

- 1 International Criminal Court
- 2 Pre-Trial Chamber I
- 3 Situation Democratic Republic of Congo
- 4 Case number ICC-01/04-01/06

14:02:00 5 Friday, 23 June 2006 - Open session - Public transcript

14:02:00 6 THE USHER: All rise.

14:02:13 7 [2:02 p.m.]

14:02:13 8 THE USHER: The International Criminal Court is now in

14:02:16 9 session.

14:02:50 10 JUDGE STEINER: Good afternoon and, please, I ask the usher

14:02:56 11 to call the case.

14:02:59 12 THE USHER: The situation of the Democratic Republic of the

14:02:59 13 Congo in the case of the Prosecutor versus Thomas Lubanga

14:03:17 14 Dyilo, No. ICC-01/04-01/06.

14:03:17 15 JUDGE STEINER: Thank you very much. Let me first welcome

14:03:24 16 Mr Thomas Lubanga Dyilo who is present at this hearing.

14:03:32 17 Let me also welcome the Prosecution and Defence team as

14:03:35 18 well as the representatives of the Court Management

14:03:43 19 Section. I would also like to apologise for the delay in

14:03:46 20 the present hearing and the inconvenience it has caused

14:03:52 21 due to technical problems.

14:03:56 22 First, I would like to ask the Prosecution, then the

14:04:00 23 Defence and the Registry, to introduce themselves and

14:04:04 24 their teams or representatives.

14:04:10 25 MR WITHOPF: Good afternoon, your Honour; good afternoon to

14:04:14 1 the learned friends of the Defence; good afternoon to the
14:04:19 2 representatives of the Registry, and I extend, as usual,
14:04:23 3 my greetings to everybody in and around the courtroom.
14:04:26 4 For the Prosecution appear today next to me Julieta
14:04:29 5 Solano; behind her Michael Lees, who is the head of the
14:04:36 6 OTP Knowledge Base Unit; next to him Sangkul Kim, He's an
14:04:41 7 associate Legal Officer; behind me Ramu Bittaye, she's
14:04:46 8 our Case Manager; and I, Ekkerhard Withopf, and I'm the
14:04:54 9 Senior Trial Attorney.
14:04:56 10 JUDGE STEINER: Thank you very much. Me Flamme?
14:04:56 11 ME FLAMME: Thank you, your Honour. Today the Defence is
14:05:04 12 represented by myself, Jean Flamme, Defence counsel; and
14:05:25 13 by Ms Véronique Pandanzyla, Judicial Assistant. Also on
14:05:29 14 the Defence bench we have Ms Melinda Taylor representing
14:05:30 15 the Public Office for the Defence. Thank you.
14:05:32 16 MR DUBUISSON (interpretation): Thank you, your Honour. As
14:05:34 17 requested, on the Registry bench we have on behalf of the
14:05:39 18 Court Management Service Anne Aurore Bertrand and Uros
14:05:50 19 Mijuskovic. The latter is the Senior Court Assistant in
14:05:52 20 the Registry. And I'm Marc Dubuisson, Director of the
14:05:57 21 Division of Court Services.
14:05:59 22 JUDGE STEINER: Thank you very much. So, first of all,
14:06:05 23 I would emphasise that this hearing is held pursuant to
14:06:10 24 paragraph 8 of the timetable set in the decision on
14:06:15 25 postponement of the confirmation hearing issued on 24 May

14:06:20 1 2006. Therefore, it will focus on the process of
14:06:27 2 disclosure and inspection on the one hand, and on the
14:06:32 3 process of communication of the evidence on which the
14:06:35 4 parties intend to rely at the confirmation hearing.
14:06:41 5 I am aware of the pending Prosecution's application
14:06:44 6 pursuant to Rule 81(2) filed on 16 June 2006, but due to
14:06:53 7 the ex parte nature of this type of application it will
14:06:56 8 not be subject of this hearing. I intend for this
14:07:01 9 application to be subject to an ex parte and in camera
14:07:06 10 hearing with the Prosecution to be held on Wednesday,
14:07:11 11 28 June 2006 at 2 o'clock at the Pre-Trial courtroom.
14:07:18 12 On the other hand, I realise that in the second part of
14:07:21 13 the hearing held on 24 May 2006 a number of logistical
14:07:26 14 issues concerning, for the most part, Mr Lubanga and the
14:07:34 15 Defence team were discussed.
14:07:35 16 Thus, before focusing our attention on the disclosure
14:07:38 17 process, I would like, as a preliminary matter, to follow
14:07:42 18 up on those issues. Besides, at the end of the hearing,
14:07:47 19 the parties will be given an opportunity to call the
14:07:52 20 attention of the single judge on any other issue they
14:07:55 21 intend to.
14:07:57 22 Is this way of proceeding acceptable by the parties --
14:08:01 23 the Prosecution, the Defence?
14:08:04 24 Then let's start with the preliminary question matters.
14:08:09 25 The first one is related to the computer access by

14:08:14 1 Mr Lubanga. In the hearing of 24 May 2006 the single
 14:08:20 2 judge was informed by the representative of the Registry
 14:08:24 3 that:

- 14:08:25 4 1. A computer with the Ringtail programme was going to
 14:08:32 5 be made available to Mr Lubanga in the coming days so
 14:08:36 6 that he could have unrestricted access to the evidence
 14:08:42 7 and materials disclosed between the parties for the
 14:08:45 8 purpose of the confirmation hearing;
- 14:08:47 9 2. That such computer was going to be connected to a
 14:08:51 10 computer in the Office of the Public Counsel for the
 14:08:56 11 Defence in order to avoid using CDs and pen drives;
- 14:09:00 12 3. that Mr Lubanga was going to receive gradual training
 14:09:04 13 in the Ringtail software;
- 14:09:06 14 4. that Mr Lubanga will have a printer available to him
 14:09:11 15 in the Detention Unit;

14:09:14 16 And, finally, that the directive was going to be issued
 14:09:17 17 which will make it possible to manage properly the use of
 14:09:21 18 the computer at the Detention Unit.

14:09:25 19 So, first, I would like to ask the Registry to explain
 14:09:28 20 the status of the implementation of these procedures.

14:09:34 21 MR DUBUISSON (interpretation): Thank you, your Honour. As
 14:09:43 22 regards the Registry and the implementation, we spoke on
 14:09:50 23 these issues on 24 May. First of all, the Detention
 14:09:56 24 Centre of the International Criminal Court is located in
 14:09:59 25 a specific block in a very extensive complex, the complex

14:10:04 1 of Scheveningen. In order to work there we need to work
14:10:11 2 in total cooperation and coordination with the Dutch
14:10:14 3 authorities.
14:10:17 4 Thus, as I indicated on 24 May, we wished to install a
14:10:27 5 computer. The computer has been delivered to the ICC
14:10:33 6 block in the Scheveningen complex. It is already
14:10:37 7 operational, in that one can use the computer with CDs.
14:10:43 8 Now, the end objective is to have a connection, but quite
14:10:49 9 substantial work still needs to be done, notably in
14:10:54 10 cabling within the complex for that to be possible. That
14:10:58 11 cabling work was done this week, so normally, at this
14:11:00 12 point in time, today the computer should be connected.
14:11:08 13 However, we do have a problem as regards the software --
14:11:12 14 the software that should normally be installed on that
14:11:15 15 computer. The software has to be configured, and to
14:11:23 16 configure that computer so that it can cope with the
14:11:26 17 documentation and that a search engine can be used we
14:11:31 18 need to work on the basis of a protocol, and I will
14:11:34 19 return to this issue later, because the issue of the
14:11:37 20 protocol is a problem in itself.
14:11:40 21 Now, as regards training, we have contacted a sister
14:11:46 22 institution which shares the same buildings within this
14:11:53 23 prison, and we have organised and set up the training.
14:11:58 24 There are two types of training: there is preliminary
14:12:02 25 training regarding accessing the computer and regarding

14:12:09 1 general use of the computer, and the second training is
14:12:14 2 use -- is training in use of the Ringtail programme of
14:12:18 3 which we spoke. I hope I have responded fully to your
14:12:22 4 question.

14:12:24 5 JUDGE STEINER: Just a clarification. You have mentioned the
14:12:39 6 problems with a protocol. Is it with a protocol or a
14:12:46 7 specific protocol? I didn't understand; could you please
14:12:50 8 clarify?

14:12:52 9 MR DUBUISSON (interpretation): As you know, the protocol is
14:12:57 10 something which is specifically attached to documents
14:13:01 11 submitted to the Registry. In a way, the protocol is not
14:13:08 12 connected to communication between the parties. However,
14:13:11 13 because we are installing a specific programme in a
14:13:14 14 computer for Mr Lubanga, and at the request of the
14:13:19 15 parties we are installing Ringtail, because Ringtail will
14:13:24 16 be the means for presenting evidence here at the hearing,
14:13:31 17 the computer must be configured on the basis of
14:13:36 18 something, and today that basis is the protocol, but this
14:13:40 19 is something which needs yet to be discussed.
14:13:43 20 The Ringtail software itself has been installed on the
14:13:46 21 computer already and, to be specific, training will be
14:13:53 22 provided in the French language on the 27th and the
14:13:58 23 28th -- 26th and 27th.

14:14:02 24 JUDGE STEINER: Would the Defence like to say something about
14:14:05 25 this matter?

14:14:08 1 [2.14 p.m.]

14:14:08 2 ME FLAMME (interpretation): Yes, your Honour. I was
14:14:15 3 informed myself, because I was quite concerned about this
14:14:22 4 matter. In relation to the computer and the training,
14:14:28 5 I have been told -- and this confirms what Mr Dubuisson
14:14:34 6 has said -- the organisers were waiting for French
14:14:40 7 language information in order to be able to provide
14:14:45 8 French language training to Mr Lubanga. Mr Lubanga needs
14:14:49 9 basic training in the French -- through French before
14:14:54 10 specific training on use of the Ringtail programme. So
14:15:00 11 I was concerned that basic training had not yet been
14:15:04 12 provided, but if I have understood the Registrar
14:15:06 13 correctly, the document in French or the training in
14:15:08 14 French will be available in order to allow us to begin
14:15:16 15 next week.
14:15:18 16 Now, another issue of concern to the Defence but which
14:15:24 17 has no connection to the Registry or the Office of the
14:15:30 18 Prosecutor, we, in order to save time, had wanted to
14:15:34 19 obtain CD-ROM copies for Mr Lubanga so that he could
14:15:41 20 already at this stage use the computer available to him
14:15:44 21 to view CD-ROMs. This would not need -- or not require
14:15:48 22 specific training.
14:15:54 23 It has not been possible for us to enter the Detention
14:15:58 24 Centre with CDs. So at this stage we have had to print
14:16:06 25 the content of the CDs provided to us by the Prosecutor,

14:16:11 1 which is quite a voluminous amount of documentation, and
14:16:16 2 have had to enter the Detention Centre with large volumes
14:16:22 3 of printed material, which is not practical for us, so we
14:16:28 4 would request that provisions be made so that, as at
14:16:37 5 ICTY, for instance, a form is provided so that CD-ROMs
14:16:44 6 may be brought into the Detention Centre.
14:16:47 7 Our request is to be able to work with CD-ROMs for the
14:16:51 8 time being and to be able to provide to Mr Lubanga in the
14:16:55 9 Detention Centre CD-ROMs provided either by the
14:16:58 10 Prosecutor or by the Registry so that we can finally
14:17:03 11 begin work, because, as I have said before, Mr Lubanga is
14:17:07 12 the most important person in the Defence team and it is
14:17:11 13 from him that the information must come regarding the
14:17:14 14 charges and the evidence which is tendered against him.
14:17:18 15 So that is what I wish to say at this juncture regarding
14:17:23 16 the difficulties encountered by us. Thank you.

14:17:27 17 JUDGE STEINER: Thank you very much. The problem of the
14:17:35 18 CD-ROMs, or the possibility of allowing Mr Lubanga to
14:17:40 19 consult documents and evidence through CD-ROMs, I would
14:17:45 20 like the Registry and then the Prosecution to give their
14:17:48 21 views on that.

14:17:50 22 MR DUBUISSON (interpretation): Thank you, your Honour. As
14:17:57 23 I mentioned when I first took the floor, what we have
14:18:02 24 done is run a cable -- physically run a cable into the
14:18:09 25 facilities. Now, that work has been done. Once -- now

14:18:13 1 that that has been done, it will no longer be necessary
14:18:16 2 to carry CD-ROMs into the Detention Centre. Information
14:18:20 3 will be able to travel on a cable from the court to the
14:18:27 4 Detention Centre. The connection will be to the Office
14:18:37 5 of Public Counsel for the Defence.
14:18:38 6 Now that the cabling has been done, I think that the
14:18:40 7 problem of CDs has been resolved. However, if the
14:18:47 8 cabling problem has not been resolved totally -- and
14:18:52 9 I would ask the Defence to check that this is working as
14:18:55 10 it should -- we will in that case take measures to ensure
14:18:59 11 that CDs can be used inside the Detention Centre.
14:19:06 12 ME FLAMME (interpretation): Your Honour, if I might, I would
14:19:08 13 like to add something to this. We ourselves are
14:19:17 14 constantly learning, as is the Registry, the Defence, and
14:19:21 15 the Office of the Prosecutor. These are highly
14:19:27 16 specialised software packages with which we are not
14:19:30 17 familiar, but I had imagined that all of the material
14:19:38 18 that would be disclosed by the Prosecutor would be
14:19:44 19 included on the Ringtail. However, the Prosecutor
14:19:50 20 explained to me at our last meeting that only
14:19:55 21 incriminatory evidence communicated by the Prosecutor
14:20:02 22 will be included in the Ringtail programme, or
14:20:08 23 exculpatory material will simply be provided to the
14:20:15 24 Defence for inspection in the offices of the Prosecutor
14:20:18 25 and will be communicated on CD-ROM, but will not be part

14:20:22 1 of the Ringtail. It is therefore important for us not
14:20:28 2 only to have the Ringtail but also to be able to provide
14:20:32 3 copies of CD-ROMs to our client at the Detention Centre.
14:20:38 4 Thank you.

14:20:39 5 JUDGE STEINER: The Prosecution?

14:20:45 6 MR WITHOPF: Your Honour, we have only very few remarks to
14:20:49 7 make. Obviously, these problems and these difficulties
14:20:52 8 are mainly issues between the Defence and the Registry.
14:20:57 9 The Prosecution notes that, unfortunately, against the
14:21:02 10 background -- and I'm quoting my learned friend from the
14:21:05 11 Defence -- that the Prosecution has already disclosed
14:21:09 12 voluminous amounts of documentation, that in such a
14:21:14 13 situation after three months since Mr Lubanga has been
14:21:18 14 surrendered to the court he's not yet in a position to
14:21:26 15 probably use the disclosed materials.
14:21:28 16 On the issue of CDs, the Prosecution would suggest, for
14:21:34 17 pure practical reasons, instead of using CDs, using pen
14:21:39 18 drives. The Prosecution has a slight concern that the
14:21:43 19 CDs can be used, if broken, for other purposes than they
14:21:50 20 are supposed to be used.
14:21:53 21 In respect to the last remark made by my learned friend
14:21:57 22 from the Defence, there appears to be a confusion between
14:22:03 23 what is in the case file, what is in Ringtail, what is
14:22:08 24 provided on the CD. This is an issue, your Honour, we
14:22:12 25 would come back in the context of our presentation on the

14:22:16 1 status of disclosure later on. This is not only a
14:22:19 2 concern for us. I think there is a learning curve -- one
14:22:26 3 we had to make and one, obviously, the Defence has to
14:22:29 4 make as well. I think these issues can be dealt with
14:22:32 5 mostly between the Registry and the Defence.

