "It cannot be
18 left to the Prosecutor to judge the exculpatory nature and to do so alone
19 and thereby to restrict the definition more than necessary."

20 My learned colleague has made reference to jurisprudence of the
21 ICTY and the ICTR, namely Blaskic and Akayesu. I wish to inform the
22 Pre-Trial Chamber that there is clear jurisprudence of the Appeals
23 Chamber of the ICTY. I'm making reference to the 7 December 2004
24 decision in the case the Prosecutor versus Brdjanin, where it explicitly
25 says: "It is for the Prosecution to determine whether or not evidence is

1 exculpatory. The Chamber does not intervene in the exercise of this
2 discretion by the Prosecution unless it is shown that the Prosecution
3 abused its discretion."

4 That's the most recent Appeals Chamber jurisprudence of the ICTY
5 on this particular matter.

6 The Prosecution has made against this background, and I really
7 wish to emphasise it, has made an effort to include counsel for the
8 Defence and his client, Mr. Thomas Lubanga Dyilo, in the exercise of
9 determining potentially exculpatory evidence by inviting them to
10 contribute to the keyword list of the Prosecution. So the Prosecution in
11 this context is certainly -- has certainly gone far beyond its
12 obligations by the law in an aggravated effort to discharge it's
13 respective obligation.

14 Having said that, your Honour, the single Judge, if you would
15 please allow me to address -- and I think that's the next agenda item you
16 wanted me to address, 3(f). Thank you, your Honour.

17 3(f), the question is: "If the interim system of disclosure were
18 to be followed for disclosure pursuant to Article 67(2) of the Statute,
19 which adjustments, in view of the Prosecution and Defence, might minimise
20 some of the practical problems they have identified in their
21 submissions?" That's the question.

22 The Prosecution has already touched upon it in its introductory
23 remarks. The Prosecution is of the view that disclosure via the Registry
24 is not authorised, is not authorised, by the applicable law. Again, to
25 the contrary. It's a duty of the Prosecution, a legal duty of the

1 Prosecution to disclose to the Defence, and the Prosecution cannot
2 delegate this legal duty to another organ of the court. Therefore, the
3 Prosecution has serious concerns, very serious concerns, to make
4 submissions as to how -- as to how shortcomings of a practice that is not
5 grounded in the law, in the applicable law, could be minimised.
6 In addition, as a matter of principle and because the Prosecution
7 has no insight and does not want to have an insight in this context on
8 how the Registry's organising its work, the Prosecution prefers to
9 refrain from making specific comments and/or suggestions. Furthermore,
10 in the view of the Prosecution, no suggestion adjustments will in any
11 way -- will in any way minimise the disadvantages of the disclosure
12 system via the Registry to an extent that it allows deviation from the
13 law what, in view of the Prosecution, the interim system for disclosure
14 does. In particular, the combination of the disadvantages are not
15 overcome by efforts to minimise the problems in the one or the other
16 area.

17 There's one aspect, however, your Honour, the Prosecution wishes
18 to address, namely whether evidentiary materials should be filed publicly
19 or confidentially, and the Prosecution will, for the reasons outlined,
20 limit its observation to this particular matter.

21 It's the Prosecution's submissions -- submission that filing of
22 evidence as a matter of principle should be done confidentially.
23 Evidence in any legal system the Prosecution is aware of becomes public
24 at the stage of the trial only and only if there are not any additional
25 reasons, as already touched upon in the course of today's hearing, that

1 such evidence should be kept confidential. Obviously, these additional
2 reasons are exceptional reasons. At trial, yes, the evidence will become
3 public. Prior to trial, the evidence should be confidential in the view
4 of the Prosecution.

5 And why? I think there are many good obvious reasons. Public
6 filing of the evidence would allow to discuss, to discuss publicly both
7 the Prosecution's evidence and the evidence of the Defence. Such a
8 discussion would put unnecessary pressure on all participants to the
9 court proceedings, including the Judges of the Pre-Trial Chamber. And in
10 view of the Prosecution - and that's the main concern - it would raise
11 serious questions in relation to victim and witness protection.

12 Therefore, the Prosecution submits that evidence, as a matter of
13 principle, as I said, should always be filed confidential at this stage
14 of the proceedings.

15 JUDGE STEINER: Thank you very much.

16 Mr. Flamme, do you have something to add, or you have another
17 view on this topic? We are talking about item (f) of the -- item (f) --
18 sub-item (f) of item 3 of the agenda.

19 MR. FLAMME (interpretation): Yes, your Honour. To begin, I
20 would just like to say one little thing in response to what my learned
21 colleague has said regarding the keyword list, the list which has been
22 provided with the keywords.

23 The impression has been given that this keyword list -- but the
24 Defence still has to evaluate the significance of this communication, but
25 personally I see it as follows: That is that communication of the

1 keyword list is the -- is a precursor to access being given to the
2 Defence to the database of the Prosecution as is the practice at the ad
3 hoc tribunals. That's all I have to say now regarding the keyword list.
4 It is also true that as regards the keyword list, for the Defence
5 at this stage, it is not yet possible to give opinions or suggestions
6 regarding the list given that -- until we have a greater knowledge of the
7 file.

8 Now, as regards item 3(f), first of all I'd like to respond as
9 briefly as possible to the question here. In this item, we are asked if
10 the interim system of disclosure were to be followed, which adjustments
11 could be made to improve the system or to minimise the practical
12 problems?

13 As regards the first subpoint here, expeditiousness, I think that

14
15 one suggestion which could be made would be in parallel to communicating
16 to the Registry that there be direct and parallel communication to the
17 opposing party in such a way as to preclude delay, delay through --
18 caused perhaps through the Registry channel.

19 As regards the evidence, and it has very judiciously be suggested
20 by the Prosecution, the evidence falling within more than one category.

21 And here I would return to what I said earlier. It is not up to the
22 Prosecutor to decide as to whether evidence is incriminating or
23 exculpatory. It is, of course, up to the Court and the Chamber to make
24 such determinations. But until that stage, it is possible for the
25 Prosecutor to say of an item of information that it does not know at this
26 stage in which category the information should be classified. And I

1 would suggest that a category C be created so that the Prosecutor can
2 deal with information which for him is difficult to classify at this
3 point in time.

4 As regards the third sub-point here, assignment of reference
5 numbers, I think that this is indeed an important point, and the Defence
6 would suggest to the Chamber that the reference codes, the reference
7 numbers, should indicate directly the origin of the evidence, Prosecution
8 or Defence, that there be a P or a D, Prosecution or Defence, to simplify
9 matters.

10 And then finally to re-stress the point made by the Prosecutor,
11 once again the matter of confidentiality and protection of victims and
12 witnesses. Once again, my comment is that communication to the Defence
13 certainly does not signify that that document or that material becomes
14 public. Public status is something quite different. It is possible to
15 discuss evidence or to hear a witness in closed session so that the
16 public does not learn of certain items of information which could
17 endanger the security of the witness, but the Prosecution something else.

18 When the Defence obtains information which is sensitive, it, too,
19 is tied by obligations set out in the Statute. So providing a

20 non-redacted text to the Defence does not mean that it becomes public.

21 And the rights of the Defence imply necessarily -- and here I would refer
22 to Article 68(1) and 68(5), which state that the protective measures
23 regarding victims and witnesses must cede or yield at a certain stage so
24 the Defence can have its rights respected.

25 JUDGE STEINER: Thank you very much. We'll come back to these

1 topics later in closed session as has been decided by the Chamber in the
2 agenda, to which both parties have agreed in the beginning of this
3 session.

4 Before suspending the session, I would like to listen from the
5 Registrar the comments on this item (f), but not considering the interim
6 system itself but both possibilities, an *inter partes* system or in terms
7 of improving -- improvement of the interim system. So I would like the
8 Registry to give its views in both possible situations.

