

1 International Criminal Court

2 Trial Chamber I

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

4 Monday, 29 October 2007. Open Session hearing

5 Transcript ICC-01/04-01/06-T-57-ENG

6 The hearing starts at 2.03 p.m.

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

9 PRESIDING JUDGE FULFORD: Good afternoon. I'll ask the Court
10 Officer, please, to call the case on.

11 COURT OFFICER: Thank you, Mr. President. Situation in the
12 Democratic Republic of the Congo, the case of the Prosecutor versus
13 Thomas Lubanga Dyilo.

14 PRESIDING JUDGE FULFORD: Thank you very much. Ms. Mabilille, may
15 I turn immediately to you. Our Court Officer has told us that there
16 's been a difficulty today in relation to Mr. Lubanga coming to court.
17 I understand that it relates to a particular dress requirement which
18 is made as part of his transportation to court. Are there any
19 submissions or applications that you wish to make?

20 MS. MABILILLE (interpretation): Thank you, President, for giving
21 me the floor on this matter. First of all, I had made no submissions
22 because I have myself only just been made aware of this issue.
23 However, at the previous hearing a problem of the same type was raised
24 by Mr. Thomas Lubanga, but apparently a solution was then found; and
25 thus, your Honours, I made no application in this connection. What I

1 have understood of the situation is that for the transfer from the
2 detention centre to here, Mr. Lubanga is asked to wear a bullet-proof
3 vest, which apparently weighs 40 kilos. Thomas Lubanga has been
4 complaining for some time now of recurrent back problems, and it has
5 already been said that that vest for him causes him some pain.

6 In the wake of the last hearing, this issue was addressed and the
7 detention centre quite rapidly found a lighter weight bullet-proof
8 vest which apparently he could wear without any pain and that is why I
9 did not raise the problem with the Chamber. I had the impression that
10 the -- that the problem had been resolved and that by wearing that
11 bullet-proof vest he would be able to travel regularly to hearings.

12 Apparently today he was given the old vest, the very heavy vest,
13 and that is why I am now obliged to come to you with a request.
14 Having had a quick look at the text, it strikes me that Regulation
15 200, which is a Regulation regarding the transportation of detained
16 persons, provides in paragraph(2) for the transportation of detained
17 persons in vehicles with adequate ventilation and light in such a way
18 as to spare him or her unnecessary physical hardship or indignity and
19 taking into account any disability from which the detained person
20 suffers.

21 Your Honours, last time I believe that a doctor was brought in to
22 certify that Mr. Lubanga did indeed have back problems. At quarter to
23 2.00 I rang Mr. Lubanga because I learnt at half past 1.00 that there
24 was a problem. I asked him whether he had seen that doctor. He said
25 no, and in consequence he had been offered that vest again.

1 Last time it was possible to provide him with a lighter weight
2 vest. The understanding was that he was entirely safe in that
3 bullet-proof vest and that he himself did not complain in any way of
4 it.

5 I would request that in future he be allowed to wear that vest,
6 this vest which causes him no difficulty. This is the solution I
7 would suggest to solve this problem, which strikes me as being a minor
8 one. I think it is a matter of concern that this problem could not be
9 resolved and that we found ourself now at the hearing in presence of
10 it.

11 Thank you, your Honours.

12 PRESIDING JUDGE FULFORD: Well, Ms. Mabilille, thank you very much
13 for those submissions. We will investigate what happened today as
14 soon as the Court has risen, and I'm going to ask, please, that there
15 is communication during the course of this afternoon's session so that
16 at the end of the day we can be informed as to why on this occasion
17 there was a request that your client wear the heavier rather than the
18 lighter version of the vest. This has clearly got to be resolved
19 satisfactorily so as to ensure that your client can be here. But
20 thank you very much for those submissions.

21 Mr. Walley, Ms. Bapita, as we have indicated earlier during last
22 week, since we're taking victims issues first, we thought it
23 appropriate that we should ask for your assistance first, and we leave
24 it up to the two of you as to who should go first.

25 MR. WALLEYN: Thank you for that, Mr. President. We convened

1 that I will start the intervention.

2 Mr. President, madam, sir, (interpretation) I'd just like to say
3 that I'm going to speak in French, and I don't want to tire out the
4 court by repeating what we've already spoken about in the common
5 submissions which were filed, but what I'd rather like to do is to
6 reply to what the Defence has stated with regard to it's position and
7 with regard to our proposals.

8 First of all, our point of departure, if you like, is that of the
9 Rome Statute and of the Rules of Procedure and Evidence. In the
10 proceedings before the ad hoc tribunals, as participants or parties
11 you just have the Prosecutor, who represents the international
12 community and the Defence, and this was a -- there was a great new
13 element, an innovation in international justice that the parties who
14 adopted the Rome Statute decided that before the International
15 Criminal Court, there would also be the possibility for the
16 participation of victims. This was something that was really felt as
17 an important progress in international justice, which went along with
18 the recent development of human rights, and in particular with the
19 fundamental principles and directives concerning the right to recourse
20 and reparations of victims of flagrant violation of international
21 human rights law and of grave breaches of international humanitarian
22 law, which the General Assembly of the United Nations adopted on the
23 16th of December, 2005, but which was already being discussed a
24 considerable time before the Statute of the court and the regulations
25 of the court were adopted. And furthermore, these principles

1 explicitly cite by way of example of the Statute of the International
2 Criminal Court in its preamble.

