

1 International Criminal Court

2 Trial Chamber I

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

4 Transcript ICC-0104-0106-T-54-ENG - Open Session

5 Tuesday, 2 October 2007

6 The hearing starts at 11.13 a.m.

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

9 PRESIDING JUDGE FULFORD: First of all, our profound apologies to
10 everyone, the parties, the participants, and the public, for having
11 kept you all waiting, but the ex parte matter that we had to deal with
12 first of all this morning unexpectedly took rather longer than we
13 thought it was going to. So I repeat our apologies in relation to
14 that.

15 Mr. Desalliers, we were at some stage yesterday in the middle of
16 your submissions in relation the e-court. Can I inform everyone
17 present through you that matters have progressed somewhat overnight in
18 that it has become clear that an appropriate expert, someone who's
19 worked with the implementation of the e-court at the ICC is able to
20 write a report for the assistance of the Bench very quickly. I
21 understand that once she's received the representations of the parties
22 she will be able to conclude a report within 10 days.

23 So if it's convenient with you, Mr. Desalliers, rather than
24 hearing further oral submissions on that point now, it seems to us
25 that it would be better if you were to put your various

1 representations into written form, to send them, please, to the
2 expert, and you'll be provided with her details at the end of today's
3 hearing.

4 We're going to ask that representations are sent in by 4.00 on
5 Friday of this week, and she will then write and distribute a report
6 10 days thereafter.

7 Would that be convenient, Mr. Desalliers?

8 MR. DESALLIERS (interpretation): Certainly, Mr. President.

9 PRESIDING JUDGE FULFORD: Thank you very much indeed.

10 Can I ask whether there are any objections from any party or --
11 any objections from any party or participant.

12 Yes, Mr. Walleyne.

13 MR. WALLEYN (interpretation): Mr. President, thank you for
14 giving me the floor.

15 We would like to know, as the representatives of victims, if we
16 are also involved in this expertise and if the deadline of Friday
17 would also be applicable to us. For us it's not clear either the
18 extent to which the representatives of victims will be also subject to
19 the e-court protocol, the day when we present documents within the
20 framework of reparations, but if it's the case, of course we would
21 like to be involved from the start of this work.

22 PRESIDING JUDGE FULFORD: Mr. Walleyne, our view is that we would
23 welcome the participation of the representatives of the victims at
24 this stage. Of course, that's not in any way to pre-judge any later
25 determination, of course, but in terms of you having an opportunity of

1 expressing your interests and how you feel that the e-court protocol
2 could best be used for the victims, that is -- those are areas where
3 we would very much welcome your contribution.

4 We, of course, regret that the time between now and 4.00 on
5 Friday isn't great, but we hope, if you're able, particularly to
6 engage in the meantime in discussions with both the Prosecution and
7 the Registry, you should be in a position, at least in outline, to set
8 out your concerns by that deadline.

9 Are those indications of any help to you?

10 MR. WALLEYN: Thank you, Mr. President. We will try to respect
11 that deadline.

12 PRESIDING JUDGE FULFORD: An ultimately, Mr. Walley, if you need
13 more time, please let us know.

14 MR. WALLEYN: Okay. Thanks.

15 PRESIDING JUDGE FULFORD: We turn next, therefore, to the
16 procedures that are to be adopted for ex parte proceedings. The
17 parties and the participants are aware of the events that have been
18 set out in paragraph 3 of today's agenda, and it seems to us that
19 really three issues fall for consideration.

20 First, should there, save exceptionally, ever be an ex parte
21 filing that does not have an application attached to it? Put
22 otherwise, should anyone, save exceptionally, have the right to
23 provide information to the Bench on an ex parte -- on ex parte basis
24 when they are not asking for any kind of relief?

25 Second, when an ex parte filing is made, what is the extent of

1 the obligation of the party or participant making the filing to notify
2 the other party of the fact that the filing has taken place?

3 And thirdly, to what extent is there an obligation to set out the
4 legal basis for the filing?

5 We immediately indicate, in relation to the second two matters,
6 that on the second, our preliminary view is that that can only be
7 decided on a case-by-case basis. Namely, it will all depend on the
8 facts as to whether it is possible to notify the other party or the
9 participants, because sometimes notification of any sort may reveal
10 matters which need to be kept confidential, or so it is suggested.

11 And in relation to the third, it is our preliminary view that the
12 obligation to set out the legal basis is one that ordinarily we would
13 expect to be followed, and that not only should the legal basis be set
14 out in a formal sense, but the particular justification in the
15 particular case should also be made clear. Put otherwise, there
16 shouldn't just be a general rehearsal of a principle, but there should
17 be some detailed justification for the particular course of action
18 taken in the individual instance.

19 Now, with those general introductory remarks, Mr. Withopf, can I
20 turn to you first, please.

21 MR. WITHOPF: Thank you, Mr. President, your Honours.

22 Mr. President, your Honours, may I use this opportunity to, for
23 two minutes, please, complement what I have said yesterday in respect
24 of Article 54(3)(e)? I want to add something what appears to be very
25 important for the Office of the Prosecutor's position.

1 PRESIDING JUDGE FULFORD: Mr. Withopf, you will be provided with
2 the opportunity of doing so. Can we come back to Article 54 later and
3 stay with the matter in hand for the time being .

4 MR. WITHOPF: Happy to do so, Mr. President.

5 Talking about the ex parte filings, the Office of the Prosecutor
6 agrees and very much agrees with the observation of the Bench that
7 ex parte filings should be the exception and only where necessary.
8 The necessity should be determined on a case-by-case basis, but there
9 should also be flexibility. The Prosecution, in this context,
10 specifically agrees with the considerations of the Appeals Chamber as
11 they are outlined in the Appeals Chamber decision of the 13th of
12 October, 2006. That's the decision the Honourable Bench has made
13 reference to in its Scheduling Order.

14 Logically, the same principles should govern the obligation to
15 notify the other party or the participants. Notification should be
16 the rule. Non-notification should be limited to exceptional
17 circumstances, to such circumstances where the mere notification would
18 be detrimental to the ex parte filing and its context.

19 For example, Mr. President, your Honours, in situations where the
20 knowledge of the legal basis of the application, in particular when
21 combined with the factual basis for it, could allow the other party or
22 the participants to deduct the source or the nature of the evidence.
23 Another example would be, the Prosecution submits, where cases are
24 involved that concern national security interests.

25 The level of notification should also be determined on a

1 case-by-case basis, and again there should be flexibility. The level
2 of flexibility in this context should be determined by the relevant
3 provisions that allow for the ex parte filings such as - and these,
4 examples only, Mr. President, your Honours, Rule 83, Rule 81(2), or
5 81 -- 88(2).

6 The question arises Mr. President, your Honours, who should be
7 notified, the Defence and/or other participants. Maybe in this
8 context, if you allow me to do so, Mr. President, your Honours, there
9 appears to be a different use of the terms "parties" and
10 "participants." There's a difference between what the Pre-Trial
11 Chamber has said and what this Honourable Bench has said. For the
12 sake of the today's submission, I follow the definitions as they have
13 been provided by the Bench.

14 The information to be provided will depend on the nature of the
15 content of the application. The determination, in our view, should be
16 along the lines whose rights are potentially, and I emphasise the word
17 "whose rights are potentially," concerned.

18 At this stage, and I think the Honourable Bench will understand
19 this, it is very difficult to be very concrete, and these matters
20 cannot be determined hypothetically, because they are not predictable
21 at this stage.

22 To answer your final question to what extent -- or the extent of
23 the obligation to set out the legal basis of the filing, the legal
24 basis, in our view, should always be set out, but again, the
25 requirement to inform the other party and/or the participants of the

1 legal basis for ex parte filing must also be assessed in light of the
2 circumstances of each filing. There may be very rare instances, and I
3 really emphasise the word "very rare instances," where it can be
4 imagined that the extent of setting out the legal basis, that that
5 extent should be limited where, for example, setting out the legal
6 basis would reveal, and in particular combined with the factual basis,
7 the identity of the provider concerned.

8 If I may conclude our short submission with a suggestion,
9 Mr. President, your Honours. Our suggestion would be the following:
10 A party making an ex parte application shall notify the other party or
11 participants of the fact of that application and of the legal basis,
12 unless to do so would prejudice the interests being protected by the
13 ex parte nature of the application. And second, if the party making
14 an ex parte application proposes not to notify the other party or the
15 participants of the fact and/or the legal basis of that application,
16 then the party should set out its reason for doing so in the
17 application itself.

18 Thank you Mr. President, your Honours.

19 PRESIDING JUDGE FULFORD: Do we take it from your silence,
20 Mr. Withopf, that you agree with the proposition that save, perhaps
21 exceptionally, there should never be an ex parte filing that doesn't
22 have attached to it an application?

