

1 International Criminal Court

2 Trial Chamber I

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

4 Transcription ICC-0104-0106-T-52-ENG - Open Session

5 Monday, 1 October 2007

6 The hearing starts at 10.11 a.m.

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

9 PRESIDING JUDGE FULFORD: Mr. Withopf could I ask you to
10 introduce counsel so the public knows who is here and who they
11 represent.

12 MR. WITHOPF: Good morning, Mr. President; good morning, your
13 Honours. Good morning to the Defence, the legal representatives and
14 the representatives of the Registry. And I also extend my greetings
15 to everybody in and around the courtroom.

16 The Prosecution today is represented by Ms. Fatou Bensouda, the
17 Deputy Prosecutor of Prosecutions; by Ms. Nicole Samson. She's a
18 legal officer. By Ms. Julieta Solano. She's an Associate Trial
19 Lawyer. By Ms. Ramu Bittaye. She is our case manager. And I'm
20 Ekkehard Withopf, the Senior Trial Attorney.

21 PRESIDING JUDGE FULFORD: Thank you very much. In relation,
22 therefore, to other persons present, I'll then turn - thank you,
23 Mr. Withopf - to Ms. Mabilille. There are a number of people who I
24 think accompany you today, Ms. Mabilille; is that right?

25 MS. MABILILLE (interpretation): Yes, Mr. President. To my left

1 Mr. Jean-Marie Biju-Duval, who is co-counsel in the Thomas Lubanga
2 case. To my right Marc Desalliers, who is the legal assistant. And
3 on the other Bench behind me, Caroline Buteau, who a legal assistant
4 to Sandra D'angelo, who is the case manager. We have a young intern
5 called Emilie Cuk.

6 Mr. President, that is the Defence today.

7 PRESIDING JUDGE FULFORD: Thank you very much, Ms. Mabilie.
8 Could I now ask that the representatives for the victims and the OPCV
9 to make themselves known, please.

10 MR. WALLEYN (interpretation): Good morning, Mr. President. My
11 name is Luc Walley. I represent Victims Number 1, 2, 3, to make
12 matters simpler. I work with Mr. Franck Mulenda, who is unavoidably
13 absent. I am assisted by the members of the OPCV, who I expect will
14 introduce themselves. Oh. I'll do it. It's Ms. Paolina Massidda,
15 Sarah Pellet, Dmytro Suprun, and Tamara Margitic.

16 Thank you.

17 PRESIDING JUDGE FULFORD: Thank you very much.

18 MS. BAPITA (interpretation): Thank you, Mr. President. I am
19 Carine Bapita. I represent A1005/006. I am assisted by the OPCV,
20 assisted by the OPCV.

21 PRESIDING JUDGE FULFORD: Thank you very much.

22 The Registry today is represented by Mr. Dubuisson.
23 Mr. Dubuisson, you are accompanied by some other representatives.
24 Could I ask you, please, to introduce those other representatives.

25 MR. DUBUISSON (interpretation): Thank you, Mr. President. On

1 the Bench of the Registry we have Fiona McKay, who is the head of the
2 Victims Participation and Reparation Section; and Bibiana
3 Becerra-Suarez, who is a legal coordinator in the Office of the
4 Director of Court Services; and I represent the Registrar, as you have
5 said.

6 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Dubuisson.

7 One thing that we would wish to make clear at the outset is that
8 Ms. McKay is here today essentially at our invitation and
9 exceptionally, of course in a wholly neutral position, simply to
10 provide information to the Bench on technical matters should we
11 request it. And we are grateful to you, Ms. McKay, for having
12 attended for those reasons.

13 Finally, Mr. Keita is here, I understand, for the OPCD.

14 MR. KEITA (interpretation): Good morning, Mr. President. I'm
15 Xavier-Jean Keita. I am lead counsel for The office of Public Counsel
16 for the Defence, and I'm here at the invitation of the Defence team,
17 that is, Ms. Catherine Mabilille.

18 PRESIDING JUDGE FULFORD: Thank you very much indeed, Mr. Keita.

19 Ms. Mabilille, I understand that there were some difficulties this
20 morning as regards the circumstances in which the defendant was
21 transported to court. Unless there are reasons for doing so, we don't
22 wish to investigate that now, but if there are any enduring or if
23 there is something which has the potential for presenting us with an
24 enduring problem, can you please communicate formally with the
25 Registry about it so that we can be informed and, if necessary, take

1 action.

2 MS. MABILLE (interpretation): Quite, Mr. President. Since I
3 have not really discussed this with my client so far, I suggest that
4 we do what you have said. If there is a real problem, we shall inform
5 you at the appropriate time, and thank you for the opportunity.

6 PRESIDING JUDGE FULFORD: Thank you, Ms. Mabilille. I suspected
7 that there wouldn't have been time this morning for you to investigate
8 this properly, so I just want it noted that we were aware of the issue
9 and to let you know that if there is a problem, then of course we will
10 provide such assistance as is useful in all the circumstances. Thank
11 you very much.

12 Mr. Withopf, turning to today and the possibility, of course,
13 that we may be still engaged in these matters tomorrow, can I indicate
14 to everyone through you that unless there are difficulties with this
15 proposal, we are intending at 9.30 tomorrow morning to hold an ex
16 parte hearing with the Prosecution and the Registry only present to
17 deal with a filing which, as I understand it, was made with the
18 Registry at about 11.15 on Friday, but which was only communicated to
19 the Bench and, I think, to you at around 5.00 on Friday afternoon. So
20 we propose to deal with that filing ex parte at 9.30 tomorrow.

21 I would ask that someone be in a position to provide us with an
22 explanation as to why we only received the filing at 5.00 given that
23 it arrived at the Registry at 11.15, and we will also need a full
24 explanation as to the course of events in relation to an order of the
25 Bench that a document should be made public, which was then removed

1 from the web site, and we will require assistance and an explanation
2 as to how those events came to take place.

3 So that's tomorrow morning, subject to any submissions that
4 anybody wishes to make about that matter during the course of the day.
5 I'm not inviting submissions now, but if for some reason it presents a
6 problem having a hearing at 11.15 -- at 9.30 tomorrow morning, please
7 let us know.

8 Turning, therefore, to today's agenda, can I suggest that we
9 proceed as follows: The item listed first, date of trial, is, as it
10 seems to us, to a very large extent dependent on other matters that
11 are listed within the agenda, so I think it is going to be unhelpful
12 to deal with that as a discrete topic right at the beginning. That
13 said, can I please ask everybody during the course of today to bear in
14 mind that on an analysis of the submissions we've received, a
15 tentative proposal that we have in mind in this regard is a date
16 somewhere around mid-February. So that provides some food for
17 thought, and you can come back on this issue in due course.

18 Issue 2, languages to be used in the proceedings. I anticipate,
19 although no doubt I will be proved wrong in just a moment, I
20 anticipate this shouldn't delay us for very long, certainly as far as
21 your submissions are concerned, Mr. Withopf. You, I think on behalf
22 of the Prosecution, putting it very shortly, draw our attention to the
23 fact that really it's English, French, and Swahili that we ought to
24 have in mind, and that Swahili spoken in Ituri, you bring to our
25 attention, is a variant of the Swahili spoken in East Africa.

1 MR. WITHOPF: Mr. President, this is entirely correct and there
2 is nothing to add. There are no changes between the 11th of September
3 and now.

4 PRESIDING JUDGE FULFORD: Thank you very much indeed.

5 Ms. Mabilille, can I then turn to you, please, in relation to
6 languages. You have taken it a little bit further in that you have
7 made reference Swahili and Kilendu, although I think your position
8 obviously is to an extent dependent on receiving the entirety of the
9 list of evidence so that you can know, in relation to the various
10 witnesses who the Prosecution propose to call, which languages they
11 speak. Is there anything that you would wish to add to the written
12 submissions that you've already filed?

13 MS. MABILILLE (interpretation): I beg your pardon. For this
14 hearing my colleague Jean-Marie Biju-Duval will speak, if the Chamber
15 thinks this is all right. Thank you.

16 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President. On
17 that point we have nothing to add to our written submissions. We
18 share the same concerns as those of the Prosecutor, and we are not in
19 a position to be able to determine today who the -- which witnesses we
20 will call. We are still in a situation of uncertainty, but we have
21 nothing to add to our written submissions.

22 PRESIDING JUDGE FULFORD: Mr. Duval, we would ask the Defence
23 and, of course, all others involved in this case to keep languages and
24 indeed really all issues under review, so that if in due course your
25 submissions in this regard, focusing on this issue, should change, can

1 you please make sure that you alert the Bench if you consider that we
2 need to cast the net wider in relation to interpretation.

3 Can I then turn to counsel for the victims. Mr. Walley, do you
4 have anything to add to your written submissions?

5 MR. WALLEYN (interpretation): I have nothing to add,
6 Mr. President. I think everybody is agreed as to the languages to be
7 used. If there are other languages apart from French and English,
8 which are used in this courtroom, in our submissions we also raised
9 the problem of LiveNote and translations from French to English.
10 Actually, our problem is that since the text in LiveNote is only in
11 English and is subsequently translated into French, it means that
12 something that was said in French at the outset is translated into
13 another original. So our concern, our interest, was that LiveNote
14 should use the language of the speaker and then have translations
15 subsequently, so that we can make sure that everything that is said in
16 that instant is -- appears on the screen and does not -- is not made
17 available several days later. But I must admit that there has been an
18 improvement in translation services, documents relating to
19 proceedings, court orders, and that sort of thing provided with the
20 translation several months later in some cases, and this can be useful
21 for the legal representatives who do not speak English well.

22 PRESIDING JUDGE FULFORD: Mr. Walley, have you raised your
23 concerns in relation to LiveNote with the head of the interpretation
24 section?

25 MR. WALLEYN (interpretation): Well, no, Mr. President. We noted

1 that this approach has been organised as such by the court. I did not
2 think that this was initiative of the Court Interpretation and
3 Translation Section.

4 The problem is that what appears on the screen is a translation.
5 So when a speaker expresses himself in French, what appears on the
6 screen is not what the speaker is saying but what the translator is
7 saying. So we only receive what the speaker may have said
8 subsequently. So I imagine that the Defence would have a similar view
9 to ours.

10 PRESIDING JUDGE FULFORD: Thank you. We'll bear that in mind.

11 Ms. Bapita.

12 MS. BAPITA (interpretation): Thank you for giving me the floor,
13 Mr. President. I am not changing anything as expressed in my is
14 submissions. I would, however, like you to take account of the Alur
15 language, which is the language of the victim I represent. Thank you.

16 PRESIDING JUDGE FULFORD: Thank you very much.

17 Mr. Dubuisson, did you want to intervene at this stage or not?
18 Please do.

19 MR. DUBUISSON (interpretation): Of course, Mr. President. The
20 transcript we see is prepared in a booth here. The person who is
21 working is English speaking, and this person provides the live
22 transcript in English. So she's working with a headset. When anybody
23 speaks, she receives what they say in English.

24 We have a booth working in French, which for technical reasons
25 cannot provide the French version on the screen, which is why you

1 receive it within two hours of the hearing in a French version. It is
2 not technically feasible to provide French and English, Swahili if we
3 ever require that in the future, at the same time on the screen. So
4 that is the thing. Technically it is not possible.

5 PRESIDING JUDGE FULFORD: In the light of that, Mr. Walley, do
6 you want to come back or not?

7 MR. WALLEYN: If it's technical, we accept, of course.

8 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, I think what that
9 really comes down to is that we have -- we are in a position to note
10 the current concerns of all those involved in relation to languages.
11 We're asking everyone to keep this under review. So this isn't simply
12 a question of the responsibility of the Bench. This is the
13 responsibility of all the parties and the participants if later issues
14 arise which mean that we need to make provision for additional
15 languages. So we impose that positive burden on everyone present in
16 court today, but I think there's probably little else that we can
17 usefully deal with on that subject.

18 Let us then turn, please, to the more substantive issues. C is
19 the timing and the manner of disclosure of the evidence the
20 Prosecution seek to rely on to the defendant, any participants, and to
21 the Chamber, and all other disclosure issues.

22 Please, Mr. Withopf, proceed on the basis that we have, of
23 course, read your submissions very carefully. We have considered each
24 and every one of the documents you have referred us to, and so, as it
25 were, amplify your submissions bearing in mind that we are now

1 well-familiar with your core argument.

2 MR. WITHOPF: Thank you very much, Mr. President, your Honours,
3 and I will indeed bear your suggestion in mind.

4 The trial date, as you have rightly emphasised, Mr. President,
5 your Honours, is to an extent linked to the Prosecution discharging
6 its disclosure obligations. There's a second point, a second issue,
7 Mr. President, your Honours. That is witness and victim-security
8 related, which has an even higher and even more significant bearing on
9 the start of the trial. Nevertheless, at this juncture, as requested,
10 I will limit my observations on the disclosure situation.

11 I believe, Mr. President --

12 PRESIDING JUDGE FULFORD: They are all inter-related,
13 Mr. Withopf, so don't limit yourself. It seems to us at the moment
14 that in terms of the timing of disclosure, you are also going to have
15 to address the security issues in relation to the witnesses, and it
16 may be that we are going to reach the stage where part of your
17 submissions are going to have to be heard ex parte. So please don't
18 restrict the ambit of your submissions.

19 MR. WITHOPF: That's well-understood, Mr. President. And this
20 was actually my initial intention, because these issues are indeed
21 intermingled.

22 I will start, Mr. President, to provide you an overview on the
23 disclosure of the documents, and in a second step I will provide you
24 with an overview in respect of the victim and witness security
25 situation.

1 Since it's the first time this Bench hears about the disclosure,
2 at least in a hearing, I will provide you with some of the statistics
3 on the DRC document collection. The DRC document collection is
4 comprised about 27.500 documents, adding up to about 92.500 pages.
5 The total number, Mr. President, your Honours, of documents requiring
6 review, in the Office of the Prosecutor's opinion, amounts to about
7 20.000 documents comprised of 74.400 pages.

8 The Office of the Prosecutor has established a number of criteria
9 for the selection of documents to be reviewed, and they are four.
10 First we review documents that are responsive to keyword searching.
11 Second, we review unsearchable documents, and I wish to add that about
12 half of the DRC collection is indeed electronically unsearchable. I
13 will address this matter in a minute in some more detail.

14 The Office of the Prosecutor is also reviewing witness-related
15 documents and, of course, we are reviewing, and in particular,
16 reviewing documents that have been flagged by investigators and
17 analysts.

18 Reviewed are about 14.100 documents comprised of about 65.000
19 pages. What of course is of particular interest at this stage of the
20 proceedings is what is still to be reviewed. Pending review are about
21 5.200 documents comprised of about 8.500 pages. That means about 11.5
22 per cent of the DRC document collection are left to be reviewed, and
23 the Office of the Prosecutor has made an undertaking to complete this
24 review by mid of October.

25 In respect of the disclosure, and I provide you, Mr. President,

1 if you permit me to do so, further statistics. As of the 28th of
2 September, the Prosecution has disclosed as incriminatory evidence,
3 and that also provides the number of documents that are currently on
4 the Prosecution's list of evidence, we have disclosed 534 items
5 comprised of 7.849 pages. Included in this, about 530 items are 17
6 videos and related transcripts. We have disclosed 385 items comprised
7 of about 5.800 pages up until the last day of the Confirmation
8 Hearing, and since then we have disclosed about 150 documents, adding
9 up to 1.226 pages.

10 I make this distinction, Mr. President, your Honours, for the
11 following reason: Until the last day of the Confirmation Hearing, we
12 have filed the documents that the Prosecution has disclosed as
13 incriminatory evidence with the Registry. This was in compliance with
14 the respective order of the Pre-Trial Chamber. Since then, awaiting
15 an order of the Honourable Bench, we have not filed yet the respective
16 documents with the Registry.

17 I move on, Mr. President, your Honours, with your leave, to the
18 documents -- to the materials the Office of the Prosecutor has
19 disclosed under the heading of "Potentially Exculpatory Information."

20 We have disclosed 167 documents comprised of about 1.700 pages.
21 We have also disclosed to the Defence 70 witness statements --
22 excerpts from 70 witness statements - I need to correct - and four
23 excerpts from summaries of witness statements. Again, the distinction
24 between the time prior to and leading up to the Confirmation Hearing
25 and afterwards, we have disclosed 111 items comprised of about 1.500

1 pages until the last day of the Confirmation Hearing, and since then
2 we have disclosed 56 items comprised of 223 pages, since then. This
3 includes excerpts from 10 witness statements and excerpts from one
4 document.

5 And finally, we wish to address the pre-inspection. And
6 pre-inspection, as your Honours are aware, is a term that has been
7 used by the Pre-Trial Chamber, by the single Judge of the Pre-Trial
8 Chamber. We have provided for pre-inspection 199 items, adding up to
9 1.848 pages. These materials include five videos, an excerpt from one
10 document, and four excerpts from summaries of witness statements.

11 Mr. President, your Honours, this is the situation of what has
12 been disclosed. There's one particular issue, and we have indicated
13 this in our 11 September filing, which has indeed a potential -- or
14 potentially has an impact on the trial date. And the Defence has
15 also, in their 12 September filing, a response to our filing,
16 highlighted this particular issue.

