

1 International Criminal Court

2 Pre-Trial Chamber I

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

4 Status Conference

5 Tuesday, 5th September 2006 - Open session

6 The hearing starts at 11.00 a.m.

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

9 JUDGE STEINER: Good morning. If it please the usher, call the
10 case.

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

14 JUDGE STEINER: Thank you very much.

15 Let me first welcome Mr. Thomas Lubanga Dyilo, who is present at
16 this hearing. I would like also to welcome the Prosecution, the Defence
17 teams and representatives of the Registry. And I would like first the
18 Prosecution, then the Defence, and then the Registry to introduce
19 themselves and their teams.

20 MR. WITHOPF: Good morning, your Honour. Good morning to the
21 learned friends from the Defence. Also, good morning to the
22 representatives of the Registry. And I extend my greetings, as always,
23 to everybody in and around the courtroom.

24 For the Prosecution appears today Ms. Julieta Solano to my left,
25 an associate trial lawyer; behind Ms. Solano, Mr. Michael Lees, who is

1 the head of the OTP's Knowledge Base Unit; behind me, Ms. Ramu Bittaye,
2 our case manager; and I, Ekkehard Withopf, the senior trial attorney.

3 MR. FLAMME (interpretation): Good morning, Your Honour. Good
4 morning to everyone present in the Court.

5 For the Defence, I am Jean Flamme; I am counsel for Mr. Lubanga.
6 Next to me is Ms. Veronique Pandanzyla, who is the Legal Assistant, and
7 Ms. Melinda Taylor, who represents the Office of Public Counsel for the
8 Defence.

9 Thank you.

10 MR. VAAITANEN: Good morning, your Honour. Good morning,
11 everybody in the courtroom. My name is Simo Vaatainen. I am the chief
12 of the Victims and Witnesses Unit, and I'm appearing on behalf of Mr.
13 Marc Dubuisson, Director of Division of Court Services. He was not able
14 to attend due to a prior obligation outside the Court that he wasn't able
15 to reschedule. He might be present in the afternoon.

16 To my right is Mr. Esteban Peralta Losilla, who is the officer in
17 charge of the Defence Support Section. Behind me is Mr. Ian Blacker; he
18 is the head of the Information and Communications Section. To my left is
19 Mrs. Anne-Aurore Bertrand; she's the Assistant Legal Officer, Division of
20 Court Services. And behind me is Mr. Uros Mijuskovic; he's the Senior
21 Court Record Assistant from the Court Management Section.

22 JUDGE STEINER: Thank you very much.

23 I would also like to introduce Ms. Leda Limann; she is the
24 Assistant Legal Officer for Judge Akua Kuenyehia, in substitution of our
25 dear colleague Josyanne Pierrat, who is on maternity leave.

1 So, first of all, I would remind all participants to the status
2 conference that this hearing is held pursuant to paragraph 8 of the
3 timetable set in the decision on the postponement of the confirmation
4 hearing issued on 24th May 2006.

5 At the last status conference held on 24th August 2006, we dealt
6 with a number of logistical issues concerning, for the most part,
7 Mr. Lubanga and the Defence team, and hence I would like, before entering
8 the discussion on the disclosure process, that we have an update from the
9 Defence and the Registry on these logistical issues, and in particular on
10 the problems of the Defence team as a result of not having access to the
11 Court's network.

12 Afterwards, we will focus on the process of disclosure and
13 inspection, on the one hand, and on the process of communication of the
14 evidence on which the parties intend to rely at the confirmation hearing,
15 on the other hand, since the last status conference.

16 Subsequently, I would like to carefully revise with the parties
17 where exactly we are in terms of Defence access to evidence included in
18 the Prosecution Charging Document and List of Evidence filed on 28 August
19 2006.

20 Finally, we will discuss the implications in relation to the 12th
21 September 2006 time limit for the filing of the Defence List of Evidence.

22 At the end of this agenda, the parties will have an opportunity
23 to raise any matter that they would like to raise at that point.

24 Is this way of proceeding agreeable to the parties? Mr. Flamme,
25 is that acceptable?

1 So let's, then, start with the preliminary matters. They are
2 related to logistical issues.

3 First, I would like to invite Defence to make its observations,
4 views and concerns in relation to logistical issues related to Defence
5 access to the evidence included in the Prosecution Charging Document and
6 List of Evidence.

7 The Defence has the floor.

8 MR. FLAMME (interpretation): Thank you, your Honour. I would
9 like to repeat what I said in the previous hearing, and obviously this
10 involves both logistics, logistical issues, which have implications for
11 Defence working facilities; they also concern issues noted, included, in
12 the agenda.

13 I shall give you an example. I myself have yet to receive the
14 e-mail to which the decision on the agenda is attached. If Ms. Taylor
15 hadn't called me yesterday evening, when I was travelling to The Hague in
16 my car, to announce that there was an agenda for this morning, I would
17 not have been aware of it. So it is this morning, when I was going
18 through the Court's web site, like any other member of the public, that I
19 was able to see the agenda.

20 This is obviously closely linked to the lack of access to the
21 Court's network for the Defence. We talked with the Registry this week.
22 I spoke with them, and more officially Ms. Taylor did. More
23 specifically, Ms. Taylor took part in a meeting where these problems were
24 raised and when it was said that there might be a solution. If I
25 understand correctly, this has been discussed for some time now. There's

1 the possibility of giving us extranet access, which would then give us
2 special or secure access based on a key or a password for our computers.

3 If I understand correctly, first, since that meeting, there has
4 been no further word of that solution. Secondly, as I understand it,
5 this access would be limited to work that is carried out here in The
6 Hague. This access does not give Madam Pandanzyla and I access to the
7 information we need when we work in Gent and in Brussels. This is
8 important in terms of economies or savings that could be realised for
9 logistics and lodging purposes.

10 When I put the question to Mr. Dubuisson, in my conversation with
11 him I asked him why, since the beginning of this case, has the Defence
12 been denied access to the Court's network. Mr. Dubuisson clearly told me
13 in response that the Office of the Prosecutor has refused that such
14 access be granted.

15 Madam President, that, in my view, is the origin of all the
16 problems, and the alternative solutions that can be imagined have still
17 not been implemented.

18 I'll give you another example. I never received a report on
19 hearings. I have not received the minutes of the previous hearing and
20 the hearing before that. Some e-mails I do not receive. I am referring
21 to the very crucial issue pertaining to the victims. In my last
22 submissions pertaining to the participation of the first series of
23 victims, I had to tell the Court that the e-mails mentioned in the last
24 decision on the victims I had not yet received.

25 This was also the case not only for e-mails but also for

1 submissions and applications that I had filed. And luckily I telephoned
2 the Registrar to determine whether it had received my e-mails, and the
3 response I got was that they had not been received.

4 So it took one or two days to solve these problems. I was told
5 subsequently that this was an internal problem. So I'm beginning to
6 wonder whether this is not a problem of a connection between an external
7 e-mail address, such as mine, and an ICC e-mail address, which I do not
8 have. There is an address with my name, but the address doesn't seem to
9 work.

10 So if this is not only a working problem -- this is not only a
11 working problem but also a problem of confidentiality, because I am being
12 denied confidentiality because I am forced to use my official e-mail
13 address, which is probably visible -- available to the whole world. I
14 have already talked about the large-scale espionage, of telephone
15 conversations, bank accounts, and e-mail addresses all around the world.

16 Also, in my confidential communications with my team members, I
17 am forced to use unofficial e-mail. That is not the object of the
18 exercise.

19 And I would like to point out that, following the discussions
20 with my team, which, in the meantime, has increased in the sense that we
21 have interns who have been provided to us by the Defence section, I was
22 told that in the ICTY it is not the case that Defence is part and parcel
23 of the Court's network, and it is not considered to be on par with the
24 Prosecutor and the Defence and others.

25 I am giving you these examples to indicate that we are still not

1 included in the network, that we do not have an alternative solution,
2 were such a solution to be found. I found this interesting that the
3 Defence could not be part of the network. Perhaps it is a distrust of
4 the Defence. If that is the case, then the Defence would have trouble
5 accepting that.

6 So, to answer your question, we have not made any progress to
7 date.

8 JUDGE STEINER: So on this very specific --

9 MR. FLAMME (interpretation): Madam President, it has been
10 pointed out that in the English translation on the screen, there is a
11 translation error. I said that it is the case before the ICTY that the
12 Defence is part of the network, whereas it indicates in English that --
13 it is indicated that it is not the case. So that is the opposite,
14 actually.

15 THE INTERPRETER: The interpreter apologises.

16 JUDGE STEINER: Thank you very much.

17 So, first, before giving the floor to the Registry, I would like
18 to listen to the Prosecution, his comments on what has been said by the
19 Defence counsel.

20 MR. WITHOPF: Your Honour, thank you very much.

21 I think what my learned colleague from the Defence is addressing
22 is, indeed, a serious matter. Not having access and not being able to
23 even receive e-mails from Court Management, indicating, for example,
24 agendas for a status conference, is serious without any doubt.

25 The only matter I'm going to address is the statement made by my

1 learned friend from the Defence, making reference, obviously, to a
2 conversation with Mr. Marc Dubuisson that the OTP has objected to having
3 Defence -- having Defence access to the Court's network.

4 I think there's a difference to be made between having access to
5 the network, which contains all materials that are at the disposal of the
6 Court, including evidential materials, and having access to the e-mail
7 exchange, which is something completely different. Of course, the
8 Prosecution, the Office of the Prosecutor, at no point in time has made
9 such a statement that my learned colleague from the Defence should not be
10 entitled to have access, including external access from Gent or Brussels,
11 to e-mails being sent from Court Management. That appears to be either a
12 misinterpretation or a misunderstanding on Mr. Dubuisson's side or on the
13 side of my learned friend from the Defence.

14 A final remark: It's certainly not only up to the Office of the
15 Prosecutor to refuse - and this is the final word - even if that would
16 have happened, but it has not; it's not the Registry just conveying a
17 message of the Office of the Prosecutor to the Defence and not taking
18 action.

19 On that point, in respect of that point, your Honour, I would
20 suggest that the Registry takes all efforts, as it has done in the past
21 in many respects, to grant such access to counsel for the Defence as soon
22 as possible in order to allow counsel for the Defence to properly
23 discharge its obligations.