23 MR. WITHOPF: Mr. President, your Honours, your conclusion is
24 entirely correct.

25 PRESIDING JUDGE FULFORD: That's very helpful.

1 Ms. Mabilie.

2 MS. MABILLE (interpretation): Mr. President, the question that
3 you raise is of particular interest to the Defence and, in my view,
4 raises issues in regard to the principle. This is transparency, which
5 I think we must -- we can agree on, maximum transparency for all
6 participants or parties in the proceedings.

7 On the basis of that principle, what follows immediately is that
8 ex parte filings must be exceptional and should not be the rule. If
9 that element is how the Defence -- when it is the case where the
10 Prosecutor is asking for an ex parte hearing, how can the Defence
11 obtain as much information as possible? Of course I do understand
12 that ex parte implies a certain degree of confidentiality.

13 Mr. President, our position is as follows: Firstly, and in
14 reference to a Prosecution motion, if such a thing happens we, have to
15 know that such a filing has been made and the legal basis for it. But
16 we consider, Mr. President, that this is not sufficient guarantee for
17 the Defence.

18 Consequently, what we would also like is to have a copy of this
19 application in redacted form, of course. Otherwise, it would no
20 longer be ex parte. What would prevent us from having access to this
21 document?

22 I hope the Prosecutor will not take this amiss: We would like to
23 find out what reasons under -- under our own require an ex parte
24 filing. First the ex parte, the reasons, and, as soon as possible, a
25 redacted version.

1 Since we feel that this is not sufficient, we would require
2 controls after the fact, which I shall develop before you. The
3 reasons why an ex parte is requested, I take this example: An
4 ex parte hearing is requested because it is necessary or one wishes to
5 protect a witness's identity. On the day the witness's identity is
6 revealed, we can agree that the ex parte hearing and the transcript no
7 longer need to be confidential and at that time can be provided to the
8 Defence, which leads us, Mr. President, to the conclusion that is at
9 the end of the trial everything will have been transparent or as much
10 as possible.

11 So first, when the application is filed, the Defence should be
12 informed of the filing along with the legal basis therefore.
13 Subsequently, we could have a redacted version of the application.
14 And thirdly, when the reasons for which you have required for --
15 requested this special measure no longer exists, then the documents,
16 including the transcripts of the ex parte hearing, become available.

17 This is what the Defence has to say on this point.

18 PRESIDING JUDGE FULFORD: Thank you very much, Ms. Mabilie.

19 Mr. Walley.

20 MR. WALLEYN (interpretation): Mr. President, I think that we are
21 in agreement that the principles advanced by the Prosecutor should be
22 followed. We have reservations regarding the third point advanced by
23 the Defence, because even if a witness or victim becomes known, it is
24 no reason why confidentiality should not apply to the problems that we
25 discussed. Otherwise, things might be revealed if we take these as a

1 guiding principle. If we accept this as a guiding principle and
2 provide for exceptions, it would be simpler in the sense that an
3 ex parte proceeding remains so.

4 PRESIDING JUDGE FULFORD: Thank you very much.

5 MS. BAPITA (interpretation): I have nothing to add. I support
6 the view.

7 PRESIDING JUDGE FULFORD: Mr. Dubuisson, is this something on
8 which the Registry would wish to play a part?

9 MR. DUBUISSON (interpretation): Of course, Mr. President. I
10 would like to start by saying that, as you can observe here and in the
11 ad hoc tribunals, it is not parties we have here. We have
12 participants. There are three participants in the proceedings.

13 As is known, ex parte can be approached from two different ways.
14 Perhaps the parties can be present and not have the right to take the
15 floor, especially as we saw in the Blaskic case and others where the
16 Defence was there but was not allowed to take the floor. And there's
17 another kind of ex parte hearing where there is no presence or
18 knowledge of one party to the proceedings. In the ad hoc tribunals
19 you have only the Defence and the Prosecutor, of course, as parties.

20 In the ICC, unlike the ad hoc courts, it is not except. It is
21 only for -- or for the purpose of that these things are done.

22 During proceedings before the Pre-Trial Chamber, it must be
23 recalled that access -- access to victims -- the victims only had
24 access to public documents. I do not know what the arrangements or
25 participation will be now. If this access has to extend to other

1 confidential documents, then the ex parte should be used fairly often
2 if we take into account the fact that victims can be a participant or
3 party to the trial.

4 Regarding the Registry, which often uses -- sometimes uses
5 ex parte in recording applications by victims and witnesses, I am in
6 complete agreement that this should be on a case-by-case basis. Of
7 course, I am also in agreement with the fact that this must be
8 supported by a legal basis; that is, the legal basis for the ex parte.
9 However, I should point out that it is important to underscore what
10 must be concealed from the other participants. If it is the existence
11 of -- existence of the document, it is the tenor, the content of the
12 document, because sometimes one realises that even the title of the
13 document in an index of documents could reveal potentially useful
14 information. So in my view, I think when there is an ex parte filing,
15 even a title must be redacted.

16 Thank you.

17 PRESIDING JUDGE FULFORD: Mr. Withopf, given particularly that
18 these issues are likely to affect the Prosecution as much, if not
19 more, than anyone else, do you wish to reply to any of the submissions
20 that have been made?

21 MR. WITHOPF: Your observation, Mr. President, I believe, is
22 entirely correct, and I believe reality will show that based on the
23 exceptional-circumstances principle, nevertheless, ex parte filings of
24 the Prosecution, at least at this stage of the proceedings, will
25 happen.

1 I wish to very briefly address the submissions of my learned
2 friends from the Defence. There appears not to be that much of a
3 contradiction between the views of the Defence and the Office of the
4 Prosecutor. For that reason, I only want to briefly touch on the
5 suggestion that the Defence should always receive a redacted version
6 of the application.

7 I believe that in many, if not very many, instances that should
8 be possible. However, there may be instances, and these may be rare
9 instances, where the redactions will be heavy. Otherwise, providing
10 such information would tantamount to -- would be tantamount to the
11 Defence providing that -- the facts necessary to reveal, for example,
12 the source of the information provider. As a matter of principle - I
13 repeat it - there appears to be not that much difference in approach.

14 PRESIDING JUDGE FULFORD: Thank you very much indeed,
15 Mr. Withopf.

16 Well, I think that then extremely succinctly deals with the
17 matters set out on the agenda at E, and can I thank the parties for
18 their very helpful contributions.

19 We then turn to the last matter on the agenda, which raises a
20 particular issue which we wish to give the parties and the
21 participants an opportunity of making submissions on.

22 We then turn to the last matter on the agenda, which raises a
23 particular issue which we wish to give the parties and the
24 participants an opportunity of making submissions on. I don't think
25 it's going to help having me read out the various particular questions

1 that we have set out at paragraph 7 of the agenda.

2 Mr. Dubuisson, if it's convenient with you, given that this is a
3 matter that particularly affects the Registry, I was going to ask you
4 to take the floor first in relation to the questions that we've posed.

5 MR. DUBUISSON (interpretation): In this case I shall give the
6 floor to Fiona McKay, who is the head of the Victims Participation and
7 Reparations Section.

8 MS. MCKAY: Thank you.

9 Perhaps it would be helpful to start by -- with the context of
10 this that that Regulation 86, paragraph 5, of the Regulations of the
11 Court provides that the Registrar will present applications to
12 participate in the proceedings received from potential victims with
13 the Chamber together with a report thereon.

14 Now, it's the Registry's understanding that the purpose of these
15 reports is to assist the Chamber in considering applications received
16 from victims. So certainly from the point of view of the Registry,
17 whatever is the most helpful for the -- the Chamber would be -- we'd
18 be happy and able to be able to -- to provide in terms of the -- the
19 contents of the reports. Whether that be simply organising and
20 synthesising the information that is contained in the applications
21 themselves or, additionally, providing overviews or assessments or
22 other forms of assistance.

23 I don't know whether you would like me to continue in relation to
24 the specific issues that you've raised here or afterwards perhaps.

25 PRESIDING JUDGE FULFORD: Ms. McKay, I thank you very much

1 indeed. I think it's really a matter for you. What we are seeking to
2 achieve is a decision made by us as to how best the reports should be
3 prepared so that we can make a judicial decision on the applications.
4 Your section now has, in a relatively short period of time, gathered
5 and gained some very helpful experience in relation to the preparation
6 of reports, and really, we would request at this stage in the
7 proceedings your views on how -- on how best the reports should be
8 prepared, as it were, from a general point of view, but also by
9 reference to the specific questions that we set out in the agenda. So
10 really, Ms. McKay, on this we're very much in your hands.

11 MS. MCKAY: Thank you, Your Honour. So perhaps I'll continue to
12 touch on -- by touching on some of these questions.

13 First of all, regarding the contents of the reports and a number
14 of the specific points raised in the agenda relate to what would be
15 the content of those -- of the reports, whether they would include an
16 overview, preliminary view and -- or to highlight issues. I'm
17 referring to subparagraphs(c), (d), and(f) of your paragraph 1 of
18 section F. And I think that -- I would merely there repeat the same
19 as in my introduction, that really it's a matter for the Chamber, that
20 the Registry's in a position to provide some or all of those things.