14:22:38 6 JUDGE STEINER: Thank you very much. So, as I see, we will
14:22:44 7 come back to this matter a little bit later in discussing
14:22:46 8 the procedure on filing and communication of evidence.

14:22:54 9 So let us move a little bit forward, and in relation to
14:23:04 10 the hearing on 24 May 2006 the single judge was informed
14:23:10 11 by the representative of the Registry and by Me Flamme
14:23:16 12 that -- so we're talking here again about the programme,
14:23:20 13 the Ringtail programme to be made available to the
14:23:25 14 Defence -- I'm not talking any more about Mr Lubanga and
14:23:32 15 the training of Mr Lubanga but of the Defence team --
14:23:37 16 and, also, Me Flamme had requested the appointment of an
14:23:40 17 investigator and had provided to the Registry the name of
14:23:45 18 a person suggested by Mr Lubanga who was on site in
14:23:51 19 Bunia. However, the person had not sent to the Registry
14:23:53 20 yet the necessary documentation. And, also, Me Flamme
14:23:59 21 had requested the appointment of some interns and the
14:24:02 22 Registry was considering such a request. So I would like
14:24:07 23 to ask the Registry to explain the status of these
14:24:11 24 issues.

14:24:13 25 MR DUBUISSON (interpretation): Thank you, your Honour.

14:24:20 1 I will be brief. We have informed the Defence that we
14:24:28 2 can make laptop computers available to the Defence, so it
14:24:34 3 is up to the Defence to make the necessary contacts to
14:24:39 4 have the computers installed and to have any necessary
14:24:44 5 training. I don't think that there should be any further
14:24:47 6 difficulty on that issue.

14:24:48 7 As regards the second matter, availability of
14:24:51 8 investigators, I would like to underline that it is
14:24:56 9 not -- there is no difficulty for the Registry to make an
14:25:00 10 investigator available or interns, because there was the
14:25:04 11 issue of interns, but I would prefer that the Defence
14:25:07 12 take the floor on this issue because the Registry has no
14:25:14 13 difficulties in this connection and needed at the time
14:25:18 14 further details on the name of the individual.

14:25:21 15 JUDGE STEINER: Me Flamme, please.

14:25:24 16 ME FLAMME (interpretation): Thank you, your Honour.

14:25:28 17 Certainly there are a certain number of subjects which we
14:25:33 18 should deal with. To start with, where it concerns the
14:25:38 19 easiest of them, the computers, laptops have arrived
14:25:42 20 today, so we will be able to start. We have already had
14:25:49 21 initial training concerning Ringtail without having
14:25:54 22 laptops, so we have been able to continue. I think we
14:25:56 23 will be able to continue very quickly with the work, with
14:26:03 24 these laptops with the Ringtail programme, and I propose
14:26:06 25 that at the next hearing we will be able to inform you of

14:26:11 1 the progress that has been made.

14:26:18 2 Where it concerns the interns that we've asked for,

14:26:21 3 straight after the hearing we had contacts with the

14:26:26 4 Registrar who confirmed that this was a request which was

14:26:29 5 totally possible, and I immediately made a written

14:26:33 6 request to the Defence section, but for the moment I have

14:26:36 7 not had a response from the Defence section concerning

14:26:40 8 the acceptance or not of these interns.

14:26:46 9 I also have to add that the Defence section has been very

14:26:49 10 busy in the last weeks and that there are also problems,

14:26:52 11 I think, of moving. So I think that -- I hope to be able

14:26:59 12 to get a response before the end of this month, because

14:27:05 13 I would like to be able to hire one or two interns such

14:27:11 14 that they can be able to undertake the reading of -- such

14:27:16 15 voluminous amounts of reading of the documents

14:27:20 16 transmitted by the Registry.

14:27:23 17 Another point, a third point, which is a very difficult

14:27:25 18 point which I would like to speak about today, is the

14:27:28 19 issue of going to the -- of the Defence team going to the

14:27:41 20 Democratic Republic of Congo. We have expressed the wish

14:27:43 21 to be able to do so as soon as possible to Goma, Kinshasa

14:27:48 22 and Bunia, to be able to have contacts, which are very

14:27:51 23 significant. We know there are problems, obviously,

14:27:53 24 concerning such trips which have been requested. I don't

14:27:55 25 know if you would like me to speak about that for the

14:27:58 1 moment, or would you rather that I speak about that at
14:28:02 2 another time during the hearing?

14:28:04 3 JUDGE STEINER: I would prefer if you go ahead and speak
14:28:06 4 about all problems related to this topic.

14:28:09 5 ME FLAMME (interpretation): We have, firstly, asked -- well,
14:28:13 6 because it was a period which seemed to us to be
14:28:18 7 appropriate, we asked to carry out a trip to DRC in the
14:28:22 8 last part of the month of July, because we envisage that,
14:28:28 9 given the hearing on 27 August and 28 September, we don't
14:28:34 10 think it will be perhaps appropriate to go and we will
14:28:37 11 probably be confronted with a lot of work to carry out
14:28:40 12 here in The Hague when it comes to preparing the hearing
14:28:43 13 and drafting motions, so work which essentially has to be
14:28:51 14 done in the office.

14:28:52 15 So we had contact with the person responsible for travel
14:28:56 16 and logistics there, and we were told that between
14:29:01 17 15 July and 15 August it was out of the question to
14:29:04 18 travel to DRC because of logistical reasons -- purely
14:29:10 19 logistical reasons related to the elections. So we
14:29:13 20 immediately, at the same time, carried out a request to
14:29:16 21 leave tomorrow, so that was 24 June, until 5 July, and we
14:29:22 22 have made this request. We have had confirmation that
14:29:26 23 probably it won't be a problem at that time to organise
14:29:29 24 our trip, with all the logistics that go with it in the
14:29:35 25 field, but we have very quickly received a letter from

14:29:39 1 the Defence section saying that it wasn't possible either
 14:29:43 2 for us to travel at that time, which causes a problem --
 14:29:49 3 a very serious problem for us, that is to say, that we
 14:29:53 4 don't know when it will be possible to travel there, if
 14:29:57 5 it will be possible to travel there, and when it will be
 14:29:59 6 possible to travel. And we see that, as was said very
 14:30:04 7 well by the -- in a -- tempus irreparabile fugit, as they
 14:30:12 8 say in Latin, we know that we're going to -- there's this
 14:30:16 9 hearing coming up on 27 September, time is passing, and
 14:30:20 10 we are confronted with a situation where perhaps we won't
 14:30:23 11 be able to go to the DRC before that date. While we
 14:30:26 12 really have to see people in the field, and there are
 14:30:31 13 people who can't move and they have information which is
 14:30:34 14 very important to the Defence, and that is the problem
 14:30:37 15 that we're confronted with.
 14:30:40 16 [2.30 p.m.]
 14:30:40 17 JUDGE STEINER: Could the Registry confirm this information
 14:30:45 18 and maybe clarify or explain and, if possible, to inform
 14:30:52 19 the Chamber whether and when the Defence could travel to
 14:30:57 20 the field?
 14:30:58 21 MR DUBUISSON (interpretation): Thank you, your Honour. Yes,
 14:31:06 22 as we have already said previously, the situation in the
 14:31:12 23 Congo, particularly following the elections, will create
 14:31:18 24 a greater request of actors in the field who normally
 14:31:25 25 support us -- that is to say, particularly MONUC, for

14:31:30 1 example, who help us with flights, for example, for
14:31:33 2 people to move there, and as well as a certain aid there
14:31:38 3 as well, so all this infrastructure, all this help that
14:31:42 4 we receive through the actors in the field will be
14:31:45 5 mobilised particularly for other ends at that particular
14:31:48 6 time. That is a fact, and we have to take that into
14:31:51 7 account.

14:31:54 8 This fact does not only affect the Defence but it also
14:31:58 9 affects the work of the court in general, including the
14:32:00 10 work of the Office of the Prosecutor. It is a fact;
14:32:04 11 that's it.

14:32:05 12 Now, does it affect the rights of the Defence and is it
14:32:10 13 enough to say there's this fact and that's it? No,
14:32:14 14 that's not enough. What we always try to do and what
14:32:17 15 we're trying to do, as far as possible, is to plan a
14:32:20 16 mission, and to see how ourselves we can help this
14:32:26 17 mission to take part in the field, and, for example, with
14:32:30 18 a defence investigator or the counsel himself, if he
14:32:33 19 decides to go to the field, and this question of
14:32:38 20 assistance and the means that we'll make available is --
14:32:41 21 and the risks that are taken not only by the court but
14:32:46 22 also by the -- those people who are involved themselves
14:32:48 23 when they go to the field, this risk management is
14:32:51 24 something that has to be discussed.

14:32:53 25 So to plan a mission during a period in a specific time

14:32:58 1 in which we can't have complete support and bring it back
14:33:03 2 and say: okay, we'll go tomorrow, that also is not
14:33:06 3 something which is feasible, because it really does
14:33:10 4 require -- or it causes difficulties for the court.
14:33:14 5 We also have to be able to measure what type of
14:33:17 6 assistance is needed by the Defence team. And, as you
14:33:23 7 know, we have not, I would say, armed forces in place.
14:33:27 8 We work together with the authorities, and perhaps
14:33:31 9 certain authorities -- perhaps the Defence might not want
14:33:34 10 to have certain authorities who work with us, but -- or
14:33:38 11 at least with the Defence, and so it really does require
14:33:40 12 a high degree of preparation.
14:33:43 13 So, certainly, we will do whatever we can within the
14:33:48 14 realms of possible [as interpreted] to be able to ensure
14:33:52 15 that the Defence mission can take place, but we certainly
14:33:55 16 don't lose sight of the rights of the Defence, but at the
14:33:57 17 same time we also have to ensure that there is security
14:34:04 18 as well as risk management and look at the threat during
14:34:08 19 this exact period where we don't have the same resources
14:34:11 20 available to us that we would have had beforehand.
14:34:14 21 So I can't say any more without going into a large degree
14:34:19 22 of detail on security questions, so I don't want to
14:34:21 23 elaborate further on this subject, but I think that in
14:34:29 24 the immediate future it's not possible, but I think that
14:34:32 25 what we can do something [as interpreted] is to find a

14:34:36 1 solution soon -- soon, certainly. Thank you.

14:34:47 2 JUDGE STEINER: This idea of having something soon, do we

14:34:53 3 assume, for instance, that as soon after the elections,

14:34:59 4 for instance?

14:35:01 5 MR DUBUISSON (interpretation): Yes, taking into account the

14:35:04 6 date that was put for the hearing for the confirmation of

14:35:09 7 charges, the dates which are linked to this confirmation

14:35:11 8 of charges concerning certain communications, and

14:35:15 9 effectively we will do whatever we can and -- when we

14:35:18 10 know about the exact dates. This -- there are also

14:35:27 11 aspects linked to risks and threats, but we will try to

14:35:29 12 do that in the period that's nearest to the hearings

14:35:31 13 without compromising the deadline and the work of the

14:35:34 14 parties at this time, which is very important to them.

14:35:40 15 JUDGE STEINER: In this period immediately before the

14:35:43 16 elections, in the views of the Registry it's totally

14:35:47 17 impossible to have anything planned, because we see now

14:35:51 18 we have a period here between 15 July and 15 August, and

14:35:57 19 we are still in the 23rd of June, so --

14:36:00 20 MR DUBUISSON (interpretation): No, we can plan something

14:36:05 21 before this date. The only issue which is one to wait

14:36:13 22 for is the risk management. The Defence has to accept

14:36:18 23 that if we have a mission during July, given that we

14:36:22 24 won't have the necessary support to -- if I take a

14:36:26 25 concrete example -- be evacuated, if there's a problem,

14:36:31 1 then it's necessary for this risk management to be
14:36:33 2 discussed with the Defence. We are ready to discuss this
14:36:36 3 with the Defence and to see how we can assist the Defence
14:36:41 4 without compromising the neutrality of the Registry,
14:36:48 5 while of course providing the security which is essential
14:36:50 6 to the Defence team, because today we are providing it to
14:36:54 7 the Prosecution team as well, and of course it is very
14:36:56 8 important for us to ensure the equality of arms in a
14:36:59 9 process which should be equitable and swift.

14:37:06 10 JUDGE STEINER: So may I assume that the Registry and the
14:37:09 11 Defence will be in touch to discuss all these matters and
14:37:11 12 then any decision should be communicated to the Chamber?

14:37:16 13 ME FLAMME (interpretation): Yes, your Honour, but
14:37:21 14 nevertheless, just a couple of suggestions on the part of
14:37:23 15 the Defence. As you know, we had proposed a candidate
14:37:33 16 who could act as an investigator and we hoped that this
14:37:36 17 process of appointment would be quicker than it has, and
14:37:40 18 it seems that it's not so easy following certain
14:37:44 19 documents which haven't yet been transmitted, and we all
14:37:48 20 know that the communication in -- with the field isn't
14:37:52 21 that easy, either. So one of my suggestions would be
14:37:55 22 that, perhaps through the presence of staff -- court
14:38:04 23 staff in the field, these people could perhaps contact
14:38:09 24 these people themselves and see with them if, quickly,
14:38:15 25 they could get hold of the necessary documents and

14:38:18 1 perhaps to get this person to come to The Hague to be
14:38:24 2 able to already carry out a certain number of
14:38:28 3 investigations in the field.

14:38:29 4 And another suggestion that we would have is, if there
14:38:32 5 really are problems, we will already carry out a visit --
14:38:40 6 perhaps a limited visit just to Kinshasa, for example,
14:38:44 7 which shouldn't pose a lot of problems, I think. For
14:38:47 8 travelling to Kinshasa, it can be done easily, and from
14:38:51 9 Kinshasa perhaps we could have some significant contacts
14:38:55 10 which could help us progress significantly.

14:39:06 11 JUDGE STEINER: So I hope that the suggestions made by the
14:39:09 12 Defence are considered by the Registry, and the Chamber
14:39:12 13 will be waiting for information on the progress of these
14:39:15 14 conversations on this topic.

14:39:20 15 I think now we can move to the Prosecution's initial
14:39:34 16 remarks on the process of disclosure. I would invite the
14:39:42 17 Prosecution to give an overview on how the process of
14:39:45 18 disclosure has taken place since the decision on the
14:39:50 19 final system of disclosure was taken, and how he
14:39:54 20 envisioned the process of disclosure will take place from
14:39:59 21 now on to the next Status Conference. You have the
14:40:04 22 floor.

14:40:05 23 MR WITHOPF: Thank you very much, your Honour. Your Honour,
14:40:09 24 prior to making substantive submissions, I wish to inform
14:40:12 25 your Honour on how the Prosecution this time has divided

14:40:17 1 its work for the purpose of today's Status Conference.

14:40:21 2 I have invited my colleague, Ms Solano, to provide you

14:40:32 3 with the Prosecution's update of the status of disclosure

14:40:35 4 and the related court filings. It will be a detailed

14:40:37 5 update covering all aspects of disclosure, namely,

14:40:40 6 disclosure of incriminatory evidence, disclosure of

14:40:44 7 potentially exculpatory evidence, and inspection of

14:40:48 8 Rule 77 materials.