17 There are documents, and there are very many documents,
18 Mr. President, your Honours, that were obtained by the Office of the
19 Prosecutor under the condition of confidentiality pursuant to
20 Article 54(3)(e). These documents are indeed -- or the number of
21 documents that fall within that category amount to about 50, 5-0, per
22 cent of the DRC document collection. And, Mr. President, your
23 Honours, you can easily imagine that this poses a challenge to the
24 Office of the Prosecutor.

25 As of today, Mr. President, your Honours, we have reviewed and

1 proposed for disclosure documents that fall under Article 54(3)(e) as
2 follows: 740 documents comprised of about 4.400 pages. Disclosed to
3 date are 120 documents amounting to 670 pages. We wish to inform the
4 Chamber that the various information providers have refused the
5 lifting of restrictions in respect of 46 documents comprised of about
6 220 pages.

7 Currently pending lifting requests - and I believe this is the
8 most important aspect - are 39 documents amounting to 388 pages. And
9 there are another 523 documents, amounting to about 3.080 pages, which
10 are also pending potential lifting requests to the information
11 providers.

12 As we have mentioned in our 11 September filing, this causes a
13 challenge to the Office of the Prosecutor for the main reason that
14 once the lifting requests have been sent to the various information
15 providers, it's up to the information provider to deal with the
16 requests.

17 The Prosecution always was and continues to actively seek the
18 lifting of respective materials, the lifting of respective
19 restrictions, and the Prosecution of course pays particular attention
20 to such documents which contain information that falls within the
21 ambit of Article 67(2).

22 Since this, and, Mr. President, your Honours, you have mentioned
23 in your Scheduling Order, since this is the first case before the ICC,
24 both the Prosecution and the various information providers make their
25 first experiences in this context with the lifting procedures. Best

1 practices need to be established, and the practices of the various
2 information providers vary and vary to a pretty high extent,
3 Mr. President, your Honours.

4 In this context, we, the Office of the Prosecutor, we believe
5 that not only the Prosecution but that also the court has to accept
6 that the mandate of the various information providers is quite often
7 very different, very different to the Office of the Prosecutor's
8 mandate, and that the materials concerned at the time were not
9 collected by the information providers for the main purpose to be
10 later on used in trials.

11 In this context there are very complex negotiation processes
12 ongoing between the Office of the Prosecutor and the various
13 information providers, and it certainly doesn't come as surprise,
14 Mr. President, your Honours, that these negotiation processes take
15 time. They are, and in particular, the duration of these processes to
16 the extent that they are determined and are influenced by the
17 information providers' internal structures and decision-making
18 procedures, that's, Mr. President, your Honours, that's beyond the
19 Office of the Prosecutor's control and thus is the timing of the
20 granting of the Prosecution's lifting requests.

21 Mr. President, your Honours, here I stop in respect of making
22 submissions in relation to Article 54(3)(e). If you permit, I want to
23 address, as I have indicated, briefly the issue of unsearchable
24 documents.

25 PRESIDING JUDGE FULFORD: Before you move on, Mr. Withopf, can we

1 then just take stock in relation to what you are submitting? In your
2 written submissions, you said at paragraph 24, in a global way, that
3 you saw the possibility that the end of October might provide, or you
4 hoped would provide a date by which restrictions on disclosure would
5 be lifted and provision of the material could take place, certainly to
6 the defendant, so long as protective measures are in place. Now,
7 that's how I read your paragraph 24. You're now submitting that there
8 are some clear exceptions to that because of the various problems you
9 have outlined.

10 Now, we're going to have to look, aren't we, probably at ex parte
11 at some stage, as to the detail of those problems and whether or not
12 that is -- the problems are going to prevent us from setting a trial
13 date in the first two months of next year.

14 MR. WITHOPF: Mr. President, your Honours, I do agree, and I do
15 very much agree that this is a very complex issue. And I also do
16 anticipate that at a certain stage there will be an ex parte hearing,
17 within the conditions as outlined by the Trial Chamber, necessary.

18 I wish to emphasise, though, that what I am submitting today for
19 the Office of the Prosecutor is in line, is in line what we have
20 submitted on the 11th of September, because, and I quote from our
21 written submission: "The Prosecution anticipates having disclosed or
22 provided for inspection or having sought to lift any restrictions on
23 disclosures on the materials concerned by the end of October."

24 And, Mr. President, your Honours, there is indeed, there is
25 indeed a huge difference between having sought lifting and having

1 disclosed materials. The lifting processes take time. And when I say
2 they take time, I talk about weeks if not even months.

3 PRESIDING JUDGE FULFORD: Well, you're of course right,
4 Mr. Withopf, that that is the language that was used. One issue that
5 we may have to look at is whether the requests to lift the
6 restrictions have been advanced in a timely fashion given that you
7 yourself have been indicating that you hope that the trial would
8 commence late this year. In all of your submissions to date, you
9 have, as I understand it, kept open the possibility that we could have
10 commenced the trial before the turn of the year.

11 Now, if that's the case, one does have to reflect on whether or
12 not the request to lift the restrictions have been -- or whether that
13 process has been commenced early enough.

14 MR. WITHOPF: Mr. President, I'm sure this will be addressed at a
15 later stage, and I'm of the strong belief that we can provide
16 information to the Honourable Bench that will satisfy their concerns.

17 PRESIDING JUDGE FULFORD: Thank you very much.

18 Now, in terms of how we deal with the -- for instance, the 46
19 documents which at the moment are subject to the problem that the
20 providers will not lift the restrictions, are you in a position either
21 later today or tomorrow to address us ex parte as to the -- the nature
22 of those documents and the detail of your understanding of the
23 difficulties that confront the providers and the explanation as to
24 why, as you understand it, the -- the restrictions can't be lifted?

25 MR. WITHOPF: Mr. President, your Honours, we will be in a

1 position to provide the information as requested. What I can say and
2 what I believe I can say in public session, the Office of the
3 Prosecutor, in particular when this comes to documents that contain
4 potentially exculpatory information and the information provider has
5 refused to lift the respective restrictions, the Office of the
6 Prosecutor is looking for alternatives in its document collection,
7 alternatives along the lines whether there are other documents which
8 do not fall under Article 54(3) that contain the same or very similar
9 information. Then the Prosecution makes a deliberate decision to
10 disclose such documents to the Defence.

11 PRESIDING JUDGE FULFORD: Last intervention by me, Mr. Withopf,
12 and then I'll let you carry on. Just so we can get a feel of it, does
13 it nonetheless hold good that you anticipate that by the end of
14 October the Defence will be materially better placed than they are at
15 the moment in terms of having seen the documentation that particularly
16 relates to the case against Mr. Lubanga Dyilo?

17 MR. WITHOPF: Of course, Mr. President, your Honours, the Office
18 of the Prosecutor has a particular interest to identify materials that
19 are of incriminatory evidence in addition to its obligation to also
20 investigate possibly exculpatory evidence.

21 PRESIDING JUDGE FULFORD: But the end of October, Mr. Withopf.

22 MR. WITHOPF: I understand the question, Mr. President. I
23 understand it very well. In respect to the documents that do not fall
24 under Article 54(3)(e) we have made this undertaking, and there is
25 very good reason to believe that we will be in a position to comply

1 with the undertaking in respect of the documents that fall within the
2 category of Article 54(3)(e). Again, we depend to a large extent on
3 the information providers.

4 What we do in practice, Mr. President, your Honours, and this may
5 help, in practice we are in constant contact with the various
6 information providers. We send letters to them and emphasise the
7 urgency in respect of their decision-making processes. We had in the
8 past, and we continue to have, meetings with the various information
9 providers where we explain the procedure and where we again highlight
10 the urgency of the matter.

11 As I mentioned, there are internal structures within the various
12 institutions that go beyond our control. We do everything what's
13 possible to speed up the process.

14 PRESIDING JUDGE FULFORD: You were going to move on to another
15 topic, I think.

16 MR. WITHOPF: That's correct, Mr. President. And of course it's
17 also disclosure related, and this is for the information of the Bench.

18 I mentioned at the beginning that there's a very high percentage
19 of materials that is not electronically searchable. It's not
20 electronically searchable for a whole variety of reasons, mainly due
21 to the fact that many of the documents that have been gathered by the
22 Office of the Prosecutor are actually in handwriting, Mr. President,
23 your Honours, and these documents, in addition to other documents that
24 are not electronically searchable, such as maps, such as photographs,
25 these documents amount to about half of the DRC document collection.

1 I believe it's self-evident that this poses a challenge to the Office
2 of the Prosecutor, and of course also to the Defence when they are at
3 the receiving end.

4 About 15.000 documents adding up to 32.000 pages fall into that
5 category. The fact that they are not electronically searchable means
6 that staff of the Office of the Prosecutor must read all these
7 documents, including the thousands of pages of handwritten documents,
8 must read them to ensure that all materials that are relevant to, in
9 particular Article 67(2), potentially exculpatory information, and
10 Rule 77, what is potentially material to the Defence, are identified
11 and disclosed.

12 Mr. President, your Honours, here we are confronted -- this is
13 just the fact. Here we are confronted with the realities in the
14 region. In the region concerned, such as the fact, and in particular
15 the fact, Mr. President, your Honours, that these documents are quite
16 often in handwriting or of a quality, and this comes on top of it,
17 Mr. President, your Honours, that does not provide for the use of
18 modern electronic reading tools.

19 The Office of the Prosecutor has paid particular attention to
20 this fact from the beginning of its disclosure efforts, and again I
21 can assure to the extent that these documents do not fall within the
22 range of Article 54(3), protected documents, that they will be
23 reviewed and disclosed by the end of October.

24 PRESIDING JUDGE FULFORD: Mr. Withopf, if I can interrupt just
25 for a moment. That is obviously a -- a considerable body of

1 documentation, and clearly if there is handwriting of poor quality it
2 makes scanning the documents into the system electronically really
3 very difficult, if not impossible. However, when they're being read,
4 I imagine that summaries are made in typed form of the material of, as
5 it were, the relevant parts which the reader is taking on board. Now,
6 presumably those summaries will be capable or will be susceptible to
7 electronic searching.

8 MR. WITHOPF: That's correct, Mr. President, and we are
9 proceeding gradually. And once this exercise is completed, such
10 summaries will be made available -- or would be available.

11 PRESIDING JUDGE FULFORD: Well, presumably given the --
12 presumably the summaries will have been made as and when the documents
13 were read, and if you've got some 8.500 pages, I imagine the bulk of
14 that work has been completed, hasn't it, Mr. Withopf, by now?

15 MR. WITHOPF: Mr. President, would you allow me to convene for a
16 second with my colleagues?

17 PRESIDING JUDGE FULFORD: Of course.

18 [Prosecution counsel confer]

19 MR. WITHOPF: Mr. President, your Honours, I want to clarify what
20 I said in respect of the summaries. There are indeed summaries made
21 by the Office of the Prosecutor, but these summaries, as my colleague
22 Ms. Solano has just pointed out to me, these summaries are mainly made
23 for internal purposes of the Office of the Prosecutor to actually
24 identify those documents which require a close reading. So these
25 summaries, the way they are produced appear not to be disclosed or

1 appear not to serve the purpose the Defence may wish to add to them.

2 PRESIDING JUDGE FULFORD: Well, just as an observation,
3 Mr. Withopf, that may not have been the most helpful way of dealing
4 with this material given that if it's in poor handwriting, it requires
5 someone to read it. And if your typed notes of those documents that
6 have been put onto the system are not disclosable, it then means, if
7 your argument is valid, that we're going to have to consider the
8 situation where someone else has to start from the beginning reading
9 them all over again.

10 MR. WITHOPF: Mr. President, I believe we will look into that
11 issue. We will also inquire whether the summaries can be enhanced to
12 an extent that would serve that purpose, and we would come back to you
13 on this matter.

14 I wish to emphasise in this context already now at least to my
15 knowledge -- to my knowledge - I must be careful what I say - that the
16 ad hoc tribunals' summaries have not been disclosed. Obviously, the
17 documents themselves are subject to disclosure.

18 PRESIDING JUDGE FULFORD: Well, it's always, of course, of great
19 interest to know what has happened at the ad hoc tribunals,
20 Mr. Withopf, but of course we are a new court engaged in our first
21 trial. We are going to have to lay down procedures that are
22 appropriate for this court.

23 I'm going to ask you, please, either later today or tomorrow to
24 come back to the issue of the typed summaries that have been made of
25 what I understand is 50 per cent of the DRC document collection. We

1 would wish to know how full those summaries are, whether they contain
2 essentially all of the important things that were seen within the
3 written material, and whether they can be put into a form that can be
4 disclosed to the Defence and to the participants.

5 MR. WITHOPF: Mr. President, that's well understood, and we will
6 look into that matter in more detail and we'll come back.

7 PRESIDING JUDGE FULFORD: I'm obliged.

8 MR. WITHOPF: If you allow me to continue. I want to raise, and
9 this is summarising, and I will very briefly do so, the fact that
10 neither the previous Defence nor the new Defence has contributed to
11 the search of the materials, be it by commenting and the Prosecution's
12 keyword list, or be it by providing criteria for the definition of
13 what the Defence team and/or Thomas Lubanga Dyilo consider being
14 material under Rule 77. I refer to paragraphs, to keep it short, 28
15 and 31 of our 11th September filing.

16 Mr. President, your Honours, if you allow me to do so, I want to
17 spend a few minutes on the keyword list, and I want to do so because
18 the Defence has specifically addressed this matter in their response
19 to our 11th September filing.

20 The Prosecution -- I thank you very much, Mr. President. The
21 Prosecution uses its keyword list to complement, and I really
22 emphasise the word, to complement the search for relevant materials in
23 the DRC collection that are not unsearchable, witness-related
24 materials, or materials that have specifically been flagged by the
25 investigators and analysts.

1 The materials, as I mentioned, that fall within one or the other
2 category of the later categories are subject to complete review
3 anyway. The keyword list - and I believe that's an important point to
4 make - the keyword list allowed prioritising the document review, and
5 it allowed to do so, in particular, in light of the respective order
6 of the Pre-Trial Chamber to provide for most of the potentially
7 exculpatory evidence prior to the Confirmation Hearing. We believe
8 that the keyword list best serves the purpose to retrieve potentially
9 exculpatory materials.

10 Why do we think so? We think so because the keyword list
11 provides, in particular, for the de-selection of irrelevant materials,
12 materials that are in the DRC document collection but are not relevant
13 to the case of Mr. Thomas Lubanga Dyilo. We will give you a number of
14 reasons.

15 Number one, the DRC document collection is not a Lubanga case
16 collection of documents. The materials in the DRC document collection
17 were collected from the beginning of the investigation into the
18 situation, and the emphasis lies on the word "situation" in the DRC.
19 Thus for that reason do not contain information that is relevant to
20 the Lubanga case. And the materials in the DRC collection were also
21 and continue to be collected for investigations -- for other
22 investigations in the DRC.

23 And of course, on top of prioritising potentially exculpatory
24 information, the keyword list allows for categorising materials, and
25 it does allow so not only for the Office of the Prosecutor but also

1 for the Defence. The Defence, at the very early stages of the
2 proceedings, have been provided with the Prosecution's keyword list.

3 One issue came up in the context of the discussions as to why the
4 Office of the Prosecutor is using a keyword list and is not providing
5 what's well-known under the term "disclosure suite" at the ad hoc
6 Tribunals. There are at least two very good reasons for not doing so.

7 There is, and I come back to this issue, the very high percentage
8 of Article 54(3) protected documents, and on top of it comes the very
9 delicate situation in respect of victim and witness protection. And
10 the scope, Mr. President, your Honours, in that respect, the scope of
11 the problem in that respect is very, very unusual.

12 Furthermore, there is the high percentage of unsearchable
13 materials and the combination of these reasons, of these three main
14 reasons, Mr. President, your Honours, render one of the key aspects of
15 the disclosure suite, namely to allow the Defence to do their own
16 electronic searches, which render it meaningless.

17 So the Office of the Prosecutor has taken a deliberate decision
18 for the reasons I was just mentioning to not provide for a disclosure
19 suite, because it would not serve the purpose.

20 On top of it, of course, the Office of the Prosecution - and your
21 Honours are very well aware of the jurisprudence of the ad hoc
22 tribunals - on top of it, the Prosecution would have, nevertheless,
23 disclosed its disclosure obligations by -- in addition to its own
24 searches.

25 Finally against this background, Mr. President and your Honours,

1 there is no alternative, no alternative for the Office of the
2 Prosecutor other than to using the keyword list. It's the sole
3 efficient way of processing the data due to the volume. And this is
4 also confirmed by the fact that keyword lists, as you, Mr. President
5 and your Honours are probably aware of, that keyword lists were used
6 and were used for many years at the ad hoc tribunals. Keyword lists
7 have proved to be useful in the context of disclosure.

8 You have rightly said, Mr. President, at the very beginning that
9 it's not only the documents that play a particular role in this
10 context. The disclosure of witness statements is, of course, key for
11 the preparation of the defence. And there if you allow me to do so, I
12 would like to expand a bit, because this, and we believe rightly so,
13 and I agree with my learned friend from the Defence, is of very
14 particular interest. And there is an another challenge the Court is
15 facing, and I'm deliberately saying the Court is facing because it's
16 not only the Office of the Prosecutor that's facing that challenge.
17 It's also the Registry and, in particular, Victims and Witnesses Unit.