24 Thank you.

25 JUDGE STEINER: Thank you very much. I would like some

1 preliminary observations from the Registry, and with particular attention
2 to some of the points like access to e-mail; the problems Defence is
3 facing with receiving and sending e-mails with documents; the point that
4 the Defence does not have an e-mail address, if I well understood; in
5 terms of possible alternative solutions.

6 So these are the main points that I could take notice of. But
7 the Registry has the floor to give an overall view on these points.

8 MR. VAAITANEN: Thank you, your Honour.

9 If I first could just -- there's a couple of points that were
10 made by the Defence counsel, and after that I will give the floor to
11 Mr. Ian Blacker to explain to you, from a technical point of view, the
12 issues, and probably Mr. Mijuskovic is going to add to that as well.

13 On the issue of the e-mail received last night, I believe that is
14 only a question of timing, as we received the agenda very late, and the
15 Court Management Section forwarded it to all the participants. So I
16 think it's just an unfortunate timing issue there.

17 On the matter concerning the conversation between Defence counsel
18 and Mr. Dubuisson, I am not privy to that conversation so it's difficult
19 for me to comment, other than that, as indicated by the Office of the
20 Prosecutor, I would be equally puzzled if that was accurate. I think
21 there must be some sort of misunderstanding on the issue.

22 After those points, if I may, with your permission, your Honour,
23 I'll give the floor to Mr. Ian Blacker.

24 Thank you.

25 MR. BLACKER: Good morning, your Honour. Good morning,

1 everybody.

2 I would like to concur with the comments of the Prosecution. I
3 think there is a slight difference between giving access to the Court's
4 network and to the e-mail.

5 The problem with the e-mail, there's no technical issue about
6 giving access to the e-mail. We can do that in one day. Giving the
7 e-mail would send a message that the e-mail address would be
8 flamme@icc-cpi.int, and the Registrar has indicated that he's not in
9 favour of that solution. We are working on an e-mail solution for the
10 Defence that has a different name, which also allows collaboration for
11 the Defence, and it's a service that we are prepared to pay for.

12 I have a time line here as to what can be delivered in terms of
13 access to the ICC network in the short term and in the long term, and I
14 have the dates when we can deliver those solutions.

15 I would also like to point out that we must keep in mind that the
16 Office of the Prosecutor also does not have remote access to the Court's
17 applications, like Ringtail. They all have to actually be in the office
18 to access those applications. But we are going to go one step further to
19 allow the Defence to get that access.

20 So, as you can imagine, the reason why the Defence did not
21 receive our proposed solution is because the technicalities of the
22 solution was only worked out late last night and therefore they did not
23 receive a copy of what I am about to present to you.

24 Our short-term solution, we will provide e-mail accounts to the
25 Defence which has limited access to the ICC network, taking into account

1 all the issues of security and the integrity between the organs. We will
2 also provide them with a network folder, where they can all save the
3 documents to, and that folder, of course, can be password-protected. So
4 everybody who has access, then, to the Court's network, this limited
5 access, will also have access to this one, or whatever folders they
6 decide to create for themselves under that protected space. This will
7 allow them to, of course, collaborate and share files and folders on the
8 ICC network.

9 We will then also -- this will also give them access to Ringtail
10 to allow them to do some analysis, which will be shared by the OPCD users
11 and the Defence users. To do this in a very quick manner, we will
12 provide them access to the Registry's Ringtail application. And then the
13 e-mail -- which, of course, will mean that all the information will be
14 loaded up onto the Registry's Ringtail and they will have access, like
15 the OTP has access.

16 The e-mail, we will provide e-mail through an external e-mail
17 provider, so therefore, again, not using the ICC's e-mail service, but we
18 are also looking for a solution where we can send e-mail with attachments
19 that are encrypted, which will allow secure -- which will allow the
20 Defence to receive e-mail through the Internet through an encrypted
21 means, which will be safe and secure. This solution can be delivered by
22 Friday, the 8th of September, close of business.

23 We then move to a longer-term solution where pretty much
24 everything is the same. By October the 16th, we will then allow the
25 Defence to have external access to the ICC network, which will give them

1 remote access to all these systems and remote access to TRIM as well.

2 However, the e-mail solution will be the same. I suggest we test this
3 e-mail solution and see how it works, and then we'll give the results and
4 see if we have to do anything more on that.

5 That's what we can offer in the short term and the long term.

6 The long-term solution, of course, allows access from anywhere in the
7 world, as long as there's an Internet connection.

8 I just want to go back again to the beginning of the e-mail
9 problem. We have to also realise that the ICC e-mail service processes
10 200.000 e-mails a day. However, because of the nature of the Internet,
11 once the e-mail leaves the ICC, we have no control over where it goes and
12 how it reaches the individual on the other side. Our obligation
13 basically stops once the e-mail leaves the building, and that's all we
14 can -- there are so many unknowns on the Internet. Sometimes it can take
15 5 minutes; sometimes it can take a day. But we don't control that part,
16 end to end. So we cannot promise that an e-mail will reach somebody
17 within 10 minutes if it's outside the ICC. Okay?

18 With that, I conclude my submission. If you have any other
19 questions.

20 JUDGE STEINER: I'm sorry, I still have very, very basic doubts
21 and problems in understanding these points. The access to e-mails,
22 long-distance access that we, for instance, the Judges, we have with this
23 ID card, this kind of ID card - I don't know exactly the name - is this
24 the one that has been thought of in terms of giving Defence access to
25 e-mail accounts?

1 MR. BLACKER: Your Honour, no, this is not the solution that we
2 intend to provide. That solution, of course, I said can be provided;
3 however, in a meeting with the Registrar again yesterday, providing the
4 Defence or external counsel with an e-mail service that ends up with
5 "name.surname@icc-cpi.int" would implicate that this person is a -- I
6 don't know. We normally give these accounts to ICC staff members, or
7 they are -- I don't know what's the word, but closely -- not affiliated.
8 But we provide these e-mails to the staff members, to the Judges, and to
9 -- very seldom do we allow this e-mail address to be used for, I don't
10 know, for other parties. This is totally an e-mail -- this domain
11 identifies this person as an ICC staff member or somebody that the ICC
12 directly pays or whatever. So this is not the e-mail service that the
13 Registrar would like to give at the moment.

14 JUDGE STEINER: And the second question: In relation to Defence
15 access to the transcripts that we at least have by this LiveNote, is
16 there any proposal for the Defence to have access to the transcripts of
17 the hearings?

18 MR. MIJUSKOVIC: Good morning, your Honour. I will try to answer
19 your questions, and maybe the Registry will explain it in a wider manner.

20 Two important points have been raised by the Defence; one is
21 access to the transcript, which we know is very important; the second one
22 is numerous court records which apparently have not been received either
23 by the Court Management Section or by the Defence team.

24 In relation to the reception of court records and the e-mail
25 problem, as your Honour is aware, the Registry raised this problem with

1 the Chamber, with the appropriate services at the Registry, and did its
2 best to inform participants of the problems that we were facing. It
3 lasted for five or -- four or five days, I'm sorry, and we did our best,
4 the Registry did its best, to inquire as to the documents which were
5 potentially not received and to send them again. The time lapse during
6 which this problem occurred - I wish to repeat this - was not longer than
7 a week. Sometime by the end of the month of July. Today the problem is
8 solved. The documents are sent.

9 Of course, as you may know, for information security reasons, the
10 Registry is not in the capacity to send documents via e-mail if they are
11 confidential or under seal. DHL is used. Sometimes it takes more time.

12 As far as the transcripts are concerned, transcripts have been
13 sent also via DHL, because most of the time they are confidential. And
14 we also took a precautionary measure to provide Mr. Flamme with a
15 version, an unfinished version, of the transcript as soon as the hearing
16 is over. This is what we will continue to do. So we will copy the
17 transcript on a media, whether it's a CD or a pen drive, and provide the
18 Defence team with a transcript as soon as the hearing is over, or maybe
19 after one hour.

20 Thank you, your Honour.

21 JUDGE STEINER: Thank you very much. So if I well understood,
22 there are three or four items, most of them related to e-mail access,
23 that can be implemented by September the 8th.

24 Just for the record, I would like, please, to invite the
25 representative of the Registry to repeat exactly which items are these,

1 just to make sure that everything is on the record.

2 MR. BLACKER: Okay. Your Honour, on the 8th of September, we
3 will be able to deliver the user accounts for the Defence with limited
4 access to the ICC network. We will create a network folder for them to
5 store and have collaboration, so they can all have access to the same
6 information, which means they will be able to share files. We will --
7 they will have access to Ringtail, where we will move all the information
8 over to. And then we will provide them with e-mail access, external
9 Internet provider for e-mail access. And they will also have access to
10 the Defence -- to the transcript repository.

11 The only limitation for the 8th of September is that the staff
12 and the Defence have to be at the ICC, at the Arc or in the Hoftoren.

13 The long-term solution to be delivered on October the 16th is the
14 same. The user accounts will have access to the ICC network. They will
15 have access to shared folders, access to LiveNote again. Again, a
16 separate Ringtail, though probably, in the third phase, we'll provide
17 them with a different Ringtail environment. But they will still have
18 access to all the information.

19 The addition to this now is that they will have access to the
20 court records interim. And the e-mail solution will remain the same.
21 And they will have secure remote access to all the items I've just
22 mentioned for October the 16th.

23 Thank you.

24 JUDGE STEINER: Thank you. Would the Defence like to add
25 something to these provisional solutions offered by the Registry?

1 MR. FLAMME (interpretation): Yes, your Honour. We're speaking
2 of a problem, a complication, which for me is extreme. I'll try and work
3 through this in order.

4 The electronic system, for me, is subdivided into different
5 parts, each of which pose their respective problems. Let's start by
6 talking about the e-mail problem, e-mail being the mode of communication
7 which we continually use.

8 First of all, the Prosecutor tells me -- well, we can deal with
9 the other issues in a moment, but let's start with e-mail.

10 The Prosecutor says he may have been misunderstood. I did not
11 understand it that the Prosecutor was refusing access to the e-mail to
12 the Defence. No. If I've understood rightly, the Registry services
13 would have only accepted that non-officials of the Court, including the
14 Defence, would have the same access to the e-mail system as officers of
15 the Court.