14:40:51 9 Ms Solano's submissions will also cover all related

14:40:53 10 aspects in respect of the filings to the court. I will

14:40:59 11 then, afterwards, with your permission, your Honour,

14:41:02 12 address a number of specifics and a number of issues that

14:41:07 13 arose in the context of the past disclosure, and I will

14:41:12 14 then cover any questions, any further discussion that

14:41:16 15 will arise out of our presentations later on. Provided

14:41:23 16 that this is agreeable, your Honour, I would like to

14:41:25 17 invite Ms Solano to make the presentation.

14:41:31 18 MS SOLANO: Your Honour, good afternoon. I will proceed with

14:41:37 19 the report on the disclosure activities that have taken

14:41:39 20 place since the 24 May hearing. The Office of the

14:41:44 21 Prosecutor has met with the Defence on three occasions

14:41:46 22 and at least at the mutually agreed intervals of two

14:41:52 23 weeks. On 2 June, pursuant to its Rule 77 obligations,

14:41:56 24 the Prosecution provided the Defence with the opportunity

14:41:59 25 to physically inspect five documents comprising 22 pages,

14:42:04 1 and provided electronic copies thereof.

14:42:07 2 On 9 June, pursuant to its Article 61(3)(b) obligations,

14:42:12 3 the Prosecution disclosed to the Defence nine documents

14:42:15 4 comprising 118 pages, and a video of a duration of

14:42:21 5 38 minutes. On the same day, pursuant to its

14:42:25 6 Article 67(2) obligations, the Prosecution disclosed

14:42:28 7 six documents comprising 85 pages.

14:42:32 8 The Prosecution also provided the Defence with the

14:42:35 9 opportunity to inspect one 1-page document and provided

14:42:40 10 an electronic copy thereof. A total of 16 documents and

14:42:45 11 204 pages plus one video were thus disclosed or provided

14:42:49 12 for inspection on 9 June.

14:42:51 13 On the occasion of this 9 June meeting the Prosecution

14:42:54 14 invited the Defence, as it had already done on 10 April,

14:42:57 15 to identify and communicate to the Prosecution additional

14:43:01 16 keywords that might be incorporated in the Office of the

14:43:07 17 Prosecutor's searches for potentially exculpatory

14:43:10 18 evidence. To date, no response has been received to this

14:43:13 19 invitation from the Defence.

14:43:16 20 The Prosecution also requested the Defence, as it had

14:43:20 21 equally done on 10 April, to indicate categories of

14:43:24 22 evidence and information it considers material in the

14:43:27 23 sense of Rule 77. Again, to date, no response to this

14:43:33 24 request has been received by the Prosecution.

14:43:37 25 On 21 June the Prosecution disclosed to the Defence a

14:43:41 1 further 17 documents comprising 35 pages that it intends
14:43:47 2 to rely on at the confirmation hearing pursuant to its
14:43:50 3 Article 61(3)(b) obligations. It also disclosed five
14:43:55 4 documents, comprising 14 pages, as potentially
14:43:57 5 exculpatory evidence and provided the Defence with
14:44:00 6 printed copies of the handwritten documents.
14:44:02 7 Finally, the Prosecution provided the Defence with the
14:44:05 8 opportunity to inspect eight documents comprised of
14:44:09 9 74 pages -- all of this in the inspection room that the
14:44:15 10 OTP has at its disposal for this purpose.
14:44:18 11 On this occasion, on 21 June, only electronic copies of
14:44:23 12 the documents were provided for inspection, because paper
14:44:27 13 copies are not in the possession or control of the
14:44:30 14 Prosecution, as will be explained by Mr Withopf later on
14:44:34 15 today.
14:44:38 16 These disclosure activities that I have just reported,
14:44:41 17 your Honour, bring the total number of materials
14:44:43 18 disclosed pursuant to the Prosecutor's obligations under
14:44:47 19 Article 61(3)(b) to 97 documents comprising 1,659 pages
14:44:54 20 plus one video. The number of materials disclosed as
14:44:58 21 potentially exculpatory evidence is now 40 documents
14:45:02 22 comprising 371 pages and, finally, the number of
14:45:05 23 materials which have now been provided for inspection
14:45:08 24 runs to 14 documents comprised of 97 pages.
14:45:08 25 [2.45 p.m.]

14:45:14 1 This brings the overall number of disclosed or inspected
14:45:17 2 materials to 151 documents, 2,127 pages and one video.
14:45:25 3 While it prepared today's report on disclosure
14:45:28 4 activities, your Honour, the Prosecution realised that
14:45:30 5 there is one document which it has inadvertently
14:45:34 6 disclosed to the Defence twice, in both cases as
14:45:36 7 potentially exculpatory evidence. The Prosecution has in
14:45:41 8 place systems to prevent such mistakes, and while we had
14:45:46 9 not previously had the opportunity to inform our
14:45:48 10 colleagues from the Defence of this, we take the
14:45:51 11 opportunity to do so now. The document concerned is
14:45:55 12 DRC-OTP-00190153, and it was disclosed to the Defence on
14:46:02 13 20 April as well as on 23 May.
14:46:06 14 I will now proceed, your Honour, briefly with an account
14:46:08 15 of the filings in the record of the case that are related
14:46:11 16 to the disclosure activities that I have just mentioned.
14:46:15 17 I will first address the filing of the originals of all
14:46:18 18 documents the Prosecution intends to rely on at the
14:46:21 19 confirmation hearing. The materials disclosed to the
14:46:25 20 Defence as incriminating evidence on 20 April were filed
14:46:29 21 first in the case record on 21 April while the interim
14:46:34 22 system of disclosure was still in force, and the original
14:46:43 23 documents were filed on 22 June. The same is the case
14:46:46 24 for the documents that were disclosed to the Defence as
14:46:49 25 incriminating evidence on 8 May.

14:46:52 1 Originally, these documents were filed in the case record
14:46:56 2 on 9 May, and the originals have now been filed on
14:47:02 3 22 June. The originals of the documents which have been
14:47:08 4 disclosed to the Defence since the decision on the
14:47:12 5 permanent system of disclosure has been in place -- that
14:47:15 6 is, the documents which have been disclosed to the
14:47:18 7 Defence on 23 May -- were filed with the Registry on
14:47:23 8 2 June. Those that had been disclosed --
14:47:23 9 THE ENGLISH INTERPRETER: The interpreters request that
14:47:34 10 Julieta slow down.
14:47:34 11 MS SOLANO: And then, finally --
14:47:34 12 JUDGE STEINER: Please, sorry to interrupt you; the
14:47:36 13 interpreters are asking you, please, to slow down a
14:47:39 14 little bit, because it's been difficult for them.
14:47:44 15 MS SOLANO: Of course. I was about to mention the final set
14:47:47 16 of incriminating documents which were disclosed to the
14:47:50 17 defence on 21 June. The originals of those documents
14:47:54 18 have now been filed with the court on 22 June.
14:47:59 19 I will now move on, your Honour, to the filings related
14:48:03 20 to the disclosure of potentially exculpatory evidence.
14:48:08 21 Since the 24 May hearing the Prosecution has filed three
14:48:11 22 disclosure notes in the record of the case, as it is
14:48:15 23 required to do under the permanent system of disclosure.
14:48:20 24 These disclosure notes were filed on 26 May, on 12 June,
14:48:25 25 and on 22 June.

14:48:28 1 These three disclosure notes add to the communication to
14:48:32 2 the Chamber of the disclosures of potentially exculpatory
14:48:36 3 evidence that took place between the Prosecution and the
14:48:39 4 Defence on 31 March and on 20 April, and which had been
14:48:45 5 filed in the record respectively on 3 April and on
14:48:50 6 21 April.

14:48:53 7 Finally, as for the materials provided for inspection
14:48:57 8 pursuant to Rule 77, all of these activities took place
14:49:02 9 after the 24 May hearing. The inspection report for the
14:49:07 10 materials provided for inspection on 2 June was filed on
14:49:12 11 8 June. The inspection report for the materials filed
14:49:15 12 [sic] on 9 June was filed on 12 June, and the inspection
14:49:21 13 report for the materials inspected on 21 June was filed
14:49:25 14 on 22 June. This brings my report to a close, your
14:49:31 15 Honour. Thank you.

14:49:35 16 JUDGE STEINER: Thank you very much. Then, with this
14:49:50 17 comprehensive report, I will apologise if later on I will
14:49:54 18 come back to some specific questions, because sometimes
14:49:58 19 it's difficult to localise in the documents the specific
14:50:04 20 points that the Chamber would like to have a little bit
14:50:09 21 clarified. So I would invite Mr Withopf to continue.

14:50:23 22 MR WITHOPF: Thank you very much, your Honour. Actually, my
14:50:25 23 submissions may contribute and pre-empt some of the
14:50:27 24 questions you may have. At the beginning of my
14:50:31 25 submissions I wish to again emphasise that counsel for

14:50:35 1 the Defence today has twice -- has twice confirmed that
14:50:39 2 the Prosecution in the past has disclosed voluminous
14:50:43 3 materials.

14:50:45 4 In this context, your Honour, a number of matters came up
14:50:50 5 that we want to inform the Pre-Trial Chamber and your
14:50:56 6 Honour about. First, I want to talk briefly about an
14:51:00 7 unproblematic aspect of chain of custody, just for the
14:51:04 8 purpose of providing you full information.

14:51:08 9 Whenever the Prosecution submits in the context of
14:51:12 10 disclosure and submission of incriminatory evidence --
14:51:16 11 whenever we submit originals to the Registry -- the
14:51:20 12 Prosecution uses a chain of custody form signed by both
14:51:25 13 the Prosecution and the Registry -- a procedure that is
14:51:29 14 in place and works very well.

14:51:32 15 Whenever the Prosecution submits electronic versions
14:51:36 16 instead of paper copies -- and, your Honour, I will come
14:51:40 17 back to this issue in a second -- both the Registry and
14:51:45 18 the Prosecution provide for what we call custody
14:51:52 19 signature. For this purpose the Prosecution and the
14:51:54 20 Registry were working together, a form has been developed
14:51:59 21 and, again, this is a procedure that works very well.

14:52:06 22 There are a number of other issues I wish to address, and
14:52:09 23 the first one is the aspect of handwritten documents. We
14:52:13 24 have, your Honour, in accordance with our courtesy
14:52:19 25 agreement with the Defence, provided to the Defence, in

14:52:24 1 all instances we have disclosed handwritten materials,
14:52:29 2 paper copies of such materials. You may recall, your
14:52:33 3 Honour, that this issue has been discussed at the
14:52:36 4 occasion of the 24 May hearing. There is a courtesy
14:52:40 5 agreement between the parties, and the Prosecution
14:52:45 6 provides, in addition to the electronic copies, paper
14:52:48 7 copies in order to accommodate the concern of the Defence
14:52:52 8 that electronic copies may not be readable.
14:52:56 9 I wish, however, in this context to inform your Honour --
14:53:02 10 and this addresses a concern that has been expressed by
14:53:04 11 my learned friend from the Defence in the context of the
14:53:07 12 last hearing -- that we have double checked whether in
14:53:13 13 the past handwritten documents have been disclosed or
14:53:16 14 not. This review has revealed that such handwritten
14:53:20 15 documents have not been disclosed. The Prosecution has
14:53:25 16 the impression that the Defence, certainly not
14:53:29 17 deliberately, is mixing up annexes to court filings --
14:53:34 18 and some of them are handwritten documents -- and
14:53:37 19 documents that have been disclosed in compliance with the
14:53:41 20 Prosecution's disclosure obligations.
14:53:46 21 We want to address a further and important element of the
14:53:51 22 Prosecution's disclosure practice, and we want to inform
14:53:56 23 your Honour about the reason -- and you may have noticed
14:54:00 24 it when reading the various disclosure reports -- why we
14:54:05 25 have indicated the provider of the document in all

14:54:11 1 instances in which the document was provided by the DRC
14:54:15 2 authorities. There is a particular reason, and the
14:54:17 3 Prosecution has informed in a letter the Defence counsel
14:54:22 4 about it.
14:54:24 5 The reason is, not surprisingly, the protection of
14:54:29 6 victims and witnesses. The underlying thought of
14:54:34 7 indicating the DRC authorities as the provider of certain
14:54:39 8 documents was -- and the underlying thought continues to
14:54:45 9 be -- to indicate to Thomas Lubanga Dyilo that even if
14:54:50 10 the documents contain names, identifying features,
14:54:55 11 addresses, email addresses, telephone numbers, in such
14:54:59 12 situations Thomas Lubanga Dyilo should know that these
14:55:05 13 documents were not provided by these individuals but by
14:55:08 14 the DRC authorities.
14:55:11 15 The alternative, your Honour, would be that the
14:55:15 16 Prosecution redacts such information in documents, which
14:55:20 17 would delay the disclosure of such documents and such
14:55:25 18 information, and it cannot be excluded that in such
14:55:30 19 situations the Prosecution would have to go before the
14:55:33 20 Pre-Trial Chamber seeking authorisation of such
14:55:37 21 redactions.
14:55:39 22 The Prosecution in this context has made an effort -- an
14:55:49 23 aggravated [sic] effort -- to balance the right of the
14:55:51 24 person under an arrest warrant, namely, Thomas Lubanga
14:55:55 25 Dyilo, to fair proceedings and to get the disclosure

14:55:58 1 materials as soon as possible, with the statutory duty of
14:56:00 2 the Prosecution to provide for the protection of victims
14:56:04 3 and witnesses. In this particular situation the
14:56:09 4 Prosecution has decided that the procedure as applied by
14:56:14 5 it is satisfactory for both proper disclosure and the
14:56:19 6 protection of victims and witnesses.
14:56:24 7 Your Honour, this is a complex issue, and the next issue
14:56:28 8 I'm going to address is also a complex one. It's the
14:56:34 9 filing in the case of the record of materials that were
14:56:39 10 disclosed as incriminatory evidence and that the
14:56:42 11 Prosecution has received in an electronic format only.
14:56:49 12 Repeatedly the Prosecution has received materials -- in
14:56:54 13 particular obviously documents -- in electronic format,
14:56:59 14 and in electronic format only, meaning that in much of
14:57:04 15 such cases the Prosecution has downloaded such materials
14:57:07 16 from the internet which obviously are then publicly
14:57:15 17 available materials.
14:57:16 18 There are also other cases -- and these cases are rare --
14:57:19 19 that the Prosecution has received paper originals from a
14:57:25 20 variety of providers under the condition that the
14:57:30 21 originals need to be given back to the providers,
14:57:33 22 otherwise the Prosecution would have not received such
14:57:37 23 originals. The Prosecution has scanned the originals,
14:57:42 24 and obviously for that reason has only electronic
14:57:46 25 versions of such originals available, including for the

14:57:50 1 purpose of disclosure. Accordingly, the Prosecution has
14:57:55 2 filed the electronic versions of such documents.
14:58:03 3 There's one further aspect, and it's linked to a number
14:58:07 4 of observations that have been made today by my learned
14:58:10 5 colleague from the Defence we want to draw the attention
14:58:14 6 of your Honour to; namely, the fact that the Defence has
14:58:21 7 asked the Prosecution to provide annexes to court
14:58:28 8 filings, and to provide such annexes under the heading
14:58:33 9 of "disclosure".
14:58:35 10 The Prosecution, your Honour, is of the view that its
14:58:41 11 disclosure obligations do not entail the disclosure of
14:58:46 12 annexes to court filings. Access to court filings, in
14:58:51 13 our view, including access to annexes to court filings,
14:58:55 14 is provided by the Registry upon reclassification,
14:59:00 15 obviously, of previously ex parte materials as either
14:59:05 16 confidential or public. Accordingly, the Prosecution
14:59:09 17 would like to encourage the Defence to address such
14:59:13 18 requests directly to the Registry and not to the
14:59:17 19 Prosecution.
14:59:21 20 There's a last issue, your Honour, the Prosecution wishes
14:59:26 21 the Pre-Trial Chamber to be informed about, and this is
14:59:30 22 the matter related to documents and other materials that
14:59:34 23 are protected by Article 54(3)(e) of the Rome Statute.
14:59:41 24 We have provided you, at the occasion of the last
14:59:44 25 hearing, with statistics outlining the number of

14:59:47 1 documents that are concerned. We today give you an
14:59:52 2 update.