3 With regards to the Defence, there's a red line in its
4 submissions which we will discuss today, which is that the
5 intervention of victims on each point should be reduced to the minimum
6 provided by the Statute and the Rules of Procedure and Evidence. And
7 there there's the possibility of -- where there's a margin to assess
8 this, then the decision has to always go towards the minimum.

9 With regards to the Defence, it is only exceptionally that the
10 victims can be able to get their points across during the debates on
11 guilt, because they are not parties to the case but, however, when we
12 do speak about anonymity of victims or the possibility to be able to
13 hear a victim who participates -- participates as a witness, then of
14 course we treat the witness -- the victim as a party because they do
15 bring accusations against the accused who has to be able to defend
16 himself. That hardly seems to be subject to controversy.

17 With regards to the victim, you can only intervene if their
18 personal interests are affected, personal interest which is
19 specifically opposed to the general common interests of all victims.
20 That's 45 to 49 of the submissions of the Defence.

21 These common interests of victims should be represented by the
22 Prosecutor, but when we speak about the possibility to have common
23 representation, at that moment the Defence considers that we should
24 bring together all the groups of victims, because whatever happens,
25 they do make their claim on the part of the group. So how can we

1 reconcile all the different victims in the same group given the fact
2 that the same victims can only intervene when their personal
3 interests, individual interests, are subject to debate? So the
4 Defence considers that all the victims who are authorised to
5 participate in proceedings should be subject to a protection programme
6 organised by the court services, and at the moment there are only four
7 victims who have been authorised to participate, but there is a
8 significant number of applications underway at the moment. And of
9 course that will have significant implications if the victims -- all
10 the victims who have been authorised to participate have to be -- or
11 take part in an individual protection programme.

12 And once again, such a commitment, why for an intervention which
13 would only be symbolic? Well, if the Defence can blow hot and cold at
14 the same time, to put it like that, it's obviously because the
15 founding texts of the court are the fruit of compromise between
16 visions which were sometimes opposed to each other. They can be
17 reconciled in the court's text, but of course we didn't opt radically
18 for one orientation which was for the pro-victims or for another
19 orientation, anti-victims, if I can put it like that.

20 In effect, the text of the court leave up to you, up to the
21 Chamber, a very large room for manoeuvre when it comes to deciding on
22 a case-by-case basis with regards to the concrete fact of the case in
23 accordance, for example, with the complexity of the case, the number
24 of accused, the number of victims who have been authorised to
25 participate to give more or fewer possibilities for intervention to

1 the victims. The court could in theory either, for example,
2 completely empty the participation of victims from any content, or it
3 could accord them by always saying yes to every single question. In
4 theory they could be given a status which is almost the same as that
5 of the party to the case.

6 So the Defence is asking for the Court to go for the first
7 extreme option, to empty participation of victims from all its
8 content. And we are not asking the opposite. We are not asking to
9 have at the current stage, which is a state of debate with regards to
10 the responsibility of the accused, we are not asking to have the same
11 rights as the Defence or the Prosecutor.

12 What is true, and this is something that we have put in our
13 submissions, we do consider that the issue -- or the question that you
14 asked at the last hearing, if the victims who participate are now
15 parties or not, or at what time will they become parties?

16 Well, the position of Mr. Mulenda-- Madam Mulenda [as
17 interpreted] and myself is perhaps not the same as that of all
18 victims, but is to say, that when we look at the texts of the court
19 and the philosophy that's behind it during the first phase of the
20 proceedings when we discuss the probability of the accused, the
21 victims are perhaps not yet parties, full parties, but they will
22 become that at the time when we start discussing the applications for
23 reparations that they've introduced and within the framework of
24 proceedings where they are not only parties to the case but where they
25 also are parties for redress.

1 At the current stage of the proceedings, we are not asking that
2 the Court obliges the Prosecution and the Defence to communicate to us
3 all the documents that are in their possession. We are just asking
4 that we have access, as the rules of procedure indicate, that we have
5 access in good time to the documents which are part of the case record
6 of the court.

7 PRESIDING JUDGE FULFORD: So that it doesn't get missed, can I
8 ask you about the submission you've just made about the status of
9 victims, whether or not they are parties or participants, and whether
10 or not reparations affects that. And I want to put this question to
11 you: If the Bench decided that insofar as it was consistent with the
12 defendant's fair trial rights, there should be consideration at least
13 of some aspects of reparations throughout the entirety of the trial
14 process, wouldn't you in fact be submitting to us that that makes the
15 victims parties rather than participants for the whole of the trial?

16 MR. WALLEYN: Thank you for that question, Mr. President. I
17 think indeed that if the Court decided to make application of Rule 56,
18 not only in a particular -- for a particular issue or a particular
19 question but for the whole procedure, that's -- in that event we
20 could, indeed, have a trial where both stages of the procedure are
21 merged and where, indeed, the victims will act as parties like the
22 others.

23 It depends on the decision that you will take on that.

24 PRESIDING JUDGE FULFORD: I suppose even with that broad
25 formulation, which I anticipated was going to be your position, even

1 within that you would be accepting that if we agreed that you did --
2 that the victims did become parties for that purpose, they would only
3 be parties for that purpose. It wouldn't be parties, as it were, for
4 all purposes throughout the trial, unconnected with the personal
5 interests of the victims.