16 Now, I can only interpret this as being a motion of no confidence
17 vis-a-vis the members of the Defence, and that the Defence are seen to be
18 outsiders, strangers, to the system. I think that this would be a very
19 bad solution, and I think that in the short term and in the medium term
20 and possibly also in the long term, it will have very negative
21 repercussions, because a Defence who feels like an outsider, an alien,
22 perhaps even an enemy of the system, will find it very difficult to play
23 its role.

24 So when I hear that interns who work for the Office of Public
25 Counsel for the Defence, the day after they take up their functions, have

1 their ICC e-mail address, and when I hear that the ICTY, which is the
2 tribunal that has been operating for the longest period of time in
3 international criminal justice, that there it is a routine matter and
4 that the Defence is an integral part of the system, I find it difficult
5 to imagine a system which will be even more complex.

6 I have heard talk of encryption. And if my knowledge is
7 sufficient, I know that encryption means that I will need a password or a
8 key and that I will not be able to use that password or key when I am
9 working from a hotel, for instance, the day when I am in a position to
10 travel to the DRC, to Kinshasa, or elsewhere, or when I am sojourning in
11 a hotel on holiday in Italy.

12 Now, if I have understood the Registry rightly, before the 16th
13 of October, I will not be able to use the system outside of the Hoftoren
14 building. And after the 16th of October, I don't know what happens
15 because I haven't heard a response to that question.

16 In order to work well, I am obliged to work from the Hoftoren.
17 That is possible. But then the funds available to the Defence would have
18 to be incremented to make lengthier stays in the Netherlands possible.

19 For the time being, we are working largely from Gent and
20 Brussels, and we write our conclusions and briefs from there and file
21 also from there, albeit perhaps with risks involved. However, all I want
22 is to be fully integrated into the system, complete with all of the
23 security measures that are necessary.

24 I hear that when an e-mail exits the system that there are no
25 guarantees. Well, then, I think that is one more reason why the Defence

1 should be included in the system, and then the problem which was raised
2 by the representative of the Registry would no longer be a problem. The
3 confidentiality problem would be resolved, as would the difficulties
4 thrown up by the DHL dispatches, which I often do not receive before
5 arriving in The Hague. I have never received a transcript by DHL, so
6 clearly there is a problem there.

7 When I hear that there is a system which would resolve all of
8 these problems, is it not the objective of the E-Court that the system
9 serve all? Currently we only receive confidential documents by DHL. And
10 I would like to point out to your Honour that sometimes the deadlines for
11 response to decisions are quite short, and, owing to communication
12 problems, the time limits which I must respect to study files to respond,
13 et cetera, in reality, only begin to run in my case perhaps only four
14 days after the day it was originally tendered; that is to say, the day
15 when the DHL agent transmits the document to me by hand.

16 Quite honestly, I just don't understand. That's what I have to
17 say on the e-mail issue.

18 A problem which is substantially more important in my eyes is the
19 Ringtail problem. We are told that from the 8th/9th we will be in a
20 position to access the Ringtail system, and that this will make it
21 possible for us to consult and study documents online but only from the
22 Hoftoren, not from Gent or Brussels, which is not the case for counsel
23 appearing before the ICTY, where the Defence have what is called a bucket
24 where all information, evidence, et cetera, which is necessary to the
25 work of the Defence is deposited. And that bucket can be consulted

1 online by Defence working at the ICTY, not just from The Hague but also
2 when they are travelling or when they are elsewhere.

3 If we are in the DRC and we are working, we will constantly need
4 to consult the evidence disclosed by the opposing party in order to
5 identify the needs in relation to a particular witness or to respond to
6 certain accusations or documents or evidence related to that accusation.

7 Now, the Prosecutor has not yet stated what his point of view is
8 regarding access of the Defence to that part of the network. I am no
9 longer speaking of e-mail but I am speaking of Ringtail, or the online
10 Ringtail, if I could dub it as such. Perhaps my terminology is not
11 exact. But this online Ringtail is what would make it possible for the
12 Defence to have constant access to evidence online without having to
13 consult a laptop, which sometimes is in The Hague and isn't in Gent or
14 has to be brought with the travelling counsel, et cetera.

15 Your Honour, I need to underline that it is just impossible to
16 work in this fashion. I now have a team of several interns who will be
17 in a position, from tomorrow, to begin work on the evidence disclosed by
18 the Prosecutor, but I don't have a computer to give them. I have a
19 laptop, but I should take a laptop to Gent and Madam Pandanzyla should
20 take one to Brussels.

21 Working on disks or the CD-ROMs, which has been the means of
22 communication used by the Prosecutor hitherto, is also not possible
23 because desktop computers and our own laptop computers do not have the
24 software needed to read certain documents. So, in fact, we can only read
25 them using the Ringtail system, which perhaps is logical enough; but if I

1 don't have access to the Ringtail system, what am I to do?

2 I need to point out that I will only have access to this Ringtail
3 system, if I have understood rightly, from the 8th/9th, less than 20 days
4 before the confirmation hearing. And what happens after the 16th of
5 October and the confirmation hearing? Will I have access from home and
6 from locations outside of the Hoftoren building? I do not know.

7 I would add to what I have already said. I'm looking ahead now
8 to the confirmation hearing in order to work well. To work well, I will
9 need to have part of my team with me at the hearing to attend and
10 participate in the hearings on a continuous basis, to point matters out
11 to me, et cetera, but I will also need to be able to contact them outside
12 of the hearings; for instance, contact them from the courtroom by e-mail
13 so that those individuals will be able to make contact with whatever
14 service is necessary - the library, for instance, or an external party -
15 to obtain clarifications regarding certain items, certain items of
16 material.

17 I will also need access to LiveNote, as I believe it's called. I
18 will need to be able to consult LiveNote from an office here in the
19 building. Now, we do have an office in the building, but I thought today
20 that in the case of one of the offices, not only have the desktop
21 computers disappeared from that office but also one of the desks has
22 disappeared and two chairs. So I barely have one office which is empty,
23 with a chair and a coat stand, which is very handy because I can hang my
24 coat when I come in. But, as for the rest, I have nothing. No
25 infrastructure any more, and this is three weeks ahead of the

1 confirmation hearing.

2 JUDGE STEINER: Thank you, Mr. Flamme. I would give again the
3 floor to the Registry. But before doing that - I think maybe it was my
4 misunderstanding or maybe Defence's misunderstanding - when we talk about
5 long-distance e-mail address, it's something different than having an ICC
6 e-mail account, as far as I know, because no one except, as far as I
7 know, the Judges have long-distance access to e-mail. This ID card I
8 mentioned, only the Judges -- a part of Chambers, only the Chambers have.
9 So it is not something where, as the Defence said, the interns have
10 access and everyone has and the Defence cannot have access.

11 I just mentioned the ID card in order to see if there is
12 something similar that could be done. I don't know if it is technically
13 possible, but something similar. But this special access by an ID card
14 is not given to staff members, except some officials of the Court, like
15 the Judges are.

16 The second point in relation to the transcripts, as far as I
17 understood, the Defence said that it has not received any, but ...

18 MR. MIJUSKOVIC: Your Honour, the Registry will investigate this.
19 It is highly strange, but the Registry will investigate and come back to
20 you and Monsieur Flamme on this matter.

21 JUDGE STEINER: Thank you.

22 Finally, the problem with access to evidence by an electronic
23 way, I would like someone from the Registry to correct me if my wrong,
24 but none of this information is sent by e-mail. It's sent by CD, in a
25 format -- in a CD format. Chambers can only -- all confidential

1 documents have been accessed by Chambers, at least by this Judge, using a
2 CD. So I presume it's the same way as the Defence is receiving the
3 documents.

4 I would like to give the floor to the Registry, even for the
5 purpose of clarifying this problem. And later I would come back to this
6 Ringtail. I am, in a way, some kind of old-fashioned judge, so even if I
7 don't have the Ringtail, I will read the documents to prepare for the
8 confirmation hearing. So I understood that the Ringtail is something
9 that is put for the parties in order to facilitate their work. But I
10 would like to know if the work, it would be impossible to be dealt with
11 without the Ringtail. What is, exactly, the idea of the Registry on
12 that?

13 MR. MIJUSKOVIC: Thank you, your Honour. I would just like to
14 clarify the first point, which was a bit confusing for your Honour, and
15 then I would give the floor to Mr. Ian Blacker to explain more about
16 Ringtail.

17 When Maître Flamme refers to CDs and files which he cannot read,
18 and evidence, he is not referring to the same documents we are sending to
19 the Chambers. There is a difference between those documents, which are
20 court records, motions, decisions, responses, and evidence material,
21 which is in fact disclosed via CDs in a specific format that, of course,
22 cannot be used if the system is not in place. In order to read those
23 CDs, you have to import whatever is on the media into the system, being
24 Ringtail, and then the information is usable. That's why there's the
25 confusion.

1 JUDGE STEINER: I thank you very much for this clarification.

2 It's good for the record, because sometimes we are talking here about two
3 completely different things. One is related to decisions, to filings,
4 and things like that; another thing is the specific format of the
5 evidence filed within the Registry. So there are two completely
6 different things and two different solutions, probably.

7 MR. MIJUSKOVIC: Yes, your Honour.

8 MR. BLACKER: Yes, your Honour, the issue of -- well, I just want
9 to clarify for the record: The ID card given to ICC staff, it is given
10 to staff for an operational need and proper business need. And you are
11 right, it is not given to any of the interns unless there is an urgent
12 need. But so far I don't think we have given them any.

13 Mr. Flamme is correct in saying that the e-mail service that we
14 are offering, if we're sending him encrypted information, that it will be
15 difficult to read this information on an Internet cafe PC or a laptop
16 because those machines just do not have the ability to decrypt the
17 information that is being sent to him. But we can work with the Defence
18 in coming up with a solution, a different solution. We provide laptops;
19 we provide all these machines. So we could come up with something that's
20 easily acceptable.

21 The issue on Ringtail was to be able to move the Defence.
22 Currently we received the issue that they only have two laptops, so
23 therefore they could not work in a collaborative environment and it
24 limited their ability to have more people working on the case. Of
25 course, by giving them a Ringtail solution by this Friday, essentially,

1 it allows them -- all eight people, working in either the Hoftoren or the
2 Arc, are now able to access this information, which will increase his
3 ability to work.