14:59:54 3 For 30 of such documents comprised of 178 pages the
14:59:59 4 restrictions have been lifted; for six documents
15:00:03 5 comprised of 123 pages the providers lifted the
15:00:09 6 restrictions under the condition of redactions. There
15:00:13 7 are a further two documents comprised of 21 pages,
15:00:18 8 restrictions have been lifted by the provider, with the
15:00:21 9 condition -- with conditions other than redactions, and
15:00:26 10 for 17 documents comprised of 133 pages the lifting of
15:00:33 11 restrictions has been refused by the various providers.

15:00:33 12 [3.00 p.m.]

15:00:41 13 The refusal of lifting of the restrictions is obviously
15:00:46 14 an issue that is of concern for the Prosecution and
15:00:49 15 certainly also for the Defence and the Chamber. For that
15:00:52 16 reason, the Prosecution will be in contact with the
15:00:55 17 various providers to negotiate about the scope of such
15:01:01 18 conditions and redactions, in particular, in respect of
15:01:07 19 documents that may contain information or evidence of
15:01:12 20 potentially exculpatory value for the Defence.

15:01:18 21 Internally, at this stage we have identified another
15:01:23 22 53 documents comprised of 313 pages that require lifting
15:01:28 23 of restrictions. The respective requests to the various
15:01:34 24 providers will be transmitted soon.

15:01:38 25 Your Honour, these were a number of issues that came up

15:01:43 1 in the context of the disclosure process up until now.

15:01:49 2 The Prosecution wants to use, with your permission, your

15:01:53 3 Honour, the opportunity to alert your Honour and the

15:01:57 4 Defence of a number of issues that the Prosecution

15:02:01 5 anticipates that may come up in the near future.

15:02:07 6 In respect of these matters, your Honour, the Prosecution

15:02:11 7 is about to determine -- and this remark relates to all

15:02:16 8 the matters I'm going to address now -- whether, and if

15:02:20 9 so to what extent, the Pre-Trial Chamber needs to get

15:02:24 10 involved.

15:02:26 11 The matters I'm talking about are likely to include

15:02:32 12 inter alia possible Rule 81 applications for redactions

15:02:37 13 of documents, mainly again for the obvious reasons to

15:02:42 14 provide for the protection of victims and witnesses;

15:02:47 15 possible Rule 81 applications for the same reason in

15:02:51 16 respect to video footage the Prosecution wants and has to

15:02:58 17 disclose to the Defence; and, furthermore, the

15:03:03 18 Prosecution envisages the need to -- again for reasons of

15:03:07 19 victims and witness protection -- the need to redact

15:03:13 20 documents that will be provided for physical inspection

15:03:15 21 pursuant to Rule 77 of the Rules of Procedure and

15:03:21 22 Evidence.

15:03:28 23 The last aspect I wish to address prior to coming to an

15:03:31 24 end of my submissions, the Prosecution is also confronted

15:03:35 25 with the fact that many of the witness statements it does

15:03:39 1 not intend to use for the purpose of the confirmation
15:03:43 2 hearing contain, or may contain, information or evidence
15:03:49 3 that may be of potentially exculpatory value for my
15:03:54 4 learned friends from the Defence.
15:03:56 5 The Prosecution in the context of its investigations has
15:04:02 6 talked [sic] to many people -- in this context to about
15:04:09 7 190 individuals -- and these contacts have resulted in
15:04:13 8 statements, either signed statements, or for a whole
15:04:17 9 variety of reasons not, or not yet, signed statements, in
15:04:24 10 investigator's notes or notes about screening interviews.
15:04:28 11 Obviously, pursuant to Article 67(2) of the Rome Statute,
15:04:33 12 if these statements contain potentially exculpatory
15:04:37 13 information, the Prosecution is under an obligation, and
15:04:40 14 will do so, to disclose such information to the Defence.
15:04:47 15 There is again a matter related to the protection of
15:04:50 16 victims and witnesses. The Prosecution at this stage,
15:04:57 17 for reasons that have been addressed at various
15:04:59 18 occasions, has a difficulty to provide the names of these
15:05:04 19 individuals to the Defence.
15:05:09 20 Your Honour, this brings our submissions -- our combined
15:05:13 21 submissions on the status of disclosure and the issues
15:05:18 22 that are related to disclosure -- were related in the
15:05:23 23 past and will be related in the future -- to an end.
15:05:26 24 Thank you very much.
15:05:27 25 JUDGE STEINER: Thank you very much. Before coming to the

15:05:32 1 details, I would like to give the floor to the Defence to
15:05:36 2 make its initial remarks on the current situation of the
15:05:41 3 process of disclosure. Me Flamme?
15:05:44 4 ME FLAMME (interpretation): Thank you, your Honour. I do
15:05:52 5 not have any specific comments to make for the time
15:05:54 6 being. I would simply like to draw your attention to a
15:06:02 7 problem with which we are faced. Owing to the fact that
15:06:11 8 Mr Lubanga's knowledge of the English language is not
15:06:15 9 sufficient to permit him to study documents available
15:06:21 10 only in that language -- decisions, motions,
15:06:25 11 applications, and justifying documents provided by the
15:06:32 12 Prosecutor, for instance -- it is therefore absolutely
15:06:36 13 necessary that as soon as a document is provided in
15:06:40 14 English that a French translation be provided of it as
15:06:46 15 soon as possible.
15:06:50 16 The problem arises in terms of procedure, and I mentioned
15:06:56 17 this in my latest application -- the latest application
15:06:59 18 submitted to the Chamber -- in connection with deadlines.
15:07:06 19 It is very difficult for the Defence to meet deadlines
15:07:10 20 that begin to run from the date at which an English
15:07:17 21 version of a document is provided in a case where the
15:07:22 22 client is not in a position to understand that document
15:07:25 23 on a first reading. It is very difficult for the Defence
15:07:31 24 to have to translate itself or explain itself the content
15:07:36 25 of such a document.

15:07:39 1 Mr Lubanga should be put in a position to be able to read
15:07:42 2 and understand such documents if he is to exercise the
15:07:47 3 rights of the Defence adequately. Therefore, it seems to
15:07:51 4 me the deadlines set on the Defence should only begin to
15:07:56 5 run from the date on which a French version of the key
15:08:01 6 documents are provided.

15:08:04 7 As regards the report on disclosure made by the
15:08:07 8 Prosecutor, evidence has been provided to us and there,
15:08:18 9 also, if the document -- and sometimes these documents
15:08:21 10 are very voluminous -- if the document is in the English
15:08:24 11 language, it is essential that the Prosecutor also
15:08:26 12 provide a French translation to the Defence. Thank you.

15:08:31 13 JUDGE STEINER: Just a matter for clarification, Me Flamme.

15:08:42 14 You were first talking about documents delivered or
15:08:47 15 disclosed by the Prosecution, the language or problems of
15:08:50 16 translation, but at the same time it seemed to me that
15:08:55 17 you were mentioning decisions, because decisions are the
15:09:01 18 ones that generate deadlines. What you were asking for
15:09:05 19 was for the translation of any decisions, even of the
15:09:09 20 Chamber? Maybe I misunderstood.

15:09:13 21 ME FLAMME (interpretation): To clarify, allow us to
15:09:17 22 distinguish between procedural documents such as judicial
15:09:21 23 decisions, applications, motions. The Defence is
15:09:29 24 beginning to encounter a serious difficulty in
15:09:34 25 communication with Mr Lubanga. It is very important that

15:09:37 1 Mr Lubanga be able to gain a knowledge of a decision, a
15:09:44 2 motion, an application, in English; that he be provided
15:09:51 3 with a French translation of that procedural document
15:09:56 4 before the time allowed to respond begins to run. If
15:10:05 5 deadlines are set by the Chamber I would request that
15:10:09 6 those deadlines only begin to run from the point in time
15:10:13 7 when the French translation is notified to the Defence --
15:10:18 8 the French translation of the document to which a
15:10:20 9 response must be provided. So that is my request as
15:10:26 10 regards procedural documents.

15:10:31 11 The problem, quite simply, is that documents originating
15:10:38 12 in the Office of the Prosecutor are always drafted in
15:10:41 13 English and the decisions issued by the Chamber are
15:10:48 14 issued in English, and often French translations are not
15:10:54 15 available to us for quite some time. This can create a
15:11:01 16 short-circuiting of the system, in that the time is lost
15:11:07 17 from the period allowed for a response.

15:11:14 18 Another issue is documents which are communicated by the
15:11:18 19 Prosecutor -- documents which may serve as evidence and
15:11:22 20 which are written only in English. This also presents a
15:11:27 21 problem for Mr Lubanga, who does not speak English and
15:11:34 22 who has a right to be provided with the French
15:11:39 23 translations of documents which will be used -- will be
15:11:42 24 relied upon to substantiate the charges against him.

15:11:48 25 JUDGE STEINER: Me Flamme, it's your intention to file a

15:12:14 1 formal request on the first issue of your present motion
 15:12:22 2 on the time limit for procedural documents, or may
 15:12:25 3 I consider this your motion as a formal request for a
 15:12:31 4 decision to be issued by the Chamber?
 15:12:35 5 ME FLAMME (interpretation): No, your Honour; I simply wanted
 15:12:41 6 to bring this problem to your attention. But, clearly,
 15:12:49 7 I will draft a motion along these lines and, in fact, you
 15:12:55 8 will find in our last application, the application to be
 15:13:02 9 allowed to respond to the Prosecutor as regards the
 15:13:07 10 request for release, there you will also find that this
 15:13:14 11 problem has been raised. But the Defence is willing and
 15:13:21 12 wishes to submit a general motion on the issue.
 15:13:25 13 JUDGE STEINER: Thank you very much. Before going to some
 15:13:44 14 specificities of disclosure procedure, I would like to
 15:13:49 15 listen from the Prosecution his views in relation not to
 15:13:52 16 the procedural documents but the disclosed documents to
 15:13:57 17 the Defence, the problems related to translations, if
 15:14:00 18 these problems have been put under the Prosecution's
 15:14:07 19 scrutiny.
 15:14:08 20 MR WITHOPF: Your Honour, a number of observations, and
 15:14:13 21 I will limit it specifically, as you mentioned, to the
 15:14:18 22 documents that are disclosed by the Prosecution and not
 15:14:23 23 to any court decisions, filings, from the Prosecution of
 15:14:29 24 the Defence. It is not a surprise that many, if not
 15:14:34 25 most, of the documents that fall under the Prosecution's

15:14:37 1 disclosure obligations are documents in the French
15:14:41 2 language. Defence and Thomas Lubanga probably have
15:14:45 3 realised, and will certainly realise in future, that the
15:14:50 4 majority of these documents and the majority of the
15:14:53 5 materials is in French language.
15:14:58 6 However, it's a reality that there are also documents
15:15:03 7 that are in English language, and it is a fact that there
15:15:08 8 are documents available in both the English language and
15:15:11 9 the French language. In such a situation the Prosecution
15:15:18 10 deliberately has chosen to disclose the French version of
15:15:24 11 the document, for the obvious reason to enable Mr Thomas
15:15:28 12 Lubanga to read and to understand these documents.
15:15:28 13 [3.15 p.m.]
15:15:35 14 The Prosecution appreciates the need and the necessity of
15:15:41 15 Mr Thomas Lubanga to read materials that are related to
15:15:45 16 his criminal responsibility. The Prosecution, however,
15:15:53 17 also realises that, by the law, pursuant to Rule 76(3),
15:16:01 18 it is only obliged to provide translations into the
15:16:07 19 language the person on the arrest warrant speaks and
15:16:12 20 understands in respect of witness statements it wants to
15:16:15 21 use at the occasion of the confirmation hearing.
15:16:23 22 The Prosecution, therefore, will limit the translation of
15:16:30 23 documents that are in English or statements that are in
15:16:34 24 English to its obligations under the law, and the
15:16:38 25 Prosecution will certainly provide for French

15:16:42 1 translations of such materials.

15:16:44 2 In respect of documents that are in English and do not

15:16:50 3 fall within the purview of the Prosecution's obligations,

15:16:56 4 the Prosecution would encourage the Defence to request

15:16:59 5 the Registry, and the Registry's language section, to

15:17:04 6 provide for translation of such documents into the French

15:17:08 7 language.

15:17:10 8 Obviously, the Prosecution's remarks are of a preliminary

15:17:16 9 nature. Once the formal request of my learned friend for

15:17:21 10 the Defence is in, we will certainly respond in writing.

15:17:27 11 JUDGE STEINER: Thank you very much. Has the Registry some

15:17:31 12 comments to put on this issue?

15:17:35 13 MR DUBUISSON (interpretation): Thank you, your Honour.

15:17:42 14 Indeed, I think it is important to be specific about what

15:17:45 15 we are talking about here. Are we talking about

15:17:48 16 documents which are recorded in the case, or documents

15:17:52 17 which are communicated? Now, the Prosecutor has referred

15:17:59 18 to Rule 76(3), and this is quite limiting, because it

15:18:04 19 refers only to statements -- and only statements --

15:18:08 20 whereas, as we have heard, a multitude of other types of

15:18:11 21 documents are provided to the Defence. So there may be

15:18:16 22 quite a large discrepancy here.

15:18:22 23 First of all, the Prosecutor, as he has underlined, has

15:18:30 24 most documents available to him in French and, when he

15:18:33 25 does, he provides them in that language. Documents which

15:18:36 1 are available to him only in English are provided in that
15:18:40 2 language, and it is indeed incumbent upon the Registry to
15:18:45 3 provide a translation of those documents, when necessary,
15:18:50 4 either through the Registry translation services, or
15:18:54 5 through the judicial assistance which we provide to the
15:18:58 6 Defence. It is important to note that the obligation
15:19:12 7 incumbent on the Prosecutor is covered when he provides
15:19:18 8 French documents.
15:19:19 9 Now, as regards the matter of time limits for responding
15:19:25 10 to submissions, at the ad hoc tribunals not all documents
15:19:34 11 are provided to the accused person in Serbo-Croatian --
15:19:45 12 so DCS, as it's referred to at that tribunal, for
15:19:52 13 instance. Now, here we try to translate as rapidly as
15:19:56 14 possible, and we try to be as responsive as possible by
15:19:59 15 providing a draft translation of at least part of the
15:20:04 16 decision in order to allow the Defence to begin working
15:20:07 17 and to spend its time as effectively as possible.
15:20:15 18 There is no total remedy to this. In the case law of
15:20:19 19 both the ad hoc tribunals for Rwanda and Yugoslavia there
15:20:31 20 are measures. We try and process as much material as
15:20:34 21 possible, but within the limited resources available.
15:20:37 22 Given the volume of documentation which we are speaking
15:20:39 23 of, it is very difficult to produce translations in the
15:20:43 24 short time spell allowed when the documents are initially
15:20:49 25 in English.