18 As of Friday last week, Mr. President, your Honours -- and this
19 is answering one of the further questions you have on your agenda. As
20 of Friday last week, the Prosecution has 37 witnesses on its trial
21 witness list.

22 As we have indicated in our 11 September filing, it is likely
23 that the limited number of witnesses will be added. We do not, we do
24 not anticipate, Mr. President, your Honours, that the number of
25 Prosecution witnesses for the upcoming trial will exceed 50, 5-0,

1 witnesses.

2 The identities of 11 out of the 37 current trial witnesses are
3 known to the Defence, and the Defence has received the unredacted
4 statements, five of them, to provide for the complete information,
5 nevertheless, contain Rule 81(2) redactions, due to ongoing and
6 further investigations.

7 The Defence has also summaries of the statements or transcripts
8 of additional 11 trial witnesses and redacted statements of further
9 two trial witnesses. Trial witnesses are the witnesses which are on
10 the Prosecution's list of witnesses. The Prosecution can and will do
11 so in very near future, can inform the Defence about the respective
12 court codes for such witnesses.

13 This was the introduction, Mr. President, your Honours, to
14 provide you with a framework of what I'm going to say now.

15 Out of the 37 -- 35 -- out of the 37 trial witnesses,
16 Mr. President, your Honours, in the view of the Office of the
17 Prosecutor require the Court's specific protection, require the
18 protection of the Registry's Victims and Witnesses Unit. In our view,
19 Mr. President, your Honours, that reflects very strongly on the
20 security situation on the ground.

21 Eleven witnesses have already been admitted into the Victims and
22 Witness Unit's protection programme. There are referrals of 21
23 additional witnesses to the Registry's Victims And Witness Unit
24 pending -- pending decision of the Victim and Witnesses Unit into
25 protection programme. And to provide you with complete information,

1 there are three other witnesses which are awaiting referral to the
2 Victims and Witness Unit by the Office of the Prosecutor.

3 The Prosecution is convinced that all of these witnesses need,
4 and very much do so, they need the protection of the Court. At this
5 stage, Mr. President, your Honours, of course the Office of the
6 Prosecutor is not in a position to provide your Honours with
7 information on how much time it will take the Victims and Witness Unit
8 to assess the referrals and, where applicable, to implement the
9 protective measures. I would invite in that context that the
10 Honourable Bench invites the Victims and Witness Unit to make
11 representations to that extent. And of course - and this is what I
12 said at the beginning - this aspect has an even greater bearing on a
13 trial date, a greater bearing compared to issues that are related to
14 the disclosure.

15 In that respect, if you allow me to do so, the Office of the
16 Prosecutor -- and this is now again disclosure related, and it shows
17 how intermingled these aspects are. In that respect we want to draw
18 the attention of the Pre-Trial Chamber to the following, and I'm
19 expanding on a footnote that's contained in our 11 September filing:
20 As I said, there are currently 21 referrals pending decision of the
21 Registry's Victims and Witnesses Unit. Obviously, whilst these
22 referrals are pending decision by the Victims and Witnesses Unit, the
23 Office of the Prosecutor, for witness and victims security suggestions
24 to put to the Court reasons, is not in a position to disclose the
25 statements of the witnesses concerned to the Defence, certainly not in

1 an unredacted version. The Prosecution has reason to believe, and has
2 very strong reason to believe, that revealing the identities of the
3 witnesses concerned will put their lives and the lives of their family
4 members at risk.

5 The Prosecution, being mindful of its disclosure obligations, is
6 confronted with the following dilemma: At this stage, Mr. President,
7 your Honours, we could apply to the Trial Chamber for authorise of the
8 redactions and, provided that the Honourable Bench would authorise the
9 redactions, disclose the statements and transcripts in redacted
10 versions to the Defence. This process, Mr. President, your Honours,
11 and we do know this from respective experience prior to the
12 Confirmation Hearing, is extremely cumbersome, and rightly so, due to
13 the delicateness of the matters concerned, and is resource-intensive
14 for the Prosecution and the Chamber, and is likely to result in the
15 disclosure of hundreds of pages of witness statements that are
16 redacted, potentially heavily redacted, and as such are of limited use
17 for my learned friends from the Defence team.

18 The single Judge, and I wish to add this, the single Judge of the
19 Pre-Trial Chamber always having been well-aware of the risk the
20 Prosecution witnesses are exposed, in the context of Rule 81(4)
21 applications sometimes went even beyond the redaction requests of the
22 Office of the Prosecutor and ordered, for the sake of victim and
23 witness protection, additional redactions to be applied to the
24 respective materials.

25 There's an alternative to it, Mr. President, your Honours. We

1 could wait with the disclosure of the statements until the Registry's
2 Victims and Witness Unit has decided on the referrals and has
3 implemented, where applicable, the respective protective measures, and
4 then immediately afterwards we could disclose the unredacted
5 statements to the Defence to the extent that they do not contain Rule
6 81(2) related information.

7 As I said, I'm extremely reluctant to talk about the work of
8 other organs of the Court, and I invite the Chamber again to seek
9 representations of the Registry's Victims and Witnesses Unit.
10 However, experience in the past has shown that the decision of
11 implementation of protective measures will be in place or could be in
12 place at about the same time or soon afterwards, after the
13 authorisation of redaction may or may not have been authorised by the
14 Honourable Bench.

15 PRESIDING JUDGE FULFORD: Mr. Withopf, forgive me interrupting.
16 One issue that immediately occurs to me is really to ask the question
17 why we're in this position now. In relation to the 11 who are
18 currently within the Victims and Witness Unit programme there is no
19 difficulty. They're there. A decision has been made. And presumably
20 an informed decision can be made really now as to the extent to which
21 their witness statements can be disclosed, because one knows the
22 position.

23 The question is why there are 24 additional witnesses who are now
24 either waiting referral or who are in the process of referral given
25 that we're now the first day of October with, on the Prosecution's

1 estimation, a trial possibly starting in December.

2 Now, I don't know whether you're able to answer that in open
3 court, Mr. Withopf, or whether that in turn can only be addressed ex
4 parte, but I suspect it's an issue that will be of interest to the
5 Bench.

6 MR. WITHOPF: That's very well-understood, Mr. President, your
7 Honours, and I think to -- at least to an extent I can address these
8 matters in open court, to an extent.

9 The 11 -- or the statements and/or transcripts of the witnesses,
10 and I'm making reference to the 11 that are already admitted into the
11 protection programme, they already have been disclosed to the Defence.
12 At this stage it's just a matter to inform the Defence that these are
13 the 11 concerned, and the Defence would know that these are 11 out of
14 the 37 on the Prosecution's trial witness list.

15 PRESIDING JUDGE FULFORD: I assumed that that was the link. What
16 about the rest, though, Mr. Withopf?

17 MR. WITHOPF: In addition to the 21 which are pending decision of
18 the Victims and Witness Unit, and there are likely three to be added
19 -- or referrals to be added to the Victims and Witnesses Unit, I wish
20 to inform the Trial Chamber to the extent I can during public session
21 that the assessment of the need of referrals done within the Office of
22 the Prosecutor is again a very complex exercise. It's complex due to
23 a whole series of reasons.

24 Obviously, the general security situation in the region concerned
25 must be evaluated. The region concerned is obviously the Democratic

1 Republic of the Congo, and is, in particular, the region of Ituri.
2 The security conditions in that region are fluid, but despite the fact
3 they are fluid, they're always worse -- or always very bad, and it
4 appears that they are becoming worse. That's the general assessment.

5 On top of it, Mr. President, your Honours, the Office of the
6 Prosecutor needs to make individual assessments in respect of the
7 security situation of the witnesses concerned. This requires staying
8 in close contact with the witnesses, to gather information from the
9 witnesses, which is sometimes volunteered, sometimes not, and to make
10 an assessment against the background of the general security situation
11 on the ground.

12 My colleague Ms. Nicole Samson is just reminding me that at least
13 four out of the 24 pending referrals have been referred to the Victims
14 and Witnesses Unit some time ago, and obviously their cases must be
15 discussed in closed session with the Honourable Bench. Again, here I
16 would invite that the Bench consults with the Victims and Witnesses
17 Unit.

18 PRESIDING JUDGE FULFORD: That means, I think, that a -- the
19 greater proportion have only been made very recently in a -- in an
20 area in Africa where even if the situation has recently deteriorated,
21 it has not been particularly good for quite a long time.

22 MR. WITHOPF: Mr. President, there is a particular reason for it,
23 and I believe it's a very logic reason. With the trial coming closer,
24 Mr. President, the pressure on the witnesses -- on the Prosecution
25 witnesses is increasing, and only recently certain experiences have

1 been made. There's a difference, and this difference has been
2 emphasised by the Registry's Victims and Witnesses Unit, and rightly
3 so, at the very early process. There's a difference between being a
4 year prior to the trial and coming closer to the trial. The pressure,
5 for the very obvious reasons, the pressure exerted on our witnesses is
6 increasing with the trial coming closer, because now it becomes very
7 clear to the persons who do cause the risk for the Office of the
8 Prosecutor's witnesses that they understand that this is now becoming
9 serious, very serious business, and the Office of the Prosecutor has
10 to react to such situations.

11 Mr. President, your Honours, that's the maximum I can provide in
12 public session. Otherwise, of course, I would be able to provide
13 additional information in closed and, where necessary, in an ex parte
14 court hearing.

15 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf. We
16 may wish for more detailed assistance from you in due course ex parte,
17 but this is a matter that I will need to discuss in detail with my
18 colleagues.

19 We're now half past 11.00, and we must give those who are
20 responsible for the interpretation a break. So we will rise now. And
21 I'm just going to ask how long for.

22 [Trial Chamber confer]

23 We will rise now, Mr. Withopf, and resume again at five to 12.00.

24 COURT USHER: All rise.

25 Recess taken at 11.27 a.m.

1 On resuming at 11.59 a.m.

2 COURT USHER: All rise. The International Criminal Court is now
3 in session. Please be seated.

4 PRESIDING JUDGE FULFORD: Mr. Withopf, before I ask you to
5 resume, can we just address together one particular discrete but
6 potentially important area. In your submissions, you -- in your
7 written submissions, you set out very helpfully that you have some 417
8 items on the anticipated list of evidence. These include 374
9 documents, and that there are some audio and video materials as well.
10 And as you've repeated to us today, you are anticipating between 40 to
11 50 witnesses.

12 Now, we've -- we've dealt certainly in part with the position as
13 regards the witnesses. Could I ask for your particular help in
14 relation to the 417 items of evidence. Have those items been
15 disclosed? Have they been, as it were, put together, collated in one
16 particular place for the benefit of the Chamber, the Defence, and the
17 participants? And if this hasn't happened, what are your proposals in
18 that regard?

19 MR. WITHOPF: Thank you very much, Mr. President, your Honours,
20 for giving me the opportunity to address these matters.

21 As I have mentioned earlier on today, the amount of documents has
22 increased since our 11 of September filing. If I recall correctly,
23 the number is now about 540 documents. Amongst these materials are
24 still the 17 video materials I was mentioning earlier on today.

25 At this stage, Mr. President, your Honours, I can confirm that

1 all of these materials have indeed been disclosed to the Defence.

2 PRESIDING JUDGE FULFORD: Excuse me interrupting. Have they been
3 identified as the documents which either do or will form your list of
4 evidence?

5 MR. WITHOPF: Mr. President, they have been identified as such.
6 It may help and may assist the Honourable Bench if I describe what we
7 have done in the past.

8 Whenever we disclose materials to the Defence, we make a
9 distinction between materials that fall within the ambit of
10 incriminatory materials, incidentally, obviously meaning -- implicitly
11 meaning that these materials will form part of the Prosecution's list
12 of evidence. Then we disclose the materials that are of potentially
13 exculpatory nature, and then, of course, everything what falls under
14 Rule 77.

15 PRESIDING JUDGE FULFORD: It would be of huge assistance to the
16 Bench in terms of our preparation, our own preparation, prior to
17 trial, Mr. Withopf, if we could have set out, as it were, in one place
18 the 417 items together with either the documents or references to them
19 so that we can find them within the electronic storage facility.

20 MR. WITHOPF: What we have done in the past up until the last
21 day, Mr. President, your Honours, of the Confirmation Hearing, and
22 based on a decision of the single Judge of the Pre-Trial Chamber, we
23 have filed all the incriminatory materials with the Registry, and as
24 such they were made available to the Pre-Trial Chamber. And in my
25 belief they should form part of the case record, and as such these

1 materials are available to the Honourable Bench.

2 Since then, awaiting instructions of the Bench, we have not filed
3 the incriminatory materials with the Registry. But if I understand
4 you, Mr. President, if I understand you correctly, I hope that you
5 wish us to file such materials with the Registry.

6 PRESIDING JUDGE FULFORD: I assume that in this you're not at the
7 moment talking about the requirement that has been made historically
8 that originals are left with the Registry. And can I indicate that,
9 as it were -- I'm, as it were, departing from the main discussion. As
10 we understand it, there is agreement that originals do not have to be
11 left in the custody of the Registry. And if it's right there is
12 agreement over that, the Bench does not intend to stand in the way of
13 the Prosecution being entitled to retain originals. But we certainly
14 are indicating that we do wish, however precisely it's done, to have
15 access to identified materials that form part of the positive -- or
16 that form the positive case against this accused.

17 MR. WITHOPF: Mr. President, your Honours, that is
18 well-understood, and the Prosecution is very satisfied to hear that
19 this Chamber does not require the Office of the Prosecutor to provide
20 for the originals of the documents, and I do not need to refer to our
21 written submissions as to why there appears to be agreement between
22 the Defence and the Prosecution, if I interpret my learned
23 colleague's, my learned friend's, filing correctly. We will find a
24 way to provide the Honourable Bench with the respective materials in
25 due course.

1 PRESIDING JUDGE FULFORD: Please continue with your submissions,
2 Mr. Withopf.

3 MR. WITHOPF: Thank you very much, Mr. President. Prior to the
4 short break, I was addressing the alternatives, detailing as to how we
5 can deal -- or how the Office of the Prosecutor suggests to deal with
6 the statements of the witnesses that are awaiting decision on the
7 referrals, and I was describing the process that would need to be
8 followed if we would need to apply for authorisation of redactions,
9 and I was also describing the likelihood that we could provide, soon
10 after the Registry's Victims and Witness Unit has dealt with the
11 pending referrals, the unredacted statements to the Defence.

12 In our view, Mr. President, your Honours, and in particular
13 considering aspects of judicial economy, the later option appears to
14 be preferable. It can be anticipated that it saves time and resources
15 and does not - and this is actually the main point I wish to make,
16 Mr. President, your Honours - and does simultaneously not impact on
17 the Defence preparation of the case. In any event, would the Defence
18 receive the unredacted statements long prior to the testimonies of the
19 witnesses concerned.

20 And I wish to add, and I wish to emphasise, that the Defence at
21 this stage has 13 of the statements concerned out of 23 already in
22 redacted version or in summarised version. A significant body of the
23 volume of the Prosecution's witness-related evidence -- or anticipated
24 evidence, to be correct, is already provided to the Defence.

25 On this matter, Mr. President, the Office of the Prosecutor would

1 invite the Honourable Bench to provide for instructions taking into
2 account the considerations I just put forward to the Bench, and I'm
3 sure the Defence will have views on this matter.

4 If you allow me, Mr. President, there are very few aspects I want
5 to briefly address, and these aspects are mainly related to paragraph
6 7, I believe, of the Defence filing of the 24th of September, and they
7 concern the question what is attached to the witness statements.

8 At this juncture, I would ask my learned friends from the Defence
9 to clarify what their definition of "attached to" is about. And again
10 I make reference to the Defence's 24th of September filing.

11 It can -- it can be -- or it can be determined or it can be
12 defined by what is annexed to a statement or what is referred to in a
13 statement. That's the approach that has been taken during the
14 Confirmation Hearing.

15 I raise this particular point -- and I believe, Mr. President, I
16 need to provide the Honourable Bench with some more background
17 information as to why I'm raising this point.

18 In the Office of the Prosecutor's view, many of the documents
19 that are either attached to or referred to a witness statement are
20 entirely irrelevant, and they are irrelevant in our view because they
21 were collected at the initial stages of the proceedings, of the
22 investigation. At the initial stages of the investigation the focus
23 was broader, and of course materials have been collected and have been
24 provided by witnesses, which now that it's clear that in these
25 proceedings the focus -- or the charges are the trial social [phone]

1 related charges that such documents became irrelevant for the purpose
2 of the current and present proceedings.

3 On this aspect, Mr. President, your Honours, it would be
4 beneficial for the practice of disclosure to get the views of the
5 Defence, but also, it would also be beneficial to our future
6 disclosure of the materials, or non-disclosure of the materials,
7 concerned if the Chamber could provide guidance.

8 What we are currently doing is the following , Mr. President,
9 your Honours: All attached to documents that are responsive to either
10 of the disclosure categories are disclosed and will be disclosed. And
11 for trial witnesses, Mr. President, your Honours, all materials were
12 and continue to be reviewed, meaning anything that was mentioned or
13 attached is reviewed and will be disclosed where applicable. It also
14 concerns at this stage such documents that are sourced by trial
15 witnesses.