9 MR. DUBUISSON (interpretation): Thank you, your Honour. As
10 regards the expeditiousness or the efficiency or inefficiency of the
11 current system, I would say that the Registry has no difficulty with
12 documents being filed with the Registry. However, it is important that
13 there be a different technical approach, practical approach. Unlike the
14 current situation, it is essential that we agree on one computerised
15 system, a specific one, one which allows or ensures compatibility with
16 the systems used by the different parties. So first of all, we need a
17 single IT system; and secondly, we need a specific protocol which would
18 be adhered to, which must be adhered to by all the parties if we are to
19 ensure the efficiency of our work.

20 What would this protocol entail? It would be a protocol which
21 would specify the format desired, the standard of image that will we wish
22 to use, a numbering system. And here I would pick up upon the points
23 made by Mr. Flamme and the Prosecutor. We must also have guidelines
24 regarding the metadata so that one can establish exactly what type of
25
26 document one is dealing with. One must also establish responsibility in

1 the instance or in the event of viruses and the resulting costs. There
2 might be need for an advisory committee, and of course one could have to
3 set time frames for reception of information.

4 The system that we have in place today is not performing
5 sufficiently. It is not a matter of having competent persons at work
6 alone. It is important to have an IT system which is specific. And the
7 jurisprudence of the ad hoc tribunals require that the participants use a
8 specific system, and I can offer a similar system to you here and present
9 it after the break if you so wish.

10 It's true that there are disadvantages -- advantages and
11 disadvantages to filing documents with the Registry, but I suggest that
12 we deal with those later in the agenda as appropriate. Thank you, your
13 Honour.

14 JUDGE STEINER: Thank you very much, Mr. Dubuisson.

15 So in order to give the interpreters their right to -- to a short
16 break, I will suspend this hearing for half an hour. We will resume at
17 4.30.

18 THE USHER: All rise.

19 Break at 3.57 p.m. - Break ended at 4.35 p.m.

20 THE USHER: All rise. The International Criminal Court is now in
21 session.

22 JUDGE STEINER: So we resume this hearing, and I would like to
23 make some observations and then request Defence and the Prosecution, if
24 they agree, in a change on the -- on the agenda in order to shorten, if
25 possible, the extent of this hearing. We can see that both parties in

1 principle agree on the fact that the exchange will be firstly and
2 directly between them, the parties. We can see it from paragraph 8 of
3 the Prosecution's observation number 66, and page 4 of the Defence
4 observations, number 68. Both seem to agree not to -- or do not have
5 problem with the fact that any exchange of evidence be disclosed
6 afterwards to the Chamber via the Registry. This is on paragraph 8 of
7 the Prosecution's observations and page 5 of the Defence observations.
8 And as we could see from the first part of this hearing, many of
9 the questions partially overlap, and some of them have been already
10 answered. Then my suggestion is that we should focus the debate for the
11 next hour in a selected number of questions. So my suggestion is that
12 during the following 30 minutes or 40 minutes the Prosecution and the
13 Defence will make their observations discussing the system of disclosure
14 they consider the most appropriate, and, when necessary, the Registry
15 shall comment on it. The last 30 minutes, we will go to closed session
16 to discuss some of the pending matters. And the Prosecution and the
17 Defence may present their final submissions in writing, as requested by
18 the Prosecution, concerning the issues discussed until next Monday, the
19 1st of May.

20 So these are the changes proposed on the agenda. I would like to
21 ask the Prosecution and the Defence if this is acceptable.

22 I'm sorry if I interrupt your consultations, but to make it clear
23 that we are going to follow the questions put on the agenda. We are just
24 excluding some of the questions that have been already answered by the
25 parties, or in advance, or that are overlapping.

1 MR. WITHOPF: Your Honour, under this precondition the
2 Prosecution would agree, with the caveat that it may, in the view of the
3 Prosecution, from time to time be necessary to come back in very limited
4 cases to earlier observations.

5 MR. FLAMME (interpretation): Yes, your Honour. Where it
6 concerns the conclusion, written submission, the 1st of May, in general,
7 for most of the countries is a holiday, public holiday. Do you want to
8 say the 2nd of May, or do you want to say the 30th of April? For us it
9 would be useful to have a bit more than a week available to us if
10 possible.

11 JUDGE STEINER: Mr. Flamme, the 1st of May has been suggested by
12 the Chamber exactly in face of the urgency of some of the matters,
13 urgency that you have emphasised in your -- in your speech. But if for
14 the Prosecution it's not a problem to have the deadline on the 2nd of
15 May, the Chamber sees no problem.

16 MR. WITHOPF: The Prosecution has no problem to file it on the
17 2nd of May.

18 JUDGE STEINER: So the filing of the final submissions in writing
19 concerning issues discussed in this hearing is scheduled for the 2nd of
20 May till 4.00 p.m. in the court.

21 So -- and of course I have selected what I consider the most
22 important questions to be discussed between the parties, but of course,

23
24 as I said, this is a dialogue, and the Defence and the Prosecution are
25 allowed to raise any issues related to these -- to the questions, even to
26 those that have been put aside. So I would invite the Prosecution, on

1 the item 4 of the agenda, to make its comments on sub-items (b) and (c).

2 MR. WITHOPF: Your Honour, sub-item (b) of agenda item 4 concerns
3 the question: "What are the implications of the 30-day and 15-day
4 deadlines provided for in Rule 121(3) and (4) of the Rules for discharge
5 by the Prosecution of its obligation under Rule 76 of the Rules?"

6 We submit, your Honour, that in respect to Rule 121(4), the
7 Prosecution is not yet in a position to make a determination as to
8 whether or not it will amend the charges prior to the confirmation
9 hearing. This is in line what we have informed the Pre-Trial Chamber
10 earlier on at a different occasion. Accordingly, at this stage it is not
11 appropriate for the Prosecution to address the 15-days deadline in
12 Rule 121(4).

13 In relation to Rule 121(3), the Prosecution submits that the
14 30-days deadline applies to the list of evidence only but not to the
15 statements of the witnesses the Prosecution intends to call at the
16 hearing.

17 I'm now going to address sub-item (c). The question reads:
18 "When and how the evidence disclosed under Rule 76 of the Rules for the
19 purpose of the confirmation hearing is to be communicated to the
20 Pre-Trial Chamber under Rule 121(2)(c) of the Rules."

21 The Prosecution, your Honour, in the instant case will
22 communicate the witness statements to the Pre-Trial Chamber as soon as
23 possible once disclosed, once disclosed, to the Defence under Rule 76.

24 For future cases, however, the Prosecution, obviously in agreement with
25 counsel for the Defence, reserves its right to disclose at a later stage

1 in light of the fact that the law envisages communication to the
2 Pre-Trial Chamber at the end, at the end, of the disclosure process only.

3 In this context, the Prosecution wishes to emphasise as a general
4 observation that its practice - and I wish to say that the practice is to
5 be distinguished from its legal obligation - that its practice up-to-date
6 proves that the Prosecution is inclined to keep the time in between
7 disclosure to the Defence and communication to the Pre-Trial Chamber as
8 short as possible.

9 These were our observations on these two agenda items.

10 JUDGE STEINER: Mr. Flamme, your observations on the two topics,
11 please.

12 MR. FLAMME (interpretation): Thank you, your Honour. Where it
13 concerns the issue of 4(b), that is to say the 30-day deadline and the
14 15-day deadline respectively for the end of the possibility to
15 communicate under the existing charges, and 15 days at the end of the
16 deadline to possibly determine new charges, the Defence considers that
17 this is simply the end of a deadline or the end of the procedure of
18 communication for the Prosecutor. We can easily say that Article 121
19 sets up the procedure for communication which could last for a certain
20 number of weeks, even months, but which finishes, whatever happens, 30
21 days before the confirmation hearing. That has nothing to do, in our
22 view, with the notion or the ideas that we've mentioned at the start of
23 the hearing and which say that the Prosecutor has to communicate his file
24 within a deadline which is sufficiently short.

25 I'm not going to take up all the different expressions that are

1 involved which I mentioned earlier, which I mentioned as "promptly," or
2 "promptly," we said before, and as soon as the Prosecutor has available
3 to him the material which he intends to use. So it would be wrong to
4 think that the Prosecutor, to take a position which is quite theoretical,
5 communicates 30 days before the confirmation hearing the whole dossier to
6 the accused.