4 Thank you.

5 MR. MIJUSKOVIC: Your Honour?

6 JUDGE STEINER: Please.

7 MR. MIJUSKOVIC: If you'll allow, your Honour --

8 JUDGE STEINER: Near the microphone, please.

9 MR. MIJUSKOVIC: If you'll allow, your Honour, you just earlier,
10 your last point, asked the difference that the Ringtail makes and the
11 assistance that it could provide to Ringtail. Well, of course, Defence
12 can go without Ringtail, but they would have to have all the documents
13 that are disclosed in their hands, in hard copies, go through thousands
14 of pages without any possibility of a faster, more efficient search, more
15 efficient analysis of documents they have in hand. So basically Ringtail
16 is there for that. It's there to help. It's there to allow a better
17 preparation and, what's more important, a faster preparation.

18 Thank you.

19 JUDGE STEINER: Thank you very much. I do believe so.

20 Could we move forward to other logistical issues? The Defence at
21 the last hearing has also requested additional resources, and we still
22 have the problem of Defence in proceeding to investigative activity in
23 the territory of DRC.

24 Could the Defence, as briefly as possible, update the Chamber on
25 the issues related to additional resources, and to its ability to proceed

1 to investigations?

2 MR. FLAMME (interpretation): Thank you, Madam President.
3 Perhaps I might say something about the e-mail. If I understood you
4 correctly, if we have a court e-mail address it will not be possible for
5 me in Congo, or elsewhere if I am abroad, to receive my correspondence;
6 for example, read a decision that has just been issued, as was the case
7 during the summer recess when, through my -- the decisions of the Chamber
8 were sent to my personal address. So that might be a problem.

9 Now, regarding the Ringtail, another clarification: This is how
10 I understand it, because the problem is we might have a different view of
11 the matter, and it would not be convenient. I see Ringtail as a central
12 server which receives, from the Prosecution and the Defence, evidence,
13 exculpatory or otherwise, from both sides with certain parameters which
14 are according to your decision on the E-Court; and that all members of
15 the Defence team will be able, based on using their computers mainly in
16 the Hoftoren building for the time being, or here if possible, will be
17 able to consult or look at the evidence.

18 That is how I understood it. I do not wish there to be any
19 misunderstanding. It would raise serious problems for the Defence, but I
20 think that is what can be done for the time being, from what I
21 understand.

22 Now, regarding the problem of Defence investigations and the
23 building of its case, you know that we've been working with a consultant
24 for some weeks now --

25 JUDGE STEINER: I'm sorry to interrupt you. You can continue.

1 MR. FLAMME: (No interpretation).

2 JUDGE STEINER: We have no translation. Just a moment, please.

3 THE INTERPRETER: Can you hear me now?

4 JUDGE STEINER: Yes.

5 MR. FLAMME (interpretation): We hope to be able to see our
6 consultant as from the beginning of next week. From what I understand,
7 the trip is yet to be confirmed. The Defence section has done everything
8 in its power to arrange the trip, which is to be organised at very short
9 notice.

10 Let us be realistic, however. I must give to the Trial Chamber
11 my list of witnesses before the 12th of September, and that is
12 impossible. I must talk with our consultant over several days. We have
13 to go and see our client at the detention centre together, we have to
14 talk about all this, and it will therefore be impossible to prepare a
15 list and hand it in before the 12th of September, because that would, in
16 fact, mean that we only have two days in which to work.

17 Secondly, and I shall move a little further towards the
18 confirmation hearing, we should submit our evidence which we have
19 selected for the Defence into the Ringtail system. As you know, the
20 Defence does not yet have a case manager with IT experience. The
21 Prosecutor has several legal officers with IT experience who support him
22 in this difficult task. Because when you make the slightest mistake, you
23 have to start again. You have to do things exactly as they should be
24 done. So we shall be requesting the services of the Registry, that is,
25 the IT service, to do this work for us.

1 That means that we have to move or we have to ask these people to
2 come to our place so we can explain to them what it is that we need.
3 With all due respect, I don't know if these people will by jurists. We
4 will have to inform them of the legal implications of some issues, and,
5 with all the parameters that are available, we will have to enter this
6 into the system.

7 So once we have identified the evidence that we need to use, I do
8 not know how much time that will take, but I am sure it will take several
9 days.

10 So that is the situation with regard to the preparation of the
11 Defence case.

12 Thank you.

13 JUDGE STEINER: Thank you. So we are coming back to these more
14 specific issues on the preparation for the Defence.

15 In relation to the first issue, the possible trip by Mr. Flamme
16 to Congo, and the need of support by IT or a case manager, I would like
17 to listen to the Registry, please.

18 MR. PERALTA (interpretation): Your Honour, regarding the
19 mission -- regarding Registry support to the Defence, we must clarify the
20 question of access to e-mail or Ringtail by Mr. Flamme when he will be in
21 the Democratic Republic of the Congo. The solution to this problem
22 depends on the matters that have already been discussed and explained by
23 my colleagues of the various sections. I do not think I can add anything
24 to that.

25 Regarding the services of a case manager, on the 31st of August,

1 the Registrar authorised Mr. Flamme to recruit for his team a case
2 manager, and the letter says it is "an assistant in charge of managing
3 files to be used for the Defence at least until the end of the
4 confirmation hearing." And that is a quote from the Registrar's letter.

5 For the time being, we are also waiting for an opportunity to
6 meet with Mr. Flamme and offer him all necessary assistance for the
7 identification of a person who will be able to assist him.

8 JUDGE STEINER: Thank you very much.

9 Has the Prosecution some observation make on these topics?

10 MR. WITHOPF: There are a number of observations, your Honour, we
11 wish to make, and I will try to keep it short.

12 First of all, I'm grateful for the clarification of my learned
13 friend from the Defence that the Prosecution has not objected to the
14 Defence having access to e-mail. I think this is very important for the
15 records.

16 I agree with my learned friend from the Defence that, not being
17 able to communicate properly with the Court from the places he's working
18 and his team is working is a very serious issue. And I hear today that a
19 lot of effort is put in to solve these problems, but I do have a lot of
20 sympathy for my learned friend from the Defence when he is saying, and in
21 my view very correctly, that it is rather impossible for him to comply
22 with the Single Judge's order in respect to submitting evidence by the
23 12th of September. And I'm sure we will address this later on today when
24 we come to agenda item 4 of today's agenda.

25 I can confirm what my learned friend from the Defence has said in

1 respect to the practice, to the very helpful and useful practice, of the
2 ICTY and the access counsel for the Defence have to the evidence
3 repositories at the ICTY.

4 In this context we wish to raise our serious concern, our very
5 serious concern, in respect of using DHL for transmitting materials,
6 transcripts, and whatever, as we have heard today. These materials are
7 confidential, are very often very confidential by the very nature of what
8 they do contain, and I wish to put it on the record that the Prosecution
9 is against such a practice and it's only justified in any extraordinary
10 situations.

11 Coming to Ringtail, there's no objection of the Prosecution,
12 obviously, for the Defence to have access to Ringtail once the technical
13 aspects are taken care of by the Registry, and we understand that efforts
14 are made to allow such access. The Prosecution provides the data to the
15 Registry, and, in our view, it's up to the Registry to load this data
16 into Ringtail in order to allow my learned friend from the Defence to
17 discharge his obligations towards his client.

18 In respect to having access to the office, the Prosecution,
19 unfortunately, is faced with the very same problem. Of course, we also
20 would appreciate to have access to our offices at this stage. This is,
21 unfortunately, not possible, and the Prosecution would very much
22 appreciate if this could be taken care of and hopefully prior to the
23 confirmation hearing.

24 In respect to the ID cards that have been mentioned a number of
25 times, the Registry's observation is correct: These ID cards are

1 distributed on a need-to-have-them basis, and there are a certain number
2 of individuals, a certain number of staff members, within the Office of
3 the Prosecutor that do have such ID cards, allowing them to have access
4 to the network from wherever they are.

5 On the other logistical matters, I believe that at this stage
6 it's very difficult for the Defence, but I wish to expand on these
7 matters in closed session, when we are going to discuss agenda item 4,
8 that it's very difficult for the Defence to discharge its obligations,
9 and certainly not in line with the Single Judge's order on the time line.
10 But, again, I will expand on this matter once we reach agenda item 4.

11 Thank you, your Honour.

12 JUDGE STEINER: Thank you very much.

13 If all logistical matters have been discussed at length, I think
14 we could go to item 2 of the agenda. Sorry, to item 3 of the agenda.

15 MR. VAAITANEN: Your Honour?

16 JUDGE STEINER: Please.

17 MR. VAAITANEN: Thank you, your Honour. Could I just say a brief
18 point on what was raised by the Office of the Prosecutor?

19 Of course, all these issues related to access, they relate to the
20 information security, which is crucially important for the Court,
21 anybody; both the Office of the Prosecutor, Defence; the Victims and
22 Witnesses Unit; the Court as a whole. And I believe part of the
23 problems, technical problems, that we are facing now relate to this very
24 issue.

25 I would just want to make a specific point that was raised by the

1 Office of the Prosecutor relating to DHL.

2 First of all, I think it would be actually more accurate to be
3 speaking about the courier service, regardless of the service provider we
4 use. This practice has been vetted by our -- the Court's information
5 security officer and has been actually recommended as the method of
6 conveying confidential information. So while noting the obvious and
7 justified concern, this is the best system available so far for the Court
8 and is accepted by the information security professionals.

9 Thank you.

10 JUDGE STEINER: Thank you for this information also.

11 So I must inform the participants to this hearing that, due to
12 the adjustment of our agenda, to the time we have available, and combined
13 with the breaks that we need to give to interpreters, this first part of
14 the hearing can go just up to -- sorry, to 12.30. Then we'll have to
15 suspend for one hour and a half. We will resume at 2.00. We'll proceed
16 until 3.30, suspend for half an hour, and then resume at 4.00 and proceed
17 to 6.00. So this is the time we have available for discussion on many,
18 many important matters.

19 So I would emphasise to the participants of this hearing to be as
20 objective and as concise as they can in order to allow the Chamber to go,
21 point by point, through the agenda items.