6 MR. WALLEYN: I can accept that, Mr. President, yes.

7 PRESIDING JUDGE FULFORD: Thank you. Please carry on. I just
8 didn't want us to -- to let that slip by without being addressed, as
9 it were, head on, because it is undoubtedly something which arises out
10 of your submissions.

11 MR. WALLEYN (interpretation): The fundamental problem,
12 Mr. President, and I think at the end of the day a balance will have
13 to be found. The Chamber will have to find a balance, proportionality
14 between the rights which will be granted to us and the obligations
15 which will be put upon us and what will be asked of us, because the
16 rest of the Defence's position is that not only should we not have too
17 many rights, but also that when it comes to our obligations, when it
18 comes to the practicalities of the proceedings such as the e-court
19 protocol or other issues there, when it comes to the obligations we
20 shall want the victims to act like parties, and that's what is
21 happening now.

22 Now, there is a grey area here where one could indeed shift more
23 to the right or to the left. What we want are balanced proceedings.
24 We don't -- we are not asking to be able to question each witness in
25 the same way as the Defence or the Prosecution would. That is not the

1 case. But at the same time, we cannot accept simply to attend here as
2 a decorative element in the courtroom without having the ability to
3 intervene on matters of direct concern to our clients.

4 We wish to participate not just for the form but to really
5 contribute to this endeavour of justice and through our participation
6 to provide satisfaction to our clients. It is important that these
7 people who are taking risks, even risking their life by committing to
8 proceedings before the court, be taken seriously. They have been
9 invited to participate. We cannot now turn around and say, "How nice
10 of you to apply. We'll put you in a corner now, and in a number of
11 months time if we have a convicted person, you may then take the
12 floor."

13 As regards Regulation 56, the Defence says that this is a
14 regulation which can only apply in connection with proceedings on
15 admission of guilt. This I do not understand, because if we read
16 Article 65(2) and Rule 139 as regards proceedings on admission of
17 guilt, we see that the Chamber may convict an accused person even if
18 evidence is not produced or if only a minimum amount of evidence is
19 produced. So it would certainly not be in the framework of
20 proceedings on an admission of guilt that witnesses would be called
21 and would be questioned. It would certainly not be in connection with
22 such proceedings that this would apply. Rather, I see this provision
23 as applying when there are a -- there is a large number of witnesses
24 to be questioned, and that in the interests of effectiveness it has
25 been considered that it would be absurd to question witnesses over a

1 matter of months and then have to bring back half of those witnesses
2 in the event of a conviction to be questioned in connection with
3 reparations.

4 I believe that Regulation 56 is a provision which underpins
5 effectiveness, efficiency. Indeed, you could decide to apply that
6 regulation for all of the proceedings, in which case we would become
7 almost a party to the case, or you might decide to apply it on a
8 case-by-case basis, on a witness-by-witness basis. There will
9 undoubtedly be witnesses who are of no particular interest or concern
10 to the victims, as there may well be witnesses who do directly -- or
11 are directly connected to the interest of the victims, and there we
12 will want to put questions if the Prosecution or Defence have not done
13 so.

14 This is not prejudicial at all to establishing the guilt or
15 innocence of the accused person. I think that it can indeed be in the
16 interest of the Defence that a witness be questioned on the prejudice
17 or the harm suffered by a victim, particularly if the Defence believes
18 that the claims of the victim are ill-founded.

19 The matter of the rights of the Defence and a fair trial, these
20 are covered by Articles 68(3). I do not mean that the rights of
21 victims should be reduced.

22 If a victim is a participant in the proceedings, the fact that
23 they participated does not prejudice or violate the rights of the
24 Defence in any way. Nobody has ever claimed that the French or
25 Belgian criminal justice systems infringe human rights, international

1 human rights, simply because victims may participate in those
2 proceedings and may join the proceedings at the side of the
3 Prosecutor. No. The rights of the Defence are the rights to defend,
4 and there the Statute emphasises this clearly.

5 If applications are made and positions are adopted, then the
6 Defence must, of course, have the right to respond, to reply, to
7 challenge. However, to my mind victims participation is never a
8 threat as such to the fairness of the proceedings or the rights of the
9 Defence. Large numbers of groups of victims could pose difficulties
10 for the effectiveness of the proceedings.

11 Here we have two groups of victims. Were we to be 100 groups of
12 victims and each were to have the right to address the Court, that
13 could indeed cause difficulties in relation to crimes which have
14 affected large numbers of victims, and this is almost by definition
15 the crimes against humanity, the crimes which we are dealing with
16 here.

17 In connection with the efficiency of the proceedings, there, too,
18 a balance must be struck. One could adopt positions which have a
19 negative impact, a perverse impact.

20 Let's take the example of the confirmation of charges hearing
21 where one single witness was questioned in public proceedings over
22 several days. In the course of those days, we, the victims
23 representatives, put one question, one question only, and to put that
24 question we had to explain our request. The request was discussed in
25 an adversarial fashion. The Chamber withdrew to deliberate and

1 returned to rule. And this was a very simple question that we wished
2 to put.

3 Now, of course such a procedure could be applied in relation to
4 each witness and each question, but I do not think it -- such a
5 procedure would be in the interests of efficiency. Personally, I
6 think that the systems which we see in the national courts, national
7 courts before which I appear, there what happens is that the legal
8 representative will put the question to the Presiding Judge. "May I
9 put such-and-such a question?" He may deliberate with the other
10 Judges on the Bench but rules, adjudicates, on the spot based on his
11 discretionary power. So I do believe that a balance must be struck
12 there also between the rights of each comer and efficiency.