7 Just to give you an almost absurd example, this would put the
8 accused in an impossible situation. How could he be able to instruct his
9 investigators with confronted with all this material? And what responses
10 could he give to this file? I mean, that's quite meaningless in that
11 sense. So I think we have to make a very clear distinction in this
12 regard. And it has to be clearly -- we have to clearly go to the
13 Rule 121(7), which does make it possible for the Chamber to postpone,
14 perhaps because the Chamber notes at the ultimate date, the last deadline
15 of 30 days, the Prosecutor still communicated a significant amount of
16 information, that there would be the possible for the Chamber to postpone
17 the date of the confirmation hearing. So we can't consider that these 30
18 days are something sacred, as it were, and final, as it were.

19 With regard to the point (c), I'm just going to be very brief in
20 this regard. We think that this information which is disclosed to the
21 Defence should be communicated to the Pre-Trial Chamber and to the
22 Registry, under Article 121(c) of the Rules at the same time.

23 Oh, yes. And you also mention how this is obviously a very
24 interesting question, because I don't think that -- we've already spoken
25 about this, and the Registrar mentioned aspects which, as far as I'm

1 concerned, are very interesting. He rather specifically, when we spoke
2 about the question of how -- how the evidence is disclosed will he
3 mention the possibility of a deficiency with regards to the electronic
4 system. And we have -- on the side of the Defence, we've noted that,
5 firstly, it's possible that some documents aren't -- can't be
6 communicated electronically. For example, manuscripts, which aren't very
7 clear.

8 And the second thing is the electronic means can -- can go wrong
9 for lots of different reasons, and for the reasons the Registrar rightly
10 said. There might be a virus for example. We all know that very well.
11 So the suggestion of the Defence is that in parallel with the
12 electronic communication and certainly between parties that there should
13 also be communication in copy, a copy, a hardware -- a hard copy, as it
14 were, in a classic way, which is also communicated. So there's a file
15 which is copied in the traditional way, if you like. And that's with
16 regard to the questions which were raised by 4(c) on your agenda.

17 Thank you.

18 JUDGE STEINER: Thank you, Mr. Flamme. I would like to -- to ask
19 the Registry to make its comments, especially on this -- on the concerns
20 put forward by the Defence counsel.

21 MR. DUBUISSON (interpretation): Thank you, Madam Judge. Thank
22 you, your Honour.

23 Yes. Perhaps I was misunderstood. I don't know. I certainly
24 highlighted within the framework of protocol that it should be attached
25 to the use of a single infomatic system, and this is one which we've

1 purchased within the heart of the court, and this is really quite secure.
2 It's now used by the Prosecutor, and we have the means of making it
3 available to the Defence from now. And it's envisaged also within the
4 Registry, where it concerns the presentation of evidence, this can be
5 done if the courtroom. So this makes me think that the electronic means
6 which would be used between the parties at this first stage within
7 procedure will greatly facilitate the courtroom proceedings when we go
8 into the hearings, because we will also use the same system, and which --
9 for example, the system's already in the -- things have already been
10 registered in the system, and this will make the judicial process much
11 more easy. And then we are in a perfect notion of equitable and
12 expeditious proceedings.

13 I mentioned viruses. Why did I mention that? Because when we
14 speak about IT, we have to mention viruses and what the responsibilities
15 are as well. The measures have to be taken to protect against this type
16 of viruses, and also to have an approach, an overall approach, which is
17 responsible with regard to this issue. But of course if we work in a
18 situation where is completely secure, which we can make available within
19 the Court, I think that the problem isn't necessarily resolved. If we
20 don't work with a single system, if we work with a product which, for
21 example, different parties have access to, for example, the Defence,
22 there is another problem. If we oblige everybody to work with the same
23 system, the Registry - and here I'm speaking in my capacity as the
24 Registrar, as it were - the Registrar would be responsible for giving to
25 the Defence, as well as to the victims' representatives, later a system

1 which will make it possible for their work, including, with regards to a
2 solid system which will avoid errors. And also -- this will also cover
3 training.

4 With regards to originals, the originals will also have to be
5 provided. This is something which is very important. Unlike the ad hoc
6 tribunals where there is the use, which is practically unique, of copies
7 in the regulations the court, this is quite clear in this.

8 We speak about originals, and this is quite good to give them to
9 the Registry, and then we know that once the original is given to the
10 Registrar it remains in that form, and here we could -- basically the
11 reference can be made to a document as the Registrar received it.

12 Certain documents, furthermore -- and here I have to say sorry
13 for the interpreters. It seems to be that I'm going a bit fast.

14 Some of the documents, furthermore, for certain reasons, possibly
15 class -- security classifications, there are certain documents which are
16 covered by Article 54, for example, that these documents will have a use
17 which is quite particular. And so within the framework of the management
18 of this type of documents, we have to envisage another means other than
19 the electronic means in accordance with what's been promised to -- by the
20 parties with regards to the source of these documents. And we will be
21 very flexible in that regard and open to respond to any requests on the
22 part of the parties in this regard.

23 Thank you. I've finished.

24 JUDGE STEINER: Thank you very much.

25 MR. WITHOPF: Your Honour.

1 JUDGE STEINER: Yes, please.

2 MR. WITHOPF: If you please allow me to very briefly respond to

3 one or two of the observations of counsel for the Defence.

4 Counsel for the Defence is suggesting that in addition to the

5 electronic version of materials, provide paper copies. I think this is

6 very much in contradiction of the so-called e-court principle, the

7 e-court being the aim of the International Criminal Court, and to work on

8 the basis with the least possible paper. The Prosecution very much

9 opposes any suggestion that there should be a burden on the Prosecution

10 to in addition to the electronic disclosure also provide for paper

11 copies. Counsel for the Defence is certainly well aware that the

12 materials that the Prosecution will have to disclose will be extensive,

13 in particular in the lead-up to the trial phase. And I'm not quite sure

14 whether at these early stages of the court proceedings there should

15 already be a decision of a Pre-Trial Chamber that would allow for the

16 provision of paper copies.

17 In that respect, I wish also to mention that it appears to be a

18 bit contradictory if my learned friend from the Defence, on the one hand

19 side, says he wants to have access electronically to the whole universe

20 of the Prosecutor's file -- files, and, on the other hand side, he wants

21 to have paper copies in addition to the electronic copies of disclosure

22 materials. There may be viruses. I accept that. But there are also

23 problems with paper copies, as we all have experienced, and it's a matter

24 of balancing the disadvantages of these problems, and at this stage, I

25 have every confidence -- the Prosecution has a high confidence in the

1 Registry to avoid such a situation.

2 Thank you very much.

3 MR. FLAMME (interpretation): Your Honour, if you will allow me
4 just to give a response to that. Just in a -- I would like to address
5 this request with regards to co-communication of copies.

6 The Prosecutor spoke about access to the database. I think we
7 have to make a -- differentiate between access to the database within our
8 spirit of defence. This is within the framework of the inspection by the
9 Defence and not with regard to communication or the use of evidence, the
10 use of evidence, as far as we are concerned, with regard to communicating
11 a copy which would ensure safe communication. I think we also have to
12 make sure - and this is an ancillary way that I mention that - if you
13 decide for the electronic system, if you decide just to go for that
14 system, then what should also be made available to my client in prison --
15 he has to have a computer, and he has to have electronic access as well,
16 because in the classical way, traditional way, of having things, you have
17 the lawyer who receives a photocopied document, and he immediately makes
18 a photocopy to be able to present it to his client, and such that his
19 client can have the time to study the document in prison. And so if we
20 opt for the system -- the electronic system, I think that we have to --
21 if we say A, we have to say B. I think the accused has to have
22 individual access himself separately his lawyer to the same electronic
23 materials. Thank you.