22 So, going to the third item of the agenda, we have the updating
23 of the disclosure process and filing of evidence with the Registry, and
24 also any problems related to the filings according to the E-Court
25 Protocol.

1 First, I would like to listen to the Prosecution on this
2 document.

3 MR. WITHOPF: Thank you, your Honour.

4 With your permission, we will apply the very same procedure as we
5 have established at the occasion of previous status conferences. Ms.
6 Solano will provide your Honour, the Single Judge, with an update about
7 the current status of disclosure. In doing so, she will particularly pay
8 attention to the progress made since the last status conference and
9 related court filings.

10 Due to the very short time that has elapsed since the last status
11 conference, this update will be very short, and I am very sure we will
12 manage to provide you with the respective data by 12.30 today, prior to
13 the break.

14 After Ms. Solano's update - and I anticipate this will be after
15 the break at 2 p.m. - I will address a number of specific aspects of
16 disclosure. I will cover two main areas in open session and one area in
17 closed session.

18 The ones I'm going to cover are the ones related to the Rule 77
19 inspection, or preinspection, and I make reference to your Honour's 24
20 May 2006 decision on the timetable on the final system of disclosure.

21 In the closed session part, I will provide information to both
22 your Honour and my learned friend from the Defence where we are in
23 respect of disclosure of witness statements and transcripts of interviews
24 that have been taken pursuant to Article 55(2) of the Rome Statute.

25 Provided, your Honour, that this procedure is okay with you, I

1 would invite Ms. Solano to give you a very brief update today.

2 JUDGE STEINER: Please. Ms. Solano has the floor.

3 MS. SOLANO: Good morning, your Honour.

4 Since the last report to the Chamber on August 24th, there has
5 been a single disclosure exchange between the Prosecution and the
6 Defence, and that took place on August 29th, when the Prosecution
7 disclosed six documents it intends to rely on at the confirmation
8 hearing. These documents had been previously disclosed to the Defence in
9 redacted form only. So on the occasion of the single disclosure exchange
10 on the 29th of August, an unredacted version of these six documents was
11 provided. The originals of these documents were filed with the Registry
12 on August 30th.

13 Since the beginning of the disclosure process on March 31st this
14 year, the Prosecution and the Defence have thus met on a total of 14
15 opportunities, with the average interval of such meetings being roughly
16 one and a half weeks. For the combined results of these 14 disclosure
17 inspections that have taken place since March 31st, I simply refer to
18 what was stated at the status conference on August 24th, as the overall
19 numbers have remained unchanged.

20 The next disclosure meeting between the Prosecution and the
21 Defence will take place tomorrow, your Honour. At this occasion, the
22 Prosecution will redisclose to the Defence nine witness statements, this
23 time providing it with the metadata in a way that complies with the
24 E-Court Protocol and your Honour's decisions of 28th August and 1st
25 September. These nine witness statements, with the accurate metadata,

1 have been provided to the Registry yesterday.

2 Additionally, at tomorrow's disclosure meeting, the Prosecution
3 will disclose a single document it intends to rely on at the confirmation
4 hearing, which had previously been disclosed to the Defence in redacted
5 form but which it is now in a position to disclose in unredacted form.

6 And finally, we will provide two documents for preinspection,
7 pursuant to Rule 77, as well as the one or the other document containing
8 potentially exculpatory evidence.

9 At the following disclosure meeting, that is, the one that will
10 take place after tomorrow's at a time which has not yet been discussed
11 with the Defence, the Prosecution would provide the Defence with the
12 metadata for 303 documents which it intends to rely on at the
13 confirmation hearing, once this metadata is filed with the Registry in
14 compliance with the E-Court Protocol and your Honour's decisions on the
15 28th of August and the 1st of September.

16 JUDGE STEINER: Thank you very much, Ms. Solano.

17 MR. WITHOPF: Your Honour, I'm just noting a transcript mistake.
18 In line 23, it should read "which the Prosecution is now in a position to
19 disclose" instead of "not in a position to disclose."

20 JUDGE STEINER: Thank you very much for the clarification. Yes,
21 the interpreter take note.

22 So we still have five minutes. I would ask Mr. Flamme if he
23 prefers to make his observations on the report made by the OTP, the
24 Prosecution, after the break or if you feel you are in a condition to
25 make your observations in five minutes. It's up to you to decide.

1 MR. WITHOPF: Your Honour, it may be helpful for my learned
2 friend for the Defence to first receive our further observations on
3 disclosure.

4 JUDGE STEINER: I apologise. Mr. Withopf, you have the floor.

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

6 As indicated earlier on, in the context of agenda item 3, we wish
7 to elaborate on two matters, and, as also indicated, both matters are
8 related to your Honour's 24th May 2006 decision on the postponement of
9 the confirmation hearing and both matters concern the inspection of
10 materials that do fall under Rule 77.

11 With your permission, your Honour, I'm going to address the first
12 matter that is covered in the 24th May 2006 decision as follows, and I'm
13 quoting from the respective portion on page 7 of that decision:

14 "The parties shall make every effort to agree on the
15 frequency of inspection under rule 77 of the Rules with a
16 view to ensure that the Defence is allowed to inspect as soon
17 as practicable and no later than 31 August 2006 most..."

18 And I repeat "most"

19 "...most of the materials obtained from or belonging to

20 Thomas Lubanga Dyilo or material to the Defence preparation."

21 Your Honour, the Prosecution has complied with the order of the
22 Single Judge. The Prosecution has repeatedly and duly informed your
23 Honour in respect to the frequency of inspections that took place under
24 Rule 77. Accordingly, your Honour does know that the Prosecution has
25 provided to the Defence since April of this year on ten occasions

1 materials for inspection and/or preinspection - "preinspection" in the
2 sense of your Honour's oral decision at the occasion of the 23rd June
3 2006 status conference. The parties have agreed, without any problems,
4 on a very tight frequency of Rule 77 inspection, and the inspection, or
5 preinspection, took place as ordered by your Honour.

6 Addressing the far more interesting aspect of this question,
7 whether the Prosecution has provided for inspection under Rule 77 "most,"
8 and that's again a quote, "most of the materials obtained from or
9 belonging to," and I make reference to the language of Rule 77, "obtained
10 from or belonging to" Thomas Lubanga Dyilo, the Prosecution is in a
11 position to answer this question in the affirmative. And we are actually
12 quite confident to answer this question in the affirmative, and I'm going
13 to explain why in detail.

14 We are confident for a whole series of reasons. The Prosecution
15 has used criteria, very broad criteria, in favour of the Defence and in
16 an effort to ensure fair proceedings in identifying the materials
17 "obtained from or belonging to" Thomas Lubanga Dyilo.

18 First, the Prosecution has applied the criteria that the
19 documents in which Thomas Lubanga Dyilo features either by his name or by
20 his function, such as the President of the UPC, the Commander-In-Chief of
21 the FPLC, or any of his former positions with a whole variety of
22 organisations - and for illustration I add that we have used 28 variants
23 of these criteria in order to capture as many documents as possible - the
24 Prosecution has used that criteria to capture as many documents as
25 possible. In doing so, the Prosecution has included any information that

1 is related to Thomas Lubanga Dyilo as the one who was either signing a
2 document, or as the one whose name appears on the signature line without
3 any signature attached to it, or as the one to whom a document was
4 addressed to, or - we went even a step further - to whom a document was
5 copied to.

6 In the second step, your Honour, the Prosecution applied the
7 criteria that documents in which either phone numbers or e-mail
8 addresses -- and/or e-mail addresses known to the Prosecution as the
9 one -- the ones of Thomas Lubanga Dyilo appeared that they were
10 associated with Thomas Lubanga Dyilo that such documents meet the
11 criteria of Rule 77.

12 As your Honour and as my learned friend from the Defence
13 certainly does appreciate, the Prosecution was using a very and extremely
14 broad range of criteria to ensure that my learned friend from the Defence
15 is provided for inspection of relevant materials.

16 These criteria applied to the comprehensive electronic searches
17 of the Office of the Prosecutor. This criteria revealed about 225
18 documents. Out of these 225 documents, 37 are protected by Article
19 54(3)(e) and accordingly cannot be disclosed without having received the
20 permission of the respective providers; and, additionally, 24 documents
21 contain the very same -- or concern the very same document.

22 The Prosecution has provided 137 of the documents -- sorry, I
23 correct myself, 164 documents to the Defence; 45 of them under the
24 umbrella of Rule 77; and an additional 90 of these documents have been
25 disclosed as incriminatory evidence that the Prosecution intends to rely

1 on at the confirmation hearing.

2 To summarise, the Prosecution has provided more than 80 per cent
3 of the materials concerned that it can disclose at this point, given the
4 restriction of Article 54(3)(e); and, in your view, having disclosed more
5 than 80 per cent of the materials, we have disclosed most of the
6 materials as ordered by the Single Judge.

7 To get the record straight and to avoid any confusion, we have
8 provided 137 out of 164 documents.

9 Moving on, your Honour, with your permission, to the second
10 aspect of the respective order, namely, the question as to whether the
11 Prosecution has provided for inspection most of the materials that are
12 material to the Defence - that's, again, the language used by Rule 77 -
13 the Prosecution feels also comfortable to answer this question in the
14 affirmative.

15 In this context, your Honour, the Prosecution wishes to recall
16 and to reemphasise that it was significantly hampered to discharge this
17 obligation by the mere fact that the Defence, despite the Prosecution
18 having asked on numerous occasions to provide information on what the
19 Defence considers being -- of being material to its preparation, that the
20 Defence has not provided any information that would have supported the
21 Prosecution's electronic searches.

22 We do believe that this fact needs to be spelled out clearly in
23 order to allow your Honour, the Single Judge, to make an informed
24 assessment of the Prosecution's efforts to comply with your order.

25 Against this background, the Prosecution, left in the dark by the

1 Defence, has mainly focused on materials that contain information in
2 respect of the support of foreign states of either the UPC and/or the
3 FPLC, obviously not meeting the threshold of evidence and information
4 that potentially could fall within the ambit of Article 67(2), namely,
5 potentially exculpatory evidence and information.

6 The documents that the respective electronic searches have
7 indicated matching these search criteria have been or are currently
8 reviewed by the Office of the Prosecutor. This examination has resulted
9 in the inspection or repeatedly preinspection of a significant number of
10 documents. In more concrete terms, over 40 per cent, namely 44 out of
11 107, of these documents have already been disclosed to the Defence or
12 provided for inspection.