21 As regards the question of whether -- or of the transmission of
22 the reports to the parties, I think that rather depends on what the
23 contents of the reports would be. Certainly if the reports were to
24 contain purely factual information drawn from the applications
25 themselves then there would be no problem. We may, however, have some

1 concerns on grounds of security if certain information, particularly
2 perhaps certain information that was not already included in the
3 applications themselves, were to be included in the reports. And the
4 Registry also has a more general concern to avoid a situation where we
5 would be drawn into perhaps direct argumentation, if you like, with
6 the -- with the parties since we believe that this could compromise
7 the neutral role that the Registry has in this regard.

8 PRESIDING JUDGE FULFORD: Would you be able to help, and can I
9 stress in a non-specific way, but would you be able to help generally
10 with the sort of areas you have in mind when you say that the reports
11 could include information from places other than the application
12 forms, so that we can have an idea as to what the likely potential
13 risks are if the reports were then made public if they contain
14 information from those sources?

15 MS. MCKAY: Perhaps I could mention two potential areas. One is
16 information relating to perhaps intermediaries on the ground who had
17 been involved in the -- perhaps in the filling in of the application
18 forms or their presentation to the -- to the court, and that -- and
19 the -- so that's -- that's one potential --

20 PRESIDING JUDGE FULFORD: I'm sorry to interrupt. It's just so
21 that we can get a clear idea on this. Is your concern focused on
22 revealing the identities of the intermediary, or is it focused on
23 something that the intermediary has said which has contributed to the
24 report? I'm sure you can see the distinction.

25 MS. MCKAY: And I think it could be either. And the second --

1 the second potential area where there could be difficulties would be
2 relating to perhaps the security contact -- context, perhaps any
3 recommendations that the Registry might want to make as regards
4 non-disclosure of certain information, whether to the parties or to
5 the public.

6 PRESIDING JUDGE FULFORD: Would it be unreasonable to ask that
7 the reports are prepared in such a way as to, by highlighting, to
8 indicate to the Bench those areas where your unit believes there is a
9 potential confidentiality problem if the particular marked passage is
10 distributed publicly?

11 MS. MCKAY: That would certainly be possible to do that at the
12 time when the applications were filed with the Chamber with the
13 report, yes.

14 PRESIDING JUDGE FULFORD: Because what I'm -- I'm just -- I'd
15 like you to help us with is whether there's an intermediate stage,
16 that it's not just the extremes of either handing the reports over or
17 completely keeping them back, whether it would be feasible for
18 reports, suitably redacted, to be passed over to the parties and
19 participants.

20 MS. MCKAY: I'm not sure whether I understood you correctly.
21 That redacted versions would be passed over at the same time as they
22 were -- as the unredacted versions were to be filed with the Chamber?
23 No.

24 PRESIDING JUDGE FULFORD: No. What I have in mind is that we
25 receive everything. But if the conclusion is that there should be an

1 opportunity to reply not only to the applications but also to the
2 reports, whether before the reports are distributed we make sure that
3 they have been suitably redacted so as to take out any material that
4 properly should be removed from public gaze.

5 MS. MCKAY: Certainly that would be possible, yes.

6 PRESIDING JUDGE FULFORD: Anything else, Ms. McKay?

7 MS. MCKAY: Perhaps just on the -- the second set of issues
8 regarding common legal representation, and this relates to the
9 provision again in the Regulations of the Court, Regulation 90, that
10 provides that where there are a number of victims, then the Chamber
11 may ask them to essentially group themselves and be represented by a
12 common legal representative. And there I would suggest that this is a
13 matter that it's -- it would be helpful to have some guidance from the
14 Bench as early as possible, because organising and assisting victims
15 to -- in organising their common legal representation is something
16 that can take time, and of course it's important to ensure, for
17 example, that the victims would have full confidence in the -- the
18 legal representative.

19 PRESIDING JUDGE FULFORD: Are you able to give just a little bit
20 more particularity as to the kind of guidance you'd be seeking from us
21 in this regard?

22 MS. MCKAY: I think it would be perhaps -- it needn't be very
23 specific, but perhaps some guidance as to whether the Bench is minded
24 to -- to really be -- be very strict, if you like, in only accepting a
25 very small number of groups, if you like, represented by legal

1 representatives, or whether it might be prepared to accept several --
2 quite a number of groups should -- should different groups of victims
3 express the desire to be represented by different legal
4 representatives.

5 I would say it's more this general guidance as to -- not perhaps
6 a specific number of how many teams of legal representatives but in
7 general the approach that the Bench intends to take. That would be
8 extremely helpful.

9 PRESIDING JUDGE FULFORD: I suspect that the answer to that
10 question is very much going to depend on the overall assessment that
11 we reach as to the ways in which victims should participate in these
12 proceedings. I doubt whether we can address this issue solely in
13 relation to the reports. I think it's -- it's a well-made -- it's a
14 well-presented question, if I may say so, but I think you won't get an
15 answer to that straight away. I think we're going to have to wait
16 until the next Status Conference before we're going to be able to
17 determine that issue.

18 Thank you very much indeed.

19 Mr. Withopf.

20 MR. WITHOPF: Thank you, Mr. President, your Honours. I'm going
21 to address the various aspects in the order of the agenda, and
22 obviously I start with 1(a).

23 There are a number of starting points for the Prosecution's
24 observations. Rule 89(1): "The Registrar shall provide a copy of the
25 application to the Prosecutor and the Defence." There's no mentioning

1 of a Registry's report. The Registry's report, however, is mentioned
2 in Regulation 86(5), meaning that the applications go together with
3 the Registry's report to the Chamber, the Chamber that is seized with
4 the applications.

5 The Pre-Trial Chamber I, in its decision of 17th of August -
6 that's number 374 - in the DRC situation has very narrowly, has very
7 narrowly interpreted both Rule 89(1) and Regulation 86(5). I make
8 reference to paragraphs 32 to 38 of that decision.

9 The Pre-Trial Chamber says Rule 89 does not direct the Chamber to
10 transmit the report. The report is meant to assist the Pre-Trial
11 Chamber and the Pre-Trial Chamber only, and the Pre-Trial Chamber
12 relies heavily on Article 21(1)(a) of the Statute, meaning that there
13 is no express provision in the Statute requiring the Pre-Trial Chamber
14 to transmit the report to the parties or the participants, and in
15 doing so, the Pre-Trial Chamber has denied the respective application
16 of the Prosecution.

17 The Prosecution's submission, in light of the background I just
18 detailed, is the following: Though differing practices before
19 different Chambers of this court would be unfortunate, the Trial
20 Chamber is obviously not bound by the decision of the Pre-Trial
21 Chamber. I haste to add that also the different stage of the
22 proceedings may justify different approaches.

23 The Prosecution maintains its view and its submission as it has
24 it made before the Pre-Trial Chamber, meaning that the report, the
25 Registry's report, should be disclosed also to the parties and the

1 participants. And why is this our submission, Mr. President, your
2 Honours? The language of the respective provision Regulation 86(5)
3 does not say, Mr. President, your Honours, that the report should be
4 submitted to the Chamber only. And regulation 86(5) does equally not
5 forbid that the Chamber discloses the report to the parties and, where
6 applicable, the participants. Based on this observation, we submit
7 that it lies within the discretion of the Trial Chamber to disclose
8 the report to the parties, and the discretion is obviously judiciously
9 determined.

10 This determination, in our view, Mr. President, your Honours,
11 should follow a entirely logic interpretation of the respective
12 provisions. The question to be asked, in our view, should be the
13 following: Does disclosure of the report to the parties and/or to the
14 participants and their submission on it serve the purpose that the
15 Trial Chamber is best assistant -- best assisted by all arguments to
16 make an informed decision?

17 Here if I may pursue this line of argument. Here the advantages,
18 Mr. President, your Honours, for the judicial process in disclosing
19 the report need consideration. The reports to the extent that they
20 were in the past, and to a very limited extent they were made
21 available to the Prosecution, it turned out that the information
22 contained in these reports, on top of the information contained in the
23 application, because of the way the reports have been structured, they
24 have provided essential data to the Office of the Prosecutor to assist
25 in its submissions to the Pre-Trial Chamber where applicable.

1 It made, in our experience, the proceedings significantly more
2 efficient, and I believe that the parties would benefit from the
3 reports, as would the Chamber, by the submissions of the parties.

4 PRESIDING JUDGE FULFORD: Can you just develop slightly,
5 Mr. Withopf, your submission that the -- the way that the reports are
6 structured, that that provided the Office of the Prosecutor with
7 assistance in its submissions? How -- how exactly does this work?

8 MR. WITHOPF: The reports, to a high extent, have summarised the
9 various applications, and in providing summaries of the application,
10 the Registry, following the respective instructions of the Pre-Trial
11 Chamber, has structured the various applications in a way which turned
12 out to be very useful to the Office of the Prosecutor.