24 MR. WITHOPF: Your Honour, I will keep it very short.

25 JUDGE STEINER: Okay.

1 MR. WITHOPF: I think my learned friend from the Defence is, in
2 respect to the inspection of materials via -- having access via an
3 electronic system, mixing up the various rules and regulations.
4 Inspection under Rule 77 is inspection of the tangible objects which in
5 itself -- in themselves are not subject to access via an electronic
6 system. Rule 77, it's with the physical integrity of materials and not
7 with the contents of documents.

8 And my learned friend from the Defence was also raising the
9 point. Yes, Mr. Thomas Lubanga should have access to disclosed materials
10 in a traditional system. It's up to counsel for the Defence to provide
11 for such access by, in the worst scene -- scenario, copying it himself or
12 by his staff members.

13 Thank you.

14 JUDGE STEINER: I think we should go forward, and since we talk
15 about inspections, we could go to the set of questions on item 5 of the
16 agenda, and I would invite the Prosecutor to make his views on items (b),
17 (c), and (d) of item 5.

18 MR. WITHOPF: Your Honour, item 5, sub-item (b), addresses the
19 question: "What are the implications of the 30-day and 15-day deadlines
20 provided for in Rule 121(3) and (4) of the Rules with regard to discharge
21 by the Prosecution of its obligation under Rule 77 of the Rules?"
22 We repeat, your Honour, what we said earlier on in respect to
23 Rule 76. In respect of Rule 121(4), the Prosecution is not yet in a
24 position to make a determination as to whether or not it will amend the
25 charges prior to the confirmation hearing. Accordingly, at this stage it

1 is premature to address the 15-days deadline in Rule 121(4). In general
2 terms, however, your Honour, the Prosecution submits that the 15-days
3 deadline would indeed apply to Rule 77.

4 In relation to Rule 121(3), the Prosecution is of the view that
5 the 30-days deadline does also apply in relation to Rule 77.

6 I'm moving on to sub-item (c) of agenda item 5, meaning that I
7 will elaborate on the question to: "Elaborate on any differences between
8 the content of the Prosecution's obligation to disclose under Rule 76 of
9 the Rules and the content of the Prosecution's obligation to permit
10 inspection under Rule 77 of the Rules in relation to the evidence the
11 Prosecution intends to use at the confirmation hearing."

12 Rule 76, in view -- in the view of the Prosecution, regulates the
13 provision of names of witnesses and statements, including prior ones,
14 whereas Rule 77 provides, as I already have mentioned, for the inspection
15 of books, documents, photographs, and other, and the keyword is "other,"
16 other tangible objects. The scope of Rule 77 is determined by its
17 language, namely to "permit the Defence to inspect."

18 The Prosecution submits that inspection, the term of
19 "inspection," in its literal meaning does not imply that counsel for the
20 Defence being given an opportunity to access the materials on the
21 premises of the Office of the Prosecutor. Inspecting does not [sic]
22 include, however, handing over materials subject to inspection.

23 I see the transcript, probably rightly, in relation to what I
24 said says "does not imply." Of course it does imply that counsel for the
25 Defence is given access on the premises of the Prosecution.

1 The Prosecution, in supporting the argument that access does not
2 mean hand-over of materials, however, further submits that if there were
3 no difference between disclosure in terms of handing over evidentiary
4 materials and inspection in terms of providing access to such materials,
5 there would not be the need of the law to use different terms. The law,
6 in view of the Prosecution -- in the view of the Prosecution, carefully
7 considers the differences by attaching different obligations to the two
8 categories of materials.

9 Rule 77, as I said repeatedly, is dealing with physical evidence
10 which requires, in the view of the Prosecution in particular, that the
11 Prosecutor, at the confirmation hearing and/or at trial, will be able to
12 prove the chain of custody, the chain of custody. This is a fact that by
13 itself excludes disclosure in terms of hand-over to the Defence and, even
14 more, excludes hand-over of such materials via a third party.

15 The Prosecution's view -- the Prosecution's opinion is supported
16 by established international jurisprudence, notably by the ICTR's Appeals
17 Chamber decision of 12 December 2002 in the Prosecutor versus Rutaganda,
18 stating in relation to Rule 66(b) of the ICTR's Rules of Procedure and
19 Evidence, a regulation which is mirrored in the ICC law by Rule 77 that,
20 and I quote: "Unlike Rule 66(a)(2) and Rule 68 of the Rules, Rule 66(b)
21 does not require the Prosecution to disclose any material to the
22 Defence."

23 This was in relation to sub-item (c). And if I recall correctly,
24 the last item your Honour wants us to address is sub-item (d).
25 Sub-item (d), this was the question: "Whether, when and how the

1 evidence the Prosecution intends to use at the confirmation hearing and
2 which is subject to inspection under Rule 77 of the Rules is to be
3 communicated to the Pre-Trial Chamber under Rule 121(2)(c) of the Rules."

4 The Prosecution submits that Rule 77 does not provide for
5 disclosure in terms of handing over the evidentiary materials that fall
6 within the scope of that Rule. Consequently, in the view of the
7 Prosecution, Rule 121(2)(c) does not apply, meaning that the Prosecution
8 is not obliged to communicate such materials to the Pre-Trial Chamber
9 except, except, when Rule 77 materials also fall within the scope of
10 Rule 61(3)(b) materials. The latter materials would obviously be
11 communicated to the Pre-Trial Chamber as any other such evidence of
12 incriminatory nature.

13 If your Honour allow me to just briefly check something, what I
14 have noted down in respect to the introductory remarks to sub-item -- or
15 to item 5 on the agenda. And I think I should mention it since it
16 concerns the sub-items I was just addressing.

17 It's in relation to the Pre-Trial Chamber's decision of 27th of
18 March, 2006, where at page 4 the Pre-Trial Chamber states that: "For
19 reasons of consistency," and "consistency" is the word, the term the
20 Pre-Trial Chamber has used, "inspection in terms of Rule 77 and 78 has to
21 be treated equally to disclosure in terms of Article 61(3)(b) and Article
22 67(2)."

23 The Prosecution makes the very general observation that the law
24 distinguishes between the process of disclosure and the process of
25 inspection. We use this opportunity to, in addition, refer to our filing

1 of 6th of April, 2006, and make special reference to page 7 of that
2 filing.

3 Your Honour, these were our submissions on the items under agenda
4 item number 5.

5 JUDGE STEINER: Thank you very much.

6 Mr. Flamme, your comments on the same items of the agenda.

7 MR. FLAMME (interpretation): Thank you, your Honour. As regards
8 item 5(b), the implications of the 30-day and 15-day deadlines, I will
9 refer you to what I have already said on this topic, which is equally
10 applicable to this item.

11 As regards item 5(c), as you will already have noticed, there is
12 a considerable difference of opinion between the Defence and the
13 Prosecution. I wish to begin by bringing to your attention the fact that
14 Rule 76 and 77 both are part of section 2, which concerns disclosure.

15
16 Rule 76 uses the same terms and refers to disclosure relating to --
17 pre-trial disclosure relating to Prosecution witnesses, whereas Rule 77,
18 in the opinion of the Defence, concerns evidentiary material in the
19 possession of the Prosecutor in the form of -- sorry. Rule 76 concerns
20 probatory information in the form of statements and testimony in the
21 possession of the Prosecution, whereas Rule 77 concerns all other types
22 of evidence. Therefore, the argument of the Prosecution surprises me.
23 Here I refer to the last line of Rule 77, which says: "...are
24 intended for use by the Prosecution as evidence for the purposes of the
25 confirmation hearing or trial." So here we are speaking of materials
26 which are not testimony but are intended to be used by the Prosecutor at

1 the confirmation hearing.

2 How could one only allow the Defence to inspect that material?

3 Clearly if the Prosecutor intends to use the information, the material,
4 he should provide a copy of it to the Defence.

5 So inspection, when it concerns this material which is to be
6 used, means disclosure, just as it does for the witness testimony
7 referred to in the preceding Rule. Therefore, I am surprised that the
8 Prosecutor says that he does not feel the need to disclose in the same
9 fashion.