13 Again, worth mentioning are a number of facts; namely, first, a
14 significant number of these documents are Article 54(3)(e) protected,
15 namely, 25 documents; second, many of these materials, nearly 20 per
16 cent, in concrete numbers, 18 out of 107, the Prosecution has disclosed
17 as incriminatory evidence, pursuant to Article 61(3)(b); third, an
18 additional six documents have been disclosed as potentially exculpatory
19 evidence, pursuant to Article 67(2); and finally, but most importantly,
20 at least 24 of the documents concerned are witness statements or
21 investigator's notes currently being dealt with in the context of the
22 Prosecution's Rule 81 applications.

23 Again, taking into account these important details, the
24 Prosecution is confident in stating that it complied with your Honour's
25 respective order to provide for inspection or disclose most of such

1 materials by the 31st of August 2006. The Prosecution is even more
2 confident in making that statement if one combines the inspection and
3 disclosure of materials that were obtained from or belonged to Thomas
4 Lubanga Dyilo or are material to the Defence.

5 There are, however, admittedly further documents falling under
6 that category of being material to the Defence that require further
7 review and disclosure, and the Prosecution will certainly focus on the
8 in-time disclosure of such materials in the near future.

9 To summarise, in our view, the Prosecution has complied with the
10 31st August 2006 deadline as set by your Honour in point 5 of the 24th
11 May 2006 decision.

12 If your Honour will allow me, taking into account the time, it
13 won't take me longer than 5 minutes to complete this portion.

14 JUDGE STEINER: I'm sure the interpreters will understand and
15 allow us to proceed for five more minutes.

16 MR. WITHOPF: I'm very grateful to your Honour and, of course,
17 also to the interpreters, and I promise it won't take longer than 5
18 minutes.

19 I'm now moving on to the second main item related -- again
20 related to the 31st August 2006 deadline. The respective portion of the
21 very same decision, as I mentioned earlier on, reads as follows:

22 "Subject to a determination under rule 81, the Prosecution
23 shall allow the Defence to inspect no later than 31 August
24 2006 the evidence which is subject to inspection under rule
25 77 of the Rules and which the Prosecution will indicate in

1 the document filed pursuant to rule 121(3) of the Rules that
2 it intends to use at the confirmation hearing."

3 The Prosecution, your Honour, has interpreted this portion to
4 cover physical evidence. As your Honour and as my learned friend from
5 the Defence certainly have noticed, since it is clear from the
6 Prosecution's List of Evidence as filed on Monday last week, the
7 Prosecution will, at least for the purposes of the confirmation hearing,
8 not rely on such sort of evidence. Accordingly, there was no need for
9 the Prosecution to provide for the inspection or preinspection of such
10 materials.

11 There are other matters in respect of disclosure we will discuss
12 in the context of agenda item 4, in closed session later on today.

13 I will very briefly use the 3 minutes remaining to cover the last
14 question your Honour has put to us in the context of agenda item 3,
15 namely, the filings according to the E-Court Protocol.

16 I can be brief because the Prosecution is complying with the
17 respective orders. We are grateful, we are very grateful, for the
18 clarification and further information the Single Judge has provided to
19 the parties following the Prosecution's urgent request. This
20 clarification and the information has allowed the Prosecution to comply
21 with the E-Court Protocol along the lines of the interpretation your
22 Honour has given the E-Court Protocol.

23 The Prosecution has devoted significant - and I repeat
24 "significant" - components of its trial team for a significant period of
25 time and of other OTP sections to the task, and it is actually an immense

1 task. And Defence will be confronted with it in a very few days.
2 Following the Single Judge's decision, it can be anticipated that the
3 Prosecution will be in a position to comply with the various deadlines
4 set by your Honour.

5 Yesterday - the Prosecution has mentioned earlier on - the
6 Prosecution has provided the Registry with a CD containing all
7 information, as requested, to be provided by the deadline of 4 September
8 2006. This concerns the information related to witness statements that
9 have been disclosed to the Defence.

10 As also mentioned earlier on today, we will meet our learned
11 friends from the Defence tomorrow, and based on an agreement between the
12 Defence and the Prosecution of yesterday, the Prosecution will, tomorrow,
13 provide the Defence with a CD containing the related information. In
14 today's filing, we have informed your Honour, the Single Judge,
15 accordingly.

16 The Prosecution anticipates that on Thursday this week, in
17 compliance with the extended deadline of your Honour, the Prosecution
18 will also be in a position to provide to both the Registry and the
19 Defence CDs with the requested data in respect of evidence other than
20 witness statements, following the distinction your Honour has made in the
21 most recent decision. And, of course, the Prosecution will, by way of
22 another filing, keep your Honour apprised of the developments made in
23 that respect.

24 Once this data has been provided - and again I anticipate that it
25 will be on Thursday - the Prosecution will have complied with the E-Court

1 Protocol. And I wish to emphasise that by then, with the submission of
2 such data, also the matter we discussed at the occasion of the last
3 status conference, namely, the resubmission of data related to the
4 previous eight disclosures, will be disclosed, since it forms part of it.

5 A final remark: The Prosecution would be interested in
6 participating in a working group with the Registry and also possibly
7 representatives of the Chamber, and, of course, Defence would also be
8 present, to improve the implementation and the practical aspects of the
9 implementation of the E-Court Protocol.

10 Your Honour, it took me 6 minutes. However, I have come to the
11 end of today's submissions. Thank you very much.

12 JUDGE STEINER: Thank you very much, Mr. Withopf.

13 Now we will suspend the hearing for lunch and the interpreters'
14 break, and we will resume at 2.00 sharp.

15 The session is suspended.

16 The hearing recess was taken at 12.40 p.m.

17 The hearing resumed at 2.00 p.m.

18 THE USHER: All rise. Please be seated.

19 JUDGE STEINER: Good afternoon. We'll resume this hearing.

20 And just with the correction that I have to make, that because we
21 are having three different blocks for this hearing, the last part of the
22 hearing we'll have to finish at 5.30. Yes. So we'll have one and a half
23 hours from now, then half an hour break, and plus one hour and a half
24 instead of two hours, as I had announced at the beginning of this
25 hearing.

1 So in relation to item 3 of the agenda, may I confirm the
2 Prosecution has already made all its observations on this topic?

3 MR. WITHOPF: Yes, your Honour. That's correct.

4 JUDGE STEINER: Thank you very much.

5 So I would like to listen to the Defence on the general aspects
6 on the disclosure process, inspection, and filings, without going further
7 into the details that we are going to discuss in closed session.

8 The Defence has the floor.

9 MR. FLAMME (interpretation): Thank you, your Honour. Subject to
10 the other issues which I have already raised regarding the means of
11 consulting the disclosed documents by the Defence and the electronic
12 documents, you may remember that at one of the earlier hearings I
13 suggested that one solution might be that, pending the E-Court becoming
14 operational, the Prosecutor might have communicated a hard copy file to
15 the Defence in the more traditional fashion, which would have allowed us
16 to work more efficiently than we have been able to.

17 Regarding the substance of what has been said, I have very few
18 comments to make, aside from, perhaps, two remarks which are quite
19 important.

20 First of all, when the Prosecutor refers to inspection and
21 communication of exonerating material, he did make quite an important
22 reservation. He said he was referring to the inspection of the total of
23 225 documents, 37 of which had not been communicated because they were
24 protected by Article 54(3).

25 I think that in the Bible it is said that you do not give with

1 one hand while removing with the other hand. Exonerating material for an
2 accused person - and here it is the Prosecutor who is vested with this
3 obligation, as in our civil law systems it would be the investigating
4 magistrate who would have the task - but there is a task to compile a
5 file of exonerating and incriminating information. Here it is the
6 Prosecutor who has this obligation and therefore the Defence is of the
7 view that he cannot hide behind Article 54(3) in order not to disclose.

8 Here we are speaking of a number of interests which conflict. I
9 said at the last hearing, I believe, that in all protection systems, the
10 only person who is not protected is my client, the accused person, who is
11 presumed innocent until proof of the contrary.

12 So I am amazed to see that the Prosecutor maintains protective
13 measures when it concerns material which is clearly exonerating. The
14 Defence, therefore, requests that the Chamber orders the Prosecutor to
15 disclose all exonerating material in his possession. That is my first
16 comment.

17 Second comment. And here I would like to put a question to try
18 and clarify a point. You may remember that at the last hearing, I
19 believe, because I'm drawing on my memory given that I do not have the
20 minutes -- and furthermore, if I might make an aside on that topic,
21 Ms. Taylor tells me that the Registry has provided us with an e-mail
22 regarding the last hearing, but she has commented that that e-mail that
23 was to give access to the transcript of the hearing provided a link, an
24 Internet link. But because we do not have access to LiveNote, that link
25 is of no use to us. So, in fact, the transcript is not being provided.

1 But that was just an aside.

2 I was referring to an intervention which was made at the last
3 hearing in connection with the application or enforcement of your order
4 regarding a translator or interpreter to be provided to the Defence. In
5 that connection, the Registry put the question to me: How much material,
6 how many pages, are to be translated? And I raised or I put the same
7 question to the Prosecutor at a meeting with him, and he said that he
8 would respond within a week. The Prosecutor, true to himself, was very
9 punctual and met his obligations, and it's to his honour, and he did
10 respond within the week by e-mail. Now, I don't have the e-mail with me,
11 but he said that it was approximately 2.450 pages, if I remember rightly,
12 which have not been translated I suppose.

13 I spoke to the representatives of the Registry in this connection
14 and they said that, in their view - but I'm not sure what they were
15 basing themselves on - they said that there should already be
16 translations of these documents in English, because the issue is
17 translating from English into French.

18 I would also like to point out that all of the interns who we
19 have at the moment are French speakers, so there is a problem within the
20 Defence team when it comes to reading this material.

21 So I would like to have clarification from the Prosecutor in this
22 connection. My question is: This number of pages, 2.500 to 3.000 pages,
23 are they available only in English or are there translations of this
24 material available, as the Registry believes? This is an important
25 matter, given the period of time available to us to read this material.