15:20:55 1 This court is a bilingual court with two working
15:21:00 2 languages, and we appreciate the efforts that the judges
15:21:02 3 have made not to be too demanding in terms of their
15:21:06 4 translation requirements. Similarly, we may be in a
15:21:09 5 position to provide ad hoc solutions which would
15:21:12 6 facilitate the parties -- the production of a finalised
15:21:18 7 revised translation in a very short period of time is
15:21:23 8 difficult. It will always depend on the number of pages
15:21:27 9 a document contains, the workload, or the amount of
15:21:32 10 paper, or the amount of text that a translator can
15:21:36 11 translate to a revised level is five pages per day, so
15:21:42 12 depending upon the number of decisions and other
15:21:44 13 documents which are issued in a given week, there may be
15:21:47 14 limits to what can be provided by the translation
15:21:50 15 services available to us. We may not be in a position to
15:21:55 16 influence the decision.

15:21:56 17 JUDGE STEINER: Thank you very much for this information. It
15:22:05 18 all helps, of course, the Chamber, to decide on the issue
15:22:08 19 as soon as the Defence files its formal motion or request
15:22:13 20 on this specific topic.

15:22:19 21 ME FLAMME (interpretation): Your Honour, if you permit?

15:22:25 22 JUDGE STEINER: Yes.

15:22:27 23 ME FLAMME (interpretation): Thank you. To ensure that there
15:22:31 24 is no misunderstanding, I think that I have understood
15:22:34 25 the Prosecutor correctly, but he will interrupt me if I'm

15:22:42 1 wrong, that he limits the translation which is done by
 15:22:46 2 his offices to communications which are made under
 15:22:51 3 Rule 76. You know my interpretation of Rules 76 and 77.
 15:23:04 4 I believe that Rule 76 only covers statements of future
 15:23:08 5 witnesses and Rule 77 concerns documentary -- evidentiary
 15:23:20 6 material.
 15:23:20 7 I know that the Prosecutor definitely does not share that
 15:23:24 8 interpretation, but are we to understand that the
 15:23:28 9 interpretation made by the Prosecutor, when it comes to
 15:23:32 10 translation, is that all documentary material which does
 15:23:35 11 not concern statements of witnesses and which is in the
 15:23:39 12 English language will not be translated by his office?
 15:23:44 13 If so, this presents, to my mind, a serious problem, but
 15:23:49 14 I await clarification. Perhaps I have misunderstood the
 15:23:54 15 contribution made by the Prosecutor on this point.
 15:23:59 16 JUDGE STEINER: A final clarification from the Prosecution,
 15:24:03 17 please.
 15:24:04 18 MR WITHOPF: I can confirm that my learned colleague from the
 15:24:09 19 Defence has perfectly well understood the Prosecution's
 15:24:12 20 submissions.
 15:24:14 21 JUDGE STEINER: Thank you very much. Please, Me Flamme?
 15:24:21 22 ME FLAMME (interpretation): Thank you, your Honour. Having
 15:24:26 23 obtained this clarification, I am forced to note that
 15:24:32 24 this interpretation will create a substantial problem for
 15:24:36 25 the Defence. Let us not forget that the documentary

15:24:40 1 material to date is the only material which has been
15:24:46 2 provided by the Prosecutor, and that in volumes of
15:24:53 3 hundreds of pages this documentation produced by him is
15:24:58 4 evidentiary material. If amongst these documents there
15:25:01 5 are English documents which are not translated, we will
15:25:04 6 not be able to directly have our client take a knowledge
15:25:13 7 of this evidentiary material and that, I believe, poses a
15:25:16 8 serious problem.

15:25:21 9 JUDGE STEINER: Me Flamme, you have already said that a
15:25:27 10 problem with translations of decisions and motions filed
15:25:33 11 in the case file could cause serious problems for the
15:25:36 12 Defence, and you would file a request -- a motion and
15:25:43 13 formal requests on these what you call procedural
15:25:48 14 documents. As far as I understood, now you are seeing
15:25:54 15 also problems with the hundreds or thousands of pages
15:26:00 16 disclosed by the Prosecution to the Defence in this phase
15:26:04 17 of the disclosure procedure.

15:26:08 18 So may I understand that you will include this second set
15:26:16 19 of documents in your motion, you will file separate
15:26:21 20 motions, or may I consider that your statement made at
15:26:26 21 this hearing is a formal motion? Just for clarification.

15:26:35 22 ME FLAMME (interpretation): Having heard the position of the
15:26:46 23 Prosecutor, the Prosecutor is sending the ball to the
15:26:55 24 Registry's court as regards the translation of
15:26:59 25 evidentiary documentation. Now, this is a factor -- it

15:27:04 1 is a factor whether the Registry is in a position to
 15:27:08 2 carry out this perhaps enormous translation effort. Now
 15:27:15 3 that I know the position of the Prosecutor, I will ensure
 15:27:20 4 that we submit a specific motion regarding translation of
 15:27:27 5 evidentiary material disclosed by the Prosecutor, this
 15:27:32 6 issue being, to my mind, an entirely different issue to
 15:27:36 7 the translation of procedural documents. I would prefer
 15:27:38 8 not to mix the two issues in a single motion.

15:27:42 9 JUDGE STEINER: Thank you for your clarification. So since
 15:27:49 10 you were aware of these problems, in theory, from this
 15:27:58 11 hearing, I would ask the Defence to file its motions as
 15:28:06 12 soon as practicable. Thank you very much.

15:28:11 13 In order to comply with regulations of the staff board,
 15:28:17 14 I will suspend this session for 30 minutes in order to
 15:28:22 15 give the interpreters the necessary break. Thank you.

15:28:22 16 [3:28 p.m.]

15:28:41 17 [Short adjournment]

16:08:37 18 [4:08 p.m.]

16:08:37 19 THE USHER: All rise. The International Criminal Court is
 16:08:47 20 now in session.

16:09:12 21 JUDGE STEINER: We resume this hearing, and I would like to
 16:09:20 22 make -- I thought make some questions to the Prosecution
 16:09:25 23 about the report it has given before the break. However,
 16:09:32 24 the fact is that the Registry has not submitted to the
 16:09:36 25 Chamber any of the documents that the Prosecution

16:09:39 1 mentioned in relation to the files of 22 June, so we will
16:09:47 2 have to postpone the specific questions on this updating
16:09:51 3 of the Chamber, and I hope these kind of problems can be
16:09:55 4 fixed for the next Status Conference and then to allow
16:10:00 5 the Chamber to have at hand all documents necessary to
16:10:05 6 conduct the proceedings.

16:10:08 7 On the other hand, I would like to inform the parties
16:10:10 8 that before this Status Conference this morning the
16:10:16 9 Chamber, the single judge has filed the decision on the
16:10:21 10 Prosecution motion for a reconsideration and, in the
16:10:25 11 alternative, leave to appeal. That is now with the
16:10:29 12 Registry.

16:10:32 13 So after this information, I would like to come to some
16:10:37 14 few specific questions that first I would like to put to
16:10:42 15 the Prosecution for clarification. Coming now to the
16:10:50 16 first question, if I understood the Prosecution
16:10:52 17 correctly, the Prosecution is disclosing documents under
16:10:55 18 Article 61(3)(b) as incriminating evidence in a something
16:11:05 19 different form -- the disclosure of the Prosecution
16:11:08 20 witness statements under Rule 76, the inspection of other
16:11:12 21 evidence on which the Prosecution intends to rely at the
16:11:16 22 confirmation hearing under Rule 77. I would like to have
16:11:29 23 a explanation or a direct clarification of the
16:11:30 24 Prosecution of why it is doing so if, according to the
16:11:34 25 decision on the final system of disclosure, all

16:11:36 1 incriminating evidence must be disclosed under Rule 76 if
16:11:41 2 they were witness statements, or must be subjected to
16:11:43 3 inspection under Rule 77 if they are other types of
16:11:50 4 evidence. It seems to me that a third category of
16:11:53 5 evidence has been mentioned by the Prosecution, and
16:11:56 6 I would like some clarification on that point.

16:12:05 7 MR WITHOPF: Your Honour, there are three different
16:12:08 8 categories of materials -- let's phrase it in very
16:12:16 9 general terms -- the Prosecution is disclosing or is
16:12:19 10 providing inspection of. The first ones are the
16:12:23 11 materials which are considered being of an incriminatory
16:12:27 12 nature and which the Prosecution intends to use for the
16:12:31 13 confirmation hearing. These materials are disclosed to
16:12:35 14 the Defence, and they are filed in compliance with the
16:12:39 15 court's decision in the court's records. The originals
16:12:43 16 are filed in the case record.

16:12:48 17 Then we have the second category, which is evidence of a
16:12:52 18 potentially exculpatory nature pursuant to Article 67(2).
16:12:59 19 Such materials are disclosed to the Defence in an
16:13:02 20 electronic version, and a disclosure note is provided to
16:13:11 21 the court.

16:13:11 22 And there's a third category. These are the materials
16:13:14 23 that form subject to disclosure -- to inspection, to
16:13:22 24 physical inspection. There were, if I recall correctly,
16:13:27 25 meanwhile three of such instances of physical inspection.

16:13:33 1 The Prosecution and the Defence, pending final decision
16:13:39 2 of your Honour the single judge, have applied, in
16:13:42 3 practice, the following system: the Defence is given the
16:13:47 4 opportunity to inspect such materials, which in the past
16:13:52 5 have been documents only, in the Prosecution's inspection
16:13:59 6 room. For reasons of practicability and efficiency,
16:14:04 7 Defence and Prosecution have agreed that the Prosecution,
16:14:08 8 in addition, provides electronic versions of these
16:14:12 9 documents.

16:14:14 10 The Prosecution, with the explicit consent of my learned
16:14:21 11 colleague from the Defence, have filed a request to your
16:14:24 12 Honour that we change the system for mere reasons of
16:14:33 13 practicability to the following: we provide electronic
16:14:36 14 versions of materials -- and in this context it would
16:14:41 15 only be documents -- to the Defence, and the Defence
16:14:45 16 comes back to us if they want to physically inspect the
16:14:51 17 one or the other of these documents. As long as there's
16:14:54 18 no decision, the Prosecution will fully comply with the
16:15:02 19 Pre-Trial Chamber's or the single judge's respective
16:15:06 20 order. These are the current three categories of
16:15:10 21 disclosure or inspection.

16:15:10 22 [4.00 p.m.]

16:15:14 23 You were mentioning witness statements, your Honour.
16:15:16 24 Your Honour has mentioned it at the beginning of this
16:15:19 25 hearing that a number of applications per Rule 81(2) are

16:15:29 1 pending, or an application covering a number of witness
16:15:31 2 statements are pending before the single judge for a
16:15:37 3 decision. For that reason, it's correct: witness
16:15:42 4 statements at this juncture have not yet been disclosed
16:15:46 5 to the Defence.

16:16:01 6 JUDGE STEINER: Thank you. So you have mentioned the request
16:16:09 7 made jointly by Defence and the Prosecution on the filing
16:16:13 8 of 8 June 2006 which encompasses a modification on the
16:16:32 9 system of inspection specifically imposed by the decision
16:16:35 10 on the final system of disclosure. According to
16:16:44 11 paragraph 137 of the annex 1 of that decision, for a more
16:16:52 12 expeditious inspection process the door has been left
16:16:57 13 open for such an agreement.

16:17:07 14 On the basis of the proposal made by the joint request by
16:17:12 15 Prosecution and the Defence, the single judge, if the
16:17:20 16 parties agree, would propose the following procedure for
16:17:24 17 inspection of documents under Rule 77 of the Rules. The
16:17:30 18 Prosecution submits the relevant documents to the Defence
16:17:33 19 in electronic format. Secondly, every time the
16:17:39 20 Prosecution submits documents to the Defence in this
16:17:43 21 electronic format the Prosecution files with the Registry
16:17:47 22 a pre-inspection note signed by both the Prosecution and
16:17:51 23 the Defence in which the list of these documents that
16:17:56 24 have been submitted by the Prosecution and received by
16:17:59 25 the Defence and the reference numbers shall be included.

16:18:05 1 3. The Defence identifies the documents, if any, that it
16:18:09 2 wishes to inspect physically.

16:18:13 3 4. The Prosecutor makes available for physical
16:18:17 4 inspection the originals of the documents identified by
16:18:21 5 the Defence and files the corresponding inspection
16:18:25 6 report.

16:18:27 7 And, finally, in the case of documents on which the
16:18:30 8 Prosecution intends to rely at the confirmation hearing,
16:18:33 9 the Prosecution, as soon as practicable after the Defence
16:18:38 10 declines to inspect the originals, or after the act of
16:18:43 11 inspection has taken place, shall file with the Registry
16:18:46 12 the originals and electronic copies of such documents
16:18:51 13 containing the details required by the draft protocol on
16:18:55 14 the presentation of evidence as it stood on 15 May 2006.

16:19:02 15 I do not know if it was clear for the parties, but
16:19:06 16 I would ask the views of the parties on this proposal.

16:19:11 17 The Prosecution first, please.

16:19:13 18 MR WITHOPF: Yes, your Honour, it's clear to the Prosecution.

16:19:16 19 The Prosecution has no further observations to make.

16:19:20 20 I think this comes very close to the suggestion made by
16:19:24 21 both parties, and we would certainly comply with this
16:19:28 22 decision.

16:19:29 23 JUDGE STEINER: Me Flamme?

16:19:32 24 ME FLAMME (interpretation): I have no observations, your
16:19:35 25 Honour.

16:19:43 1 JUDGE STEINER: So having an agreement of the parties, the
16:19:45 2 system of inspection under Rule 77 of the Rules is now
16:19:51 3 the one stated in this hearing.

16:20:11 4 In relation to disclosure of potentially exculpatory
16:20:15 5 materials under Article 67(2), in the hearing of 24 May
16:20:21 6 2006 the Prosecution stated that, according to the
16:20:30 7 360 sets of keywords that he is using in his search, the
16:20:35 8 Prosecutor had identified 3,300 documents comprised of
16:20:42 9 37,719 pages -- maybe these numbers have been modified,
16:20:48 10 but these are the latest information the Chamber has.

16:20:53 11 In addition, if priority search criteria were used, the
16:20:58 12 number was still of 11,014 pages. Out of this, the
16:21:06 13 Prosecution informed the single judge that around
16:21:11 14 8,000 pages could fall within Article 54(3)(e) of the
16:21:16 15 Statute. However, the Prosecutor informed that until now
16:21:28 16 only 372 pages of potentially exculpatory materials have
16:21:33 17 been disclosed, if I well understood the report made by
16:21:40 18 Ms Solano.

16:21:42 19 The single judge is mindful of the difficulties
16:21:45 20 encountered by the Prosecution and, however, at the same
16:21:49 21 time would like to emphasise the concerns with the pace
16:21:53 22 of the disclosure of potentially exculpatory materials.