10 Those are my comments regarding item (c).

11 As regarding item (d), the obligation to communicate to the
12 Pre-Trial Chamber, here I will be brief. Here, I believe, and I would
13 argue along the same line that materials which the -- once the Prosecutor
14 has decided to use materials, he must communicate them and also
15 communicate them to the Chamber. I think that this is evident and that
16 that communication should be simultaneous for both -- both recipients.

17 JUDGE STEINER: Thank you very much.

18 I would like to invite the Prosecution to make its comments on
19 items (a) and (c) also, items (a) and (c) of topic 6, and on item (d) if
20 there is something to be added to the comments made in item (b)
21 previously.

22 MR. WITHOPF: Yes, your Honour. I will first address item 6(a).

23 That's the question: "Is the Prosecution's obligation related to either
24 Article 61(3)(b) of the Statute or Article 67(1)(b) of the Statute? Or
25 does this obligation stand on its own?"

1 In that respect, your Honour, the Prosecution submits that what
2 falls under the notion of material to the preparation of the Defence can
3 be both, can be both of incriminating nature and of potentially
4 exculpatory nature. Information which is of -- which is exculpatory will
5 always be, in the view of the Prosecution, material for the preparation
6 of the Defence. This view of the Prosecution is confirmed by the 24th
7 June, 1997, decision of the ICTY Trial Chamber the Prosecutor versus
8 Delalic.

9 There is, however, also the possibility that objects falling
10 within the scope of Rule 77 do not fall under either of these categories.

11 In respect of both categories of evidence, in the view of the
12 Prosecution, objects falling under Rule 77 can go beyond, can go beyond
13 the motions of incriminatory and/or potentially exculpatory evidence.

14 The Prosecution is of the view that the term "material to the preparation
15 of the Defence" entails any object that is of potential relevance to
16 uncovering admissible evidence; aiding witness preparation; corroborating
17 testimony; or assisting, undermining the credibility of evidence or
18 rebuttal. This view is supported by ICTY jurisprudence, such as the
19 Trial Chamber's decision in the Prosecutor versus Delalic. This time
20 it's the decision of 26th of September, 1996.

21 These were the observations in respect to sub-item (a). I think
22 your Honour wants us further to address sub-item (c). Sub-item (c)
23 concerns the question: "Do the materials and evidence which are material
24 for the preparation of the confirmation hearing by the Defence depend on
25 the evidence selected by the Prosecution to rely on -- to rely on at that

1 hearing?"

2 The Prosecution, in this context, your Honour, submits that it is
3 not limited to the evidence the Prosecution relies on at the confirmation
4 hearing. The Prosecution, however, at this stage, not knowing what the
5 Defence considers being material to the preparation of its defence, is
6 not in a position to, for the present case, fully determine the scope of
7 the application of Rule 77. The Prosecution is of the view that
8 inspection pursuant to Rule 77 works best if there is an interplay
9 between the evidentiary materials the Prosecution intends to rely on at
10 the confirmation hearing and the preparedness of the Defence to inform
11 the Prosecution what it considers being material to the preparation of
12 the Defence.

13 I'm just checking whether there's any other matter I want to
14 address in relation to sub-item (d). I think in that respect, the
15 Prosecution can make reference to its 3 April 2006 submission. I make
16 specific reference to page 5 of that submission.

17 Thank you very much.

18 JUDGE STEINER: Thank you very much.

19 Mr. Flamme, please, if you could elaborate on questions (a) and
20 (c) of topic 6, and, if necessary, to add something on item (d).

21 MR. FLAMME (interpretation): Thank you, your Honour. As regards
22 item 6(a), I think that the obligation we are speaking of and which is
23 referred to as "inspection" -- now, the first part of Rule 77 permits the
24 Defence to inspect any books, documents, photographs, and other tangible
25 objects in the possession or control of the Prosecutor which are material

1 to the preparation of the defence is an obligation -- or intended for use
2 by the Prosecutor is an obligation and is not related to the Rules or
3 Articles that you refer to in the agenda. Why so? Well, preparation of
4 the Defence is clearly an independent exercise, and the obligation
5 bearing upon the Prosecutor to permit inspection is, in fact, the
6 possibility for the Defence to take knowledge of all of the case compiled
7 by the Prosecutor to establish whether there is information which is
8 material in any way to the Defence.

9 The sense of the information can only be ascertained when it can
10 be studied. Often the Defence may take a certain line, but when it
11 becomes aware of new documents and new evidence, may adjust and modify
12 its direction, and may recognise that, yes, this is material which is
13 useful. This is a line which we had not previously considered, but this
14 material does inspire us to adopt different or other line. For instance,
15 historic material. For instance, geopolitical material, political
16 material, military, material related to a war which spreads beyond Ituri
17 or which is provided from outside Ituri. And from that perspective, I
18 believe that the answer to the question is no, it is an obligation which
19 is entirely independent and what -- which must provide the Defence with
20 full freedom to inspect that material. And if it finds that the material
21 which it inspects is of importance for its defence, that it be allowed to
22 take a copy of it and use it in the defence. I think that that is the
23 essence, the very essence of a fair trial.

24 As regards item (c), I think that we have already touched on
25 this. And here once again, and for the same reasons, the answer is no.

1 The task of inspection and the subsequent use, the possible use, does not
2 depend at all on the evidence which is selected by the Prosecutor to rely
3 on at the confirmation hearing. The Prosecutor follows his own policy
4 and tactics to support his charges, and the Defence, too, must have full
5 freedom to develop its defence and substantiate it as it sees fit.

6 I would like to read an extract from a judging -- a judgement
7 which was handed down by the ICTY in the case Prosecutor versus Krnojel
8 or "lak". I hope I'm speaking -- or I pronounce it correctly. I will
9 now read in English: "(In English) The expression "evidence" is intended
10 to include any material which may put the accused on notice that material
11 exists which may assist him in his defence, and it is not limited to
12 material which is itself admissible in evidence."

13 (Interpretation) In other words, the accused has the right to
14 seek out information which may incriminate him with a view to identifying
15 information which may exonerate him in the file or elsewhere. Let us
16 remember that the Prosecutor's file is one component. It is an edifice
17 which one has constructed at a point in time, but beyond that edifice
18 there may be other points, information of use to the Defence. However,
19 within the edifice there may be items of information which indicate that
20 elsewhere information is to be found which is important to the Defence.
21 So I think it is important to have a very broad view if one is to
22 give this Rule the full significance which it must have in the interests
23 of a fair trial. Thank you.

24 JUDGE STEINER: Thank you very much.

25 MR. WITHOPF: Your Honour, if I may, please, very briefly

1 respond.

2 JUDGE STEINER: Very briefly, please.

3 MR. WITHOPF: In the interests of all participants, I will keep
4 it very brief. The first is basically a request for courtesy to counsel
5 for the Defence. If he could please inform the Prosecution of the date
6 of the decision of the ICTY in the case the Prosecutor versus Krnojel
7 to enable us to address it.

8 And the second observation has to do with the statement by my
9 learned friend from the Defence which concerns me quite a bit. He was
10 making reference to historic -- and I quote, "historic, geopolitical
11 materials, political materials, and materials that concern the war
12 outside Ituri."

13 I already wish to use the opportunity now to inform the Pre-Trial
14 Chamber and the Defence that the Prosecution would heavily oppose any
15 attempt by the Defence to run a contextual defence. Contextual defences
16 have been proven only one thing, namely to unnecessarily delay trial
17 proceedings, to unnecessarily bring witnesses before the courts, and to
18 produce evidence that is not relevant to the cases before the courts.

19 Again, I only wish to flag this issue already now.

20 JUDGE STEINER: The Chamber has taken note of your strong
21 opposition. Of course, it will be up to the Chamber to decide on the
22 relevance and admissibility of any kind of evidence.

23 Following the agenda, now I would like to invite first Mr. Flamme
24 on behalf of the Defence to address the topics (a), (b), (d), and (e) of
25 topic 7 of the agenda.