13 PRESIDING JUDGE FULFORD: This is expressly provided for in Rule
14 91(3)(a), is it not, where the request has to be made. How one
15 resolves the request is of course a different matter.

16 MR. WALLEYN: Of course. I agree. We have to address the
17 request. The issue is as should this request be discussed with
18 everybody, or is it just a request to the Court and the Court decides?
19 I think the second option is more efficient.

20 (Interpretation) The issue of anonymity. I can understand that
21 the Defence has difficulty accepting that a victim obtain reparations
22 against the accused without his identity being divulged. If the
23 situation is one victim, one accused person, that might seem absurd.
24 However, when there are situations with hundreds or even thousands of
25 victims, which will sometimes be the case at this court and which may

1 yet potentially be the situation in this case, the identities of each
2 of these thousands of victims is not of great importance.

3 In the United States, for instance, there are civil cases,
4 class-action cases, where the identity of the applicants is not
5 necessarily divulged, not necessarily divulged to the accused person
6 or the person being sued.

7 When it comes to collective reparations and indemnities which are
8 foreseen by the Statute, I don't see the utility of providing the
9 individual details of victims, name, surname, marital status, date of
10 birth. I believe that when it comes to reparations which are not
11 necessarily financial in nature, and once again I would refer to the
12 texts of this court but also to the declaration of principles and
13 directives which I referred to earlier, reparation can be of a
14 non-pecuniary nature. It may be apologies or rehabilitation of the
15 person.

16 In the case of child soldiers, the fact that they are told, "You
17 are victims. You are not criminals," is already a form of reparation,
18 and that reparation does not necessitate that the identity of the
19 victims be known.

20 PRESIDING JUDGE FULFORD: How would you formulate the test
21 though, Mr. Walley. You're saying that if it's a one-defendant,
22 one-victim situation, it would be absurd for the identity not to be
23 known, but if there are thousands of victims then perhaps the -- the
24 need for victims' identities is reduced, but how do you formulate the
25 moment where it moves from being a situation where the identities need

1 to be revealed to a situation where they don't? There's got to be
2 some kind of principle attached to this submission which is workable.
3 Now, how do you formulate it?

4 MR. WALLEYN: Well, I think, Mr. President --

5 JUDGE ODIO BENITO (interpretation): I'm sorry. I'm sorry. And
6 in close connection with this question, how do you envisage the
7 relationship between the protective measures and the modalities of
8 participation of the victims all together?

9 MR. WALLEYN (interpretation): If I might, Mr. President, and I
10 will first respond to the question of Judge Odio-Benito. Ladies
11 first.

12 I think that one needs to adjudicate on the need of -- to protect
13 a victim quite independently from his or her rights. The need to be
14 protected is not the fault of the victim. It is *force majeure*. It is
15 because the victim is in danger that he or she needs to be protected,
16 and it is an obligation of the court to protect victims and witnesses.
17 It is not a favour which is accorded, and is also not something which
18 should be negotiated against rights. Something which I would hate to
19 see, and something which we have, of course, had to consider is to
20 have to go to our clients and say, "Sir, madam, the Court has decided
21 that you must withdraw from the proceedings unless you divulge your
22 identity publicly or at least that you provide your identity to the
23 Defence," and that would then mean divulging their identity to the
24 political group which the Defence represents.

25 We could also discuss to what degree identities could be divulged

1 to counsel under the proviso that the information is not passed on to
2 the client. The Pre-Trial Chamber has already envisaged that and even
3 decided that certain pieces of information could be provided to the
4 Office of Public Counsel for the Defence but not to the Defence team
5 and, therefore, not to the accused.

6 So there are quite a number of options which are possible, but I
7 certainly would not like to have to go to my client or clients and
8 say, "Are you willing to risk your safety, risk your life or that of
9 your children, to participate or continue to participate in these
10 proceedings?" That is a question which the court should not put to
11 the victims.

12 That said, aside from any connection between the need to protect
13 and the matter of participation, you are right, Mr. President, that
14 there are times when it becomes logical to know what it is we're
15 talking about.

16 If I claim an indemnity of 100.000 euros from Mr. X, and this is
17 justified, or supposed to be justified based on the harm suffered,
18 then it would seem reasonable to provide my identity at the same time
19 that I prove the harm suffered. But we are not at the stage of
20 reparations, and at this stage we are not applicants, except for
21 Ms. Bapita's client. Our clients have not lodged an application for
22 reparations. They will undoubtedly do so, but at this point in time
23 we are at the stage of participating in the proceedings where no
24 application for reparations has been lodged.

25 A compromise, and here I speak on my own behalf, not on the

1 behalf of my team or my client, a possible compromise would be that
2 when we come to discuss reparations, those who do not wish to divulge
3 their identity will have to withdraw. Unless, of course, we were to
4 discuss collective reparations or reparations that need not be
5 justified by the individual harm suffered.

6 PRESIDING JUDGE FULFORD: That may be a decision that would have
7 to be made early on, Mr. Walley, if -- if the Chamber was sympathetic
8 to the idea that there could be a joint trial of the guilt or
9 innocence of the accused running alongside the issue of reparations,
10 and so that would mean an abandonment of an entitlement to reparations
11 at a very early stage in the proceedings.