16 I hope I was in a position to portray or to provide sufficient
17 information for, first, probably the Defence to provide observations
18 to the Chamber, and then for the Chamber to provide for guidance to
19 the Prosecution.

20 Mr. President, your Honours, there's one last point I wish to
21 make in the context of matters that are related to disclosure and
22 witness security.

23 The Defence is requesting, and rightly so, that the Prosecution
24 is providing the Defence as quickly as possible with the trial witness
25 list. I have detailed the challenges not only the Office of the

1 Prosecutor but the Court as a whole is facing in the context of victim
2 and witness security-related matters. This has an impact on providing
3 a witness list to the Defence.

4 In any event, the law says, and I refer to Rule 67, in sufficient
5 time prior to the commencement of the trial. What is sufficient time,
6 Mr. President, your Honours? An indication could be the law at the ad
7 hoc tribunals, and there I refer in particular to the ICTY, where it
8 says that the list of the Prosecution witnesses has to be disclosed
9 six weeks prior to the Status Conference that is usually held very
10 close to the start of the trial. This at least gives an indication.

11 Revealing of identities, Mr. President, your Honours, we have
12 made the point in our filing. I do not need to repeat it. The
13 international tribunals and courts, be it the ICTY, be it the ICTR, or
14 be the Sierra Leone court have applied certain criteria, be it 21
15 days, be it 30 days, or be it 43 -- 42 days prior to the actual
16 evidence of the witnesses concerned.

17 PRESIDING JUDGE FULFORD: Mr. Withopf, forgive me, I want to test
18 this with you slightly. Doesn't it all depend? There are some
19 witnesses one can readily anticipate that if you had six weeks warning
20 you could digest the content, carry out your researches, and be
21 trial-ready. There are other witnesses, who if you only receive them
22 a month and a half before the commencement of the trial, you're not
23 going to have sufficient time to carry out the necessary researches.
24 It may be that there's material provided in the witness statement
25 that, sensibly and properly, requires checking. It may be that

1 obvious lines of inquiry are then raised which need to be followed up
2 before the witness can properly be cross-examined and before the
3 Defence can present their case.

4 Doesn't it all depend?

5 MR. WITHOPF: Mr. President, your Honours, of course it does
6 depend, to answer the question in the affirmative. However, there are
7 ways to deal with this situation, which undoubtedly is not an easy
8 situation for the Defence to deal with.

9 There are practices that have been established at the ad hoc
10 tribunals, and there is no reason why, but necessarily the same,
11 appreciating what your Honour Mr. President has said earlier on today,
12 but at least similar practices could be applied in this context.

13 One of the means to address the situation would be the order of
14 the witnesses or the order the Prosecution calls the witnesses
15 concerned. This would allow the Defence to be given more time to
16 prepare for the cross-examination of the witnesses concerned.

17 There are certainly other options one can think about, and the
18 Office of the Prosecutor is very much prepared to further elaborate on
19 this matter if need is required.

20 PRESIDING JUDGE FULFORD: I mean, we'll need your help,
21 Mr. Withopf, at some stage, because if the suggestion is going to be
22 made that with some of the Prosecution witnesses that Ms. Mabilile
23 should see their statements for the first time six weeks before the
24 trial begins, I suspect we're going to need detailed justification
25 before we would be persuaded to accept that suggestion.

1 Mr. Withopf, can I put it this way, that at some stage -- at the
2 moment, as I understand it, there's no suggestion that there should be
3 anonymous witnesses. I haven't detected that from your submissions.
4 If it's accepted that at some stage the identity of the witness
5 concerned is going to be revealed, at that point, speaking for myself,
6 I readily understand that the security issue then arises and you've
7 got to deal with it, and you've got to deal with it for the period
8 that follows the revelation of the witness's identity.

9 Now, doesn't that apply to before the trial, during the trial,
10 and indeed after the trial? If the witness has given evidence against
11 a particular accused, then his or her security is really -- from the
12 moment of being revealed, their security is at risk potentially.

13 Now, if that's the case, why does it improve the situation
14 leaving it until six weeks before the trial rather than disclosing the
15 identity much earlier knowing that you are at some stage going to have
16 to deal with the security for that witness? You recognise and
17 understand that and deal with it, but you also ensure that the Defence
18 have an adequate opportunity to deal with the evidence that the
19 Prosecution are proposing to rely on.

20 MR. WITHOPF: Mr. President, your Honours, I don't think there's
21 a big difference between the suggestion of the Office of the
22 Prosecutor and the remarks you, Mr. President, have just made, and I
23 want to reaffirm on this occasion that the Prosecution has no -- has
24 no intention rely on anonymous witnesses. I make this statement very
25 deliberately at this juncture.

1 Providing for protection of witnesses is a joint task between the
2 Office of the Prosecutor and the Registry's Victims and Witnesses
3 Unit. When the Office of the Prosecutor comes to the conclusion, and
4 we have come to such a conclusion in respect to the very many
5 witnesses I was mentioning earlier on today, the organ of the court
6 that is supposed to provide for the security of victims and witnesses
7 is the Registrar and, in particular, its Victims and Witnesses Unit.

8 The Office of the Prosecutor has made all efforts to enable the
9 Victims and Witnesses Unit to deal with the referrals that have been
10 made by the Office of the Prosecutor. In the time between submitting
11 the referral to the Victims and Witnesses Unit and the admission of
12 the witnesses concerned into the protection programme, it's the Office
13 of the Prosecutor that continues to provide for the security of the
14 witnesses concerned. Once admitted into the protection programme,
15 it's the duty of the Registry's Victims and Witnesses Unit.

16 The Office of the Prosecutor is of the belief, is of the strong
17 belief, that the identities of the witnesses concerned cannot be
18 provided to my learned colleagues from the Defence prior to the
19 admission of the witnesses concerned into the protection programme.

20 If there are no further questions from the Bench, Mr. President,
21 your Honours, this would conclude our observations on
22 disclosure-related matters, the number of witnesses, witness
23 security-related matters, and they are, of course, intermingled with
24 the trial date.

25 PRESIDING JUDGE FULFORD: We're indebted to you, Mr. Withopf.

1 Thank you very much.

2 Ms. Mabilille.

3 MS. MABILILLE (interpretation): As I said, it is my colleague
4 Mr. Jean-Marie Bijou-Duval who will speak on our behalf.

5 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President. I
6 have a few observations from the Defence on this basic issue of
7 disclosure based on the fact that there could not be a fair trial
8 if the accused cannot be given access to the entire Prosecution file
9 sufficiently in advance of the commencement of trial.

10 I will make three series of observations. The first will concern
11 the nature of the Prosecutor's disclosures and the preferred date for
12 these disclosures. The second series of observations will concern the
13 form.

14 PRESIDING JUDGE FULFORD: Could you pause for a moment. We had a
15 potential electronic problem. Could you carry on so that we can see
16 whether it's now been rectified.

17 MR. BIJU-DUVAL (interpretation): Yes, Mr. President. So I was
18 saying that I had three series of observations. First, the nature and
19 date of these disclosures; second, its form, and this will concern
20 redactions; and thirdly, a question rather than a statement: The
21 issue of the people who will be receiving these disclosures.

22 Regarding the first series of disclosures, regarding the nature
23 and the date of the disclosure of the Prosecution's evidence, which
24 should allow the accused person to prepare his defence in keeping with
25 the rules of a fair trial, in this regard I will make two initial

1 remarks.

2 The first is this: The Prosecutor provided us, provided the
3 Court, very interesting details as to the difficulties his work
4 entails, but we observe that the Prosecution investigations have
5 spread out over three years to date. The work is difficult, but this
6 it work has been going on for three years, and it can be reasonably be
7 considered that this three years and more of investigations will have
8 enabled this work to have been completed, or nearly completed, that is
9 in terms of collection and disclosure.

10 In the same vein, I will point out that in the new provisions of
11 international courts, particularly in the ICC, it should be considered
12 that on the date of the confirmation of charges the Prosecution file
13 is ready for trial at least in the main. Article 64(3) supports this
14 idea. It says that there will be subsequent residual disclosures, and
15 this is quote in Rule 84, which leads the Defence to express a certain
16 degree of surprise and concern when it hears the Defence -- the
17 Prosecution say to the Court that this case file, which was supposed
18 to have enabled the confirmation of the charges, cannot at this point
19 in time go to trial.

20 Now, regarding the nature of the disclosure very briefly, this
21 disclosure must be complete. Of course, incriminatory evidence,
22 evidence -- exculpatory evidence that the Defence will need, there is
23 a particular issue raised here regarding the issue of the disclosure
24 of exculpatory evidence and the evidence required by the Defence.

25 On this issue, I would just like to point out that it is up to

1 the Prosecutor to use the methods that he deems necessary and the most
2 efficient and relevant ones to carry out his disclosure obligations.
3 The Prosecutor has pointed out these difficulties to us, and I think
4 it is up to the Office of the Prosecutor and the Office of the
5 Prosecutor alone to bear the burden of this disclosure obligation
6 under Article 77 and Article 67(2).

7 Regarding the keywords, this is an interesting issue which the
8 Defence has addressed in its submissions. It does seem, on the one
9 hand, that keyword searches are not sufficiently efficient. It
10 appears, on the other hand, that this is part of the Prosecutor's
11 obligations.

12 Now, regarding the disclosure of incriminatory evidence.
13 Regarding the file composed of witness statements and documents which
14 will be submitted to the Trial Chamber in the course of the trial in
15 order to buttress the case of the Prosecution. The Defence must know
16 exactly what this contains. And this view held by the Defence, this
17 ability to understand and prepare its case is disturbed at this point
18 by the large volume of documents, in particular, that were disclosed
19 and which are still being disclosed.

20 Why is this so? In order to be able to prepare its case
21 adequately, the Defence does not only require the total disclosure in
22 volume that concerns the trial, the Defence needs to find out from
23 this huge volume of documents and in the large number of witness
24 statements the documents and the witnesses who will be actually called
25 to testify in support of the Prosecution's case. Otherwise, the

1 Defence's preparation will be affected by the large volume of
2 documents involved. This is why the Defence, which to mention this
3 specifically in its submissions, that it would like to receive in good
4 time the list of the documents that the Prosecutor intends to use in
5 support of his case, as well as the list of witnesses that he intends
6 to call to testify at trial.

7 Mr. President --

8 PRESIDING JUDGE FULFORD: Can I interrupt you. I fear I am now
9 confused in that I had assumed from an answer that Mr. Withopf gave me
10 shortly before his submissions were completed, I had assumed that the
11 documents that the Prosecution are relying on had been identified
12 during the disclosure process and that they were marked in a way as to
13 indicate that they form part of the list of evidence which the
14 Prosecution are intending to rely on.

15 Now, if that answer -- if I've understood Mr. Withopf correctly
16 in relation to that, then it means that really what is outstanding are
17 the witnesses and the witness statements except for the 11.

18 Now, I think we do need to have a measure of clarity on this. Do
19 I take it from your submissions that you have not been able to
20 identify the 500-odd pieces of evidence which the Prosecution intend
21 to rely on as a part of their positive case against your lay-client?

22 MR. BIJU-DUVAL (interpretation): Yes, the Defence has, of
23 course, received the documents with reference to the documents, and
24 these documents -- well, there are hundreds of these documents, 540.
25 It seems doubtful to the Defence or dubious to the Defence that these

1 540 documents be going to be effectively presented by the Prosecution
2 during the trial to support the accused.

3 Intellectually one could envisage the hypothesis that it would
4 be, but it does seem practically difficult to implement that. Where
5 it comes to questioning -- well, you have the question of the Defence
6 which is that among these hundreds of documents, if the Prosecutor can
7 limit or note those ones which he does intend to present during the
8 hearing.

9 PRESIDING JUDGE FULFORD: Forgive me interrupting again, and
10 although we are a truly an international tribunal, I'm going for a
11 moment to describe what happens in the United Kingdom, which is of
12 course the jurisdiction I'm most familiar with.

13 In the United Kingdom, what one expects, indeed what one always
14 receives from the Prosecution well in advance of trial, is a written
15 description of their case. So -- it's sometimes referred to as an
16 opening note. So that the various elements of the evidence that the
17 Prosecution -- which the Prosecution have at their disposal is put
18 into a narrative and descriptive form which enables everyone who is
19 interested to understand how the Prosecution's evidence works and how
20 the different pieces of evidence relate to the charges which the
21 accused faces.

22 Now, at some stage during the course of today and tomorrow, I --
23 we propose to ask Mr. Withopf whether we can expect in the near future
24 a document of that kind, but I imagine from what you're saying,
25 Mr. Duval, that that would be of assistance to the Defence in terms of

1 understanding how these documents actually form part of the case
2 against Mr. Lubanga.

3 MR. BIJU-DUVAL (interpretation): Absolutely, Mr. President.
4 Your remark really does address our concerns.

5 If you would allow me to continue. The same comment is also very
6 much the case where it concerns the witnesses that the Prosecutor
7 intends to call upon. And I have to share a certain lack of
8 understanding on the part of the Defence of the position of the
9 Prosecutor. There are several points that are certain. The Defence
10 received a certain number of witness statements. Most of them had
11 been subject to redactions, but I'll get back to the issue of
12 redactions later.

13 Mr. -- well, the Prosecutor said that -- today that he intends to
14 call around 35 witnesses. Thirty-five. It could go up to 50. There
15 is an uncertainty there. It seems to be an excessive degree of
16 uncertainty, as far as I'm concerned, if we're not sufficiently
17 informed in advance of the start of the trial.

18 The problem for the Defence is to know what -- who are these 35
19 or 50 witnesses. It's not about -- well, not necessarily about the
20 identity or the redactions here. Here we're talking about today, or
21 very quickly at least, seeing what -- or who these witnesses are, what
22 are the witness statements which could be disclosed, and perhaps they
23 haven't yet been, what are -- who are these witnesses that the
24 Prosecutor intends to rely on. This isn't the question related to
25 identity yet. And what we can't do today, we cannot understand what

1 prevents the Office of the Prosecutor from indicating to the Defence
2 and to the Chamber or to disclose this list of witnesses either
3 indicating the name, if possible, or indicating a pseudonym. But we
4 cannot or we are not able to understand what prevents the Prosecutor
5 from indicating to the Defence the statements on which he intends to
6 rely during the trial.

7 It has been said to us that 11 of these witnesses -- or 11 of
8 these witness statements were disclosed in a non-redacted form. We
9 can imagine which ones, but we don't know exactly which and why. Why
10 not indicate exactly which ones they are -- or which witnesses they
11 are, which witness statements they are, which are going to be produced
12 during a trial to support the Prosecution?

13 The Defence cannot understand this reticence. It can't
14 understand this reticence. And this is even more -- even more harmful
15 to the preparation of the trial, because while the Defence does not
16 know what is going to be the basis of the Prosecution, that is say the
17 witnesses, it cannot usefully or totally effectively carry out its
18 investigations, or its counter-investigations, if you like, with
19 regard to the facts disclosed by these statements.

20 So, Mr. President, that is the essential part with regards to the
21 nature of the witness statements.

22 Now, we would wish that the documents be indicated with
23 additional explications, as you mentioned, with regards to the thesis
24 supported by the Prosecution. We would like from today that the
25 Prosecutor indicates to us what are the statements that we will have

1 possession of which will be used during the trial.

2 And just a last point where it concerns the issue of disclosure
3 and the volume of the disclosure of the Prosecutor. It's the date.
4 Obviously, this goes back to the fundamental principle according to
5 which the accused should be judged without undue delay.

6 You've suggested, Mr. President, the date of mid-February to
7 start the trial. We have indicated in our submissions that the
8 Defence needs a time limit of three full months to be able to prepare
9 itself after the disclosure has been completely carried out, and this
10 is why we would suggest that an imperative date be fixed by the date
11 by which the Prosecutor will have to have carried out all its
12 disclosure obligation.

13 And this takes me to my second point, which is the issue of
14 redactions. The issue of redactions, well, I -- we have heard with
15 satisfaction the commitment of the Prosecutor, without error on my
16 part, that is, to not rely on anonymous witnesses, and we are pleased
17 about this. The issue which arises is that of the date on which these
18 redactions will take place -- or disclosure will take place.

19 I just want to -- if you allow me to go back to my first
20 observations. The Prosecutor had more than three and a half years of
21 investigations, and it's almost a year ago that the confirmation
22 decision was rendered, which should have closed the preparations of
23 the Prosecutor. So it's urgent that this disclosure takes place.

24 We have heard about these difficulties that the Prosecutor has,
25 the redactions which are linked to the sources, Article 54(3)(e), and

1 the redactions that are linked to the safety of witnesses. When it
2 comes to the reactions with regards to the -- the ban made by the
3 source, that's to say 54(3)(e), with regards to this particular point,
4 then I think that's a bad use of this article, a poor use of this
5 article. I think that it's an a poor use of this article because it's
6 simply there. It refers to the hypothesis where a person provides a
7 document or testimony just so that the Prosecutor can get other
8 evidence to be able to carry out its -- to continue with its
9 investigations. It is not actually evidence which should be brought
10 out in court. That's -- that's the first observation.