1 MR. FLAMME (interpretation): Thank you, your Honour. I would
2 like to read the Article so that all is clear, this Article 78,
3 inspection of material in possession or control of the Defence: "The
4 defence shall permit the Prosecutor to inspect any books, documents,
5 photographs and other tangible objects in the position" -- sorry, "in the
6 possession or control of the defence, which are intended for use by the
7 defence as evidence for the purposes of the confirmation hearing or at
8 trial."

9 Question (a) is what is the scope of the Defence's obligation
10 under this Article. I think that this article is absolutely clear, so I
11 will be brief.

12 The title of the -- or the wording of the Article is very clear.

13 There is very little to interpret. Any books, documents, photographs,
14 and other tangible objects. This means that we are speaking of evidence
15 other than testimony which the Defence intends to use. In other words,
16 the Defence is not obliged to provide summaries, and certainly not, but
17 I'm sure all would agree with me here, internal working documents, but is
18 also not obliged to provide summaries or reports which the Defence makes
19 based on testimony. So here we are referring only to documentary
20 evidence in the possession or control of the Defence to be presented in
21 court.

22 Now, as regards question (b): "Does the obligation of the
23 Defence under Rule 78 of the Rules include the -- the disclosure of the
24 prior statements of those witnesses the Defence intends to call at the
25 confirmation hearing?"

1 I think in the same sense, as I said previously with regards to
2 point (a), the issue is clearly no.
3 I also submit for your assessment, and I would repeat, and it's
4 important what I said previously, we really have to take note of the fact
5 that we are before a date which is fixed for the confirmation hearing,
6 the 27th of June. And so we have appointed a judicial assistant. We
7 haven't -- we still don't have -- we still have very little communication
8 of the incriminating material. We are nowhere with all this. We just
9 know -- we don't know the -- we know the charges, but we don't know the
10 material which is going to be brought forward by the Prosecutor to
11 support these charges, and at the moment I don't even have communication
12 of the request of the Prosecution which was introduced to obtain the
13 arrest.
14 It will be necessary, given the confirmation hearing, to
15 designate or appoint -- have appointed an investigator. And I should
16 make this investigator come to The Hague. This -- in The Hague. This
17 investigate will have to follow training in The Hague. The investigator
18 will have to follow training before starting operations in the field. If
19 we want to respond to the rights of the accused in the confirmation
20 hearing to challenge these charges and to already bring at this stage as
21 the Rules and the Statutes -- the Rules of Procedure and Evidence and the
22 Statute says, then we have to carry out research and investigation
23 operations in this regard. And we can really say that we're nowhere in
24 this regard. So how would you want us to -- before this confirmation
25 hearing to be able to -- I mean, it's up to you to decide, but I think

1 Article 78 doesn't exclude the declarations, previous submissions before
2 the hearing.

3 So in addition to that, how would you like us to do that? I
4 think it's impossible. And I think that's a second reason why it's not
5 possible. And it's certainly not possible for the Defence to submit this
6 declaration.

7 With regards to the point (d), I think that it's point (d) that
8 you also mentioned, Madam President, your Honour, with regards to point
9 (c). That's not -- I don't think you mentioned that. I don't think you
10 mentioned point (c), so I'll just read the question again.

11 The time limit provided for by Rule 121(5). This is the Rule
12 which states that the -- when the Prosecutor intends to presents new
13 evidence at the hearing, I think at that time -- here we're speaking
14 about something that's very difficult to decide on for the moment because
15 it's clear that if the Prosecutor, in the 15-day deadline before the confirmation
16 hearing, decides to extend the charges, then we're speaking
17 about a different context, and that given the evidentiary material which
18 will be communicated then, necessarily the Defence will have to be
19 granted an additional time to be able to respond to these additional
20 charges. So I don't see, if it's done within this deadline or just
21 within this deadline of 15 days or even 30 days, the possibility of
22 organising investigations, et cetera. Thank you.

23 JUDGE STEINER: Mr. Flamme, if you allow me just to -- in order
24 to facilitate, there is a mistake in the agenda, and in this item (d) we
25 are talking about time limit provided for in Rule 121(6), not 121(5).

1 Just for clarification.

2 MR. FLAMME (interpretation): Yes, certainly. So if the person
3 intends to present evidence under paragraph (6) of Article 61, here we're
4 speaking about the evidence under the existing charges. So the person
5 intends to present -- so that will be done no later than 15 days before
6 the date of the hearing.

7 I think that this Article confirms what I said previously, that
8 here we're speaking about a list, for example, where it concerns -- if in
9 this list there's testimony, for example, that the Defence will ask to
10 hear the witnesses. Then I think the only obligation of the Defence is
11 to present a list of witnesses that it's going to have heard. So I think
12 this is a confirmation of what I said previously with regard to the
13 communication obligation. Thank you.

14 JUDGE STEINER: Thank you very much. I invite the Prosecutor to
15 make his comments.

16 MR. WITHOPF: Your Honour, in respect to sub-item (a), "What is
17 the scope of the Defence's obligation under Rule 78 of the Rules?" the
18 Prosecution submits that Rule 78 in its scope mirrors Rule 77 with a
19 variation that it only concerns the evidence the Defence intends to use
20 for the purpose of the confirmation hearing.

21 In respect to sub-item (b), the Prosecution does not interpret
22 Rule 78 covering aspects that are, in relation to the Prosecution,
23 covered by Article 61(3)(b) and Rule 76. Mirroring its submission in
24 relation to Rule 77, the Prosecution submits that Rule 78 does not
25 provide for the hand-over of evidentiary materials. In light of

1 Rule 121(6), however, the Defence is required to provide the list of
2 evidence to the Pre-Trial Chamber which, in turn, is required to transmit
3 that list to the Prosecution.

4 Defence counsel and -- my learned friend from the Defence raised
5 an issue that troubles the Prosecution a lot, namely the observation that
6 the Defence, in his view, in view of the Defence, is not obliged to
7 provide the witness statements, which would be different from the
8 situation the Prosecution is in. If one sees Article 61(5) and (6),
9 which cover, indeed cover the confirmation hearing, the Prosecution would
10 be seriously disadvantaged by not being in a position to have access to
11 statements of witnesses the Defence wishes to rely on. The Prosecution
12 at this opportunity only flags the matter.

13 In relation to sub-item (d), "What are the implications of the
14 time limit provided for in Rule 121(6) of the Rules with regard to
15 discharge by the Defence of its obligation under Rule 78 of the Rules,"
16 the Prosecution submits that the Defence is obliged to apply for
17 inspection of pursuant to Rule 78 as soon as practicable after disclosure
18 of the Prosecution's new evidence.

19 And I think the last sub-item your Honour wanted to have
20 addressed is sub-item (e). In that respect in view of the Prosecution,
21 and I make reference to what I said at the very beginning of today's
22 hearing, the question does not arise. Such a system, in the Prosecutor's
23 view, is not supported by the law. Thank you.

24 JUDGE STEINER: Thank you very much.

25 Now, as the last item of this part of the hearing, I would like

1 to first listen again to the Defence on the topic 8 of the agenda, items
2 (a), (b), and (c).

3 MR. FLAMME (interpretation): Thank you, your Honour. Where it
4 concerns point 8(b), "What's the exact content of the Defence's
5 obligation under Rule 79(1)(a)...", well, I would like to refer again to
6 the text, which is clear, which doesn't need interpretation. "The
7 Defence informs the Prosecutor of his intention to call -- mention the
8 existence of an alibi or a ground for excluding criminal responsibility
9 provided for in Article 31."

10 I think that it's sufficient to say that the Defence notifies the
11 Prosecutor of its intention to raise one of these grounds, and it's not,
12 for example, a matter at this moment of going into detail with regard --
13 or to grounding this argument. I think that you have to say that these
14 are elements which could arise just as in the course of proceedings as
15 the Defence is notified of communications by the Prosecutor. And it's
16 clear that the Defence should have, throughout the proceedings, the
17 possibility to mention these points which are fundamental, because it's a
18 matter of -- of the criminal responsibility -- and for excluding criminal
19 responsibility.