13 PRESIDING JUDGE FULFORD: So it's not that you're receiving new
14 information. It's that the -- the way that the information is laid
15 out eases your task.

16 MR. WITHOPF: It certainly does. Considering the number of
17 applications that have been received in the past, this report's turned
18 out to be very useful. I'm not saying that it makes it redundant to
19 read the applications. The Office of the Prosecutor is reading all
20 applications. Nevertheless, it saves the time for us to structure the
21 information contained in the applications in a very similar way.

22 So I wish to emphasise that these reports turned out to be
23 extremely useful in discharging the daily work of the Office of the
24 Prosecutor. And the Office of the Prosecutor, for that reason and for
25 the legal reasons I have advanced, is much in favour of receiving

1 these reports.

2 PRESIDING JUDGE FULFORD: Presumably you wouldn't oppose the
3 Chamber redacting material that we decide judiciously needs to remain
4 confidential for conventional reasons?

5 MR. WITHOPF: We obviously would not oppose such an approach.

6 PRESIDING JUDGE FULFORD: Thank you very much. So really, you
7 say on natural justice grounds and for -- and on convenience grounds
8 the reports should go to the Office of the Prosecutor.

9 MR. WITHOPF: I would agree, and I would add that it's not only
10 natural justice grounds. In our view, the respective law of the ICC
11 actually does provide for it.

12 If I may continue with the question as to whether the reports
13 should be redacted or non-redacted. That was a question that has been
14 put to the parties and participants.

15 In our view, the reports that go to the Office of the Prosecutor
16 should not be redacted other than at some point in time where the
17 Trial Chamber believes that there's a good reason to redact such
18 information. There maybe rare instances where this may appear to be
19 necessary.

20 The Office of the Prosecutor obviously does not pose a risk to
21 the applicants for victims participation. The situation, in my view,
22 is not very different or is not different at all where the applicants
23 for victims participation would provide the very same information to
24 the Office of the Prosecutor. We have situations where the victims go
25 directly to the Office of the Prosecutor, and we have situations where

1 the victims go to the respective Chambers, be it the Pre-Trial Chamber
2 in the situation or the Trial Chamber in the case.

3 In providing information on the identities of the applicants
4 concerned, the OTP would be unable as to research whether it has added
5 information on the applicants concerned and/or on the alleged crimes.
6 And the OTP would also be unable to determine as to whether it wants
7 to contact the applicants, where it deems it necessary, via their
8 representatives.

9 Obviously there's also the question whether the Registry's
10 reports should go in a redacted or not redacted form to the Defence.
11 And when I talk about the Defence, I wish to emphasise that I mean the
12 Defence and Mr. Thomas Lubanga Dyilo.

13 Disclosing the identities of the applicants, in the Office of the
14 Prosecutor's view, is likely to result in a risk to the life of the
15 applicants concerned. And I make reference to the fact which I have
16 detailed yesterday that most of the Prosecution witnesses, in our
17 view, require a specific protection of the court.

18 Mr. President, your Honours, these were our submissions in
19 respect to point 1(a). With your leave, Mr. President, I would then
20 continue to address point 1(b).

21 The question has been put to us: "If there are -- If they are to
22 be disclosed," obviously making reference to the Registry's reports,
23 "should the Prosecution and the Defence have an opportunity to reply?"

24 Mr. President, your Honours, in light of what I've just said, and
25 I do not need to repeat myself, yes, both parties and the

1 participants, where applicable, should be provided with such an
2 opportunity. Obviously, Regulation 86(5) considers both the
3 applications and the report forming the basis for the Chamber's
4 decision. Both parties, for that reason, should be afforded the right
5 to be heard on all materials, the applications and the reports, that
6 were submitted to the Chamber to that end.

7 I would move on, then, to 1(c). The question has been put to us
8 to: "What extent, if at all --" and I repeat the question for the
9 benefit of the public audience. "To what extent, if at all, if the
10 Registrar as the author of the reports carry out an overview, a
11 review, or a summary of the information set out in the reports, should
12 the Registrar set out in a factual, non-judgmental way, whether the
13 criteria which will be adopted in due course by the Trial Chamber has
14 been addressed?"

15 For the reasons I mentioned at the very beginning of my
16 submission, Mr. President, your Honours, the Prosecution is very much
17 in favour that the Registrar provides for an overview and a summary of
18 the applications. Thus he assists both the Trial Chamber and the
19 parties where the reports are provided to an efficient and effective
20 manner address the relevant aspects of the application. However, the
21 Prosecution is not in favour that a review is done by the Registry in
22 that sense that the Registrar makes assessments on legal matters that
23 go beyond merely summarising the facts of the applications.

24 Against this background, Mr. President, your Honours, and to
25 respond to the second question, the Prosecution does not oppose the

1 idea that the Registrar, in a factual way, sets out the criteria as
2 they will be adopted by the Trial Chamber.

3 In this context, Mr. President, I wish to make a suggestion. The
4 Prosecution, in the meantime - and this is mainly based be on
5 experience we made with applications in the situation - in the
6 meantime has three years experience in dealing with victim
7 applications in both the situation and obviously also in the case.

8 Accordingly, the Honourable Bench may -- may benefit from the
9 submission of the Prosecution and, of course, also of the Defence and
10 the legal representatives for the victims, and in particular on the
11 criteria the Chamber intends to establish. For that reason, the
12 Office of the Prosecutor suggests that the parties be given an
13 opportunity to be heard on the Trial Chamber's criteria.

14 With your leave, Mr. President, I would continue to address the
15 next point (d): "To what extent --" that's the question, "To what
16 extent, if at all, should the Registrar express any preliminary view
17 on the merits of the application?"

18 There is a very clear answer, Mr. President, your Honours, from
19 the Office of the Prosecutor. The Registrar should not, should not,
20 express any views on the merits of the application. This is a
21 judicial assessment, and the judicial assessment falls squarely within
22 the range of duties and falls squarely within the function of the
23 Trial Chamber.

24 In this context, we want to express a concern based on the
25 reports we have received in the past, and obviously the Registry has

1 complied with instructions given by the Pre-Trial Chamber.

2 I cannot go into much detail, Mr. President, because these
3 reports have been provided on a confidential basis. Nevertheless, we
4 have seen a number of statements that have been made in these reports
5 that go to the merits of the applications, and these statements of the
6 Registry are not entirely unproblematic. This, in particular, refers
7 to the sections which are titled "Conclusion," and my learned friend
8 from the Registry knows exactly what I'm referring to. These portions
9 of the reports that have been submitted in the past to the Pre-Trial
10 Chamber appear to be problematic, and they appear to be problematic
11 because they make a sort of prima facie legal assessment, or, in the
12 view of the Office of the Prosecutor, does not fall within in the
13 range of functions of the Registry.

14 The Registry should, however, in our view, be allowed and should
15 be asked to make observations on the completeness of the applications.
16 That's an issue, and that's a question, and that's an area where the
17 Registry's summaries have turned out repeatedly to be of great use for
18 the Office of the Prosecutor.

19 I move on to the next question, 1(e), and again for the benefit
20 of the public audience, I repeat the question. "How should the
21 Registrar fulfil his obligations under Regulation 86(5), and in
22 particular, how should he endeavour to present one report for a group
23 of victims taking into consideration the distinct interests of the
24 victims?"

25 Our submission, Mr. President, your Honours, is the following:

1 The Registrar should use objective criteria such as the distinction
2 between natural persons and organisations or institutions as they are
3 spelled out in Rule 85. The nature of the alleged crimes and the
4 alleged harm the applicants allegedly suffered could be another
5 criteria. That's a criteria that has been used in the past.

6 I haste to add the following: The risk is that any such criteria
7 that go beyond what is at stake at the time of the application, namely
8 the determination whether the applicant should be granted
9 participation or not, such criteria should not take into consideration
10 any aspects that come into play upon -- upon granting the application
11 only.

12 Since in this context Trial Chamber will have to deal with
13 Lubanga case-specific applications, the response, the answer to the
14 question that has been put to us is even more difficult.
15 Regulation 86(5) seems to be tailored to the situation or cases where
16 there are a number of episodes of crimes rather than continuous crimes
17 as they are detailed in the -- in the document containing the charges
18 against Mr. Thomas Lubanga Dyilo.

19 The criteria -- inter alia, the criteria could be whether or not
20 the alleged harm suffered by the applicants fall within the time frame
21 of the document containing the charges and whether the applications
22 attribute the legal -- the alleged harm to the UPC/FPLC and to Thomas
23 Lubanga or to any of the other militias operating or having operated
24 in the region.

25 PRESIDING JUDGE FULFORD: Mr. Withopf, aren't we in fact on this

1 really entering into the much wider argument that's going to have to
2 take place, I think it's at the next Status Conference, in relation to
3 the -- the large question of victims' participation?