1 Thank you.

2 JUDGE STEINER: I want us to listen to the Prosecution, his
3 observations, before giving the floor to the Registry.

4 MR. WITHOPF: Thank you, your Honour. If I may please address
5 the first issue -- or the last issue first.

6 Yes, the Prosecution has provided my learned friend from the
7 Defence with the figures in respect to the documents which are available
8 in English and, I hasten to add, available in English only. The correct
9 figure is 2.458 pages of the materials that have been disclosed in the
10 past. There are no French translations available, to make this very
11 clear.

12 What the Prosecution has done, however, in the past, if these
13 documents stem from organisations which usually issue their documents,
14 like the UN obviously, in both languages, the Prosecution was very well
15 prepared, and has done so repeatedly, to, in addition to the English
16 documents, provide the French translation of it. But this is not a
17 translation by the Office of the Prosecutor; this is the source actually
18 issuing the same document in French.

19 The Office of the Prosecutor is not obliged to and does not
20 translate English documents into French. This has been discussed
21 repeatedly. This is a task that falls squarely within the ambit of the
22 Registry, and your Honour, the Single Judge, has addressed this matter in
23 your decision on tasking -- on ordering the Registry to provide for
24 translation and/or interpretation capacities to the Defence.

25 So this issue is res judicata, actually, to make it very clear.

1 There are no French translations available, to answer that question.

2 Coming back to the first issue that has been raised by the
3 Defence, 54(3)(e), protected documents, yes, as I mentioned there are
4 such documents. I make reference to what we informed your Honour, the
5 Single Judge, and the Defence about in the context of the last status
6 conference: We are requesting a lifting of the restrictions, and once
7 the provider grants such a lifting, we obviously will disclose these
8 materials. Whether they fall under 67(2) or 61(3)(b), but most of these
9 documents actually do, is a different matter.

10 Not having the respective granting of the various sources, we are
11 looking, as was also mentioned in the course of the last status
12 conference, for alternative potentially exculpatory evidence that covers
13 exactly the same matters. And in the event we have such evidence, we
14 obviously would inform the learned colleagues from the Defence
15 accordingly.

16 In our view, there is no room for an order of the Single Judge
17 because 54(3)(e) is a protection of the source. And I don't believe the
18 Single Judge can actually order the source to disclose the contents of
19 the materials. I believe this is very clearly outlined in the Statute.

20 Thank you very much, your Honour.

21 JUDGE STEINER: If possible, just a clarification from the
22 Prosecution. Mr. Flamme mentioned 37 documents not yet disclosed
23 because, according to the Prosecution, they are protected under Article
24 54(3)(e). Is this figure correct? We are talking about 37 documents?

25 MR. WITHOPF: Your Honour, please give us a moment to

1 double-check the figure.

2 [Prosecution counsel confer]

3 MR. WITHOPF: Your Honour, after clarification, the figure as
4 such is correct, but the figure doesn't mean that this is material that
5 is of, potentially, exculpatory nature. It could also be of,
6 potentially, incriminatory nature. The fact is 37 documents have not yet
7 been disclosed. There was no statement of the Prosecution to say that
8 these documents are of, potentially, an exculpatory information.

9 And again, the Prosecution is requesting the lifting of the
10 54(3)(e) restrictions. And once the providers have granted the lifting,
11 the Prosecution will disclose these documents accordingly.

12 JUDGE STEINER: Thank you very much.

13 Does the Defence have something to add to this point before I go
14 to the Registry's observations? Do you prefer, Mr. Flamme, that first I
15 give the floor to the Registry to make their comments and then we can
16 come back?

17 So the Registry, please.

18 MR. DUBUISSON (interpretation): Good afternoon, your Honour.
19 First of all, please allow me to apologise for my absence during the
20 first part of the hearing. And I would also like to thank my colleague,
21 Simo Vaatainen, for having replaced me.

22 Now, regarding the two points which have been raised by
23 Mr. Flamme and on which the Office of the Prosecutor has commented, I
24 would like to add the following detail:

25 First of all, as regards the transcripts, transcripts have always

1 been communicated to the Defence in one way or another - as a hard copy,
2 in other words, as a paper version from lawyer to lawyer, hand to hand,
3 by electronic file, or by DHL. So there have been different routes used
4 to provide the transcripts to the Defence, and perhaps that has caused
5 problems. Transcripts have also been provided to the Office of Public
6 Counsel for the Defence.

7 However, access to certain networks is easier when it concerns
8 the context of an official staff member than when it concerns somebody
9 who is not an official staff member. However, to resolve the problem
10 once and for all, I undertake to provide Mr. Flamme, tomorrow, with a CD,
11 which contains the transcripts of all the hearings to which the Defence
12 has a right. I'm speaking of excluding ex parte hearings, for instance.
13 That's the first point.

14 Regarding the second point, translations, I said last time that
15 we make available more than one-third of our resources English to French
16 to the Defence. The capacity of a translator is, on average, five pages
17 a day. By really forcing things, one might be able to arrive at 100
18 pages per week. We have heard that the number of pages involved is 2.400
19 pages, so that gives you some idea of the scale of the task.

20 One could look at using external translators, if security allows,
21 for the translation of certain documents. However, today is the 5th and
22 we are looking at the 28th, so there are 20 days available to us. If you
23 take the number of pages as your starting point, then you see that the
24 task is practically impossible.

25 Now, it's important that we know once and for all what it is we

1 are speaking of. For the time being, we are obliged to provide
2 assistance in the framework of the confirmation hearing regarding
3 specific elements. Other obligations have been covered, and your
4 decision is very clear on this topic.

5 So what I need to know today is exactly what documents the
6 Defence needs. We could then evaluate the work to be done to establish
7 whether a rapid translation could be provided, as it's possible that in
8 documents which have been disclosed by the Prosecutor to the Defence, in
9 a document there may be only one page, for instance, which is of direct
10 interest to the Defence. So it's important to know exactly what needs to
11 be translated.

12 In any case, I would say that the Defence -- well, I won't say
13 they're making progress in English, but at least they are recruiting
14 people who can facilitate their research, because if they intend to rely
15 entirely on the Registry, this will not be possible.

16 Furthermore, we have never made available to the Defence such a
17 service, and I don't think any other court has. Our task is to
18 facilitate the work of the participants in the proceedings, and tomorrow,
19 as in the future, we may have a third party involved, which would be the
20 legal representation of the victims who may also call upon us for
21 assistance of this type. So we need to be even-handed in our treatment
22 to all parties, and the situation is well known to all-comers.

23 Those are the comments I wanted to make. Thank you.

24 JUDGE STEINER: So this matter on the translation comes again and
25 again, since the beginning, and I think at a certain point, the Registry,

1 the representative of the Registry is correct in his interpretation of
2 the decision issued by the Chamber. At any time the Chamber decided that
3 all documents should be translated into French. The decision said that
4 an interpreter would be available to make an oral, if I may say,
5 explanation on the content of the document, and if the Defence deems it
6 necessary, the Defence could ask the Registry to provide translations.

7 So the idea that we need to put resources available to translate
8 into French thousands of pages of general, call it, documents - not all
9 of them are documents - it has never been the straight -- the straight
10 interpretation of the decision issued by the Chamber.

11 So on that point I totally agree with the Registry, that we have
12 not so much time before the confirmation hearing, and what the Defence
13 needs is to point out to the Registry what are the relevant documents the
14 Defence needs for the purpose of the confirmation hearing.

15 In relation to transcripts, the Registry has said that all
16 transcripts from the non-in-camera hearings have already been transmitted
17 to the Defence. But anyway, the Registry will transmit them again to the
18 Defence. So I think in two points we had some clarifications.

19 Now I'll give the floor to the Defence to make its comments.

20 MR. FLAMME (interpretation): Madam President, to start with the
21 last point, I'd like to make one observation. The accused has a right.
22 I do not wish to cast doubt on the res judicata, but we've got to come to
23 an understanding. In the current context, in the context of your
24 decision, the Registry is asking me, is asking the Defence that is, to
25 indicate the documents - and this is how I understand it - which are

1 important, and then the documents will be translated. And I am told
2 also - and in this case I think that this is becoming a bit of a closed
3 circle - I am told that all the Defence needs to do is to find people who
4 understand enough English to identify the documents in English that need
5 to be translated and then translate these documents.

6 I think there's something not quite clear about this way of
7 reasoning. The res judicata of your decision was also that the Defence
8 needs, if only to show the accused, who does not understand any English
9 and who is the most important party, it is he who has to understand how
10 he can determine the value of a document based on the context in which he
11 lives. So if we don't understand a document, then we can't make any
12 progress.

13 I should also like to point out that the interns who are
14 currently working for the Defence were almost all provided by the
15 Registry. So if there is no English-speaking person amongst them, then
16 this is what the Defence has to deal with and this is how the Defence has
17 to manage.

18 I am saying that the Defence needs translation. That's my first
19 point. Second point: Considering the time frame, because from the 8th
20 of September, I am told that I shall have access to Ringtail on all the
21 computers in Hoftoren, so from the 8th of September I will be able to
22 have three interns work at the same time. In addition, there will be the
23 two laptops. If the software is installed correctly, two other people
24 can use these laptops. All these French-speaking people will be required
25 to identify important documents in English.

1 I am trying to circumscribe the circumstances or the consequences
2 of what the Registry representative has just said. It will take time.
3 Perhaps we will have to talk with our client. Because at the rate of
4 five pages per day, five times five - how many days do we have before the
5 confirmation hearing? - so 21 times 5 is about 105 or 110 pages, and that
6 is out of a total of 2.400 pages. So with the remaining 2.300 pages, are
7 we to say that they are not important? Why is the Prosecutor going to
8 use them as incriminating evidence?

9 I said from the beginning of my contribution on the matter that
10 all the materials disclosed to us by the Prosecutor are important. If
11 the rights of the Defence must be respected, the client must be aware of
12 the contents of these documents in one way or another. I do not -- it
13 doesn't matter whether it is a summary of a translation or a draft
14 translation, but he must be aware.

15 So what I am saying, Madam President, is that this is the problem
16 the Defence is facing. We have a little over two weeks more, and we are
17 faced with what I described at the beginning of this -- during this
18 matter, an ocean, a sea, of untranslated material.