20 With regards to point (c), I think it's point (c) that you also
21 mentioned, "Whether, when and how the evidence disclosed under Rule 79 is
22 to be communicated to the Pre-Trial Chamber under Rule 121(2)(c) of the
23 Rules," I think that this obligation is once again -- this should be read
24 simultaneously with the communication which is made with the opposing
25 party, i.e., the Prosecutor.

1 At this stage, obviously the Defence communicates already
2 evidence, because here we're talking about notification of an intention.

3 So the reserve -- the reservation is mentioned in the Rule itself.

4 I don't -- can't remember if you spoke about another point of the
5 question as well. Did you speak -- did you speak about anything else
6 apart from (b) and (c)? Did you mention another point?

7 JUDGE STEINER: We've mentioned points (a), b and c, but of
8 course you can elaborate on other points if you deem necessary.

9 MR. FLAMME (interpretation): Yes, clearly point (a), because I
10 didn't remember that you mentioned point (a). It's a very important
11 point. Until when, given the confirmation hearing, for the purposes of
12 the confirmation hearing can the Defence raise this intention to mention
13 an alibi or a ground for excluding criminal responsibility.

14 Well, I think that in the classical, traditional philosophy of
15 criminal defence, if you don't want to limit the rights of the Defence,
16 then this possibility should exist until the day itself of the
17 confirmation hearing.

18 I find this argument or an argument for this reasoning in the
19 Rule itself. If we look at Rule 79(2), it says that: "The Chamber
20 dealing with the matter may grant the Prosecutor an adjournment to
21 address the issue raised by the Defence."

22 So the answer is there. I think that implies that the Defence
23 can do so, because it will have very little time. It can raise this and
24 make notification, and that can be done at the same time as the argument
25 itself is raised.

1 And there's also the point, point (3), the fact that the Defence
2 hasn't been notified with regard to this Rule. So, "Failure of the
3 Defence to provide notice under this Rule shall not limit its right to
4 raise matters dealt with in sub-rule (1) and to present evidence."
5 So I think that the text is clear. Thank you.

6 JUDGE STEINER: Thank you. The Prosecution for its views.

7 MR. WITHOPF: In respect to Rule 79, the Prosecution, at least at
8 this stage, is of the view that some of the aspects detailed in Rule 79
9 of the Rules of Procedure and Evidence are not very likely to come up in
10 the context of the present case during the confirmation hearing. This
11 appears to, in particular, apply to an alibi Defence. Accordingly, the
12 Prosecution does not want to enter into an academic discussion of these
13 matters.

14 Having said that, however, the Prosecution submits in general
15 terms that starting point for answering the question should be as
16 indicated by Rule 79(2), by the use of the word "shall," to safeguard for
17 the Prosecution the right to prepare adequately and to respond in a way
18 that allows the Pre-Trial Chamber to make an informed decision on the
19 respective matters.

20 This opinion is supported by is the second sentence in Rule
21 79(2), which provides for an adjournment including of the confirmation
22 hearing in the view of the Prosecution if necessary.

23 Why does it do so? For very obvious reasons. Any of the matters
24 or most of the matters referred to covered by Article 31 of the Rome
25 Statute are likely to require investigation, to require significant

1 investigation, additional investigation by the Prosecution, including, in
2 respect to at least some of the matters, the use of experts and to seek
3 the views of experts.

4 The Prosecution sees this as an indication that the Defence is
5 obliged to disclose related information at the earliest opportunity
6 possible. Article 31 clearly contains matters that are difficult for the
7 Prosecution to investigate and, I repeat, the Prosecution would have to
8 rely on expert opinion. For that reason, Defence should be obliged, and
9 in the view of the Prosecution is obliged by the law to provide and to
10 notify the Prosecution about such defences at the earliest opportunity
11 opinion.

12 Sub-item (b), "What is the exact content of the Defence's
13 obligation under Rule 79(1)(a) and (b) of the Rules?"

14 Aim of Rule 79(1)(a) and (b) is to allow the Prosecution, as I
15 mentioned, to comprehensively address the alibi and/or the other grounds,
16 excluding criminal responsibility. Rule 79(a) and (b), in the view of
17 the Prosecution, are clear in detailing that the Defence, in complying
18 with the respective obligation, and the French version of the respective
19 provision makes it even clearer, that the Defence has such an obligation,
20 has to provide the names of the witnesses and any other evidence upon
21 which the Defence intends to rely on.

22 Whilst the language of the law does not provide for disclosure of
23 the statements of such witnesses, the Prosecution is of the view that the
24 content of the disclosure obligations of the Defence should be similar to
25 those regulated in Rule 76, meaning that the statements of the respective

1 witnesses should be included. The Prosecution, in support of it's
2 opinion, makes reference to the respective commentary in the
3 International Criminal Court as edited by Roy Lee, "Disclosure Of
4 Evidence," at page 416.

5 Finally, I think the last aspect you wanted to have addressed,
6 your Honour, was aspect -- was it (e)? If you could please remind me.

7 JUDGE STEINER: (c).

8 MR. WITHOPF: (c). Yeah. In respect to aspect (c) -- and I
9 apologise. In respect to aspect (c), the Prosecution takes a consistent
10 approach in respect to the communication of evidence to the Pre-Trial
11 Chamber, meaning that pursuant to Rule 121(2)(c), evidence related to
12 matters covered by Rule 79 is not required to be communicated to the
13 Pre-Trial Chamber. In view of the Prosecution, Rule 121(2)(c) applies
14 only to Article 61(3)(b) evidence.

15 Your Honour, these have been our submissions in relation to
16 agenda items 8.

17 JUDGE STEINER: Thank you very much. Before we go to the last
18 part of this meeting, which is the discussion in closed session, I would
19 like to give the floor to the Registry in order to ensure that if there
20 is something that the Registry would like to add or some final comments
21 in these topics already discussed.

22 MR. DUBUISSON (interpretation): Your Honour, where it concerns
23 the points which should be mentioned, I think that the Registrar has a
24 role, specific role, to play here. I think here we're really looking at
25 a judicial debate between the Prosecutor and the Defence.

1 Now, I don't know if we have to cover right from now points (f)
2 and (g), and possibly speak about the reasons why -- or the advantages of
3 a communication by the Registry. Is that what you're asking me at the
4 moment?

5 JUDGE STEINER: If you feel you're able to do it very briefly, I
6 would appreciate it.

7 MR. DUBUISSON (interpretation): Okay. Your Honour, I will do
8 so. That will be done.

9 So to go back to what I said earlier, where it concerns the
10 effectiveness of a system, of the current system, or the inefficiency of
11 it, well, I would just like to remind you that we have -- would like to
12 have a single system. So very concretely, we've purchased a product here
13 which is available for the moment to the Office of the Prosecutor. It's
14 available in the Registry as well. We can make it available to the
15 Defence as well. Because when I've heard about the facts -- the keywords
16 which were mentioned, which at a certain time, in infomatic terms -- I
17 mean, it's -- keywords have gone a bit beyond that. There's access,
18 direct access, to information with research tools to the -- there's
19 direct access to the evidence through these research tools. So I think
20 we need to have a more sophisticated system to not limit the searches
21 which the Defence have to make via keywords or something like that, and
22 also with regards to communication of the Defence to the Prosecutor.
23 The advantages, on the other hand, of having communication of
24 evidence via the Registry, if we just go through different issues, for
25 example, is to make the work of the participants easier, and also the

1 work of the Chamber. There's also facilitating the work of searches, and
2 there's the -- dealing with information as well. So where it concerns
3 the information that's going through the Registry, I would like to take
4 the field of activities which is translation.

5 The possibility of being informed of difficulties with regards to
6 translation that the Defence has or victims have with regards to, for
7 example, problems that there aren't -- victims aren't present yet, but
8 they will have rights within the proceedings. We have -- shouldn't lose
9 sight of that possibility. So if the Registrar has such documents, they
10 will perhaps have a role to play where it concerns translation. And all
11 this will obviously depend on the question of indigence, which will be
12 linked to such action. So there will we can facilitate -- and I
13 mentioned the role of the facilitator we have. We can facilitate,
14 possibly, this work.