11 Second observation if it's not possible for the Prosecutor to
12 obtain the authorisation of the source, well at a certain time before
13 the trial we have to draw the consequences of that. And if that's not
14 possible, if redactions aren't possible, well, then unfortunately it
15 will be impossible to produce this document in court. There will be a
16 time before the trial where a clear position has to be taken on this
17 issue which directly affects the rights of the accused and the
18 possibilities to prepare his defence.

19 The second aspect with regards to the redactions which we're very
20 sensitive to is the issue of the protection of persons, the issue of
21 the protection of witnesses. And with regards to this issue, I have
22 to say that the Defence is a bit shocked by the way in which the
23 situation is presented. The argument which is put forward, which
24 should be examined, is that more -- the more the time goes on the
25 situation gets worse, the witnesses are more and more subject to

1 pressure in Ituri. They are more and more under threat. "We cannot
2 disclose, because the Victims and Witnesses Unit hasn't yet done what
3 would make it possible to put them out of danger."

4 So we have the feeling, nevertheless, that there is this hearing
5 today and has -- there are two different trials it seems, or two
6 different proceedings. There's one against Mr. Thomas Lubanga
7 concerning events which took place in Ituri in 2002, 2003, a trial
8 which we are all trying together to make as fair as possibly. And
9 furthermore, there's another trial, which doesn't have a name but is
10 carried against Mr. Thomas Lubanga in an implicit way, which consists
11 of saying that the accused himself - and this is why we want to
12 identify -- or disclose the identities - he carries out criminal
13 activities in Ituri against the witnesses. It's not said in that way,
14 but everybody understands it like that. And the Defence cannot accept
15 that, because it's a trial which is within -- it's a trial within the
16 trial, which seems to us to be completely unfair, because the
17 Prosecution hasn't made it clear, and because it's astonishing that it
18 is suspected that Mr. Lubanga is suspected, without saying so, to put
19 pressure on witnesses and he doesn't even know their identity. There
20 is a paradox there which it doesn't seem to be reasonable.

21 And, Mr. President, I go fully towards your observations, which
22 is to say whatever the case, the redactions should take place. This
23 is the commitment of the OTP. And so what difference make it two
24 weeks, one month for these redactions? The essential point is that
25 the protection is effective.

1 So, Mr. Prosecutor goes back to this point with regards to the
2 Victims and Witnesses Unit and its -- effectively its mission to carry
3 this out. But there, too, it is necessary that the date of this total
4 disclosure to be -- that they be disclosed such that the trial can
5 start without delay and the Defence can prepare itself. And once
6 again I go back to the point of the Defence to also fix on the 31st of
7 October the date by which these redactions should be deleted and the
8 documents should be disclosed.

9 Just one word, basically a question really, with regards to the
10 third series of observations that I mentioned that I wanted to make.
11 The addressees, if you like, of this disclosure, I just want to submit
12 to the Chamber a question that the Defence has with regards to reading
13 the texts.

14 While the addressees -- or while the situation is clear before
15 the Pre-Trial Chamber, it is just as uncertain before the Trial
16 Chamber. Basically what I'm saying is when it comes to disclosure of
17 the evidence of the Prosecutor, of course it takes place towards the
18 Defence. That's not where the issue is. But with regards to the
19 victims, with regards to the Chamber itself, the analysis of the text
20 really does bring an a question with it. The Defence notes that the
21 rules applying to the trial phase before the Trial Chamber
22 distinguishes two types of rules which are clear, and rules concerning
23 disclosure -- and these rules concerning disclosure don't mention any
24 disclosure towards the Defence. And there are another body of rules
25 concerning the presentation of proof -- of evidence which give rise to

1 the registration of evidence during the hearings as well, and
2 registration of this evidence into the file of the Chamber. And
3 there's also a question which arises, which is basically to know what
4 the status is of the disclosure and the result of the disclosure of
5 the evidence of the Prosecutor where it concerns the disclosure
6 towards victims or to the Chamber.

7 I understand that the Chamber wants to have disclosure of the
8 evidence disclosed by the Prosecutor, and of course we can conceive
9 this type of system, but another question arises with regards to
10 disclosure towards victims. There the texts are more clear. They
11 state that victims have access to the file registered before the
12 Pre-Trial Chamber. That's 121. And it states that the victims
13 have -- or that they are -- they receive a certain number of
14 notifications which keep them informed of the proceedings. That's
15 Rule 92. And of course that they take part in the proceedings and
16 they -- you have the notification of evidence during the proceedings.

17 But this issue, this issue of disclosure concerning the victims,
18 can be solved by the application of these three bodies of rules.

19 So, Mr. President, those are the observations that I wanted to
20 make on that subject.

21 PRESIDING JUDGE FULFORD: Mr. Duval, before you move on, can I
22 just ask your help with how disclosure has been affected between the
23 Prosecution and the Defence since the Confirmation Hearing in the
24 sense of have you been receiving the disclosed materials in the same
25 form as before the Confirmation Hearing or has there been some kind of

1 change?

2 MR. BIJU-DUVAL (interpretation): Mr. President, I don't want to
3 make a mistake with regards to the details, with regards to technical
4 aspects related to disclosure, the way it happened. I don't think
5 that there's been -- well, they said no. With regards to the manner
6 in which the documents were disclosed hasn't changed there, with
7 regards to the technique, the disclosure technique, if you like.

8 MS. MABILLE (interpretation): Could you -- do you want us to
9 tell you exactly how it's happening, the disclosure?

10 PRESIDING JUDGE FULFORD: Ms. Mabilille, it would be hugely
11 helpful.

12 MS. MABILLE (interpretation): The Prosecutor is kind enough
13 every two weeks to call us to his office, and there he provides us
14 with a CD where there are the new materials which he intends to
15 disclose, and we sign a receipt of it, and we take the CD. And then
16 we take our computer, our little computer, which makes it upon to
17 transfer it onto the computer. Normally, it should be immediately
18 done as well on Thomas Lubanga's computer such that he, in realtime,
19 also has access to these new documents. So what I've been able to
20 find out from the former Defence team, was that it happened in this
21 way, and it's happening in the same way now.

22 The Prosecutor's proposed, but perhaps I'm anticipating, changing
23 this method and to try to make a direct communication to our
24 computers. Given all the problems that we have at IT level, we
25 preferred to keep the method which made it possible to have a clearer

1 follow-up of what was disclosed and what wasn't.

2 Has that responded to your question?

3 PRESIDING JUDGE FULFORD: That's very helpful. Can I ask one or
4 two supplementary questions? You are therefore receiving this
5 information in electronic form because it's on a CD. Is it presented
6 in such a way as to enable you to carry out searches of that material,
7 perhaps because the information has been tagged in some way or because
8 you're able to key in particular words? Are you of any -- have you
9 been provided with any, really, search facilities in relation to the
10 material that's disclosed?

11 MS. MABILLE (interpretation): Mr. President, the Prosecutor said
12 to us that he was going to make a list of keywords. When he discloses
13 materials, he doesn't disclose them with keywords. I asked the
14 question what these keywords were for, and what I've understood,
15 Mr. President - I have to say this with a certain degree of modesty -
16 what I've understood is that these keywords can't be used by the
17 Defence and that they were solely for the system of the Prosecutor.
18 So after that I didn't go any further because I said, well, if we
19 can't use them, if we can't use these keywords, then it's not very
20 relevant for us.

21 And to respond to your question: No, when the CD is provided to
22 us with regards to the Regulation 67, we disclose incriminating and
23 exonerating evidence. That's all we hear when this CD is provided to
24 us.

25 PRESIDING JUDGE FULFORD: Additionally, Ms. Mabilille, we've heard

1 today that a very substantial part of the material in possession of
2 the Prosecution, because it's in handwriting, much of it in poor
3 handwriting, is not available in electronic format. Now, the question
4 I have is have you been receiving hard copies of the material that
5 hasn't been put onto a CD?

6 MS. MABILLE (interpretation): Last week was the first time
7 since, well, I've been working on the case that the Prosecutor has
8 provided me with a paper copy of a statement because it was
9 handwritten and he thought that it was the best way of disclosing it
10 to us. So unless there is an error on my part, there was just one
11 piece of evidence which was communicated to us in handwritten form.

12 Sorry, Mr. President. I was told that on Friday -- I wasn't
13 there on Friday, and my colleague Mr. Biju-Duval who was there, so
14 Friday as well this took place, but I wasn't there.

15 PRESIDING JUDGE FULFORD: Mr. Withopf, in just a moment, if you
16 will. I promise you I'll turn to you in just a moment.

17 But, Ms. Mabilille, just before I hear -- we hear from Mr. Withopf,
18 it was said early this morning that there are about 15.000 documents
19 adding up to 32.000 pages which are not in electronic format. Now has
20 that material or part of it, and if part of it, what part, has that
21 material been made available to you or Mr. Flamme?

22 MS. MABILLE (interpretation): Mr. President, honestly, I'm
23 unable to answer that question. I haven't noted the number of
24 documents which have been provided to us. I've tried to ask the
25 Prosecutor when I arrived to join the case. I said that it would be

1 useful to have recapitulation with regards to the whole -- all the
2 different pieces of evidence which had been disclosed.

3 Our case manager tried to do this summary, and I have to ask him
4 if we can say today how many different pieces of evidence we have had
5 and different materials have been disclosed to us. I can't say it
6 today.

7 PRESIDING JUDGE FULFORD: Thank you very much.

8 Mr. Withopf, can I now ask you to intervene on this.

9 MR. WITHOPF: Thank you very much, Mr. President, your Honours.
10 I think my learned friends from the Defence have raised a number of
11 issues that require clarification. And I do appreciate that my
12 learned friends from the Defence are new to the case or comparatively
13 new to the case and there -- for that reason, obviously, there appears
14 still to be a difficulty to fully apprehend what the Prosecution does
15 in the context of disclosure.

16 To answer what first came up: Yes, the Prosecution discloses the
17 evidence in the same -- discloses the evidence since the Confirmation
18 Hearing in the same manner as it has been disclosed prior to and
19 during the Confirmation Hearing. The Defence receives the materials
20 as has been indicated on a CD, and of course there is a distinction
21 between incriminatory materials, potentially exculpatory materials,
22 and materials that fall within the purview of Rule 77.

23 The materials in handwriting, I think this requires an
24 explanation, and it is actually linked to the history of this case.

25 As I mentioned, there are very many materials that are in

1 handwriting, and your Honours are now aware of the problems, the
2 challenges that come with it.

3 The predecessor of Ms. Mabilille, at the very early stages of the
4 proceedings, has made the point that the materials in handwriting that
5 are disclosed electronically, as all other materials, are difficult to
6 read. The Office of the Prosecutor has then, as a matter of
7 professional courtesy, offered to the predecessor of Ms. Mabilille to,
8 on top of the electronic disclosure of these documents, provide hard
9 copies of the documents concerned.

10 This has all happened at the very early stages of the
11 proceedings, and since then the Office of the Prosecutor repeatedly,
12 repeatedly, has provided handwritten materials not only in the
13 electronic format but, on top of it, also in paper copies. So the
14 Defence receives both the electronic version of the documents
15 concerned and their paper copies.

16 We do apply, Mr. President, your Honours, we do apply the e-court
17 protocol that was in place for the purpose of the Confirmation
18 Hearing, and in doing so, the Office of the Prosecutor indicates, in
19 respect of all the incriminatory documents, the relevance to the
20 paragraphs -- to the respective paragraphs in the document containing
21 the charges. The linking to the paragraphs, Mr. President, your
22 Honours, is tentative, but it already provides an overview, at least a
23 rough overview, Mr. President, your Honours, to the Defence on how and
24 for what purposes the Office of the Prosecutor wants to use the
25 incriminatory evidence.

1 Already at this stage of the proceedings and since the beginning
2 of disclosure the Defence is in a position, by making use of this
3 data, to identify which documents out of the 534 documents are related
4 to which paragraph in the document containing the charges. The Office
5 of the Prosecutor is providing this service in applying the e-court
6 protocol as it has been applied for the purpose of the Confirmation
7 Hearing.

8 PRESIDING JUDGE FULFORD: Mr. Withopf, I'm going to interrupt.
9 We will, of course, give you a full opportunity to reply in due course
10 generally to the submissions advanced by Mr. Duval. I thought at the
11 moment you were just going to help us with the particular problem that
12 we'd raised in relation to the very extensive body of material which,
13 as I'd understood it, has not been disclosed in electronic form. Now,
14 it may be that I misunderstood this and it's been copied, scanned in,
15 but is simply electronically unsearchable.

16 Now, you referred earlier to 15.000 documents adding up to 32.000
17 pages. Now, have they been scanned in and disclosed on CDs, or are
18 they awaiting disclosure, Mr. Withopf?

19 MR. WITHOPF: Mr. President, if you would please allow me to
20 confer with my colleagues to provide you with a proper answer to that.

21 [Prosecution counsel confer]

22 PRESIDING JUDGE FULFORD: Mr. Withopf, this may be potentially
23 important. We notice the time. It's now 1.00. I think we'll give
24 you lunchtime to completely gather the material in relation to this,
25 and we'll look forward to answer at five past 2.00. Thank you very

1 much.

2 We'll rise now for lunch.

3 Luncheon recess taken at 1.03 p.m.

4 On resuming at 2.33 p.m.

5 COURT USHER: All rise. The International Criminal Court is now
6 in session. Please be seated.

7 PRESIDING JUDGE FULFORD: Mr. Withopf, you were going to provide
8 us with some answers.

9 MR. WITHOPF: Mr. President, your Honours, indeed, I will provide
10 you with some answers. I will provide you with some statistics which
11 will actually show that the problem, or the perceived problem, is not
12 as big as it may have been portrayed or seen prior to the lunch break.
13 I, however, make the caveat that the lunch break may have not been --
14 have not provided for sufficient time to provide entirely reliable
15 statistics. Nevertheless, I believe they give you a very good idea
16 what the situation is about.

17 One thousand and seventy-four documents, Mr. President, your
18 Honours, have been disclosed, be it as incriminatory evidence,
19 potentially exculpatory evidence, or materials that fall under Rule
20 77. Amongst these 1.074 documents are 350, and I repeat, 350
21 documents are not is searchable, that fell within the category of
22 unsearchable documents. Out of the 15.000 documents that are
23 unsearchable, 5.000 documents still require review.

24 And now, Mr. President, your Honours, comes the important part of
25 my submission.

1 In the past, only 3.5 per cent of the unsearchable documents fell
2 within the disclosure categories, and if one does the mathematics in
3 this case, and obviously these are mere mathematics, about 175
4 documents are likely to come, meaning are likely to be disclosed on
5 top of the 350 unsearchable documents.

6 Some further statistics: Out of the 534 disclosed documents of
7 incriminatory nature, 269 are searchable and an additional 71 are
8 partially searchable.

9 These are the statistics, Mr. President, your Honours. I will
10 talk a bit more about the summaries and about the metadata.

11 As I mentioned prior to the break, Mr. President, your Honours,
12 summaries are done, but they are done solely for internal purposes.
13 They are instructions to provide for a record that the documents have
14 been reviewed and that the Office of the Prosecutor has discharged its
15 disclosure obligations. It's internal work product to facilitate the
16 disclose work of the Prosecution. The summaries, they were averment
17 and are not meant to replace the actual reading of the materials.

18 As we mentioned earlier on today, staff of the Office of the
19 Prosecutor is reading the materials. The summaries also depend on the
20 purpose. And I want to draw the attention of the Honourable Bench to
21 what I mentioned earlier on today. There are other additional
22 investigations carried out by the Office of the Prosecutor into the
23 situation of the DRC, and, of course, summaries can be done in the one
24 or the other way, either solely covering the Lubanga-related aspects
25 or also covering aspects that relate to the other ongoing and further

1 investigations.

2 And finally, I want to en passant submit that the Pre-Trial
3 Chamber never required that the Office of the Prosecutor provides for
4 the summaries.

5 One more point I wish to make, Mr. President, your Honours, in
6 respect of the searchable documents, the documents that fall within
7 the category of searchable documents and that have been disclosed to
8 the Defence, full text searches are possible. In respect of the
9 unsearchable documents, no text searches are possible, but the
10 metadata that come together with the unsearchable documents provide
11 for limited searches on people and organisations. That relates to the
12 documents of incriminatory nature and of potentially exculpatory
13 nature. And to that extent, meaningful searches can be done based on
14 the metadata.

15 But, and this I believe is now very important to understand for
16 both my learned friends from the Defence and for the Bench, whatever
17 nature the documents are, whether they are searchable or unsearchable,
18 but in this context the statement is made in respect of the
19 unsearchable documents, incriminatory documents, the content of the
20 incriminatory documents, by using the e-court protocol is linked to
21 the respective paragraphs of the document containing the charges and
22 the counts. In respect of documents that contain potentially
23 exculpatory information, the Office of the Prosecutor, Mr. President -
24 and I think that needs to be understood by the Honourable Bench -
25 identifies for the convenience of the Defence what the Office of the

1 Prosecutor believes are the portions of potentially exculpatory
2 evidence, and it highlights these portions. So even in respect to the
3 unsearchable documents, these documents as they are disclosed can be
4 used, searched, and digested by the way they are disclosed to the
5 Defence to a very high extent, and this can be done since the
6 beginning of the disclosure process.