4 MR. WITHOPF: This observation is correct, Mr. President. I
5 thought I'd use this opportunity to provide you with a comprehensive
6 answer to this question. We will elaborate it -- on it at a later
7 stage.

8 PRESIDING JUDGE FULFORD: I would -- I think all three of us
9 would very much like to limit this discussion to the more formal
10 nature of how the reports are dealt with rather than going into the
11 undoubtedly difficult question as to the basis of the -- or how we are
12 to decide and the criteria to be applied to those victims who wish to
13 participate in these proceedings.

14 MR. WITHOPF: That's well-understood, Mr. President, and I will
15 leave it for then and will limit my further observation to the more
16 formalistic aspects of the questions.

17 The last one under heading 1 was (f): "Should the Registrar
18 highlight issues that appear to raise from the application for the
19 Chamber's consideration?"

20 Yes, and this has been addressed -- sorry. This has been
21 addressed in the discussion earlier on of today. As long -- in our
22 view, as long as there doesn't come with it a judgmental assessment of
23 the application.

24 Drawing the attention of the Trial Chamber to the particularities
25 of the facts that cannot cause harm, and the Trial Chamber, as well as

1 the parties and the participants, would benefit if and when the
2 Registry would be allowed to highlight specific facts.

3 Mr. President, if you allow me to move on, I would address the
4 question under 2. The question put to us is the following: To what
5 extent should communications between the Registry and the Chamber on
6 the subject of legal representation for victims, for example, on the
7 overall number of represented -- representatives, be disclosed to
8 the parties and, if so, should it be the subject of submissions?

9 The Office of the Prosecutor, Mr. President, your Honours, is of
10 the view that such communications should be disclosed, and there are a
11 number of reasons why. I'm going to mention four.

12 I believe the overall number of representative impacts on the
13 efficiency of the pre-trial -- of the pre-trial and trial process, the
14 proper legal representation will maximise the outcome of the
15 representation. The Prosecution may have a legitimate interest to
16 contact the legal representatives in order to get in contact with the
17 clients of the legal representatives and to get to know who the legal
18 representatives are may or may not play a role in the representation
19 of individuals that are interviewed pursuant to Article 55(2) of the
20 Rome Statute.

21 For these reasons, the Office of the Prosecutor is of the view
22 that such communications should also be subject to submission to the
23 parties, and the parties should be allowed to provide their
24 submissions on them.

25 Thank you very much, Mr. President, your Honours. This concludes

1 my observations.

2 PRESIDING JUDGE FULFORD: Thank you, Mr. Withopf. Just before
3 you sit down, something for you to think about over the next few
4 minutes. An issue has arisen today as to the use of the expression --
5 of the expressions "parties," on the one hand, and "representatives"
6 on the other.

7 We have chosen the language that we have used for a very
8 particular reason, and can I explain it so that you can reflect on it.
9 It seemed to us that the Rome Statute had distinguished between
10 parties, identifying two of them, the Prosecution and the Defence, and
11 everyone else. And I'll explain why in a moment, but it seemed to us
12 that if that's right, we need to distinguish between parties, on the
13 one hand, as identified by the Rome Statute, and everyone else who are
14 otherwise participants in the proceedings.

15 Don't turn it up, but you'll find in Article 82(1) a reference in
16 the opening words: "Either party may appeal." Now, to me that seems
17 to indicate two.

18 So can you reflect on that and let us know in due course whether
19 you feel that we're right to identify the Prosecution and the Defence
20 as being the parties and everyone else as being participants.

21 MR. WITHOPF: Thank you very much for drawing our attention to
22 this issue, and of course upon reflection I will make the submissions
23 for the Office of the Prosecutor.

24 PRESIDING JUDGE FULFORD: Thank you very much.

25 Ms. Mabilille, can I turn to you. In doing so, and I hope to help

1 you, you should know that as regards 7(1)(d), the Bench is of the
2 preliminary view that the Registrar should not express a preliminary
3 view on the merits of the applications. So -- and I imagine that that
4 is something which you would, in any event, object to. So as it were,
5 perhaps to ease your path in relation to some of these issues, can I
6 indicate that that is our preliminary view and otherwise hand the
7 floor over to you for your submissions.

8 MS. MABILLE (interpretation): Mr. President, on this issue I
9 would say that our position is close to that of the Prosecutor on the
10 concept of the report that the Registry should produce. What is the
11 nature of this report for us? We see in it an instrument which would
12 facilitate work. They receive the applications from victims and
13 attempt to produce a document which will assist the Chamber, the
14 Prosecutor, and the Defence in discussing the application.

15 First of all, yes, the Defence wishes to obtain these reports.
16 First of all, because you will see it, the Prosecutor undoubtedly will
17 also see it, and there is going to be a discussion on it. I think
18 it's important that we all have access to the information.

19 Furthermore, such report would facilitate our work. We in the
20 Defence are somewhat concerned by the number of victim participants
21 and the workload which this implies. Thus any preliminary work done
22 by the Registry would facilitate our work.

23 Mr. President, yes, I agree that the Registry should remain a
24 neutral body. It can, of course, bring our attention to specific
25 difficulties which it identifies in a popular -- a particular

1 application. That would facilitate the work of the Defence. The
2 texts do not stipulate explicitly that the reports should be provided
3 to the Prosecutor and the Defence, but that doesn't strike me as being
4 a matter of substance. I think that they may be communicated to us.

5 Mr. President, you may say that the following issue is one that
6 should be dealt with at the upcoming hearing. However, in relation to
7 redactions and the issue as to whether these reports should be
8 redacted or not, that is a sensitive issue. If I address that issue,
9 I will undoubtedly be addressing a matter which will be discussed in
10 three weeks' time. That is to say the issue as to whether there will
11 or will not be anonymous victims and what their status will be.

12 My position today and at the state of the proceedings where we
13 are now is that we would like to have a non-redacted copy of these
14 reports, but I do not want pre-judge a decision which has been taken.

15 So I have expressed concerns which we have, notably regarding
16 redactions, an issue which you, I am sure, would prefer we do not
17 address today.

18 So I think that I have indeed touched upon the main issues for
19 us. That is the necessity of the communication of these documents.
20 Allow me to turn now to representation.

21 The Defence Bench is particularly sensitive to this issue. I'm
22 very concerned by the prospect of having a dozen legal representatives
23 on the other side of the courtroom, each of whom may want to intervene
24 and to make various points. I think that such a phenomenon would make
25 the trial very difficult for the Defence and, therefore, I am in

1 favour of grouping victims to be represented by a common legal
2 representative so that there will not be multiple interventions and
3 contributions during the trial. It is important that the Defence is
4 aware of what is being considered regarding legal representation so
5 that it can offer its points of view on. This strikes us as
6 important.

7 Mr. President, have I responded to the various points which you
8 raised?

9 PRESIDING JUDGE FULFORD: Extremely helpfully. Thank you very
10 much indeed.

11 Mr. Walley.

12 MR. WALLEYN (interpretation): Thank you, Mr. President.

13 As legal representatives of victims who are participating in the
14 proceedings we have a specific interest in the issue, but also we
15 consider victims who may in the future request representation, or
16 those who have already requested legal representation and whose
17 request is pending. So I would like to distinguish two dimensions to
18 this issue.

19 When we speak of an application for participation, the person who
20 is most directly concerned is the person who has made the application.
21 The application might be provided to the Prosecution, the Defence, but
22 also the legal representatives. If the report were to be provided
23 by -- to a third party, for instance the Defence, I think that the
24 requestor should also be provided with a copy of the report. The
25 requestor, the applicant, might well want to make comments on it. I

1 think that it would only be fair that the applicant could comment on
2 it.

3 Another aspect is participants or victims who have already been
4 given the status of participants. They may also be interested
5 parties. Copies of other applications might be provided, but if
6 reports are also available, we would not be against receiving reports
7 produced by the Registry in relation to other applications because
8 they may be of direct concern to us. For instance, when it comes to
9 the matter of possibly joining applicants and organising common legal
10 representation, it would certainly be of interest to us to know how
11 many other applications have been lodged and by what type of victim.
12 One might imagine applications being made by persons who have
13 interests which are opposed to ours.

14 PRESIDING JUDGE FULFORD: This is, if I may say so, clearly
15 interesting, Mr. Walley. You, therefore, on behalf -- well, speaking
16 as a victims' representative, would positively wish for the reports to
17 be distributed generally, Prosecution, Defence, and victims'
18 representatives.