12 MR. WALLEYN: I agree, Mr. President, that if, if the court
13 decides to join the whole procedure, to give to the victims
14 practically the rights as party, to act as party, to produce evidences
15 about their prejudice, to produce maybe also evidences on the
16 responsibility of the accused, to question witnesses in the same
17 conditions as the Defence as it is provided for in hearings on
18 reparation, maybe this issue is to be judged differently as well.

19 So basically my position is indeed that there should be a balance
20 between rights and obligations, and if the Court decides that there
21 will be, as it is the common procedure, first the stage of debate on
22 the responsibility of the accused and only in the first step after
23 conviction a debate on reparation, in that situation I can accept that
24 our rights are not the same. But in that situation I don't see also
25 the necessity that every participating victim should be known by the

1 accused.

2 (Interpretation) We can even -- because here also I have to
3 mention the arguments that are given. For example, you say a victim
4 should be able to verify if they're a victim -- a victim isn't a
5 witness, but I haven't read anywhere that a victim who participates in
6 the proceedings cannot be questioned as a witness. There's a
7 provisional decision perhaps with regards to this issue from the
8 Pre-Trial Chamber, but it's a decision which hasn't been ruled on yet
9 and where there might be a differing comment and arguments on this.
10 This is something that has to be decided on by the Court.

11 If a victim hasn't demand -- requested reparations; for example,
12 if the victim has already introduced a request for reparations, can
13 that person be a witness? Yes or no? But there are comments or
14 comments that are given who say that perhaps even the accused person
15 could be heard as a witness if that falls within the framework of a
16 request, or if a person who -- but if there's one person who's
17 participating in the case, of course it's the accused.

18 Now, with regards to being heard as a witness, it's also possible
19 to hear them because they have participated in the proceedings. They
20 have been in the hearings via their presence of their legal
21 representatives.

22 So, President, I think that we have to be serious. The legal
23 representatives of victims aren't victims. The counsel of the accused
24 is not -- the accomplice of the accused is not the accused. These are
25 different things. And of course it is not because a counsel has been

1 party to proceedings that his client, future client, or client who
2 isn't necessarily there as a -- cannot be heard as a witness. That is
3 not the case before our national courts, and it is not the case here
4 either.

5 Furthermore, this Rule 143 is a Rule which is relative, because
6 if we think that a witness cannot know the content of a testimony and
7 that the pure presence of his counsel could be of such a nature to be
8 able to give information with regards to what was said by a witness,
9 then it is noted that this Rule can only be applied to witnesses who
10 are heard on the same day, because the hearings are disseminated
11 throughout the whole world, live or with half an hour time delay, and
12 any witness does not need to have to be at the court or to have a
13 counsel present at the court who is the spy, if you like, in the
14 court's hearings to be able to know what is said within this
15 courtroom.

16 We have asked to be able to make statements, particularly at the
17 start and the end of the trial, and we have formulated concrete
18 proposals in that regard.

19 PRESIDING JUDGE FULFORD: That's provided for is it not as one of
20 the possibilities.

21 MR. WALLEYN: Yes, but even that's contested, Mr. President.
22 Even that's contested. The Defence pretends that it's only --
23 (interpretation) what I've understood is that -- that the declarations
24 can only be done in hearings which are specifically given to the
25 interests of the victim. And you state, furthermore, that there is a

1 contradiction between Rule 80 -- or 103(1) and 89(1) and 143(1) where
2 they say that it's only statements of the Defence and the Prosecution,
3 and of course there's no contradiction. Rule 143 does point out that
4 at the end of the presentation of evidence, the Prosecution and the
5 Defence will give final submissions with regards to the evidence
6 presented or discussed, which -- what's normal, no more than that, but
7 that's got nothing to do with the participation of victims nor with
8 the application of Rule 89(2) and if I have misread your submissions
9 all the better. If there's no challenge with regards to this
10 declarations at the start and the end, then it means that I have
11 misunderstood. But of course this rule does not limit the possibility
12 to make declarations at the beginning and at the end because the -- it
13 is stated that the Court can use such statements at the start and at
14 the end, opening and closing statements, and also that there should be
15 the opportunity to present statements or to give statements.

16 And I would like to add, Mr. President, that unlike the
17 Prosecution and the Defence, we are going to ask you for authorisation
18 to be able to do so, but we're not going to do it systematically for
19 each witness every issue. We are going to do it when we think that
20 it's necessary to do so.

21 With regards to common representation of victims, this is
22 something that -- well, I've already referred to with regards to the
23 effectiveness or efficiency of the proceedings. It does concern us as
24 well. It concerns all the participants, and nobody has an interest in
25 their being here for days or weeks or months, debates which are empty

1 by people who are coming just to add to or to repeat what's already
2 been said. But once again, we have to find a correct balance.

3 It's clear, obvious, that today with two groups of victims who
4 participate in the proceedings, we can't say that there's a number of
5 victims or a number of groups which is too significant to be able to
6 harm the effectiveness of the proceedings. But we also note that
7 there are other groups who have also made a request. We know, for
8 example, that there are victims who have made such requests and -- or
9 will do so in the future, so this issue will come up.