7 In any event, Mr. President, your Honours - and I come to
8 conclude my respectful submission - in any event, we are talking about
9 a very limited number of documents that have been disclosed and are
10 likely to be disclosed to the Defence, and many of the documents
11 concerned are actually documents comprised of one page.

12 We may or may not talk about 500 to 550 of such documents, which
13 is not that much, Mr. President, your Honours, and also my learned
14 friends from the Defence, to actually read and digest, and it's not
15 that much in particular of the added values that are provided by the
16 Prosecution.

17 This completes my submission on these issues, Mr. President.

18 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, before you sit down,
19 I want to make sure that certainly I fully understand this. There
20 are, you say, 1.074 documents that have been disclosed irrespective of
21 whether they include incriminatory or exculpatory evidence.

22 Now, can we take this in stages? Those documents have all been
23 disclosed on a CD disk; is that right?

24 MR. WITHOPF: That's correct, Mr. President.

25 PRESIDING JUDGE FULFORD: You then moved on to 15.000 documents

1 that are unsearchable, of which 5.000 documents still require review;
2 is that correct?

3 MR. WITHOPF: That's also correct, Mr. President.

4 PRESIDING JUDGE FULFORD: Now, do I take it from what you've said
5 that within the Prosecution's review of the 10.000 documents that are
6 unsearchable which you have looked at, there is nothing of an
7 exculpatory nature in any of these documents?

8 MR. WITHOPF: No, Mr. President, that's not entirely correct.
9 Amongst the 10.000 documents we have reviewed in the past, we have
10 disclosed 350 documents.

11 PRESIDING JUDGE FULFORD: Right.

12 MR. WITHOPF: But these 350 documents comprise either
13 incriminatory materials, or potentially exculpatory materials, or
14 materials falling within the parameters of Rule 77. If the Chamber so
15 wishes, we, at a later point, can make the distinction.

16 PRESIDING JUDGE FULFORD: So -- but what we can take from this is
17 that out of 10.000 documents, as you've indicated, only 350 have
18 revealed themselves as being of any relevance to this case.

19 MR. WITHOPF: That's correct.

20 PRESIDING JUDGE FULFORD: Now, of the 5.000, Mr. Withopf, are
21 those that you haven't yet reviewed documents that have recently come
22 into the possession of the Prosecution, or have they been in your
23 possession for some time?

24 MR. WITHOPF: Mr. President, I do apologise that I cannot give
25 you a very clear-cut answer to this question. We would need to go

1 back to our document collection to provide you with a proper and
2 accurate answer.

3 PRESIDING JUDGE FULFORD: You can understand, I'm sure, why I
4 asked the question why at the beginning of October, with the
5 Prosecution envisaging a trial in December, there are still 5.000
6 documents that have yet to be reviewed to see whether they have
7 incriminatory or exculpatory material within them.

8 MR. WITHOPF: Mr. President, your Honours, of course the
9 Prosecution very well understands the background of your question.
10 The Prosecution, however, over the last few months has made an extra
11 effort to discharge its disclosure obligations, and I can confidently
12 say that the review of these 5.000 documents will be completed by
13 mid-October. And, of course, then the documents need to be disclosed.
14 And if they fall within the parameters of Article 54(3)(e), the
15 respective lifting requests need to be sent to the information
16 providers.

17 There's one additional aspect, and I was a bit hesitant to
18 mention it, but now that you, for very good reasons, pay particular
19 attention to this matter, there's a group of documents, and I'm not
20 going to reveal in public session what these documents concern, this
21 group of documents, and we're talking about 3.000, roughly 3.000
22 documents out of the 5.000 that remain for review, are very likely,
23 and I'm saying very, very likely, but we are completing our respective
24 review, are very likely to not have any bearing on the Lubanga case.
25 So I'm fairly confident to state today that within a matter of days I

1 could inform the Chamber that out of the 5.000 documents only 2.000,
2 or even significantly less, will require review by the Office of the
3 Prosecutor.

4 PRESIDING JUDGE FULFORD: Well, thank you for that for the time
5 being, Mr. Withopf. That's very helpful.

6 I'm afraid the Defence were interrupted some time ago.
7 Mr. Duval, can we return to your submissions, please.

8 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President.
9 Regarding the matter of the disclosure, I was going to conclude with
10 my observations, but I would like to respond to what the Prosecutor
11 has just stated. I must admit that I -- I'm at pains to understand
12 exactly the exact status of the Prosecutor's disclosure. I think it
13 is time to ask the Prosecutor to prepare a summary for the Defence and
14 the Chamber, that is, to prepare a summary table of disclosures to
15 date under Rule 77 and Rule 67(2) in regard to exculpatory documents
16 so that the Chamber, the other participants, and the Defence can have
17 a more clearer and accurate appreciation of the exact state of the
18 disclosures.

19 That is all I have to add regarding the disclosures.

20 PRESIDING JUDGE FULFORD: Does that then conclude your
21 submissions on this particular part of the agenda, Mr. Duval?

22 MR. BIJU-DUVAL (interpretation): Yes, Mr. President.

23 PRESIDING JUDGE FULFORD: Thank you very much indeed.

24 Can I next ask the victims representatives whether they would
25 wish to add anything.

1 MR. WALLEYN (interpretation): Thank you, Mr. President. Your
2 Honours, for the legal representative of the victims, the disclosure
3 of materials is essential, because up till now this issue has been of
4 some concern, in particular in proceedings before the Pre-Trial
5 Chamber. I am grateful to my colleague Mr. Biju-Duval for drawing the
6 attention of the Court to Rule 121, as further set out in Rule 131(2),
7 which sets out a system for the disclosure of documents in the case
8 file to the legal representatives of the victims.

9 We use the word "dossier", and in English it is "the record," but
10 Article 121 also says that in this record there are documents which
11 were filed with the court during the Confirmation Hearing. And
12 Article 131 further states that this record is updated by the
13 Registrar, which cannot be open to any alternative interpretation.
14 Therefore, the documents which were added to the record since the
15 Confirmation Hearing must be disclosed to the representatives of the
16 victims. And I repeat, documents that are filed with the Court, we do
17 not expect this article or want this article to be interpreted as
18 meaning that there is an obligation to disclose as to the Defence.
19 What we're saying is that this refers to documents in -- on the record
20 and where the Chamber finds that these documents can be disclosed to
21 the victims.

22 This article states that there is an exception subject to any
23 restrictions concerning confidentiality and national security
24 considerations.

25 During the Confirmation Hearing, what happened was that the rule

1 and the exception were interchanged. In the Rules of Procedure and
2 Evidence, this is an exception to the general rule, but it has become
3 a rule in itself instead, which the Office of the Prosecutor, and in
4 the Defence submissions, wish to consider as a procedure, an
5 established procedure. But it must be said, Mr. President, that the
6 Pre-Trial Chamber took this decision for various reasons. It is not
7 because the Chamber did not wish to apply the Rules of Procedure and
8 Evidence, but because, firstly, the decision had to be taken,
9 practically on the eve of the Confirmation Hearing, which made it
10 impossible to further review the documents and the redactions or
11 classifications regarding what could be disclosed and not be
12 disclosed. So there were elements that the Pre-Trial Chamber took
13 into account, but we shall return to this when we discuss the
14 arrangements for victims' participation.

15 This is also because the Pre-Trial Chamber had allowed victims to
16 participate anonymously. It is because of this that it linked the
17 consultation of the record to an anonymity and determined that
18 victims -- that this would be in force as long as victims could not
19 disclose their identities. So only -- it is for this reason that they
20 said only public documents could be consulted by the Defence.

21 This was modified in practice during the proceedings, because
22 what the Prosecutor says in his submissions is that documents
23 classified as public would be would transmitted to victims'
24 representatives barring exceptions. However, during discussions or
25 proceedings before the Chamber, this was modified somewhat in the

1 sense that the Pre-Trial Chamber asked the participants to provide the
2 representatives of the victims, at the very least, with documents that
3 had been previously considered to be confidential but whose
4 confidentiality, in their view, would not be maintained. So this is
5 another framework altogether, because we no longer need to decide at
6 very short notice on the basis of documents that cannot be redacted,
7 searched, and so on and so forth. But we need to adopt a system for
8 the entire proceedings.

9 Your Honours, the system before your Chamber should be the one
10 provided for by the Regulations or the Rules of Procedure and
11 Evidence.

12 PRESIDING JUDGE FULFORD: Rule 131, of course, is -- specifically
13 addresses the record of the proceedings transmitted by the Pre-Trial
14 Chamber. I would imagine that your real focus of interest is, at
15 least to an extent, an overlapping one, isn't it, with the defendant
16 in that regardless of what the record of the proceedings was before
17 the Pre-Trial Chamber, I would imagine you are interested in the
18 materials in the possession of the Prosecution that relate to the case
19 against this defendant. Now, that may not be the same as the record
20 of the proceedings that has been transmitted by the Pre-Trial Chamber.

21 So looking at this realistically, do I -- are we to understand
22 that really your interest goes beyond the record as transmitted by the
23 Pre-Trial Chamber and includes other materials?

24 MR. WALLEYN: Thank you, Mr. President. Our interest, certain,
25 yes, because it is the interest of the victims to know, to know what

1 happened to their family members, et cetera. So it is indeed one of
2 the purposes of participation of victims that they're not only
3 interested in reparation. They are only interested simply in the
4 truth. So -- (interpretation) we would be certainly keen to find out
5 the contents of all the documents that are in the possession of the
6 Prosecutor.

7 We shall ask the Prosecutor to disclose to us, at the very least,
8 the documents regarding our clients. And it is in this light that
9 we're going to ask, as a measure of urgency, that we submit that we
10 should at least have the index of the documents disclosed.

11 Apart from that, I am looking at Article 131 as having a broader
12 context than the transmission from the Pre-Trial Chamber of documents.
13 (In English) The first paragraph says: "The Registrar shall remain
14 the records of the proceedings transmitted by the Pre-Trial Chamber."
15 And this term "maintain the records" is translated in French by "tenir
16 a jour", which would be more correctly translated as "updated."

17 So I think that we can consider that the purpose of the
18 "redacteur," the "reglement," the drafters, was indeed that not only,
19 of course, it would not be logic only to have access to that part that
20 was transmitted to the Pre-Trial Chamber, but to have also access, of
21 course, to new documents produced later on.

22 PRESIDING JUDGE FULFORD: I only raise it because I suspect that
23 some of the documentation that you would truly be interested in may
24 not, in fact, be covered by what the Registrar had in his possession
25 as the record of the proceedings transmitted by the Pre-Trial Chamber.

1 Now, I may or may not be right on that, but I suspect,
2 particularly seeing Ms. Massidda nod her head in agreement, that I am
3 right in relation to that. So we not only -- we obviously want -- we
4 obviously have to apply the Statute and the Rules of Procedure and
5 Evidence and the Regulations, but the Bench is also interested in what
6 your fundamental interests are, Mr. Walleyne, so that we can ensure
7 that justice is done to the parties and participants in these
8 proceedings, and I think that now makes it very clear what your
9 interests are. So you've now described what it is you would seek and
10 why.

11 Can I finally, then, ask: What have you received to date? Can
12 you give us -- I don't mean document by document, but can you give us
13 a general description of what, if anything, has been passed over to
14 you that doesn't already exist on this court's web site?

15 MR. WALLEYN: We received what's now available in LiveNote -- no,
16 not in LiveNote, in e-court for the victims -- in Ringtail for
17 victims' representative, and these are documents classified as public,
18 or considered as being potentially public by the party that produced
19 the document. Practically it's almost only reports from United
20 Nations, MONUC, et cetera. Some -- one or two redacted versions of
21 witness statements, I think, and some videos. In fact, the documents
22 that were shown during the hearing, those documents we have access but
23 only that. And of course we are interested in interviews of -- of
24 maybe our own clients or friends of our clients and chiefs of our
25 clients, et cetera, to know exactly what happened to them and their

1 children.

2 PRESIDING JUDGE FULFORD: If the list is a short one, would it be
3 onerous for us to ask you to set out overnight on a sheet of paper
4 what it is, all the categories of material that have been disclosed to
5 you?

6 MR. WALLEYN: We can do that, Mr. President, yes.

7 PRESIDING JUDGE FULFORD: Thank you very much. That would be
8 extremely helpful.

9 MR. WALLEYN: Okay.

10 PRESIDING JUDGE FULFORD: Thank you.

11 Ms. Bapita.

12 MS. BAPITA (interpretation): Thank you, your Honour. I would
13 follow on from Mr. Walleyne by raising the following point: If there
14 are confidential documents or documents which have not been disclosed
15 to us amongst the public documents, some of these may be available to
16 us, but the Prosecutor may have other documents which are in the
17 interests of the victims and obtaining justice to the victims. If he
18 does have such documents, we have not been able to obtain them, and
19 thus we find ourselves at a disadvantage in relation to this category of
20 document, documents which may be pertinent when it comes to
21 reparations and the prejudice suffered by the victims. This is why we
22 need to go beyond the documents which have been made available to us,
23 the public documents.

24 We will need to have access to documents which the Prosecutor
25 knows are of interest to the victims in connection with reparations.

1 We need to familiarise ourselves with these documents.

2 PRESIDING JUDGE FULFORD: Thank you very much, Ms. Bapita.

3 Mr. Duval.

4 MR. BIJU-DUVAL (interpretation): Thank you, your Honour. I
5 would just like to bring something to the table regarding the issue
6 which has been raised, the issue as to the content of the record
7 before the Chamber, the content to which victims have access. Under
8 Rule 121 they have had access under the Pre-Trial Chamber, I believe.
9 The question is to know what was the system in place before the
10 Pre-Trial Chamber.

11 I would like to suggest to the Chamber that it consults
12 Regulation 21 of the Regulations of the Registry, which specifies the
13 contents of the record. Regulation 21 of the Regulations of the
14 Registry is relevant because it covers the fate of the evidence which
15 is disclosed by the Prosecutor at the state of the confirmation of the
16 charges and before the opening of the trial.

17 Regulation 21 states that the record, which is maintained by the
18 Registry - as Mr. Walleyne said, it is the Registry which must manage
19 that record - it should contain evidence which is -- been provided to
20 the Pre-Trial Chamber pursuant to Rule 121(2)(c). This is 121(2)(c)
21 of the Regulations of the Registry.

22 What we are particularly interested in is sub-point (g), the
23 evidence as registered by the Registry in accordance with Regulation
24 28. That is the recording of evidence at trial. It seems to me there
25 is an issue here which is not covered by the text, and that is what is

1 the situation as regards evidence which is disclosed after the
2 confirmation of charges and before the opening of the trial.

3 I understand that the participating victims are keen to prepare
4 as best possible for their participation. However, they may not be --
5 or not all of the Prosecution's file may be relevant to them. And
6 this is an issue which I think is not covered by the texts. On the
7 contrary, as I read it, the texts tend to differentiate between the
8 regime applied by the Pre-Trial Chamber, where the objective was to
9 establish a written record based on which the Pre-Trial Chamber would
10 take its decision, as compared to the Trial Chamber, which must make
11 its evaluations based on a different standard of evidence, a higher
12 standard of evidence.

13 I believe that one needs, indeed, to reflect on the handling of
14 evidence which is disclosed after the confirmation of charging and
15 before the opening of the trial. Should they be filed in the record
16 and made available as in the pre-trial phase, or should they be
17 covered by a different regime, a regime which is designed to facility
18 state a public trial and precision by the Judges based on what is
19 presented at trial? This is the question. I do not feel that the
20 system which applied before the Pre-Trial Chamber necessarily applies
21 before the Trial Chamber.

22 PRESIDING JUDGE FULFORD: Mr. Dubuisson, do you wish to intervene
23 in relation to this point?

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

25 I have two points which I would like to make regarding the

1 transcript of the proceedings. First of all, regarding the
2 conservation of the originals. Now, if the Chamber is to decide upon
3 who is to keep the originals, I would refer to Regulation 16 and
4 Regulation 53 of the Regulations of the Registry which specify who
5 should maintain the originals.

6 As regards the Victims and Witnesses Unit - this on another
7 point - the Victims and Witnesses Unit has been mentioned on -- at a
8 number of instances during this hearing. We will return to the issue
9 of the VWU tomorrow morning, but I think that we need to be cautious
10 when dealing with the matter of deadlines.

11 We are a service provider providing services to both the
12 Prosecution and the Defence, but also to the legal representatives of
13 the victims and the victims themselves when they request it, and we
14 initiate our work upon request.

15 Requests were made in anticipation of the confirmation of charges
16 hearing. That work was carried out in advance of November 2006.

17 If you wish to specify deadlines, I think it would be useful to
18 check on what dates the requests were made to us.

19 I would like to make a comment regarding the record. I believe
20 that in the Rules of Procedure and Evidence, Rule 15 refers to the
21 record of the case. And hierarchically speaking, this is a text which
22 takes precedence over the Regulations of the Registry, and Rule 15
23 limits access to certain types of documents which benefit from a
24 protected regime.