19 MR. WALLEYN: Yes, I would advocate this, but I would also -- I
20 also agree with the Prosecutor -- actually, with everybody that these
21 reports should be neutral and that -- (interpretation) by that I mean
22 views have been expressed on requests which we have lodged. We have
23 not seen these views and therefore have not been able to respond to
24 them. And I think it would be a much healthier situation if the
25 Registry were to adopt a position which were absolutely neutral. The

1 Registry must be equally at the service of the victims and the
2 representatives.

3 PRESIDING JUDGE FULFORD: On the issue of redactions,
4 Ms. Mabilille, quite understandably, has raised the issue which we're
5 going to discuss on another occasion in relation to the possibility of
6 participation of anonymous -- of anonymous victims, but there is, of
7 course -- there are, of course, other circumstances in which it may be
8 deemed appropriate for there to be redactions. For instance, there
9 maybe security issues in relation to a named victim, their current
10 address, for instance, which may have absolutely nothing to do with
11 whether or not they -- whether or not they should participate but is
12 simply a matter, a personal matter to them that for good reason the
13 Bench decides should remain confidential. I imagine you would have no
14 difficulty at all given --

15 MR. WALLEYN (interpretation): I believe it's absolutely
16 essential that in case of doubt security must be primary. All type of
17 risks should be avoided. There can always be leaks through
18 intermediaries, or whatever. Therefore, it is most definitely the
19 role of the court to safeguard security and, if necessary, to remove
20 information to that end.

21 PRESIDING JUDGE FULFORD: Anything you wish to add to this,
22 Ms. Bapita?

23 MS. BAPITA (interpretation): Yes, Mr. President, I do have
24 something I would like to add. First of all in relation to the
25 reports.

1 I don't really know what the content of these reports is, and I
2 would emphasise that. I don't know what the various points and
3 factors are that are included in the reports. I don't know if one day
4 you could provide us with a copy of these reports so that we could
5 respond effectively.

6 VPRS and the Registry receives the various applications,
7 processes them and produces reports. The intermediaries, the NGOs,
8 and the legal representatives in the field have met the victims and
9 have information also from them, information which might be
10 interpreted differently to the way it is interpreted in the report.

11 To date we have not been able to have copies of these reports,
12 and that is why I support notification of the reports to all parties,
13 including the legal representatives. Why so? Well, perhaps we will
14 have observations which we wish to make regarding the content of those
15 reports, content which does not correspond with what we have
16 experienced in the field. VPRS cannot travel to all parts of the --
17 of Ituri, unlike certain NGOs and certain representatives such as
18 myself. Thus it is in -- I would be interested in obtaining these
19 reports to ensure that what it contains does indeed correspond with
20 what I myself have experienced in the field. I think it is absolutely
21 normal that they be notified to all of the parties.

22 On the matter of ex parte, this is sensitive. These reports may
23 contain information which may impinge upon or have an impact on the
24 security of certain people. Not only victims, but also
25 intermediaries, the intermediaries who make it possible for us to make

1 contact with the victims. That is to say, as I see it, the report
2 should contained the identity of the NGOs and possibly of persons who
3 have assisted in making contact with the victims.

4 I agree entirely that these reports should be provided to all of
5 the parties. However, I do believe certain pieces of information
6 should be redacted, or they should be disseminated with a reminder to
7 the counsel for the Defence and legal representatives, et cetera, that
8 we are all bound by the duty of confidentiality.

9 Why so? Because even if one intermediary is threatened then the
10 bridge is broken. For all the legal representatives, the bridge will
11 be down. Therefore, I think there should be a case-by-case evaluation
12 on what information in the report should be made available to all of
13 parties, but bearing in mind this essential factor.

14 I would now like to turn to the concerns expressed by the
15 Prosecutor. He emphasised that the reports should be communicated to
16 the parties based on case-by-case redactions. I think I have
17 addressed that, and therefore I would move on to say, without
18 anticipating all the discussions which will be held at upcoming Status
19 Conferences, I would like to address the matter of the grouping of
20 victims and common legal representatives.

21 It's true that this principle is maintained, but account must be
22 taken of the fact as to whether all of the victims, even if they have
23 gone through the same NGOs, for instance, are located in the same
24 context. It might be a geographical context, a social context. It
25 might be the nature of harm which will determine whether joining the

1 representation is possible. It may not be beneficial to have a common
2 legal representative to represent a victim -- one victim who is in
3 Bunia, another who is in Mongbwalu, but both of whom have suffered
4 from their enlistment as child soldiers. There will have been a
5 different context, a different historical context, geographical
6 context, socio-economic context, and these I think will play in any
7 decision as to whether a common legal representative is possible.

8 We, the legal representatives, meet children who have suffered a
9 similar harm but in a different historical context. And,
10 Mr. President, on the 29th, 30th, and the 1st of November I will be
11 able to give you more particulars.

12 PRESIDING JUDGE FULFORD: Arising out of those submissions,
13 Ms. Bapita, if I can just ask you about two matters. Do I take it
14 from your submissions that depending, of course, on the discussions
15 between the three of us, you might be assisted by seeing a draft or,
16 rather, a report into an imaginary victim so that you are then able to
17 see the kind of layout which on a preliminary basis the Bench has in
18 mind having engaged in consultations with Ms. McKay's unit?

19 That's the first matter. And the second is - I just want to make
20 sure I fully understood this - are you saying that notwithstanding the
21 concerns that Ms. McKay has expressed, that you would wish to know the
22 identity of each of the intermediaries, in this instance in the DRC,
23 who have played a role in preparing the reports, those such as the
24 NGOs?

25 MS. BAPITA (interpretation): Mr. President, I will start by

1 responding to the second question, because I didn't really get the
2 first question I have to say. But with regard to the second question,
3 as a legal representative of a certain group of applicants, then I
4 would like to know the report which concerns the applicants whom I am
5 representing. With regards to the others, I don't have capacity to
6 take knowledge of that part. It can be redacted or not. But with
7 regard to the people who I represent, then I would like to have the
8 information concerning them in the report.

9 PRESIDING JUDGE FULFORD: Thank you.

10 MS. BAPITA (interpretation): With regards to the first question,
11 I'm sorry, I didn't follow what you said.

12 Yes. With regards to the first question, I think that it's
13 useful to have a model of this type of report.

14 PRESIDING JUDGE FULFORD: Let me try again, Ms. Bapita. What I
15 was asking is whether you would like to see an example of the -- an
16 example of a report, one compiled in relation to an imaginary victim,
17 so that you are able to make submissions in relation to the format
18 that on a preliminary basis is being proposed.

19 MS. BAPITA (interpretation): Yes, Mr. President. I think that
20 would help me a lot if I could see the basis which we find in the
21 field, to see if they're the same as the ones contained in the report.
22 That would help, yes.

23 PRESIDING JUDGE FULFORD: Ms. Mabilille.

24 MS. MABILILLE (interpretation): Mr. President, I omitted, because
25 it's very indelicate on my part because my -- Mr. Keita wanted to

1 intervene to speak with regards to this aspect. Would you give the
2 floor to him? Would that be possible?

3 PRESIDING JUDGE FULFORD: Thank you for raising it. The three of
4 us will just have a short discussion. Thank you very much.

5 [Trial Chamber confers]

6 PRESIDING JUDGE FULFORD: Ms. Mabilille, in relation to this
7 particular issue, we have generated what has turned out to be a very
8 full discussion in relation to the reports which, of course, are
9 prepared for our assistance in arriving at a judicial decision as to
10 whether or not applicant victims should be included in the
11 proceedings, and I think the issues have been very broadly canvassed.

12 As regards the particular application that is now made as to
13 whether or not Mr. Keita should intervene on this subject, there is
14 something of an underlying philosophical discussion that has got to
15 take place as to the precise role, if any, of the Office of Public
16 Counsel for the Defence at this stage in the proceedings when a
17 particular defendant is fully represented.

18 We are aware of the need for that issue to be addressed, and one
19 of -- and it is one of the issues that we have in mind to include on
20 an agenda once the most important pre-trial issues have been addressed
21 and dealt with. We are at this stage, therefore, aware of Mr. Keita's
22 interest. We do not wish to pre-judge the discussion as to whether or
23 not the Office of Public Counsel for Defence in fact have locus at
24 this stage, and although we are grateful for the offer, we are going
25 to decline it. We think that the issues have been fully canvassed,

1 although we recognise in due course, as I say, there is a discussion
2 to be had as to what role the Office of Public Counsel for the Defence
3 have at this stage in the proceedings once the particular defendant is
4 fully represented.

5 Thank you very much.

6 Ms. McKay, I think it really -- I'm sorry.

7 Yes, Judge Odio Benito.

8 JUDGE ODIO BENITO: Ms. McKay, taking advantage of your presence
9 here this morning, I just would like to ask you about the current
10 status of the database referred in Regulation 98. I think you have --
11 if you don't have a hard copy of the Regulations of the Registry, but
12 you probably know what I am talking about. So I would like to know,
13 for the benefit of all the presence in this hearing, what is the
14 current situation of that database. Thank you.

15 MS. MCKAY: Thank you, your Honour.

16 Yes, I can confirm that the Registry does have a database that is
17 used for storing the applications received from victims, and indeed
18 all applications received are entered currently into that database.
19 However, the database we're using at the moment is an interim one, and
20 it is not -- it doesn't have as much capacity, it's not as
21 sophisticated as we believe is necessary in order to enable us to
22 fully assist the Chamber and -- the Chambers and prepare the reports
23 on the applications. So the Registry is in the course of preparing
24 and will be building a more sophisticated database that will have more
25 capabilities that -- that I believe will assist the Chamber as well as

1 ourselves.