10 I just want to stress one particular point. I think that the
11 Prosecution and the Defence have -- do have something to say with
12 regard to the number of groups of victims that we can have in these
13 proceedings. It's true that if there's a hundred, for example, that
14 would create a problem and you have the right to mention that, and
15 that's something that can be discussed and the Court will decide what
16 should be the optimal number of groups. But where I have to be very
17 firm is when I say that the Defence and the Prosecution do not have a
18 place to make it -- with regard to the choice of victims' teams, and
19 they do not -- they should not get involved in regards to the criteria
20 which should be adopted to be able to group together victims in
21 particular groups. This is an issue between the victims, the
22 Registry, and possibly the Court, which exercises its control, powers,
23 over that and fully in accordance with the Rules of Procedure and
24 Evidence, Article -- Article 94, Rule 94.

25 And this last point that I wanted to make is with regards to the

1 Defence. We consider that even with regards to the applications for
2 participation, they should be re-examined by the Court. This is not
3 the rule, but this is an exception which is authorised by the
4 Regulations of the court. Certainly, the rule is that if the
5 victims -- or if victims have been authorised to participate, this
6 authorisation is also valid for the trial unless another Chamber has
7 decided otherwise.

8 And it is up to you, Mr. President, Judges, to decide if you're
9 going to accept the applications of the Defence, and of course we are
10 prepared to debate again with regards to our participation dossier.
11 Personally, I think that it is not necessary, particularly because the
12 argument mentioned by the Defence is not convincing. The argument to
13 do so is just the fact that the Pre-Trial Chamber has changed the
14 period with regards to the crime, the time period during which the
15 crimes were committed. But if we take the -- when we take the
16 decision of the Pre-Trial Chamber of the 24th of July, 2006, you don't
17 even have to look at the file. You just have to read the decision.
18 Well, you can see that the victim A, 00106, was -- saw his son and
19 grandson in -- who were aged less than 15 in September 2002, he saw
20 them enlisted, and until August 2003. For victim 2 saw his son
21 enlisted in the militia between February 2001 and March 2003, and once
22 again between August 2003 and October 2004, and that the victim number
23 3 did not have new -- has not had news of his son since the UPC
24 enlisted him by force since March 2003.

25 So where it concerns our clients, I think it's also the case with

1 regards to the victims represented by Ms. Bapita, these fall fully
2 within the framework of the time period taken into account by the
3 Pre-Trial Chamber such that at first sight. That doesn't seem to be a
4 valid argument put forward such that the Court should re-examine the
5 decision which was taken and take a different decision on that.

6 I would just like to stay with that, Mr. President. This was a
7 reply to what the Defence stated by way of submissions. I have read
8 relatively little of the facts with regards to the Prosecution with
9 regards to the communication of the dossier, and I would just like to
10 say a word before finishing with regard to that question, but of
11 course if, for example, on the side of the Office of the Prosecutor,
12 if there are positions or arguments which are developed, then I would
13 ask you to also give me the floor to be able to reply on that matter.

14 Now, just with regards to the access to the documentation in the
15 record. This is an issue which we've already debated in the
16 proceeding hearing. I had understood that this issue was resolved for
17 the most part because the Office of the Prosecutor told us that all
18 the documents which support the Prosecution, so not potentially
19 exculpatory documents but the documents -- incriminating documents
20 which were produced before the Pre-Trial Chamber after the last
21 hearing and after the Pre-Trial Chamber had referred the case to it,
22 then all -- everything would be referred to the dossier, and in
23 accordance with the Rule 130, we'd have access to it.

24 Now, we were made aware of the decision of the Prosecutor of
25 the -- or to file all these documents in the record of the court, but

1 until now we only have via Citrix, or I don't know whether
2 it's been changed yet, but until now we still don't have access other
3 than to 161 documents which were produced until -- by the 17th of
4 October, and there's a new group of documents.

5 What I've understood is that the Statute -- the status of these
6 documents with regards to the Prosecution is not different, with
7 regards to the documents that have previously been submitted, but
8 perhaps the Registry is simply expecting a decision from the Chamber
9 on this issue. But unless it's due to administrative slowness on the
10 part of the Registry service, of course I would ask that we also have
11 access via Ringtail to these documents. Mr. President --

12 PRESIDING JUDGE FULFORD: I think this is one of the things,
13 Mr. Walley, that we have got to resolve, and we've heard submissions
14 on this already, is the exact nature of the procedures that should be
15 followed as regards, for instance, filing documents with the Registry
16 when they're exchanged between the parties, and you can expect a
17 decision on that from us in the relatively near future.

18 MR. WALLEYN: Thank you very much, Mr. President.

19 (Interpretation) So I'm now going to ask you to give the floor to
20 Ms. Bapita. I'd also like to mention because we haven't gone around
21 all the different participants where it concerns the presence -- I
22 would also wish to point out, Mr. President, that Mr. Mulenda was
23 unable to come; although, he really wished to be present at this most
24 important hearings. This is for medical reasons.

25 The victims that are participating are represented by two legal

1 officers from the OPCV. That is Sarah Pellet and Roland Adjovi and
2 Tamara Margitic as case manager thank you.

3 PRESIDING JUDGE FULFORD: We're very grateful to you.

4 Ms. Bapita.

5 MS. BAPITA (interpretation): Thank you for giving me the floor,
6 Mr. President. We are assisted by the legal officer of the OPCV that
7 is Sarah Pellet and Mr. Roland Adjovi. We're also assisted by
8 Ms. Tamara Margitic as case manager.

9 Mr. President, many things have been raised by my colleague, the
10 previous speaker, and like him my contribution with regard to the
11 Defence reply. I shall focus on three main points for which I thought
12 that the concerns were not sufficiently highlighted by Mr. Luc
13 Walley.