16:21:57 23 In view of that, according to the current schedule, most
16:22:00 24 of the potentially exculpatory materials in relation to
16:22:04 25 the present case must be disclosed by 28 August 2006.

16:22:10 1 Likewise, I acknowledge the difficulties that the
16:22:13 2 Prosecution is encountering in identifying Rule 77
16:22:18 3 materials that could be material for the Defence
16:22:22 4 preparation at the confirmation hearing. However, also
16:22:27 5 in this case the single judge would emphasise that by
16:22:31 6 28 August 2006 most of these materials must have been not
16:22:36 7 only identified but also made available for inspection by
16:22:40 8 the Defence.

16:22:48 9 On this point, in the hearing on 24 May 2006 the
16:22:53 10 Prosecution informed that the search it had conducted had
16:22:58 11 identified 64 documents comprised of several hundreds of
16:23:03 12 pages that were obtained from or belonged to Mr Lubanga.
16:23:11 13 According to the Prosecution, these documents could be
16:23:14 14 made available for inspection by the Defence -- I'm
16:23:19 15 quoting from the transcript of the last hearing -- in the
16:23:24 16 very near future.

16:23:26 17 Besides, the Prosecution also informed the Chamber that
16:23:30 18 it was examining another 50 documents to see whether they
16:23:34 19 belonged to or were obtained from Mr Thomas Lubanga
16:23:39 20 Dyilo. And also on this point the single judge would
16:23:43 21 like to just state its concerns with the pace of
16:23:46 22 inspection materials under Rule 77 and, in particular, on
16:23:53 23 these materials that had already been identified as
16:23:58 24 belonging to or obtained from Mr Thomas Lubanga Dyilo.
16:24:04 25 Therefore, I would like the Prosecution to elaborate on

16:24:07 1 the reasons of the pace of the inspection of these
16:24:13 2 specific materials.

16:24:16 3 MR WITHOPF: Your Honour, thank you very much for giving us
16:24:18 4 an opportunity to further explain details of disclosure
16:24:23 5 and inspection. If I may address the last question,
16:24:30 6 please, first. Yes, the Prosecution has identified
16:24:37 7 documents that belonged to Mr Thomas Lubanga. The
16:24:43 8 Prosecution has -- and this explains why there was not an
16:24:49 9 inspection of such materials -- disclosed yesterday a
16:24:56 10 number of these documents under Article 61(3)(b), because
16:25:03 11 the Prosecution wants to use these documents as
16:25:08 12 incriminatory evidence for the confirmation hearing. So
16:25:12 13 these documents, after evaluation by the Prosecution,
16:25:16 14 fall under a different category, and the Prosecution
16:25:20 15 works on the basis, once they are disclosed to the
16:25:23 16 Defence and the originals are filed with the court, there
16:25:27 17 is no room and no need for inspection of such materials.
16:25:33 18 This may explain that there is a difference between the
16:25:38 19 statements we made last time and the realities as they
16:25:42 20 have evolved over time.

16:25:45 21 There is one other aspect I wish to mention, and this is
16:25:48 22 related to Article 54(3)(e) restrictions. As a matter of
16:25:53 23 fact, unfortunately, a comparatively high percentage of
16:25:59 24 these documents was received by the Prosecution under the
16:26:03 25 restrictions of confidentiality by Article 54(3)(e) of

16:26:09 1 the Rome Statute. The Prosecution has identified these
16:26:14 2 documents, and these documents form part of the 50 or so
16:26:19 3 documents I mentioned earlier on today which are
16:26:23 4 currently with the respective section of the Office of
16:26:27 5 the Prosecutor to be sent out to the providers for
16:26:30 6 lifting the restrictions.
16:26:32 7 In that respect the Prosecution has done the utmost
16:26:37 8 possible -- what was possible at this juncture. The
16:26:41 9 Prosecution has used a second set of keywords to identify
16:26:47 10 or to ensure that all documents that belonged to Thomas
16:26:52 11 Lubanga in the broadest sense and in the broadest
16:26:55 12 interpretation of the respective Rule are caught by our
16:27:00 13 keyword searches. We anticipate that this additional
16:27:07 14 keyword search will produce a number of additional
16:27:10 15 documents. Then, based on our internal determination, we
16:27:15 16 will either provide them for inspection or disclose them
16:27:18 17 as incriminatory evidence.
16:27:21 18 On the PEXO disclosure your Honour has quoted the numbers
16:27:31 19 correct. Yes, this is a concern -- the sheer volume of
16:27:35 20 these materials is of a high concern to the Prosecution
16:27:38 21 as well. A whole group of people within the Office of
16:27:44 22 the Prosecutor are working on this project, which is a
16:27:49 23 very resource-intensive and a very time-intensive
16:27:54 24 project, and I wish to draw the specific attention of
16:27:58 25 your Honour to the fact that this is not only disclosure

16:28:02 1 of potentially exculpatory materials -- I mentioned it in
16:28:06 2 the last hearing. We have to pay particular attention to
16:28:11 3 issues related to victims and witness protection, and
16:28:17 4 certain portions of these documents need to be redacted,
16:28:22 5 and this adds to the burden of the Prosecution.
16:28:26 6 However, there is also a positive aspect to it. Not
16:28:31 7 every hit that's generated by our keyword searches means
16:28:36 8 that these documents do indeed contain potentially
16:28:41 9 exculpatory information, so out of, let's say,
16:28:45 10 100 documents, the experience we are making to date --
16:28:49 11 this may change over time -- is that only a certain
16:28:53 12 number, a certain percentage of these documents actually
16:28:58 13 do contain potentially exculpatory information.
16:29:05 14 To give you figures in that respect, 947 documents have
16:29:16 15 been reviewed, and 655 have been marked as not containing
16:29:27 16 potentially exculpatory evidence. So the number of
16:29:31 17 documents that have been disclosed is not an indication
16:29:36 18 for the number of documents that have been reviewed by
16:29:39 19 the Office of the Prosecutor.
16:29:41 20 However, I wish to emphasise again that the obligation
16:29:50 21 has created a serious drain to the resources of the
16:29:53 22 Office of the Prosecutor, and we are very well aware of
16:29:58 23 the deadline, and the whole group of people will continue
16:30:02 24 to work on this project.
16:30:05 25 We are well aware that the Pre-Trial Chamber has taken

16:30:09 1 the approach that most of the potentially exculpatory
16:30:13 2 information has to be disclosed prior to the confirmation
16:30:17 3 hearing.
16:30:17 4 [4.30 p.m.]
16:30:20 5 The question is: what is "most"? There is certainly room
16:30:27 6 for interpretation and at this juncture, still aiming to
16:30:31 7 disclose most of it, including quantity, the Prosecution
16:30:37 8 takes the approach that quality is more important than
16:30:41 9 quantity. I have touched on this matter in the course of
16:30:46 10 the last hearing. The Prosecution has identified a group
16:30:50 11 of keywords which, in its view, is very likely to
16:30:55 12 generate quality potentially exculpatory information.
16:31:00 13 When I say "quality", I mean it will be of high interest
16:31:05 14 for the Defence team and Mr Thomas Lubanga Dyilo.
16:31:11 15 This is done in a specific effort of the Office of the
16:31:15 16 Prosecution to comply with its obligations. The Office
16:31:21 17 of the Prosecutor is examining the documents that have
16:31:27 18 been generated by such searches first. And only once the
16:31:34 19 examination of such documents is completed it will move
16:31:38 20 on to the other search criteria where we believe that the
16:31:42 21 documents that will be generated as results will not --
16:31:47 22 and certainly not to the same extent -- contain what we
16:31:51 23 consider being of quality potentially exonerating
16:31:56 24 information.
16:31:57 25 The process as such is highly complex. Issues of

16:32:02 1 Article 54(3) play a role; victims and witness protection
16:32:08 2 has a role. It's not just reading documents saying "Yes"
16:32:11 3 or "No"; it goes far beyond it. It requires a certain
16:32:16 4 knowledge of the case, a certain knowledge of the people
16:32:19 5 the Prosecution has talked to, and the Prosecution pays
16:32:23 6 particular attention to issues of victims and witness
16:32:27 7 protection.
16:32:29 8 That is all what I can say at this stage, and I hope
16:32:32 9 I was able to explain to your Honour, and to the other
16:32:35 10 participants, the efforts the Prosecution is making in
16:32:39 11 complying with its obligations.
16:32:47 12 JUDGE STEINER: Thank you very much. Just one more question
16:32:50 13 in relation to this search criteria based on keywords.
16:32:53 14 Has the Defence already provided the OTP with its list of
16:32:56 15 keywords? I remember this is something that has been
16:33:01 16 mentioned in the last hearing.
16:33:04 17 MR WITHOPF: Your Honour, as you have been informed by my
16:33:10 18 colleague Ms Solano, we have requested the Defence
16:33:13 19 repeatedly to provide comments on our keyword list, or to
16:33:18 20 add to our keyword list. Unfortunately, and for reasons
16:33:22 21 my learned colleague from the Defence may wish to explain
16:33:26 22 to the Pre-Trial Chamber, to date the Prosecution has not
16:33:29 23 received any response to its request.
16:33:34 24 JUDGE STEINER: Thank you very much for your clarifications.
16:33:37 25 I would like to listen from Me Flamme not only on this

16:33:41 1 point but on the points on these inspection procedures
16:33:49 2 that the Defence deems necessary to call to the attention
16:33:53 3 of the Chamber.

16:33:57 4 ME FLAMME (interpretation): Yes, your Honour. As regards
16:34:04 5 the last point, the list of keywords, it is important to
16:34:12 6 realise that the Defence has been working on this case
16:34:22 7 for barely three months. We have begun to study the
16:34:30 8 material disclosed by the Prosecutor and that we will
16:34:34 9 only be in a position, possibly, to make suggestions or
16:34:41 10 to ask the Prosecutor to add keywords as and when we
16:34:53 11 become in a position to produce a Defence tactic.

16:35:03 12 When one obtains an in-depth knowledge of a case, one is
16:35:07 13 in a position to put forward a number of proposals. This
16:35:12 14 also supposes that our client, who has not yet even begun
16:35:16 15 to study the file of evidence that is to underpin the
16:35:24 16 charges brought against him -- our client has not yet
16:35:27 17 begun that work, and it is from him that suggestions will
16:35:33 18 come regarding material which may potentially be
16:35:38 19 exonerating. So, quite simply, we are not yet in a
16:35:42 20 position to make suggestions in this connection.

16:35:48 21 Now, we must realise that we find ourselves here in a
16:35:56 22 situation where the Prosecutor has been in a position,
16:36:01 23 I believe, for a number of years to work on the situation
16:36:06 24 of the Congo and now on the case against Mr Lubanga and
16:36:11 25 that the Prosecutor, therefore, is in a much more

16:36:16 1 advanced stage of his study and we will only be in a
16:36:21 2 position to suggest keywords in due course. We are not
16:36:29 3 in a position to do so blindly. These are important
16:36:31 4 things.
16:36:37 5 Defining keywords would also render clear the importance
16:36:43 6 which the Defence attaches to certain matters. Now,
16:36:52 7 clearly, we do not yet have in our possession the
16:37:00 8 integrality of the file. It may be a number of weeks
16:37:04 9 before we are in a position to study it in its entirety.
16:37:08 10 Now, with regard to the other points referred to by the
16:37:10 11 Prosecutor, we do not at this juncture have comments to
16:37:13 12 make on them. Thank you.
16:37:17 13 JUDGE STEINER: Thank you very much. Does the Prosecution
16:37:19 14 want to add something?
16:37:20 15 MR WITHOPF: Yes, your Honour, I want to make a number of
16:37:22 16 observations to what my learned friend from the Defence
16:37:25 17 said. Of course, Defence is perfectly free to not submit
16:37:33 18 any comments to the Prosecution's keyword list or to
16:37:36 19 suggest keywords to it, and I acknowledge that. What
16:37:41 20 I do not acknowledge is the following, that there's a
16:37:45 21 link between the volume of disclosure, which my learned
16:37:50 22 colleague has described as very voluminous earlier on
16:37:54 23 today, and the inability to provide keywords.
16:37:58 24 What my learned colleague from the Defence forgets to
16:38:01 25 mention is the following: Defence and Thomas Lubanga are

16:38:06 1 in possession of a redacted version of the Prosecutor's
16:38:12 2 application for arrest warrant. Though this application
16:38:20 3 is redacted, it in very detail describes the facts on
16:38:24 4 which the Prosecution bases its allegations that Thomas
16:38:29 5 Lubanga has criminal responsibility under the Statute.
16:38:33 6 Defence and Mr Thomas Lubanga are also in possession of a
16:38:37 7 redacted version of the Chamber's 10 February 2006
16:38:41 8 decision on the application of an arrest warrant, which,
16:38:45 9 to a high extent, makes reference and repeats the details
16:38:50 10 of these facts. And the Defence is also in possession of
16:38:57 11 the redacted versions of six statements, and your Honour
16:39:05 12 my learned friend from the Defence know to what
16:39:08 13 statements I'm referring to. For that reason the
16:39:12 14 Prosecution cannot understand the assertion of my learned
16:39:16 15 colleague from the Defence that there is no factual basis
16:39:19 16 for the Defence to provide for keyword searches.
16:39:24 17 I am very sympathetic to any approach of the Defence to
16:39:28 18 not reveal the Defence strategies to the Prosecution --
16:39:32 19 fair enough, entitlement of the Defence. But then
16:39:37 20 Defence should say it, and the Prosecution has no problem
16:39:43 21 with it. But to link it to the disclosure, this is not a
16:39:49 22 way to approach this matter in the view of the
16:39:55 23 Prosecution.
16:39:55 24 JUDGE STEINER: Thank you very much. So I think we are now,
16:40:04 25 at least for me, on the last point to be discussed and

16:40:10 1 this discussion will necessarily involve the comments of
16:40:15 2 the Registry. It is the questions related to the filing
16:40:22 3 with the Registry of the originals and/or electronic
16:40:27 4 copies containing details required by the draft protocol
16:40:32 5 on the presentation of evidence. As mentioned in the
16:40:36 6 beginning of this hearing by the Registry, that could be
16:40:42 7 one of the problems of the access given to Mr Thomas
16:40:49 8 Lubanga Dyilo of the content of the evidence already
16:40:54 9 filed.

16:40:57 10 But not only this: I think there is some problem even
16:41:02 11 with the filing and consequent communication of this
16:41:06 12 evidence and access of this evidence from the Defence.
16:41:11 13 And I would like to listen to the parties to be clarified
16:41:19 14 on what are the specific points in dispute on the
16:41:25 15 application of this draft protocol and what are the
16:41:30 16 consequences of these points in dispute and what would
16:41:38 17 be, on the views of the parties and of the Registry, a
16:41:43 18 possible or possible solutions for this matter. So,
16:41:47 19 first of all, I would like to give the floor to the
16:41:50 20 Registry to put forward his views on the problems raised
16:41:58 21 on the filing of documents.

16:42:03 22 MR DUBUISSON (interpretation): Thank you, your Honour.
16:42:10 23 Indeed, in application of the decision of 15 May 2006 the
16:42:17 24 Prosecutor must file in the record the evidence on which
16:42:22 25 he intends to rely at the confirmation hearing. The

16:42:27 1 Registry is encountering difficulties in implementing
16:42:31 2 this decision of 15 May 2006. In fact, as was previously
16:42:37 3 said by the Prosecutor in the person of Julieta Solano,
16:42:43 4 we are indeed receiving the documents of the Office of
16:42:49 5 the Prosecutor. However, we are not in a position to
16:42:55 6 file them, to record them.