25 PRESIDING JUDGE FULFORD: If I understood correctly the first

1 point that you raised, are you therefore submitting that under
2 Regulation 16, the regulation provides that every single original
3 piece of evidence, be it an original witness statement or some form of
4 hard exhibit, must be stored with the Registry?

5 MR. DUBUISSON (interpretation): Yes, indeed, your Honour. The
6 documents which will be submitted and of which there is an original
7 must be -- must be filed with the Registry for the purpose of their
8 conservation.

9 PRESIDING JUDGE FULFORD: That's very straightforward. Thank you
10 very much.

11 Mr. Withopf, before we pass on to the e-court issues, can I just
12 run through very quickly a number of matters that I would ask your
13 assistance on? Let me give you the list so that you can deal with
14 them one after another.

15 The first is the point just raised by Mr. Dubuisson. Given that
16 the parties are not keen on originals being stored with the Registry
17 for reasons that I've already indicated the Bench understands and is
18 not unsympathetic to, how did you get round Regulation 16. That's the
19 first point.

20 Secondly, are the Prosecution prepared to provide in the near
21 future an opening statement of the kind that I described earlier,
22 really explaining how the evidence on the list of evidence relates to
23 the allegations made against the defendant and the charges he faces?

24 Thirdly, Article 54(3)(e) is a particular provision that I --
25 that the Bench would like your focused assistance with, because on one

1 view of that provision the Prosecution are only entitled to agree not
2 to disclose material if that material is to be the springboard for
3 obtaining further material. And if that is the correct
4 interpretation, then doesn't that raise a question mark over what
5 appears to be an extensive body of material which is currently the
6 subject of precisely these kind of agreements, and is the Prosecution
7 saying that in relation to all of that material it's all springboard
8 material?

9 Next, keywords. I'm afraid at the moment, speaking entirely for
10 myself, I'm finding the Prosecution's submission in relation to this a
11 difficult one.

12 If a decision has been made to disclose material - so there's a
13 body of material that is going to be put onto a CD, passed over to the
14 Defence - I, at the moment, can't see the difficulty in providing the
15 facility to carry out a keyword search of that material. I don't see
16 how that creates the risk of protected and sensitive material being
17 revealed, and so I'm afraid at the moment I'm not following the
18 argument that the Defence should be -- should be barred from having
19 the keyword search facility.

20 And finally, how do the Prosecution respond to the request that
21 Mr. Duval made that a summary of disclosure to date should be
22 provided?

23 Now, I'm sorry, that's rather a long list, but I -- certainly for
24 me those are the current outstanding issues which I would be grateful
25 for your assistance with.

1 MR. WITHOPF: Mr. President, your Honours, I'm going to address
2 the questions in the order they have been put to me.

3 The first one concerns the submission of originals to the
4 Registry, which is obviously related to Regulation 16 of the
5 Regulations of the Registry which reads as follows: "The original
6 form of evidence and of audio-visual recordings of proceedings shall
7 be stored in the Registry vault."

8 The first point I wish to make is that there's a hierarchy
9 between the legal texts of the court. There's the Statute, there are
10 the Rules of Procedure and Evidence, there are the Court Regulations,
11 and there are the Regulations of the Registry.

12 The second point I wish to make is, yes, there is agreement
13 between the parties, and I understand also between the parties and the
14 participants, that there is no need to provide for the originals in
15 the context of these proceedings other than there's a particular
16 interest of either of the parties or the participants or the Bench
17 that such materials are provided in their original paper version.

18 The Prosecution has outlined in its written submission that are
19 further and other investigations ongoing in the situation of the DRC,
20 and, of course, in this context, if this provision would prevail,
21 originals theoretically would need to be provided in two or three
22 different trials, and obviously there is only one original that
23 already highlights the dilemma in which we are in.

24 But this leads me to the following question: What is regulation
25 16 actually talking about? That's the original form of evidence

1 that's going to be used in trial. And as long there is agreement
2 between the parties and the participants and the Bench that what we
3 are going to use are the electronic versions of the materials, which
4 are electronic copies of the originals, then the evidence are actually
5 the electronic copies or the copies of the materials. The evidence
6 are not the originals, and that means the originals can be retained in
7 the vault of the party. And obviously, there will also, at a later
8 point in time, originals of the Defence and also originals of the
9 legal representatives of the victims.

10 That makes me conclude, Mr. President, your Honours, that
11 Article -- or Regulation 16 is not -- is not contradicting the
12 agreement between the parties, and I understand the Bench's
13 sympathising with that agreement. It's not contradicting the approach
14 that has been taken or we are suggesting to be taken that only copies,
15 electronic copies, of the materials will be provided in future.

16 I believe, Mr. President, your Honours, this is my response to
17 the first question.

18 The second question, Mr. President, was the one on the opening
19 statement. If I understand you correctly, Mr. President, you're not
20 making reference to the opening statement at the beginning of the
21 trial but to a written summary of the case.

22 Contrary to the law that governs -- governed and governs -- still
23 continues to govern the ICTY or ICTR proceedings, the law of the ICC
24 does not specifically provide for the provision of such a summary.
25 That does not exclude, obviously, that the parties, or either of the

1 parties, or one party, or the participants volunteer to provide such
2 an opening statement. And it does, furthermore, not exclude that the
3 Honourable Bench orders the parties and/or the participants to provide
4 for such a statement.

5 The Prosecution is not against providing such a statement. You
6 were asking the question whether the Prosecution would be prepared to
7 provide such a statement within near future. It would assist the
8 Office of the Prosecutor if you could define what's meant by "near
9 future". And if I understood you correctly, the Chamber's currently
10 considering starting trial in mid-February 2008. And against this
11 background, the Office of the Prosecutor would certainly be prepared,
12 if ordered to do so, to provide such a statement within reasonable
13 time prior to the commencement of the trial, but it would again -- it
14 would assist if the Bench could give an indication of what's meant by
15 "near future". Of course --

16 PRESIDING JUDGE FULFORD: Can I really just answer the question
17 you've posed there, Mr. Withopf? The purpose of this would be to
18 provide the Defence and the participants with a clear understanding of
19 the case that's made against the defendant.

20 In those circumstances, given that Ms. Mabille has indicated that
21 she is going to require something of the order of three months from
22 the moment when the case against Mr. Lubanga is clear to analyse and
23 to prepare for trial, if we are thinking of a mid-February trial, that
24 would mean a statement of the kind that you've described really at the
25 latest by the end of the second week in November.

1 MR. WITHOPF: Mr. President, there is obviously some logic
2 behind, and I believe that can be done if the Chamber orders us to do
3 so. I would work on the basis that the same order would go to my
4 learned colleagues of the Defence.

5 To move on, not expecting an answer in that respect right now, to
6 move on, Mr. President, your Honours, you posed a question in relation
7 to Article 54(3)(e), and indeed, Mr. President, your Honours, this
8 question does not come as a surprise. I was awaiting this question,
9 because indeed the sheer volume of the materials that are protected
10 pursuant to Article 54(3)(e) is unusual, and there is no, at least not
11 to my knowledge - I must be careful what I'm saying - there's no
12 precedent. And, of course, the language we are usually using in this
13 context, Article 54(3) protected documents, does not -- and I agree
14 with the observation, does not necessarily reflect what Article 54(3)
15 was meant to cover. It says: "Obtain materials under provisions of
16 confidentiality and for lead purposes and solely for lead purposes."

17 In this context, we believe it's necessary to draw the attention
18 of the Trial Chamber to the following: It is very obvious to the
19 Defence, to the participants, and I believe it's also very obvious to
20 the Trial Chamber, that the information providers in this context are
21 either the United Nations - and the United Nations have provided very
22 many of the materials concerned under Article 54(3)(e) - or NGOs. And
23 as I mentioned earlier on today, Mr. President, your Honours, neither
24 the United Nations nor the NGOs have the same mandate as the Office of
25 the Prosecutor; namely, to investigate and prosecute crimes falling

1 within the jurisdiction of the court.

2 The Office of the Prosecutor needs cooperation, needs cooperation
3 from both the United Nations, in particular, but it also needs
4 cooperation from the various NGOs that are working under very
5 difficult conditions on the ground.

6 And making reference to the very difficult conditions of the
7 staff of the ground, the United Nations and the NGOs concerned have
8 made a very deliberate decision, at least to the extent that it
9 concerns the United Nations and to the extent I can tell, that in
10 order to protect their staff on the ground and the information that
11 has been gathered for very different purposes, different to the
12 purposes of a trial, remains protected, at least remains initially
13 protected.

14 These considerations - and the Office of the Prosecutor as a lot
15 of sympathy for these considerations - these considerations have led,
16 to the extent that it concerns the United Nations, to agreements
17 between the Office of the Prosecutor and the United Nations that all
18 materials that the United Nations provide in this context are provided
19 under the condition of Article 54(3)(e).

20 I was repeatedly using the term "initially". And why was I doing
21 so? I was doing so because despite the fact that there's an agreement
22 that materials are provided under the condition of Article 54(3)(e),
23 there's also an understanding between the Office of the Prosecutor and
24 the United Nations, and up to a limited extent also between the OTP
25 and the various NGOs, that there is a preparedness on the side of the

1 United Nations to lift the restrictions, and what's currently
2 happening in practice is exactly based on that understanding. Whilst
3 on the one-hand side the materials are obtained in their entirety
4 pursuant to Article 54(3)(e) to protect the very specific and very
5 particular interests of the United Nations and other information
6 providers, on the other-hand side there is such a preparedness by
7 using the process that's currently applied in practice to provide for
8 the restriction of documents that are relevant to the Lubanga case.

9 In reality, over the last month -- not only over the last month
10 but also since the beginning of the proceedings has shown and the
11 practice has shown that the United Nations are very well-prepared to
12 lift the restrictions.

13 If the Office of the Prosecutor will not be prepared to accept
14 the realities -- and again I wish to emphasise that the Office of the
15 Prosecutor has a lot of sympathy for the reasons put forward by the
16 United Nations and the NGOs. If it would not be prepared to accept
17 these realities, these information providers would not provide the
18 information and the evidence to the Office of the Prosecutor. And the
19 mere fact that this problem is -- or this challenge is as big as it
20 is, it simultaneously shows - and that's the other side of the coin -
21 it simultaneously shows that a huge quantity of the evidence the
22 Office of the Prosecutor is going to rely on, but also - and this is
23 also important to mention - huge quantities of the potentially
24 exculpatory information and information that falls under Rule 77 and
25 as such is material to the Defence case is obtained under such

1 conditions.

2 It's the first case, and I mention this again. And in the
3 context of the first case, these issues come up, and the Office of the
4 Prosecutor had to accept the realities. Otherwise, Mr. President,
5 your Honours, we would not have received the materials.

6 I understand and the Office of the Prosecutor understands the
7 concern that has been raised. Nevertheless, at this stage and at the
8 stage we were at the time when the respective agreements were signed,
9 there was no other option available for the Office of the Prosecutor.

10 PRESIDING JUDGE FULFORD: So putting it shortly, agreements of
11 this kind have been reached in relation to a large body of material
12 which isn't springboard or lead material, but which is material which
13 either inculcates or exculpates the accused.

14 MR. WITHOPF: I believe, Mr. President, you have very correctly
15 summarised what I said.

16 PRESIDING JUDGE FULFORD: We -- well, speaking for myself, I
17 understand your argument as to the practical difficulties that you
18 were confronted with. The other side of that argument, however, is
19 that we're now in a position at the beginning of October where there
20 is, it seems, a substantial body of material that is potentially
21 direct evidence in the case which is now bound by these agreements and
22 which -- to which you don't currently have access.

23 MR. WITHOPF: Mr. President, your Honour, this was in -- or based
24 on the statistics I have provided the Honourable Bench with is
25 correct, and in this context I also want to address something that has

1 also been raised by the Defence.

2 The body of material contains potentially exculpatory materials.
3 It also contains incriminatory materials and materials that fall
4 within the purview of Rule 77.

5 The Defence has suggested in the 24 September filing and again
6 today in their oral submissions that there should be a cut-off date
7 for using such materials. In this context, I believe the Office of
8 the Prosecutor is bound by Article 67(2) to provide on an ongoing
9 basis for the materials that are of potentially exculpatory nature to
10 the Defence no matter whether there would be a cut-off date or not.
11 One could take the approach that there should be cut-off date in
12 respect of the incriminatory materials, and one could take the
13 approach by saying it's the problem of the Office of the Prosecutor to
14 not yet have received the lifting of restriction decisions of the
15 respective information providers.

16 I would disagree with such an approach, and I'm going to explain
17 why I would disagree with such an approach.

18 This Court has a statutory duty to establish the truth, and the
19 truth is established by assessing both incriminatory and exculpatory
20 evidence. If one would now say there is no cut-off date for the
21 potentially exculpatory material but there's a cut-off date for the
22 incriminatory material, it would be very difficult for the Honourable
23 Bench to establish the truth. And the Office of the Prosecutor very
24 well appreciates that this is a very particular situation, and to my
25 knowledge this is the first time at an international court one is

1 faced with such a situation. But being faced with such a situation
2 for the first time, there must also, in our view, or there should be,
3 in our view, also be a preparedness on all sides concerned to deal
4 with that situation, and there are no easy solutions to it.

5 What we would suggest at this point in time is the following:
6 That the Office of the Prosecutor, as we have undertaken in the past,
7 by the end of October has reviewed all materials concerned and has
8 sent all lifting of restriction letters to the information providers
9 concerned. Whatever would then become available as evidence, either
10 as incriminatory or potentially exculpatory evidence, should be
11 allowed to be admitted as evidence either for the Prosecution or the
12 Defence.

13 This is our suggestion, and again, Mr. President, your Honours,
14 this is a very novel situation, and a novel situation is militating
15 for novel approaches.

16 Thank you very much, Mr. President.

17 PRESIDING JUDGE FULFORD: Keywords, Mr. Withopf.

18 MR. WITHOPF: On the keywords I wish to submit the following:

19 The Defence has been provided with a keyword list. The predecessor of
20 Ms. Mabilille has been provided with a keyword list very early in the
21 proceedings. Ms. Mabilille, once she took over that case, has been
22 provided, within a matter of days, with a keyword list, and on Friday
23 last week the Defence has been provided with an amended keyword list.

24 The Defence could use the keyword list and could use exactly the
25 same keywords to run for electronic searches in the materials that

1 have been provided to the Defence.

2 The Office of the Prosecutor is not in a position to assess
3 whether the technical means that are provided to the Defence to allow
4 to do so. We don't know, but this is not an issue that's a question
5 or an issue between the Office of the Prosecutor and the Defence.
6 This is more an issue between -- between the Defence and the Registry.

7 This would be my submission, Mr. President, your Honours, on the
8 keyword list.

9 PRESIDING JUDGE FULFORD: I had misunderstood, Mr. Withopf. I
10 had understood you to be saying that there was a particular problem in
11 affording the facility of keyword searches in relation to some of the
12 disclosed material. You're saying there isn't, so my mistake.

13 So finally then, the summary of the disclosure as requested by
14 Mr. Duval, really just a history bringing the new Defence team
15 up-to-date which the disclosure that's taken place thus far.

16 MR. WITHOPF: Sorry, Mr. President. On the summary on
17 disclosures that have been taken place in the past, the Office of the
18 Prosecutor would consider this as being a professional courtesy to the
19 Defence. Of course, we could provide the new Defence with copies of
20 all disclosure letters the predecessor of Ms. Mabille has been
21 provided with, and we are very well prepared to do so. This would
22 easily allow the Defence to understand what has been disclosed in the
23 past.

24 At this stage, I'm not sure whether I very well understand what's
25 meant by a -- by a summary of the disclosures that took part in the

1 past. If it's just that, as a matter of professional courtesy we are
2 very well prepared to do so.

3 PRESIDING JUDGE FULFORD: Could you overnight discuss, please,
4 with Mr. Duval exactly what he envisages by way of a summary, which I
5 suspect may go further than the copies of the disclosure letters, and
6 see whether you can reach agreement between the two of you so that the
7 Defence are sufficiently informed as to what disclosure has taken
8 place so far?

9 MR. WITHOPF: That's easily possible, Mr. President. And before
10 I conclude, if you would allow me to address one further
11 disclosure-related issue which we have flagged in both our 29 March
12 filing of this year and also in the context of our 11 September
13 filing, and that's the situation in respect of Rule 77. It will take
14 me five minutes to address this point.

15 PRESIDING JUDGE FULFORD: Did this come up in your filing under
16 other issues?

17 MR. WITHOPF: It did come up.

18 PRESIDING JUDGE FULFORD: Yes, rather elliptically, Mr. Withopf.
19 Now, what's this all about?

20 MR. WITHOPF: I'm going to explain it to you, Mr. President and
21 the Honourable Bench, what it is about.

22 As you may be aware of, in the pre-Confirmation Hear phase, the
23 single Judge of the Pre-Trial Chamber has converted - and I'm very
24 deliberating using that word - has converted the inspection system of
25 Rule 77 into a quasi-disclosure system by inventing the idea of

1 pre-inspection. In practice, pre-inspection is nothing else but
2 disclosure.

3 In complying with the order of the single Judge of the Pre-Trial
4 Chamber, we provide materials, obviously documents, that fall within
5 the ambit of Rule 77 in the electronic version to the Defence. In
6 practice, it's exactly the same as disclosure.