14 First, it is with regard to regulation 56 of the Regulations of
15 the court, point 14, that is 14 to 16. I do not agree because the
16 Defence deduces that Regulation 56 of the Regulations of the Court
17 cannot be reconciled with a fair and expeditious -- with fair and
18 expeditious proceedings except the accused pleads guilty. This means
19 in the case -- in the case where proceedings on harm do not affect the
20 presumption of innocence.

21 I have considered this regulation carefully, and on no account do
22 I find it expressly stated that it could not be applied except where
23 the accused pleaded guilty.

24 In our case, and this is our position, I think that if the Court
25 were to invite, based on the merits a discussion of the questions of

1 testimony of any person with regard to elucidating the harm suffered
2 by the victims under Regulation 56, it would be interesting for
3 victims who are interested in this harm, which is why I mention the
4 personal interest of the victims. It would be, therefore, interesting
5 for the victims to be able to participate actively by examining these
6 witnesses on these facts.

7 But to the extent that the Court will decide to maintain these
8 proceedings all through the case, our contribution, our intervention,
9 could not be on a daily basis. It can only occur if there is
10 testimony or statements on the facts that are in keeping with the
11 interests of our victims or the harm they have suffered. This means
12 that we can maintain this approach without taking the floor at all
13 times, and it would not in any way affect the conduct of proceedings
14 or delay them.

15 However, I would like us to consider a situation where in the
16 course of the proceedings, that is the period after the conviction and
17 before reparations, a situation where a witness talks about something
18 that is of interest to the victims without being covered by Regulation
19 56. I think in such case it would be desirable for the Court to
20 exceptionally grant leave to the legal representatives to be able to
21 examine this witness if the witness is able to prove that his or her
22 testimony is -- relates to matters that would be of interest to the
23 victim.

24 Regarding reparations, it is obvious, Mr. President, that
25 reparations, or during reparations proceedings, it is active. We

1 examine the witness. We can also examine the accused. There is no
2 restriction on our rights as there is at the time of the proceedings
3 to determine guilt.

4 What I wish to emphasise is with regard to the Defence
5 submissions in point 2.2.5; that is, the anonymity of the victim.
6 This is a crucial point in my view, and I do not agree when the
7 Defence claims that anonymity is not necessary for the protection of
8 victims.

9 The Defence relies on the period during which the victims were
10 accepted as victims before the court or at the time when the
11 applications for participation were filed with the Registry. But in
12 order to address the Defence concerns, it would be worthwhile to
13 consider what the capacity of the Victims and Witnesses Unit is in
14 terms of providing protection for any victim that wishes to attend the
15 proceedings without anonymity.

16 Is it normal to consider that we are going to consider for
17 victims to say that they were going to disclose their identity to the
18 Defence in exchange for protection? This would reassure the victim
19 and the family for all subsequent applications. What is the capacity
20 of the Victims and Witnesses Unit to provide protection, effective
21 protection? We cannot set aside the issue of security.

22 In the DRC there is not peace. You know what is going on there.
23 You know that there is a lot of unrest in the east. We cannot deny
24 the obvious. There is a serious security problem, and for this reason
25 we must provide victims with protection.

1 During previous hearings, we heard the Victims and Witnesses Unit
2 say that they had already had 50 witnesses who would apply or appear
3 for the Prosecution without anonymity. I shall go further and say
4 that if all the people who requested participation in proceedings, if
5 most of them were to accept it, we would have a fairly large number of
6 people. What is the ability or capacity of the VWU to provide
7 protection for all of these people? Would it therefore be logical to
8 maintain that the anonymity should be set aside because the
9 Prosecution must be aware of the people who are asking for reparations
10 behind its back, or should we not face the facts and find a balance?

11 We are of the opinion that we can find a balance, but before we
12 propose that, Mr. President, I would have liked to emphasise some
13 aspects that will enable the Court to appropriately weigh the context
14 and the reason for the anonymity.

15 When the Defence says that it is not necessary, we disagree, why
16 so? We said that Ituri is in the east of the DRC. We have said -- we
17 have not said, but I'm telling you now, Mr. President, that Mr. Thomas
18 Lubanga Dyilo is not just anyone. This is a man who has the
19 confidence of his base or the grassroots in his community. For this
20 community this is a sacrificed person. You have had the time to go
21 through the record, to refer to the proceedings of the Confirmation
22 Hearing, and you would understand that this is one of the rare people
23 who had the courage to stand up and end the genocide of the Hema
24 community. In his community, they do not accept to hear and see that
25 he's here appearing for acts that he committed in the interests of the

1 community.

2 Mr. President, please also bear in mind that Mr. Thomas Lubanga
3 Dyilo is the president of the UPC, a political party which has three
4 members of parliament which were elected in Imuru territory. They are
5 present and they have political clout. They have -- he has militants
6 who still believe in him to this day. And I must tell you that a
7 great -- a significant part of the applicants come from Imuru
8 territory. Most of the victims who are seeking reparations, who
9 sought to participate in the proceedings or are participating in the
10 proceedings, also come from his community.

11 So what would be the reaction of the community when they are
12 present in court? They are described as traitors because it is these
13 children, they say, he took the work-force from the community. It is
14 therefore not normal that the children of the community bring him to
15 court.