16:42:59 7 We are encountering a difficulty in the provision of
16:43:02 8 documentation to the Registry, notably in the format of
16:43:06 9 that documentation; in other words, the protocol which is
16:43:13 10 in place today is not being followed. There are
16:43:17 11 discussions to find a solution with a view to configuring
16:43:27 12 the applications on the basis of the decision.

16:43:31 13 Now, we have a major problem, because today we are not in
16:43:37 14 a position to file what we are receiving. The Ringtail,
16:43:40 15 which we are making available to the Defence and which is
16:43:45 16 configured on the basis of the protocol -- even if there
16:43:49 17 is no obligation, we have had to configure it based on
16:43:53 18 something and therefore we have taken the protocol
16:43:55 19 because it is in place -- today it is a tool which cannot
16:44:04 20 be used. It is there, but one cannot use it as one
16:44:08 21 should. Therefore, we need to find a solution
16:44:11 22 immediately in order to enable the filing of documents.

16:44:16 23 Now, I know that the Office of the Prosecutor has
16:44:20 24 requested that the protocol be modified to a degree. The
16:44:26 25 Chamber has taken a decision on that. Also, a statement

16:44:31 1 was made whereby the Prosecutor said he is not entirely
16:44:35 2 in agreement with the protocol, but the protocol, as it
16:44:40 3 exists today, was drafted on the basis of discussions
16:44:48 4 with the Office of the Prosecutor in the person of Klaus
16:44:58 5 Rackwitz who stated that there were no technical
16:45:00 6 difficulties on their side. And we have paperwork, too,
16:45:02 7 that in -- dating back to March, so these difficulties
16:45:05 8 need to be overcome if the entire procedure is not to be
16:45:08 9 held up. Thank you.
16:45:08 10 [4.45 p.m.]
16:45:27 11 JUDGE STEINER: Even I have difficulties with these
16:45:29 12 electronic things. So, first, I would like to listen
16:45:38 13 from the Prosecution maybe in a more specific way. What
16:45:43 14 are the difficulties the Prosecution is facing in
16:45:46 15 complying with the draft protocol?
16:45:54 16 MR WITHOPF: Your Honour, I don't think the issue is that
16:46:02 17 complex as it has been portrayed. There are a number of
16:46:11 18 reasons -- and I'm going to explain them, and I think
16:46:15 19 they are very understandable reasons -- why the
16:46:19 20 Prosecution is just not in a position to comply with the
16:46:25 21 draft protocol. And I wish to emphasise it is a draft,
16:46:31 22 and whilst it is true that the Prosecution was at certain
16:46:36 23 moments consulted on this draft, it is also true that the
16:46:41 24 Prosecution has not -- and I mentioned it in one of the
16:46:44 25 written filings -- agreed to each and every aspect of

16:46:48 1 this draft.

16:46:51 2 However -- and this has been rightly said by the

16:46:58 3 representatives of the Registry -- there is contact, and

16:47:03 4 there is actually quite extensive contact with all good

16:47:06 5 intentions between the representatives of the Registry

16:47:10 6 and the ones from the Office of the Prosecutor to solve

16:47:15 7 the technical problems.

16:47:20 8 There is a sort of a working group in place and this

16:47:23 9 group has met just recently, and this group is making

16:47:28 10 progress in solving -- in addressing and solving a whole

16:47:34 11 variety of matters that need to be solved prior to any

16:47:40 12 participant being able to comply with the protocol.

16:47:45 13 I may use this opportunity as a side remark to alert my

16:47:51 14 learned colleague from the Defence that at some point in

16:47:56 15 time he will also have to comply with this protocol, and

16:48:00 16 it may be advisable that my learned colleague from the

16:48:07 17 Defence is included in this working group.

16:48:12 18 Against this background, your Honour, I wish to emphasise

16:48:19 19 that the Prosecution, to a great extent, complies with

16:48:23 20 the draft protocol. It complies with it in respect to

16:48:30 21 the document ID, to the date field, the document date,

16:48:34 22 the estimated date, the document type, the title of the

16:48:38 23 document, the participant, and the disclosed date. In

16:48:45 24 relation to the latter, the Prosecution even adds

16:48:47 25 additional information.

16:48:53 1 There are aspects admittedly, but there are few aspects,
16:48:56 2 in respect of which the Prosecution does not comply with
16:48:59 3 the draft protocol. These aspects include the fields
16:49:03 4 related to the author of documents, the author
16:49:08 5 organisation, the recipient, the recipient organisation,
16:49:11 6 and the parties to an agreement.
16:49:16 7 Some of these aspects, your Honour, are not, or are not
16:49:21 8 yet applicable, like the parties to an agreement. In
16:49:27 9 respect to the other fields, to the other elements, the
16:49:31 10 Prosecution applies the principle that it provides the
16:49:34 11 same information to the Registry as it does provide to
16:49:39 12 the Defence. Obviously, at this stage, due to reasons of
16:49:45 13 victims and witness protection, the Prosecution does not
16:49:48 14 provide the name of authors, the name of recipients, the
16:49:52 15 name of author organisations, or the names of recipient
16:49:58 16 organisations to the Defence, and thus, following its
16:50:00 17 principle, it will also not provide these names to the
16:50:05 18 Registry.
16:50:08 19 A further remark I wish to make, a more practical remark,
16:50:13 20 is the following: the naming structure in these fields,
16:50:19 21 as foreseen by the draft protocol, for whatever reason
16:50:25 22 follows Western European structures. The African names
16:50:29 23 are different, and the African names do not fit within
16:50:33 24 that structure. For that only reason the Prosecution,
16:50:39 25 even if it wanted to provide this information, would not

16:50:41 1 be able to provide it within the current -- within the
16:50:45 2 framework of the current technical setup.
16:50:51 3 There is one other issue that came up -- that's
16:50:56 4 information required to indicate the language of
16:50:57 5 documents. The Prosecution obviously does provide the
16:51:04 6 language of the materials concerned. The issue that is
16:51:10 7 at stake is the following: whether the Prosecution uses
16:51:13 8 the word "English" or an abbreviation, namely, "EN". The
16:51:22 9 Prosecution is of the view that using the full word would
16:51:27 10 enhance the readability of the system data. The
16:51:30 11 Prosecution suggests considering such an approach. This
16:51:35 12 is one of the aspects that is being discussed in the
16:51:39 13 group of people I was mentioning earlier on.
16:51:43 14 Of course, if this group comes to the conclusion we
16:51:48 15 should use the "EN" instead of the word "English", the
16:51:55 16 Prosecution will do so.
16:51:57 17 Most importantly, however, there are a number of elements
16:52:02 18 the Prosecution simply cannot at this stage provide for
16:52:06 19 the requested information. These instances include the
16:52:12 20 fields related to witnesses, charge, element of alleged
16:52:16 21 crime, incident, elements of statements of facts and mode
16:52:19 22 of participation. A prerequisite to providing this
16:52:23 23 information is that the document containing the charges
16:52:26 24 is available. The document containing the charges is not
16:52:29 25 available due to reasons for victims and witness

16:52:34 1 protection all participants to these proceedings are very
16:52:40 2 well aware of. The deadline for providing this document
16:52:43 3 is 28 August 2006, so the Prosecution will not be in a
16:52:49 4 position to provide such information.

16:52:52 5 In the view of the Prosecution, the only aspect that
16:52:56 6 requires immediate resolution is whether we indicate the
16:53:00 7 language as "English" or by using "ENs", and I don't
16:53:08 8 quite understand, but I'm sure my colleagues and the
16:53:13 9 representatives of the Registry will be able to explain
16:53:15 10 to me, why, by not providing this information, it's not
16:53:20 11 possible to record the materials in the court file.

16:53:25 12 I understand that there are Ringtail questions that come
16:53:28 13 into play. Nevertheless, considering what I said, and if
16:53:35 14 this would be the case up until 28 August 2006, the
16:53:40 15 Registry would not be in a position to record any of the
16:53:43 16 Prosecution's filings in respect of incriminatory
16:53:47 17 evidence.

16:53:48 18 I think, and I would suggest, that the working group
16:53:54 19 comprised of people from the Registry and the Office of
16:53:59 20 the Prosecutor continues to work on these matters. The
16:54:02 21 Office of the Prosecutor is very open to any and every
16:54:06 22 reasonable suggestion, and I don't think this should be
16:54:12 23 an impediment to record these materials in the files.

16:54:16 24 Thank you very much.

16:54:16 25 JUDGE STEINER: Thank you very much for this comprehensive

16:54:25 1 explanation, and I would like to turn back to the
16:54:27 2 Registry to make its observations on the comments made by
16:54:35 3 the Prosecution -- some of them quite impressive.
16:54:39 4 MR DUBUISSON (interpretation): Thank you, your Honour.
16:54:45 5 First of all, I would like to emphasise that it is not --
16:54:54 6 the Registry is not in a position to comment upon any
16:54:57 7 decision issued by the Chamber or a judge. The Registry
16:55:01 8 is open to discussing the protocol with any party to the
16:55:06 9 proceedings. At the same time, I respect the judicial
16:55:14 10 procedure and, therefore, I have difficulties with
16:55:18 11 continuing to discuss the matter when it has been
16:55:21 12 adjudicated by a Chamber or a judge.
16:55:24 13 Now, when a judge such as yourself or the Chamber takes a
16:55:28 14 decision noting that the protocol is not being
16:55:33 15 implemented today and that this matter should be
16:55:36 16 discussed, that is one matter.
16:55:39 17 As regards the fields which the Prosecutor is not
16:55:42 18 completing today, if we enter in the system a statement,
16:55:48 19 for instance, to which a number of documents must be
16:55:51 20 attached -- now, I'm not going to get into whether the
16:55:56 21 word "English" should be written in full or in a
16:56:00 22 capitalised abbreviation, I'm sure we could certainly
16:56:04 23 come to some sort of an agreement on that, but I don't
16:56:06 24 think that's where the problem is. I think that when a
16:56:09 25 statement is submitted, and a number of fields are

16:56:14 1 connected with that statement such as location or witness
16:56:19 2 name, if those fields are not completed one will never be
16:56:24 3 able to find the statement back in the system in
16:56:26 4 connection with that individual.
16:56:28 5 So that will be one example. I could give other
16:56:32 6 examples, or indeed hand over to my colleague,
16:56:45 7 Uros Mijuskovic. When a document is submitted it should
16:56:48 8 be submitted in context, and the name of the person
16:56:51 9 should be attached to it and a number of other items of
16:56:54 10 information. It is true that today one could decide to
16:56:57 11 register a document in Ringtail circumventing certain
16:57:07 12 filters. That could be done. But there would then be
16:57:11 13 subsequent problems in using the document or using the
16:57:13 14 system. There are also a number of other fundamental
16:57:16 15 points, and I would like to have a decision allowing us
16:57:20 16 to discuss this protocol.
16:57:23 17 The fields to be completed -- now the discussion is about
16:57:30 18 what was intended, what one had agreed to include in
16:57:36 19 these fields. Now, I would be -- I am open to
16:57:42 20 discussion. However, as I speak on behalf of the
16:57:46 21 Registry, I cannot comment upon an obligation which is
16:57:50 22 incumbent upon me based on the decision of 15 May.
16:57:54 23 I cannot change the obligations bearing upon any party to
16:57:57 24 the proceedings, because we are gatekeepers, if you like,
16:58:03 25 to the proceedings, or guarantors of the proceedings.

16:58:07 1 But I do recognise that today we are encountering this
16:58:10 2 problem and this is a problem which is impacting in the
16:58:13 3 first line on the Registry.
16:58:15 4 The Prosecutor is providing the documents -- I do not
16:58:19 5 contest this at all, and I am open to discussions on any
16:58:26 6 field or decisions regarding the protocol, but a decision
16:58:31 7 has been issued, there has been a request for revision,
16:58:34 8 another decision was rendered and I have difficulties
16:58:38 9 continuing a discussion without the judges being aware of
16:58:43 10 that fact or the discussion.
16:58:46 11 At the same time, I appreciate the interesting initiative
16:58:50 12 suggested by the Prosecutor that the Defence be consulted
16:58:53 13 and that the Defence be incorporated into a working
16:58:56 14 group. I think that's an excellent initiative and
16:59:00 15 I fully respect that proposal.
16:59:06 16 JUDGE STEINER: So there are some points in this matter that
16:59:10 17 really need to be discussed, but one point is that there
16:59:18 18 are two alternatives. One is either the Chamber comes
16:59:22 19 with a complete modification of the system of filing, or
16:59:28 20 the Chamber receives a proposal -- a feasible proposal
16:59:32 21 made by the parties in agreement, and then it's easier
16:59:37 22 for the Chamber just to accept a proposed modification,
16:59:44 23 as the Chamber did today in relation to the system of
16:59:51 24 Rule 77 inspections.
16:59:51 25 [5.00 p.m.]

16:59:55 1 So I don't think that the initiative of any modification
 16:59:58 2 should be done by the Chamber without being requested by
 17:00:04 3 the participants, or even by the Registry, for providing
 17:00:09 4 for adjustments maybe on the draft protocol.

17:00:16 5 So at this point what I can see is that most of originals
 17:00:24 6 and electronic copies of incriminating evidence disclosed
 17:00:29 7 has not been filed with the Registry in the manner
 17:00:32 8 prescribed in such a decision.

17:00:37 9 So it will be to the Chamber to come back to this point
 17:00:41 10 and to issue a decision maybe ordering the parties to
 17:00:46 11 provide the Chamber with a proposal on the modification
 17:00:50 12 of the system. We cannot just wait for these working
 17:00:56 13 groups that sometimes take years to come up with an
 17:01:03 14 agreement. So the Chamber takes note of all that has
 17:01:10 15 been said here. I would like to ask Me Flamme if he has
 17:01:14 16 something else to add on this topic.