7 It was the idea of the single Judge at the time, the single Judge
8 of the Pre-Trial Chamber at the time, that the Defence would later on
9 identify such documents it wishes to physically inspect. Not as a big
10 surprise, neither the predecessor of Ms. Mabilille nor the now Defence
11 has ever requested to inspect documents. And there's a good reason
12 for it. This is very obvious why there was never such a request.

13 The Office of the Prosecutor has, not primarily for the sake of
14 the Lubanga case but more for the sake of future cases to come, a
15 particular interest that this Trial Chamber addresses the question of
16 Rule 77 and what "inspection" in this context actually means.

17 The language of Rule 77 is very clear. It says to inspect
18 materials as they are defined in Rule 77. And for the reason I just
19 mentioned, the Office of the Prosecutor would suggest that in future,
20 instead of providing the documents in the electronic version to the
21 Defence, the Defence is invited to inspect the documents concerned.

22 I very much do appreciate that this will add to an extent to the
23 burden of the Office of the Prosecutor, because it can be expected
24 that the Defence, after inspection, has an interest to receive the
25 electronic copies of most, if not all, of the materials concerned.

1 But the rule is very clear. It talks about inspection, and it's not
2 disclosure. So the Office of the Prosecutor has a particular interest
3 to clarify this situation in respect of Rule 77.

4 There's very likely to be an added practical value in the present
5 case. The Defence, at a point in time, has made a remark along the
6 lines that materials which prima facie may appear to be irrelevant to
7 the Defence case are being provided for pre-inspection under Rule 77.
8 If one would apply the system we are suggesting, the Defence would
9 have an opportunity to deselect such materials and to only ask for the
10 provision of materials the Defence considers being of relevance,
11 material to the Defence, pursuant to Rule 77. Thank you very much,
12 Mr. President.

13 PRESIDING JUDGE FULFORD: But, Mr. Withopf, before you sit down,
14 if one is talking about a very substantial body of documentation, if
15 what you're saying is right, it would mean that representatives of the
16 Defence would have to come to a room somewhere and sit for how many
17 hours with the hard copies of the documents, reading them, without any
18 of the advantages that go with having been provided with this
19 information in electronic form. It would make this, wouldn't it, an
20 extremely labourious and difficult process.

21 MR. WITHOPF: Mr. President, I tend to agree with the
22 observation, and as I said at the beginning of this submission, the
23 point we are making is -- is entirely legal. We want this Trial
24 Chamber to clarify what inspection in the context of Rule 77 actually
25 means. I'm aware that this will add to the burden. I was outlining a

1 number of areas where we believe it may actually diminish the burden,
2 but I also believe there is a necessity, and in particular in the
3 first case, the first ICC case, to clearly -- or have a clear
4 understanding what the disclosure and inspection obligations are.
5 That's the sole reason why I'm making this submission.

6 PRESIDING JUDGE FULFORD: So it's really a question of how we --
7 how we interpret the word "inspection", whether in order to inspect
8 you've got to sit there with the original, or whether you can inspect
9 it by having been provided with an electronic copy. And so that's a
10 concept we're going to have to wrestle with.

11 MR. WITHOPF: That's exactly it. And if the Honourable Bench
12 comes to the conclusion that inspection only also encompasses the
13 provision of material, and if you come to the same conclusion as the
14 single Judge of the Pre-Trial Chamber, that's, of course, fine with
15 us, but there is a need to provide for clarity.

16 PRESIDING JUDGE FULFORD: Thank you. That's absolutely clear.

17 Mr. Withopf, finally before we turn to e-court matters, I want to
18 make sure that we don't misstate the Prosecution's position later.

19 Am I right in understanding that because of the difficulties that
20 you've already explained, and you needn't repeat, that when you
21 reached the agreements which you have with information providers such
22 as the United Nations and NGOs, you knew that those agreements covered
23 material which were never going to be springboard or lead evidence?

24 MR. WITHOPF: Mr. President, your Honours, that is very difficult
25 question to answer for the sole reason that prior to receiving such

1 materials we are not in a position to tell. So I cannot answer in the
2 affirmative that we knew prior to receiving the materials that they
3 are not only lead evidence. However, and this may satisfy your
4 question, there was a certain likelihood that such materials would be
5 provided, and of course not as a surprise, such materials have been
6 provided.

7 PRESIDING JUDGE FULFORD: And it also means, therefore, that you
8 entered into the agreements not knowing whether the material you were
9 going to be receiving was lead or springboard material or material
10 which was simply going to be freestanding and not being secured for
11 the purposes of leading to other evidence.

12 MR. WITHOPF: I believe, Mr. President, this summary comes closer
13 to the reality at the time. But I also wish to emphasise that there
14 was always an understanding that this is initially being provided
15 under Article 54(3)(e), and there was an understanding that the United
16 Nations and other information providers are always prepared to
17 negotiate with the Office of the Prosecutor on the lifting of
18 restrictions.

19 PRESIDING JUDGE FULFORD: Now, Mr. Withopf, in relation to
20 e-court issues, the heart of the debate seems to revolve around -- or
21 that's a bad image. At the heart of the debate there is a discussion
22 as to what should be provided in the metadata fields. You say that
23 the single Judge was too generous and that what has been ordered by
24 the Pre-Trial Chamber imposes too high an obligation on the
25 Prosecution for too little gain for the defendant.

1 Ms. Mabilille, on the other hand, says no, the Pre-Trial Judge got
2 it right. In fact, there should have been some other fields added,
3 and it's a positive advantage.

4 Now, it's by no means impossible, but it's not easy, for the
5 Bench, unassisted by expert evidence, to adjudicate between those
6 competing positions given this is to a very large extent a highly
7 technical area. And one possible way forward that we have in mind,
8 which I'd like your assistance on, is appointing in the very near
9 future an expert, someone who has already been involved with these
10 issues at this court, to provide us with a neutral report on what the
11 implications in terms of time and difficulty would be for the
12 Prosecution in filling in the additional metadata fields and what the
13 gain would be for the defendant if that happened.

14 Now, do you -- and we would, of course, permit the parties to
15 pose such questions as they feel relevant for consideration by the
16 expert.

17 Now, this is just an idea, and I would be grateful for your
18 response as to whether you -- as to whether or not you feel that would
19 assist in taking this particular problem forwards.

20 MR. WITHOPF: Mr. President, your Honours, I cannot more than
21 agree with the suggestion that has been made. I cannot more than
22 agree in light of the discussions that took place before the Pre-Trial
23 Chamber at the time, and I cannot more than agree in light of the
24 submissions that have been made by the legal representatives for the
25 victims, and I cannot more than agree in light of the experiences --

1 or the experience that has been made in the context of the
2 Confirmation Hearing.

3 It appears that there is, for very understandable reasons, a very
4 limited knowledge in respect of what the e-court actually encompasses
5 on the side of the legal representatives for the victims. And it also
6 appears, and it very strongly appears to be the case, that none of the
7 part -- not the Defence and not the participants, and I also believe,
8 and this is based on experience we made at the time before the
9 Pre-Trial Chamber, it may also be the case that the Honourable Bench
10 is not quite well aware of what it actually means in practice to
11 comply with an e-court protocol and, in particular, the technical
12 protocol that comes with it in order to provide the requested
13 metadata.

14 There comes a very specific issue with that observation. What
15 appears to be the case when the single Judge of the Pre-Trial Chamber
16 added the very many additional metadata fields to the technical
17 protocol, that the technical protocol was converted into a
18 case-specific evidence-analysis tool. And in light of Regulation 26,
19 it's the view of the Office of the Prosecutor that the technical
20 protocol to the e-court protocol should not be case specific. It
21 should be a protocol that should be -- or could -- should and could be
22 used for all cases before the Court.

23 I raise this point in particular, because this trial team made
24 the experience in the time leading up to the Confirmation Hearing that
25 its resources, at least at the time, and I will be very blunt in that

1 respect, have been wasted, and they have been wasted to a very high
2 extent because no use was made, at least no visible use has been made,
3 of the data that have been provided by the Office of the Prosecutor.
4 Having made that experience, I want to avoid that this trial team is
5 making the very same experience again.

6 But my main point is not the resource issue. My main point is
7 the technical protocol should not be used to convert the e-court
8 protocol into a case- and evidence-analysis tool.

9 I stop here, because I understand there is an idea to appoint an
10 expert. And I come back to what I said at the beginning: Yes, I
11 would agree there's a need to appoint an expert on these matters.

12 PRESIDING JUDGE FULFORD: Just before you sit down, Mr. Withopf,
13 if you're suggesting that the protocol shouldn't be turned into a
14 case-specific evidence-analysis tool, what would you say are the
15 alternative evidence-analysis tools which are available to the Defence
16 if the protocol isn't used in this way?

17 MR. WITHOPF: Of course, Mr. President, your Honours, each party,
18 because of the very different purposes of the work of each party, has
19 an interest to develop and to use their own evidence-analysis tools.
20 The Office of the Prosecutor is using, for example, CaseMap. Your
21 Honour may be aware about the CaseMap tool. The Defence, of course,
22 for their own purposes may use the same tool or may use a different
23 tool.

24 What I'm concerned of is the following: The Office of the
25 Prosecutor does evidence analysis, but the Office of the Prosecutor is

1 a party to the proceedings, and I would be very much concerned about a
2 situation that the result of the Office of the Prosecutor's analysis
3 as provided to the learned friends from the Defence or to the legal
4 representatives for the victims, and that either of them at some point
5 in time comes back to the Office of the Prosecutor and complains about
6 the Office of the Prosecutor having misled, certainly not
7 deliberately, but having misled the other party or the legal
8 representatives for the victims. For that reason, I'm of the very
9 strong belief that each party and the participants should use their
10 own evidence-analysis tools.

11 PRESIDING JUDGE FULFORD: Potter Farrelly Associate are a company
12 that I understand that have been involved in the e-court protocol used
13 at this court, and indeed what is currently running, as I understand
14 it, is based on a proposal made by that company. Are you aware of
15 them, Mr. Withopf, or not?

16 MR. WITHOPF: I am not aware that this particular company has
17 been asked to provide for their expertise. What I can inform the
18 Trial Chamber of is the following: Prior to the Confirmation Hearing,
19 there have been meetings between the Defence, the Prosecution, and the
20 Registrar, and details of the e-court protocol have been discussed.
21 Unfortunately, the legal representatives for the victims at this stage
22 have not been invited to these meetings. The meetings were
23 facilitated by the Registrar.

24 PRESIDING JUDGE FULFORD: Would overnight give you time to
25 discuss these matters with Mr. Walley and Ms. Bapita really to ensure

1 that they have sufficient information and sufficient understanding so
2 that they can -- they'd be in a position to indicate whether the
3 proposal we've made is going to be a useful one or not?

4 MR. WITHOPF: If it's just to enable my learned friends or the
5 legal representatives for the victims to make a decision as to whether
6 the proposal's a valued one or not, that's certainly possible. Based
7 on the experience we've made, it's not possible overnight to explain
8 each and every aspect of the e-court protocol.

9 Before I conclude, Mr. President, your Honours, the e-court
10 protocol, for the reasons I outlined, has been an issue we, over the
11 last weeks, have paid particular attention to, and we have made
12 research on the various technical protocols to e-court protocols that
13 have been used in all variety of countries including Australia, the
14 UK, and Canada. We have made research. I believe, the research
15 encompasses about 8 to 10 countries.

16 If the Trial Chamber goes ahead with the suggestion, to which I
17 very much agree, then I would request that the Trial Chamber would
18 initiate that the expert also considers the national e-court protocols
19 and the experiences that have been made in that context.

20 PRESIDING JUDGE FULFORD: Thank you very much.

21 Mr. Duval, do you have any comments on the suggestion that we've
22 made? We're going to have to rise quite soon, because we've now been
23 sitting for nearly an hour and a half, and we've got to bear in mind
24 the position of the interpreters, but do you have any immediate
25 response to the suggestion that's come from the Bench?

1 MR. BIJU-DUVAL (interpretation): Mr. President, on this
2 technical matter and for technical meetings, I shall give the floor to
3 my colleague Mr. Marc Desalliers, who has some suggestions to put to
4 the Court regarding the e-court protocol very briefly.

5 MR. DESALLIERS (interpretation): Thank you, Mr. President. Very
6 briefly, the matter of the expert is an interesting suggestion, and
7 from -- the Defence considers this not to be essential at this point,
8 because in the view of the Defence, the metadata, the supplemental
9 metadata that is requested, as we have set out in our submissions, do
10 not require expert advice to determine their need, because they go to
11 the heart of the usefulness of the e-court protocol and the equity or
12 fairness in the use of the e-court protocol.

13 My learned colleague has stated that the decision the of the
14 single Judge of the 20th of June, 2006, changed the e-court to be an
15 analytical -- a tool for analysis, because the metadata includes the
16 author, the organisation that is the originator of the document, the
17 person receiving the document. These elements does not see -- the
18 Defence does not see how this can lead people into error. On the
19 contrary. These are not documents to be used for analysis. They just
20 help us to sort through the large volume of documents that are
21 disclosed to us and which help us to match them with the charges and
22 precise allegations.

23 We respectfully submit that by claiming that the document -- that
24 a document becomes a tool for analysis is not exactly accurate.
25 Metadata is added to enable us to better use the document or the

1 information that is transmitted electronically.

2 Furthermore, if the Chamber were to condition conclude, to decide
3 that an expert opinion would be useful to edify the Court on this
4 matter, what would be important was to have two kinds of expertise so
5 that we can respond either by means of an expert, or we be afforded
6 means to respond to the opinions of the expert who may be appointed by
7 the Office of the Prosecutor.

8 PRESIDING JUDGE FULFORD: This is one of the instances where the
9 Bench certainly at the moment has it very much in mind to have one
10 expert jointly instructed. So with all the parties and including the
11 Bench contributing to the instruction of a suitable expert rather than
12 having competing experts being instructed by different parties,
13 possibly therefore unconsciously coming with a partisan approach. So
14 that that's very much what is in our minds at the moment.

15 MR. DESALLIERS (interpretation): Very well, Mr. President.

16 PRESIDING JUDGE FULFORD: I just at this moment wanted your
17 response as to the suggestion. And do I detect that what you're
18 really saying is you don't see it being of huge value to have an
19 expert but that you would, of course, participate in the process if we
20 were minded to go down that route?

21 MR. DESALLIERS (interpretation): Yes, Mr. President.

22 PRESIDING JUDGE FULFORD: Well, we'll return to you on the
23 substance tomorrow, Mr. Desalliers.

24 MR. DESALLIERS (interpretation): Thank you.

25 PRESIDING JUDGE FULFORD: Any response, Mr. Walley, just in a

1 sentence or two?

2 MR. WALLEYN (interpretation): Yes, Mr. President. First we
3 would like to thank the Court for being aware of the fact that the
4 legal representatives of the victims participating in the proceedings
5 have been so far been practically excluded from all discussions of
6 the -- on the e-court, and we are indeed most interested in being
7 involved in the -- in future work, and if an expert is required, we
8 would like to be involved as well. We can have a discussion this
9 evening, and perhaps we should return to this matter tomorrow morning.

10 PRESIDING JUDGE FULFORD: Do you agree, Ms. Bapita?

11 MS. BAPITA (interpretation): I agree.

12 PRESIDING JUDGE FULFORD: Do you have any immediate response to
13 this, Mr. Dubuisson?

14 MR. DUBUISSON (interpretation): Yes, Mr. President, I will
15 answer.

16 First of all, I would like to say that this is not an analysis
17 tool. Furthermore, the e-court protocol, that is the information
18 provided therein, is provided under Rule -- Regulation 52 of the
19 Regulations of the Court three days before the presentation in a court
20 hearing. So if it were an analytical tool, it would be somewhat
21 precarious for parties to carry out an analysis two days before the
22 documents are needed.

23 It is more a problem of objective criteria and subjective
24 criteria. It is not a technical matter. But the Registry is
25 appreciative -- appreciates the possibility of using an expert, an

1 external expert, to evaluate the e-court, which in our view is very
2 important.

3 Thank you.

4 PRESIDING JUDGE FULFORD: Thank you very much.

5 Well, we'll adjourn now for the evening given that the
6 interpreters have now been working for an hour and a half. We'll sit,
7 if my colleagues agree, at half past 9.00 on the matter that's got to
8 be dealt with ex parte, with the Prosecution and the Registry present,
9 please, for that.

10 I understand that once we conclude the ex parte proceedings, it
11 then takes some 20 minutes to reconfigure the computer equipment so
12 that we can sit again in open court. I'm going to ask, please, that
13 there be some investigation as to whether or not it is really
14 necessary for there to be so long a period in order to, as it were,
15 reconfigure the court. It may be it is necessary, but it does seem to
16 me to be a very long time that we have to wait. In all the
17 circumstances, I think we're unlikely to go back into open session
18 before half past 10.00. So could I ask, please, that the other party
19 and the participants are ready to proceed again at half past 10.00
20 tomorrow morning.

21 Thank you all very much for your attendance. We'll sit again ex
22 parte, then, at half past 9.00 tomorrow morning.

23 The hearing is adjourned at 4.06 p.m.

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