2 JUDGE ODIO BENITO: And when do you presume this more
3 sophisticated database will be placed to be used by not only by the
4 Chambers but also by the participants?

5 MS. MCKAY: I'm -- I'm afraid I'm not able to give a specific
6 timetable right now, but I believe it will be a matter of months, and
7 we -- perhaps I could say that we could inform the -- the Chamber very
8 soon once we have a specific timetable. Thank you.

9 PRESIDING JUDGE FULFORD: Ms. McKay, is there any response that
10 you would wish to make to the various representations that have been
11 made?

12 MS. MCKAY: Thank you, your Honour. I believe that -- that I
13 don't have really much to add from the remarks I made in the
14 beginning. Perhaps just to note -- make a couple of notes.

15 One, the -- the issue of whether or not the legal representatives
16 of victims should also be informed of the receipt of applications or
17 of -- of -- indeed of the reports themselves.

18 I would draw your attention, for example, to Rule 92,
19 paragraph (5) of the Rules of Procedure and Evidence which provide
20 that victims legal represent -- victims or their legal representatives
21 already participating will be kept informed of developments in the
22 proceedings, and that's specified there. There's -- in the -- in the
23 text the types of documents or -- that would be -- that would be
24 notified or that would be -- of which they would be kept informed.

25 But I would also note Rule 90, paragraph (4), which says that

1 the -- provides that: "The Chamber and the registry shall take all
2 reasonable steps to ensure that in selection of common legal
3 representatives the distinct interests of the victims, particularly as
4 provided in the paragraph -- Article 68(1) are represented and that
5 any conflicts of interest are avoided."

6 So I would at this point simply raise the fact that there could
7 indeed be conflicts of interest between different groups of victims
8 participating in the proceedings, and perhaps that might be borne --
9 borne in mind in respect of the transmission of the reports as well.

10 PRESIDING JUDGE FULFORD: Thank you. On the issue raised by
11 Ms. Bapita in relation to the identity of NGOs, do you have any
12 general submissions in relation to that?

13 MS. MCKAY: Perhaps simply to reiterate the -- the point I made
14 in the beginning. That is certainly one of the issues that -- in
15 which the Registry is likely to be making recommendations of
16 non-disclosure of information, that is, information relating to
17 intermediaries on the ground. As to whether those recommendations on
18 non-disclosure would extend to legal representatives of victims other
19 than the victims in question, the victims making the applications,
20 that is something probably would need to be perhaps looked at on a
21 case-by-case basis.

22 PRESIDING JUDGE FULFORD: Just, because there -- there may well
23 be, I can see, an argument for saying that the -- that the applicant
24 should see the unexpigated version whilst, on the other hand, there
25 may be reasons for redacting those parts of the reports when it's

1 disseminated more widely.

2 Yes. Thank you very much indeed.

3 Well, I think, Mr. Withopf, that concludes the agenda for today
4 subject to, of course, your wish to come back in relation to the
5 undoubtedly important issue that was raised yesterday.

6 Now, we're quarter to 1.00. I've been told that 1.00 is the
7 deadline in relation to the human rights of the interpreters, that we
8 mustn't go beyond 1.00. Oh, 1.13 I'm told. Thank you very much.

9 I can't imagine you're going to be half an hour on this issue,
10 are you? No.

11 Before you start, can I ask you to -- to reflect on whether there
12 is any aspect of this issue that needs to be dealt with ex parte, and
13 what we particularly have in mind is whether or not the Bench would
14 benefit from being provided -- the Bench would benefit by being
15 provided by examples of the kind of material that the Office of the
16 Prosecutor has considered has to be bound by agreements and
17 restrictions in order for it to come into the possession of the Office
18 of the Prosecutor and which would otherwise be unavailable to you.

19 Now, you've put it very generally thus far, possibly for
20 understandable reasons, but would we be assisted by having firm
21 examples provided to us so that we can be better informed when we come
22 to make our decision on this issue?

23 MR. WITHOPF: Thank you, Mr. President, your Honours. I believe
24 in answering your question whether we can provide examples, this
25 touches on the very scope of Article 54(3), and I see, your Honour the

1 Presiding Judge obviously agreeing with this observation, and I would
2 prefer to make respective submissions, where applicable and following
3 the lines that have been discussed earlier on today, in ex parte
4 submissions.

5 PRESIDING JUDGE FULFORD: Is there any part of what you would
6 wish to say which can properly be dealt with inter partes? We
7 obviously want to restrict any ex parte hearing to the absolute
8 minimum, Mr. Withopf.

9 MR. WITHOPF: That's well-understood, and what I wanted to
10 volunteer to provide the Chamber with, that can be said in public
11 hearing, and I will --

12 PRESIDING JUDGE FULFORD: Please do so now.

13 MR. WITHOPF: And I will keep my submission very short, being
14 very well-aware of the human rights of the interpreters. And their
15 work is greatly appreciated, if I may this opportunity -- use this
16 opportunity to mention it.

17 What I wanted to draw the Chamber's attention to is the
18 following: The relationship agreement between the United Nations and
19 the court, and this is the relationship agreement I was making
20 reference to yesterday, is not an agreement solely between the Office
21 of the Prosecutor and the United Nations. It's a relationship
22 agreement between the International Criminal Court and the United
23 Nations.

24 This relationship agreement is publicly available and Article 18
25 of that relation agreement deals with the issues that are pertinent to

1 Article 54(3)(e), and there it says that: "The United Nations and the
2 Prosecutor may agree that the United Nations provide documents or
3 information to the Prosecutor on conditions of confidentiality and
4 solely for the purpose of generating new evidence and that such
5 documents or information shall not be disclosed to the other organs of
6 the court," Mr. President, your Honours, I draw your particular
7 attention to that portion of Article 83, "or to third parties at any
8 stage of the proceedings or thereafter without the consent of the
9 United Nations."

10 What I want to add and what I want to draw your very particular
11 attention to is the Resolution of the States Parties, and I make
12 reference to Resolution ICC-ASP/5/Resolution 3. This Resolution is
13 also publicly available, and I quote from section 13: "For which the
14 ASP calls," and that's now the quote, "calls upon the Court to promote
15 the full implementation of the relationship agreement between the
16 International Criminal Court and the United Nations."

17 This is the information I wanted to provide the Chamber with at
18 that stage -- at this stage where we are now. Obviously responding to
19 your question earlier on today, I would make -- would like to make the
20 submissions within the boundaries that have been discussed in an
21 ex parte hearing.

22 That's all I have to say in that context. If the Chamber so
23 wishes, I can make the submissions on the issue on participants and
24 parties. It will not take me longer than two or three minutes.

25 PRESIDING JUDGE FULFORD: Can I just ask you about the

1 relationship between Article 18, on the one hand, and Article 54(3)(e)
2 on the other? Article 18 is very broad, on its face seems to give a
3 wide degree of discretion to the United Nations and the Prosecutor to
4 reach agreements in relation to confidentiality, but Article 54(3)(e)
5 seems to establish a regime which is -- which much more tightly
6 controls the circumstances in which agreements can be reached limiting
7 confidentiality.

8 Now, what's the relationship between the two? And if there's a
9 difference between them, which should be applied by this Chamber?

10 MR. WITHOPF: Mr. President, your Honours, one may or may not
11 come to the conclusion that obtaining materials under Article 54(3)(e)
12 should be the exception rather than the rule. The law says the
13 Prosecutor may agree not to disclose. And obviously I do not need to
14 quote the full subsection of Article 54(3)(e). And of course the law
15 is the law, and this is the overarching consideration for the Trial
16 Chamber to apply. There's no doubt.

17 Nevertheless, in interpreting the law - and this is the point I
18 wish to make - in interpreting the law, the Trial Chamber should also
19 consider, in the Prosecution's submission, what on the one-hand side
20 is contained in an agreement between the court, and I emphasise the
21 word "court," and a potentially very important information provider
22 such as the United Nations and interpreting Article 54(3)(e) in our
23 view the Trial Chamber. And in interpreting Article 54(3)(e), in our
24 view the Trial Chamber should also consider the views of the ASP which
25 have been expressed in a certain context, being in favour of the

1 implementation of Article 18(3) of the relationship agreement.

2 This is obviously a difficult question to address, and I may
3 reference to what I said yesterday. Without having agreed to
4 Article 18(3) of the relationship agreement, the Office of the
5 Prosecutor would not have received the information and the evidence it
6 has received and, your Honour the Presiding Judge, you obviously tend
7 to agree with that observation.