19 Thank you.

20 JUDGE STEINER: Thank you very much, Mr. Flamme. I've taken
21 notes of all your comments. I just would like to emphasise what has been
22 decided by the Chamber in relation to translations, what has been decided
23 by the Chamber in relation to having someone available to the Defence to
24 provide at least a summary of the evidence in order to allow Defence to
25 decide if this document is relevant or not.

1 I would like to remind the Defence that the Defence is now in a
2 completely different situation since the Defence has already the Charging
3 Document and the List of Evidence in which all evidence is clearly linked
4 to the fact the Prosecution intends to prove at the confirmation hearing.
5 So it's not -- the Defence is not anymore in a position to make any
6 search in the dark. The Defence has already the main guidelines in
7 relation to the facts and the evidence relevant to these facts, as
8 contained in the Charging Document and List of Evidence.

9 I'm sure the Defence -- I agree that the Defence is facing some
10 real problems even in relation to access to certain documents, in
11 relation to some delays that have already occurred in our agenda. So I
12 think that instead of insisting on a position that has already been
13 decided by the Chamber - and the Chamber is not going to change its
14 decision on the issue of translations - the Chamber would very much
15 appreciate if the Defence starts sending to the Registry the relevant
16 documents the Defence thinks would be important and that already
17 described in the charging List of Evidence filed by the Prosecutor on the
18 28th of August.

19 Is there any other issue to be discussed in relation to the
20 disclosure process and the filing of evidence that the parties would like
21 to put?

22 Please, Mr. Flamme.

23 MR. FLAMME (interpretation): Madam President, I would like to
24 put one more question to the Prosecutor.

25 He referred to inspection materials and he said that this is not

1 exculpatory; there is also incriminating evidence included. That may be
2 true, but we did not talk of exculpatory material proper that may be in
3 his possession, as such materials are also subject to measures of
4 protection in the same way as materials subject to inspection. I am
5 giving the example of X or Y document whose numbers may not have been
6 disclosed for reasons of protection.

7 JUDGE STEINER: I don't know if I really -- maybe I misunderstood
8 something, but I don't know if the Prosecution is ...

9 MR. WITHOPF: Your Honour, I'm in a similar situation like your
10 Honour: I don't quite understand the question. If, however, the
11 question is along the lines of whether there's a difference between Rule
12 77 materials and materials that are of, potentially, exculpatory nature,
13 with respect to the Article 54(3)(e) protection, there is no such
14 difference. The Prosecution receives the documents protected from a
15 variety of sources under 54(3)(e). The Prosecution is the determining
16 body, determining along the lines whether the material is of,
17 potentially, exculpatory nature or falls within the parameters of Rule
18 77. So this distinction has no impact on the Prosecution requesting the
19 lifting of the 54(3)(e) protection or not.

20 Once material is irrelevant in terms of either being of
21 incriminatory nature, in terms of being, potentially, exculpatory nature,
22 or in terms of meeting the criteria of Rule 77, the Prosecution goes back
23 to the provider and requests a lifting of the restrictions. And
24 depending on whether the lifting is granted or not, the document or the
25 documents concerned are disclosed or not.

1 Thank you.

2 JUDGE STEINER: I ask Mr. Flamme, because there was some problem
3 with the translation of your question, but does the Prosecution
4 observation answer your question, or would you like to clarify? The
5 Prosecution has given the Prosecution's view on this point. Is that what
6 you asked?

7 MR. FLAMME (interpretation): Madam, I think the Prosecutor
8 understood the question. I should like to give the floor, however, to
9 Ms. Taylor on this, because it is she who conducted the research. I
10 think she is in a better position to say things directly, if it is
11 possible.

12 JUDGE STEINER: Of course it is.

13 Ms. Taylor, you have the floor.

14 MS. TAYLOR: Thank you, your Honour.

15 It is my understanding of the Prosecution's submissions today
16 that it is their belief that Article 54 -- that it is their prerogative
17 to determine whether documents fall within the purview of Article
18 54(3)(e) and that this issue is not judiciable, that it is not subject to
19 any disposition of the Pre-Trial Chamber.

20 In this regard, it is the view of the Defence that Article
21 54(3)(e) does invite and does impose some criteria which must be met in
22 order for documents to fall under the protection of Article 54(3)(e);
23 that is, they must have been provided under the condition of
24 confidentiality and solely for the purpose of generating new evidence.

25 So the question as to whether the documents, in fact, meet this

1 criteria is potentially judiciable. And it is the view of the Defence
2 that if the documents have exculpatory components in them, then it is
3 highly questionable as to whether the exculpatory components of the
4 documents were provided solely for the purpose of generating new evidence
5 for the Prosecutor.

6 So it is that issue and that component of the criteria of Article
7 54(3)(e) that the Defence would contest and say that the exculpatory
8 sections of the documents are not covered by Article 54(3)(e).

9 Thank you, your Honour.

10 JUDGE STEINER: Does the Prosecutor want to respond?

11 MR. WITHOPF: Yes, we would like to respond.

12 Of course - and this has never been said - of course it's not the
13 Prosecution who determines the 54(3)(e) protection. It is the source
14 that provides the respective documents to the Prosecution which indicates
15 very clearly that such material is provided under the provision of
16 Article 54(3)(e) -- under the protection of Article 54(3)(e).

17 It's not us; it's the source. And it's up to the source, and up
18 to the source only, to grant the lifting of the restriction or not, no
19 matter and irrespective whether the content is of, potentially,
20 exculpatory nature or incriminatory nature.

21 As I mentioned in the context of the last hearing, to solve that
22 dilemma, the Prosecution is making particular efforts to identify
23 alternative evidence which falls within the same parameters as the
24 protected, potentially, exculpatory evidence; and once such alternative
25 evidence that is not protected is identified, of course the Prosecution

1 will provide the learned colleagues from the Defence with the alternative
2 evidence.

3 So I don't believe that we have reached a point in time where
4 this matter needs to be decided upon by your Honour, the Single Judge.
5 The Prosecution is making aggravated efforts to solve that problem.

6 And, again, we are at the stage of the confirmation hearing. We
7 are not yet at the stage of the trial. This is also, and I know that I'm
8 repeating myself, but this is a point that always needs to be kept in
9 mind.

10 Thank you, your Honour.

11 And if I may add, and this is an important point to make, the
12 Prosecution is, by your Honour's order which is very extensive in
13 interpreting the Prosecution's obligations, only obliged and has done so
14 to disclose most of the potentially exculpatory evidence. Currently we
15 have identified about 89 documents which are protected by 54(3)(e), about
16 89 such documents. We have disclosed many, many more documents of
17 potentially exculpatory nature.

18 So even if, at the stage of the confirmation hearing, the
19 Prosecution has not disclosed each and every little, single document that
20 contains information of potentially exculpatory nature, the Prosecution
21 is complying with your Honour's order, and your Honour's order is already
22 quite extensive.

23 So, against this background, I really believe that the Defence is
24 not having a point in their submission.

25 I've just been notified by my colleague, Ms. Solano, that there

1 needs to be a correction. I'm talking about 98 such documents, not 89.

2 Thank you.

3 JUDGE STEINER: Ms. Taylor, do you have something to add?

4 Ms. Taylor, do you have something to add? Or Mr. Flamme?

5 MR. FLAMME (interpretation): With your leave, Madam President, I
6 will perhaps leave the abstract and come down to the concrete framework.

7 Let us suppose for one moment that the Prosecutor has materials
8 proving that my client actively and concretely, in his political
9 responsibility, took the decision and implemented the decision or tried
10 to do so to demobilise children; but that the source of this information,
11 for reasons that we are able to understand, wishes to remain not only
12 anonymous but also does not wish the information to be disclosed. In
13 that case, part of the truth would be kept out of this courtroom, a very
14 important part of the truth. It cannot be acceptable that the
15 Prosecutor, who has this information in his keeping, should try to hide
16 behind Article 54(3)(e) to try to avoid disclosing it. I think that this
17 would run counter to the letter of the Statute and the Rules. I do not
18 think this would be acceptable for the Defence. I think it's very
19 important.

20 JUDGE STEINER: Yes.

21 MR. WITHOPF: Your Honour, I truly believe it's too premature to
22 discuss evidence at this stage. But I wish to emphasise, and my learned
23 friends from the Defence are very well aware, that the Prosecution has
24 disclosed exactly such material containing demobilisation orders from
25 Mr. Thomas Lubanga Dyilo. So this is not a theoretical question, it's a

1 practical question, and the Prosecution has disclosed exactly such
2 materials.

3 And I wish to add: These materials are not only of, potentially,
4 exculpatory information; these are highly incriminatory evidence. And at
5 the point of the confirmation hearing, the Prosecution will outline in
6 detail why they are of an incriminatory nature.

7 So this is factually incorrect, to make this very clear.

8 Thank you, your Honour.

9 JUDGE STEINER: I think all parties in this hearing have put
10 their views on this issue related to protection -- protected information
11 under Article 54(3)(e). And, anyway, what we are having here is not more
12 than an academic discussion. I think the status conference is not the
13 proper forum for such an academic debate. Of course, all that has been
14 said by parties are important elements to be taken into consideration
15 when and if a concrete issue arises in relation to protected information.

16 I would like to ask the participants if there are any other
17 issues relating -- general issues relating to disclosure and filings. So
18 I would like to listen finally to the Registry on the situation of the
19 filings according to the E-Court Protocols.

20 MR. MIJUSKOVIC: Thank you, your Honour. The Registry has
21 nothing to submit in addition to what was said in relation to disclosure
22 by Ms. Julieta Solano from the Prosecution earlier this morning. We are
23 technically prepared to upload and take up all the evidence that is to be
24 uploaded in accordance with the latest decision on the E-Court Protocol
25 and clarifications.

1 Thank you.

2 JUDGE STEINER: Thank you very much.

3 So I think we are now going to the fourth item of the agenda, and
4 according to the decision on the agenda, the fourth item will be
5 discussed in closed session.

6 I will ask, please, Madam Registrar, to take all steps necessary
7 steps to keep this session closed from now.

8 [Closed session]

9

10

11

12

13

14 Pages 62 to 72 expunged-Closed session

15

16

17

18

19

20

21

22

23 The session is adjourned.

24 --- Whereupon the status conference adjourned at

25 3.15 p.m.