17:01:17 17 ME FLAMME (interpretation): Your Honour, of course the
 17:01:26 18 Ringtail for us at the moment is like Chinese, if I can
 17:01:32 19 put it like that, despite the fact that Chinese is an
 17:01:35 20 official language of the court as well, but I don't speak
 17:01:38 21 it, so I don't understand it. For us, Ringtail really is
 17:01:41 22 just another planet for us, despite the fact that we've
 17:01:44 23 had initial training which does give us an idea of the
 17:01:47 24 possibilities of the system, which is quite impressive.
 17:01:51 25 The Defence therefore cannot note the technicalities, and

17:01:59 1 certainly not the technicalities with regards to
17:02:02 2 introducing documents into this system. And the
17:02:05 3 Prosecutor is right to have warned us: be careful because
17:02:10 4 you are going to be confronted by this problem when you
17:02:12 5 try to start introducing documents into the system.
17:02:17 6 So it is very important that we can be involved in
17:02:23 7 reflection that's carried out. But, for the moment, we
17:02:26 8 are a bit outside this discussion, and the first thing --
17:02:32 9 well, the practical problem that the Defence is
17:02:35 10 confronted with is something which I can mention now.
17:02:41 11 Here I'm speaking about communication which is carried
17:02:44 12 out via CD-ROM, so it's still our means of examining
17:02:54 13 what's communicated to us. We have a first problem,
17:02:56 14 which is an old problem in fact, but which is quite
17:02:59 15 revealing, and perhaps a red light when it comes to
17:03:03 16 certain things which are communicated in the future.
17:03:08 17 The Prosecutor has -- in order to support his
17:03:13 18 application, an arrest warrant against Mr Thomas
17:03:18 19 Lubanga -- filed a certain number of evidence attached to
17:03:22 20 this application and, if I remember correctly, with the
17:03:28 21 request of the Chamber there were additional elements in
17:03:31 22 there as well. So I have asked for a long time
17:03:34 23 additional evidence as well. So I've asked for a long
17:03:38 24 time to be able to study, perhaps in a redacted form,
17:03:41 25 this evidence. And the Prosecutor responded to me that

17:03:45 1 these are documents which are attached to evidence that
17:03:49 2 has been filed and this is part of the court file -- it
17:03:55 3 is part of the Registry court file.
17:03:58 4 Okay. And I understand that this is the case, but then
17:04:05 5 how can I -- well, I see that probably in the court file
17:04:12 6 these documents or these materials are classed according
17:04:17 7 to numbers which they have received, and how can I know
17:04:24 8 what documents are part of these three different folders?
17:04:32 9 If they had been communicated to me in the old system,
17:04:36 10 which did have its advantages, where communicated
17:04:38 11 documents which were photocopied, I received three
17:04:44 12 folders and I could identify what the Prosecutor had used
17:04:48 13 to support his request.
17:04:50 14 I'm currently still in the dark when it comes to knowing
17:04:55 15 what were the exact materials which were part of
17:04:58 16 folder 1, 2 or 3. So my suggestion to the Prosecutor
17:05:00 17 would be to provide me with an inventory of the materials
17:05:05 18 with exact numbers which were part of one folder and
17:05:09 19 another.
17:05:11 20 That's the first point, which is an urgent problem as far
17:05:14 21 as we're concerned, because we are confronted with a
17:05:17 22 request for release and we want to be able to respond in
17:05:21 23 that regard.
17:05:23 24 So the second point that I wanted to make, which is
17:05:25 25 perhaps less important but nevertheless perhaps could

17:05:29 1 become more important during the proceedings, we still
17:05:32 2 have the problem that we have responded to the suggestion
17:05:37 3 of the Prosecutor concerning manuscript documents which
17:05:40 4 are electronically filed. The Prosecutor suggested that
17:05:46 5 with regard to these handwritten documents perhaps this
17:05:48 6 problem is going to go away -- we have printed them out,
17:05:52 7 but it still hasn't completely solved the problem. The
17:05:56 8 print often is just as unclear as the electronic version.
17:06:02 9 That's the second problem.
17:06:04 10 The third problem -- and this perhaps could be resolved
17:06:07 11 quickly, but it's a problem which is still at the
17:06:11 12 moment -- we don't find it -- on the CD-ROMs we can't
17:06:18 13 open certain icons. The system -- the Windows system
17:06:21 14 tells us that it's not filed under Windows, so we can't
17:06:26 15 open it. So I've spoken about this problem to the
17:06:30 16 Prosecutor and he said that this is a problem which could
17:06:33 17 be resolved by having a download of a particular
17:06:41 18 programme which would make it possible for us to open
17:06:45 19 these documents, and we have not been able to -- have not
17:06:48 20 had the time to do that yet, but we're going to try to do
17:06:50 21 that. So these are the three concrete problems that we
17:06:53 22 are confronted with at the moment. Thank you.
17:06:56 23 JUDGE STEINER: Mr Prosecutor has something to say about
17:07:07 24 these problems raised by the Defence?
17:07:12 25 MR WITHOPF: Yes, your Honour, there are a few observations

17:07:15 1 we have to make. Yes, there was an exchange of emails in
17:07:19 2 respect to these documents my learned friend from the
17:07:23 3 Defence could not open, and we have provided him with
17:07:26 4 advice in relation to a programme that can be downloaded
17:07:33 5 from the internet, and that would allow my learned
17:07:37 6 colleague from the Defence to open these documents.
17:07:42 7 Whilst the Prosecution is certainly as a last resort
17:07:49 8 prepared to provide such advice, the Prosecution believes
17:07:58 9 that such questions and such enquiries should first be
17:08:01 10 directed to the Registry. The Registry has to provide
17:08:04 11 for the technical tools to the Defence.
17:08:10 12 However, if this continues to be the case, as a last
17:08:17 13 resort -- but only as a very last resort -- the
17:08:22 14 Prosecution would be prepared to continue to provide such
17:08:28 15 advice.
17:08:30 16 My colleague just has informed me that all images that
17:08:36 17 have been delivered to my learned colleague from the
17:08:39 18 Defence are actually consistent with the protocol, which
17:08:43 19 reinforces my earlier statement that it's up to the
17:08:48 20 Registry to provide for the proper technical means to
17:08:52 21 allow Defence to open these documents.
17:08:57 22 If I may please address the issue about the documents in
17:09:00 23 handwriting, yes, the Prosecution, as mentioned earlier
17:09:05 24 on, has provided documents in electronic format and,
17:09:13 25 because of the reasons that have been mentioned by my

17:09:16 1 learned colleague from the Defence, in paper copy. It is
17:09:19 2 a reality, however, that some of these documents are very
17:09:21 3 difficult to read. The Prosecution still suggests that
17:09:26 4 the handwritten -- that the paper copies of the
17:09:29 5 handwritten documents are better to read than the
17:09:32 6 electronic versions, but some of these documents are just
17:09:35 7 of poor quality. We have to accept that, and Defence has
17:09:39 8 to accept that as well.

17:09:43 9 Of utmost concern for the Prosecution is the request of
17:09:49 10 the Defence that the Prosecution, in addition to its
17:09:54 11 legal obligations to disclose materials, as a matter of
17:10:00 12 courtesy should also provide copies of filings to the
17:10:04 13 court. What has been filed with the court and all
17:10:13 14 annexes that go with such filings have to be accessed via
17:10:18 15 the Registry. I think this is pretty clear, and there is
17:10:23 16 no legal obligation to the Prosecution to, in addition to
17:10:29 17 filing the annexes, provide the learned colleague of the
17:10:33 18 Defence with courtesy materials.

17:10:38 19 Once these annexes to ex parte filings are reclassified,
17:10:44 20 and in this particular instance the Prosecution has
17:10:46 21 double checked that they are reclassified at the very
17:10:51 22 least as confidential even if not as public, these
17:10:55 23 documents are in the court record, in the case records,
17:10:58 24 and they are accessible via the case records.

17:11:01 25 The Prosecution opposes, to the utmost extent possible,

17:11:06 1 any suggestion that the Prosecution in addition provides
17:11:10 2 extra copies to the Defence. This is not the procedure
17:11:16 3 foreseen by the underlying law.

17:11:18 4 I appreciate the difficulties my learned friend from the
17:11:23 5 Defence has in that respect, but this is again a matter
17:11:27 6 the Defence please addresses with the Registry and not
17:11:31 7 with the Prosecution.

17:11:34 8 JUDGE STEINER: In relation to this last point, I would like
17:11:38 9 to ask the Defence at what point the assistant of the
17:11:45 10 Office of the Public Counsel for the Defence have been
17:11:49 11 assisting the Defence counsel in providing these kind of
17:11:53 12 documents, the ones that were filed within the court.

17:11:58 13 ME FLAMME (interpretation): Yes, your Honour. This is a
17:12:01 14 problem that we have been studying for a few weeks
17:12:05 15 together with -- well, at separate times and together
17:12:10 16 with the Public Office counsel. But I don't know if my
17:12:15 17 esteemed colleague understood exactly. When we go back
17:12:20 18 to the decision which reclassified a certain number of
17:12:26 19 evidentiary material submitted by the Prosecutor, this
17:12:29 20 decision mentioned each time the number of the evidence
17:12:34 21 concerned which was reclassified as confidential or
17:12:36 22 otherwise.

17:12:40 23 Our problem is, when we see the number of this document,
17:12:45 24 it's just a simple problem of classification. We don't
17:12:49 25 know which file of the Prosecutor it belongs to. Is it

17:12:56 1 attached to the request for the arrest warrant, is it
17:13:00 2 attached to the second folder of additional evidence, or
17:13:05 3 is it part of the third folder? It's just that we don't
17:13:09 4 know. We see that there's material there, but we don't
17:13:13 5 know which folder it belongs to. That's the point, and
17:13:19 6 that's a simple problem when it comes to classification.
17:13:25 7 That's it.

17:13:27 8 JUDGE STEINER: I would like to ask the Registry on this
17:13:31 9 point, because I think it is possible to -- or we already
17:13:37 10 have a kind of index in which all documents are listed
17:13:41 11 and if there is some modification, even on the level of
17:13:47 12 qualification or number, it is mentioned in this kind of
17:13:52 13 index.

17:13:55 14 [5.13 p.m.]

17:13:55 15 MR DUBUISSON (interpretation): Your Honour, I share totally
17:13:59 16 the view of the Prosecutor on this issue. It's not up to
17:14:02 17 the Prosecutor, of course, to give this type of document;
17:14:05 18 it's up to the Registry to carry out this task. That's
17:14:09 19 fully within our obligations. We have taken -- it's true
17:14:14 20 it's taken us time to put the decision on
17:14:18 21 reclassification to implement that, which has generated a
17:14:21 22 lot of movements of documents from one file to another,
17:14:24 23 and attached to the -- and attached to that there's an
17:14:29 24 index. The index perhaps isn't sufficient, because it's
17:14:31 25 a file index. It's not one which says perhaps what the

17:14:36 1 -- what it was used for before. So it's up to everybody
17:14:39 2 to exercise specific functions according to needs. We
17:14:47 3 are going to re-register certain documents following that
17:14:54 4 and it will be accessible on the index. But I will now
17:14:57 5 take this opportunity to ask that if communication of
17:15:00 6 this type happens between the Defence and the Prosecutor,
17:15:02 7 I would ask that we be notified, because sometimes we get
17:15:05 8 no communication when it comes from the Office of the
17:15:08 9 Defence, so the Defence -- so the office which is part of
17:15:14 10 the Registry, so I would ask you, certainly in Court
17:15:19 11 Management, where it concerns documents, to provide us
17:15:22 12 with this as quickly as possible. If any of the parties
17:15:25 13 think that we're going too slowly in recording the
17:15:30 14 evidence, to notify us of that. Thank you.

17:15:50 15 JUDGE STEINER: I thank you for this explanation. It does
17:15:53 16 not cover entirely the concerns of the Defence. So
17:15:58 17 I hope that an agreement is possible between the Defence
17:16:03 18 and Court Management in relation to this specific point
17:16:08 19 on the reference -- the cross-references between
17:16:13 20 documents that have been changed from one file to the
17:16:16 21 other, or their level -- classification -- in order to
17:16:28 22 facilitate the Defence to recognise a document or an
17:16:32 23 attachment or annex related to the specific document.
17:16:37 24 As far as I understood, this is the main concern of the
17:16:40 25 Defence -- the difficulties in recognising the documents,

17:16:44 1 because they have their classification changed and,
17:16:48 2 therefore, their numbers changed, if I'm correct,
17:16:53 3 Me Flamme.

17:16:58 4 MR DUBUISSON (interpretation): If you would allow me? Yes,
17:17:04 5 certainly what we're going to do is to ensure, as far as
17:17:08 6 possible and without creating any type of breach of
17:17:10 7 confidentiality, so there are measures of confidentiality
17:17:17 8 there -- with regards to their particular classifications
17:17:20 9 in accordance with confidentiality, so with a full
17:17:22 10 respect of the orders that were given with regard to the
17:17:25 11 specific degrees of classification, we will transmit to
17:17:29 12 the Defence on a CD, because that is the material which
17:17:35 13 is currently used, the documents in question with the
17:17:36 14 index. We will help the Defence with this matter.

17:17:50 15 JUDGE STEINER: Thank you very much for your cooperation.
17:17:52 16 Just before giving the floor to the parties to bring any
17:17:57 17 additional matter, I would ask the Prosecution, the
17:18:02 18 Registry and, if the case, the Defence about the
17:18:07 19 possibility of receiving, before the next
17:18:11 20 Status Conference to be held, as far as I remember, on
17:18:18 21 14 July -- is that correct -- a joint proposal on the
17:18:27 22 draft protocol changes or any modifications on the draft
17:18:33 23 protocol in order to make it regular the filing of
17:18:38 24 documents. I would ask the parties to see if it is
17:18:43 25 reasonable to wait for a joint proposal before the next

17:18:49 1 Status Conference. Would the Prosecution be available
17:18:54 2 for giving priority for this matter?

17:19:00 3 MR WITHOPF: Your Honour, the Prosecution is certainly
17:19:02 4 available, and after consultation with my colleague I can
17:19:05 5 say that, in the view of the Prosecution, this is
17:19:09 6 feasible.

17:19:11 7 JUDGE STEINER: May I have the views of the Registry?

17:19:14 8 MR DUBUISSON (interpretation): Of course, we are required to
17:19:20 9 do it and to be able to do it, so there's absolutely no
17:19:25 10 problem in making it available. And we have a
17:19:28 11 provisional date, which is -- a goal date, which is
17:19:30 12 perfect. Thank you.

17:19:32 13 JUDGE STEINER: If the Defence intends to participate in this
17:19:35 14 working group in this effort in order to improve, if the
17:19:39 15 case, the draft protocol, the Defence will be welcome.

17:19:43 16 ME FLAMME (interpretation): Yes, certainly, your Honour.
17:19:46 17 Obviously, we are very interested in being able to
17:19:49 18 participate in this exercise, but I would ask, because we
17:19:52 19 are talking about a problem which is very important and
17:19:56 20 general for the Defence, that the Office of Public
17:19:59 21 Counsel for the Defence be actively linked in this
17:20:02 22 exercise -- be actively involved in this exercise.

17:20:05 23 JUDGE STEINER: I think it's a very, very useful proposal to
17:20:12 24 have involved the Office of the Public Counsel for the
17:20:14 25 Defence, due to the fact that this issue involves not

17:20:17 1 only Mr Lubanga's defence but all future cases arising
17:20:24 2 before this court.
17:20:26 3 I would like then to ask the Prosecution to make its
17:20:31 4 final observation, or if the case to bring to the
17:20:35 5 attention of the single judge any other matter it deems
17:20:38 6 important or necessary.
17:20:40 7 MR WITHOPF: Your Honour, thank you for giving us such
17:20:43 8 opportunity. There's nothing else the Prosecution wishes
17:20:46 9 to mention beyond what has been said earlier on today.
17:20:52 10 JUDGE STEINER: Thank you very much. Me Flamme?
17:20:54 11 ME FLAMME (interpretation): I don't have any other further
17:20:58 12 comments to make, your Honour. Thank you.
17:21:01 13 JUDGE STEINER: Mr Registrar?
17:21:06 14 MR DUBUISSON (interpretation): Thank you very much, your
17:21:08 15 Honour. No, I don't have any comments.
17:21:10 16 JUDGE STEINER: So I would like to thank the Prosecution, the
17:21:23 17 Defence and the Registry for this very fruitful hearing,
17:21:27 18 for again the cooperation environment that involved all
17:21:31 19 the participants on this hearing. I would like to thank
17:21:33 20 the interpreters for their efforts, and this hearing is
17:21:39 21 adjourned.
17:21:41 22 [5:21 p.m.]
17:21:46 23 [The hearing adjourned accordingly]

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