8 PRESIDING JUDGE FULFORD: Well, I understand the point,
9 Mr. Withopf, but -- and one can understand that certainly the position
10 of the Office of the Prosecutor is that a restrictive interpretation
11 could pose, certainly in your submission, difficulties for the
12 Prosecution. You'll understand that ours is a judicial function, and
13 we have got to apply the Statute that governs the work of certainly
14 this Chamber, and whatever the practical problems are, in the final
15 analysis we've got to apply the law. And so although you are
16 undoubtedly right in drawing potential practical problems to our
17 attention, I'm at the moment really seeking your assistance as to how
18 we resolve what appears to be a difference between the approach taken
19 in Article 18 and the approach taken in Article 54. They don't seem
20 to me to be easily -- easily reconciled.

21 MR. WITHOPF: With your last statement, Mr. President, I cannot
22 more than agree. I am very aware -- I am very well-aware of the
23 dilemma. I'm very well aware of the dilemma, and I cannot more than
24 agree that the law is governing the work of the Trial Chamber.
25 Nevertheless, the law says, of course, the Prosecutor may agree. So

1 there is a possibility, and the law provides for such a possibility,
2 that the Prosecutor may enter into such agreements as the one with the
3 United Nations.

4 Of course, what we are facing in this particular context is the
5 volume of the materials that have been provided under that provision,
6 and this makes the situation exceptional. But the very
7 particularities of this situation should not lead the Trial Chamber to
8 draw certain conclusions on the law. Would the Trial Chamber consider
9 the situation being different if the volume would not be as great, as
10 big as it is? I think the mere volume of the materials that have been
11 provided under Article 54(3)(e) should not be a consideration of the
12 Honourable Bench in that context.

13 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf. I
14 think you also wanted briefly to address us in relation to parties and
15 participants.

16 MR. WITHOPF: Yes. I intend to do so, and this will not take me
17 longer than five minutes, and I believe this question is an easier
18 question to deal with as compared to Article 54(3)(e).

19 Very interestingly, there are a number of definitions in the
20 Statute, in the Rules of Procedure and Evidence, in the Court's
21 regulations, and the Regulations of the Registry. For whatever
22 reason, however, there is no definition what participants are and what
23 parties are. That's the starting point.

24 Your Honour, Mr. President, you have mentioned very briefly and
25 en passant Article 81(2), which -- whose language supports the view

1 that the parties should be the Prosecution and the Defence. I would
2 agree with this observation, and I would also add Articles 64(9) and
3 Rules 140 and 134(1). There is such a clear distinction. And why
4 there is such a clear distinction? The parties, meaning the
5 Prosecution and the Defence, have, compared to the legal
6 representatives for the victims, for example, different procedural
7 roles, and they also have different procedural rights. So the
8 Prosecution submits that whilst the Prosecution, the Defence, and the
9 legal representatives for the victims, one could also add States where
10 applicable, fall within the definition of participants, but in
11 addition to it the parties, whenever the law refers to the parties, in
12 our submission the law means solely the Prosecution and the Defence.
13 That would mean that the Office of the Prosecutor would agree with the
14 definition as it has been put forward by the Honourable Bench in its
15 Scheduling Order for today's hearing.

16 PRESIDING JUDGE FULFORD: That's very helpful, Mr. Withopf. I'm
17 sorry to go back to an issue, but on -- on re-reading Article 18 of
18 the negotiated relationship agreement between the International
19 Criminal Court and the United Nations, for the sake of the record I
20 now see that on my first reading of it I had -- I had missed that of
21 course Article 18(3) is also directed at the purpose and solely of
22 generating new evidence. So where I was during the course of
23 discussion indicating that there was a difference of approach, the
24 observations that I made were clearly not right. There is, in fact, a
25 synchronicity that exists between Article 18 and Article 54. Yes. So

1 I apologise for having led the debate in something of a -- something
2 of a full sally [phoen] in relation to that.

3 Mr. Withopf, thank you very much indeed. That's really been very
4 helpful.

5 Right. We will adjourn now and sit again at half past 2.00 so
6 that the Prosecution can ex parte address us on any issues that cannot
7 be raised in open court as regards Article 54.

8 I'll give you an opportunity in a moment, Mr. Walley. Subject
9 to any submissions from the victims representative, we will sit with
10 just the Prosecution and the Registry present.

11 Now, there are a number of people who want to intervene at this
12 stage. I'll take you first, Ms. Mabil, since you're on your feet.

13 MS. MABILLE (interpretation): With your leave, Mr. President.
14 We have a concern regarding LiveNote. I do not know whether you wish
15 plea to inform the Chamber. We will discuss it in three and a half
16 minutes if given leave. We raised it yesterday, and we have a very
17 quick answer, and since the Registry is here, I would like to raise
18 the matter again very briefly.

19 This is it: LiveNote reaches us in English. We are French
20 speaking. Thomas Lubanga is French speaking, so is the team, and in
21 our view it is extremely difficult to work under these conditions.
22 It's almost impossible, because we do not actually use LiveNote.

23 Mr. President, I would like to express my concern regarding the
24 trial phase especially. Some of us have worked for the International
25 Criminal Court for Rwanda where there was LiveNote, which afforded us

1 direct access so that we could make comments regarding the testimony.
2 It also afforded us direct contact with our clients, which we could
3 then review on the evening of the day of the hearing. Following
4 comments, we would be able to work on that the next day.

5 I will -- admittedly, we wanted to point out that we had some
6 trouble reading over some of the transcripts of the hearing of
7 yesterday, but we were not able to do so in French.

8 The Registry said yesterday that it was a technical problem. We
9 would like to have an investigation into what particular technical
10 aspects were at issue, because we think that every problem can be
11 solved. What I understand is that they could not find somebody to do
12 the transcripts in French. I think it is a working tool for the
13 Defence team today, and we are hampered by the absence of this
14 transcript in French.

15 I would therefore seek the assistance of the Chamber so that this
16 matter is solved, and I would be grateful for that.

17 PRESIDING JUDGE FULFORD: Ms. Mabilie, thank you for that. Can
18 I, as a general principle, indicate that particularly on -- on
19 technical and practical issues of this kind, we would prefer it if
20 they could be raised in a relatively formal way with the Registry
21 first of all so that you can receive an answer from them. If the
22 response that you get is not satisfactory, then please raise the
23 matter with the Bench. But the advantage that we would then have is
24 that you could show us the exchanges that have taken place between the
25 two of you, which would enable us more easily to reach a resolution.

1 Your point is noted. Please discuss the matter with
2 Mr. Dubuisson. Thank you very much.

3 MS. MABILLE (interpretation): Thank you, Mr. President. We
4 shall do so.

5 PRESIDING JUDGE FULFORD: Now, Mr. Walley, I'm afraid we're
6 running out of time, and I'm told the tape has only got about four
7 minutes left. I think you were going to intervene as to whether or
8 not there should be an ex parte hearing.

9 MR. WALLEY (interpretation): I don't have a problem with the
10 ex parte status, but before we conclude, I would just like to respond
11 to some issues that were raised yesterday. You asked what documents
12 we currently had access to. We have prepared a list of this
13 document -- of these documents. So if the Registry would be so kind
14 to assist us in taking this document, I could provide copies to the
15 Court and to the Defence, and the Prosecutor has already received a
16 copy. There will be a copy for the Registry as well.

17 We currently have access to 361 documents, through Ringtail, out
18 of the 540-odd documents available. We were told yesterday, because
19 at your suggestion we had a meeting with Mr. Withopf yesterday, and we
20 came to the conclusion that problem would soon be solved in that the
21 Prosecutor intends to tender all the documents disclosed to the
22 Defence within the context of the court in the record of the case to
23 which, in principle, we have access as per Rule 131. So I think that
24 the problem of the disclosure of documents should for the time being
25 have been solved.

1 We had a discussion, but I think that during the next hearing we
2 shall discuss this at further length, that is, regarding the problem
3 on the concept of confidentiality. It does involve the
4 representatives of the victims and the Defence team. So there must be
5 a distinction between disclosure to counsel and disclosure to the
6 party, the client.

7 PRESIDING JUDGE FULFORD: I'm going to interrupt you, because
8 we're about to run out of time. The tape is going to stop.

9 MR. WALLEYN: I suggest anyway to discuss that next time.

10 PRESIDING JUDGE FULFORD: Right.

11 MR. WALLEYN: And also to have for us the opportunity next time
12 to say something on the distinction between participants and parties,
13 but this is not an urgent matter for today of course.

14 PRESIDING JUDGE FULFORD: And I'm going to urge you, please, to
15 put in any -- if you have submissions, to put them in writing in
16 relation to access on the part of the victims' documents. So please
17 not only make oral submissions, but put them in writing as well. I'm
18 not going to put a timetable on this, but you must do so well in
19 advance of the next hearing, please, Mr. Walley.

20 MR. WALLEYN: Okay.

21 PRESIDING JUDGE FULFORD: We'll rise and sit again at 2.30.

22 COURT USHER: All rise.

23 The Status Conference adjourned at 1.09 p.m.

24

25