15 Where it concerns the judicial administration section, I would
16 like to remind you that unlike what I've heard, that we would slow up the
17 proceedings, absolutely not. From the moment that we have a system which
18 is compatible between the Prosecutor and the Defence and the Registry, a
19 system which will be, furthermore, used during the hearings, during the
20 presentation of evidence, then it's very clear that will have no -- that
21 will cause no delay whatsoever.

22 Of course, there has to be combatibility of the system with
23 regards to the evidence as well. That's going to facilitate things.
24 There will be no delay produced because of that, and there will be
25 centralisation of all the different evidence with a view to be able to
26

1 obtain a complete file and a single file as well, which furthermore, the
2 Prosecutor highlighted on page 12. Every piece of evidence will have a
3 unique reference making it possible to find that in its context, to avoid
4 any confusion and any claims in that regard. So I think there we will
5 possibly have a role to play.

6 The Victims and Witnesses Unit, often we speak about them,
7 mention that they're responsible for protection. With regards to
8 Article 68(4), they work with the Prosecutor, and tomorrow we'll work
9 with the Defence, and we'll work with the different participants in the
10 proceedings with regard to this communication, the last-minute
11 communication. This is, all this, something that's a bit afraid of. We
12 have lots of examples in the ad hoc tribunals. This last-minute
13 communication has influenced the development of the proceedings and
14 sometimes the -- for example, we brought -- had to bring a different
15 witness. So when it came to this management, we have to have -- here,
16 for example, we're not working with close proximity, European proximity,
17 if you like, of a neighbouring country like Rwanda with Tanzania, for
18 example. Here we have an extremely complex situation. We don't want to
19 affect the protection of persons, because the fact that they're gone for
20 a long time, et cetera, this will play a role.

21 There's also the psychological part which is linked to the fact
22 that a witness might have to stay here for a long time, and the fact that
23 this is communications of -- the last-minute communications are limited.
24 This is something that will be -- something that is indicated in the
25 text. This is with relevant to victims and witnesses.

1 With regards to the detention, we spoke about that just now, and
2 I'll go back to what was said just, last-minute communication and where
3 it comes to weekends and urgencies, et cetera. I would like to draw your
4 attention to the rules of the Registry where the services of a legal
5 officer are provided for. I think that's -- that's in 39, as adopted in
6 Regulations of the Registry and approached by the Presidency.

7 With regards to detention, it was suggested possibly to say,
8 because we work in electronic manner, why perhaps Mr. Lubanga, who is
9 present here, why couldn't he have access to such an information tool.

10 Without -- without any prejudice to the privileged communication
11 between counsel and his client, it's clear that this would be a lot more
12 easy for us to be able to manage this type of communication rather than
13 sending millions of -- thousands of boxes to the Detention Unit with all
14 the associated risks with that. So effectively it is a possibility that
15 we could make available, which would greatly facilitate, I think, the
16 work of a lawyer as well as his client. And I would like to remind you,
17 furthermore, that a person can also defend themselves in the absence of a
18 lawyer. So all these means of thinking and all the different problems
19 which have been seen, such as the Milosevic proceedings, should be
20 thought of in the first place. So this is something we have seen.

21 And finally - I spoke about this before - what happens to the
22 communication of evidence to victims? Well, how is the Chamber going to
23 be able to say what is material which the victims can have if they can't
24 know what has been communicated. Well, the fact that this is up to the
25 Registry, making it -- we have no discretionary power with regards to the

1 access to these documents, but Chamber could -- could govern the access
2 to such documents.

3 I -- with regards to facilitating searches, when you have an
4 information -- information system, this is something that becomes a lot
5 easier. We've developed software which makes it possible to classify
6 documents and to exchange them with a view to facilitating searches.
7 So this is something that we have at our disposal. With regard
8 to the question I mentioned of having a protocol, the protocol has
9 already been exchanged with the Prosecutor. I think we are on the same
10 wavelength on that particular subject.

11 And finally, Mr. Flamme spoke about the justice. Well, there's
12 the -- when it comes to the references and the notary, when it comes to
13 the file, we don't know what's going to be in it necessarily. I think
14 that the notary will -- will respond to what the dossier is going to be.
15 That's something that I'd like to say in general with regards to the
16 advantages of going through the Registry. Thank you.

17 JUDGE STEINER: Thank you very much, Mr. Registrar, for these
18 clarifications that I think would be very useful for both Defence and
19 Prosecution.

20 First of all, I would like, for the records, to mention that
21 after the break the interns Fleur Place-Rivan, Esine Okudzeto, Felipe
22 Rojas are present at the courtroom.

23 So we came to the end of the first part of the agenda. We still
24 have to be discussed two items in closed session. I would like to -- to
25 ask the Prosecution and the Defence to -- very briefly to give their

1 views, final views or observations, and just reminding them that I've
2 given the parties the opportunity to present their views in writing. So
3 if, even having this opportunity to say his views, concerns and
4 observations in writing, the parties want to make their final
5 observations, I will open the floor, but emphasising that we have only
6 half an hour to finish this hearing because of the break of -- the need
7 of a breaking for the interpreters.

8 So would the participants like to make any observations, or they
9 will reserve their observations to the written ones?

10 MR. WITHOPF: Your Honour, we want to make some observations. We
11 will keep it will very short, and we already announce now that we will
12 certainly elaborate in our submissions in writing, which are due by the
13 2nd of May.

14 I wish to emphasise again one point, and this is our main point
15 from the beginning of this hearing, disclosure is a process between the
16 parties, between the Prosecution and the Defence, and the Defence and the
17 Prosecution. Disclosure and the purpose of disclosure is best ensured if
18 it's done between the parties without a third party, in this case the
19 Registry, getting involved. And the Prosecution is of the strong view
20 that the current interim system of disclosure is not supported by the
21 law. And for that reason the Prosecution, at this stage, unfortunately,
22 due to its legal concerns, is not as it would like to be in a position to
23 provide access of counsel for the Defence to materials that fall under
24 Rule 77.

25 Again, we will supplement our final observations by way of filing

1 in writing. Thank you.

2 JUDGE STEINER: Thank you very much.

3 Mr. Flamme.

4 MR. FLAMME (interpretation): Yes, your Honour. I, too, shall be
5 brief.

6 The Defence is of the view that the Rules on protection are
7 limited by the rights of the Defence, and I would cite here Article 68(1)
8 in fine: "These measures shall not be prejudicial to or inconsistent
9 with the rights of the accused and a fair and impartial trial."

10 And Article 68(5), in fine: "Such measures shall be exercised in
11 a manner which is not prejudicial to or inconsistent with the rights of
12 the accused and a fair and impartial trial."

13 The case law of the ad hoc tribunals, furthermore, does
14 illuminate -- or is illuminating in that it also states that the
15 Prosecution cannot use the need to protect and ensure security as a
16 screen in order to continue to hide certain items of information that the
17 Defence would need if it were to exercise its full rights. And we are in
18 a position to support this point of view in our submissions, and we shall
19 do so.

20 JUDGE STEINER: Thank you very much, Mr. Flamme.

21 So I would like to thank the Registry and its representatives for
22 their presence and clarifications brought to this session. And I would
23 ask Madam Registrar, please, to ensure that we go into closed session.
24 We are waiting for the representative of the Victims Unit.

25 MR. WITHOPF: Can I use the time in between, your Honour, to

1 raise a concern of the Prosecution?

2 JUDGE STEINER: Please. You have the floor.

3 MR. WITHOPF: Thank you very much, your Honour.

4 JUDGE STEINER: Sorry. Sorry?

5 THE REGISTRAR: Sorry. I just want to make it clear that I have
6 not been confirmed we're in closed session with the broadcast, so ...

7 (Closed session)

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Pages 85 to 88 expunged- Closed session.

The hearing suspended at 6.24 p.m.