16 When there are any exceptions, there would -- may be victims who
17 are not from his community but most of them are. So can you imagine
18 what would be the reaction of his community at grassroots level when
19 it is known that it is X who has come to give testimony before the
20 Court or that it is Y who has applied to participate in the
21 proceedings as victim?

22 I'm not wishing to go to extremes, but 90 per cent of the people
23 may be killed, or these people have a 90 per cent of being killed,
24 eliminated, or liquidated.

25 Mr. President, to give you some material so that you can weigh

1 the degree of insecurity on the ground, I will say that no later than
2 the 18th of July, 2007, in Bunia, in a case of the Prosecutor and the
3 former minister of defence of Thomas Lubanga, Mr. Kahwa Panga Mandro
4 in respect of events he committed and which were committed, it
5 seems, under the UPC, we were there. There were 13 victims. We
6 assisted them in the Trial Court and the Appeal Court. There was
7 "acquittal." How did the UPC militants in the court respond? It can
8 be checked. MONUC was present, Rejusko [phoen] which organised the
9 proceedings was present. The police which was supposed to protect the
10 victims now that they were under threat were there. This is
11 verifiable evidence.

12 These victims did not sleep. They were forced to leave their
13 homes because they were threatened as they had come to give testimony
14 against the minister of defence. Their lawyers had to ask for MONUC
15 protection to be able to leave the hotel where they were lodged to go
16 elsewhere. This -- if this is the grassroots response to the minister
17 of defence, then consider what it would be for the president of the
18 UPC who has been considered as a sacrificed person, and who it is said
19 did everything to limit the genocide of the Hemas.

20 PRESIDING JUDGE FULFORD: Is there a documentation in relation to
21 that, Ms. Bapita, for instance, from MONUC?

22 MS. BAPITA (interpretation): Quite so, quite so, Mr. President.
23 You can check this at the military court of Bunia, and they will give
24 you all this data. MONUC had to take measures to protect the victims
25 and we'll give you the details, Rejusko [phoen] which is from the

1 United -- or the European Union will give you all these details, and
2 in the Confirmation Hearing you will hear everything about what Mr.
3 Lubanga did to end the -- the Hema genocide.

4 So in this case I wonder, since the Prosecution would like to
5 know who these people who have come to seek reparations are or who are
6 the people who want to -- who applied to participate in the
7 proceedings, should we then consider that we should -- I should accept
8 to reveal their identities knowing what is -- what they should be
9 expecting?

10 I understand the Defence interests in wanting to know the
11 identity of people, of victims, but should I take this risk for all
12 the victims, or should I, in terms of bringing the victims together in
13 a group present a key element for each group? Why do I say a key
14 witness or a key person? Perhaps you will discover this when you will
15 be responding to the applications for participation still pending
16 before the Registry. You will understand that some of these children
17 underwent training in the same armed camp. They underwent the same
18 training. They had the same commander. They had the same course, and
19 they lived in the same geographical area. For these people will I be
20 forced to accept that their identities be revealed or whether in terms
21 of representation I can select one key person who can answer for the
22 facts that have been experienced by everyone as evidenced in their
23 applications for participation?

24 What would be the advantage, Mr. President? We would protect a
25 large number of victims on the one hand, and furthermore, we would

1 reduce the workload of the Victims and Witnesses Unit, and somehow
2 also, Mr. President, the Prosecution would be aware of the identity of
3 the key person who will be appearing on behalf of the others, and I
4 can assure you that when you will have to rule on their applications
5 that you will know that there at least -- or there will be at least
6 three groups who will be able to apply or to appear.

7 So it is up to us. Should we remove anonymity, bearing in mind
8 will happen to these children or their families, or shall we review
9 our position because we are aware of the issues at stake and that we
10 want to take the decision based on the security situation as I've
11 described it to you?

12 Mr. President, your Honours, a second point was raised. This was
13 raised by Mr. Luc Walley, and this concerns the legal representation
14 of the victims.

15 The Defence argument was limited to applying to the Chamber for
16 the victims to be able to be joined in groups because they have done
17 so when they made a collective submission.

18 I'd like to highlight one thing. It is not at all times that we
19 have convergent view points, sometimes we have divergent viewpoints.
20 But we are quite in agreement that for issues for which we consider
21 that it is in the interest of all victims not to waste time by
22 submitting two different submissions but to make one single one --

23 PRESIDING JUDGE FULFORD: Ms. Bapita, I think I can help on this.
24 You would submit, wouldn't you, that this has to be a fact-dependent
25 situation. Whether or not there can be common representation will all

1 depend on whether there is common interest and whether it is
2 practically possible to put a particular number of victims, as it
3 were, under the care of one advocate, and one is just going to have to
4 look at the particular applications and the particular circumstances
5 application by application, group by group. Is that a fair summary of
6 what you'd say on this?

7 MS. BAPITA (interpretation): Quite right. You understand me.

8 I shall now move on to my next point, Mr. President. That is
9 point 45 submitted by the Defence regarding the stage of the
10 proceedings at which victims may be authorised to intervene.

11 Mr. President, we support those who consider that we must be
12 given the opportunity to participate at all stages of the proceedings.
13 Why so, or how, better still. It is not that in participating in
14 the -- all stages of the proceedings that we will have the opportunity
15 to respond to all matters or points that will be raised or that we'll
16 consider to be as of interest to us. No. That is not the case.

17 When the Defence says at paragraph 45 that the legal
18 representatives say that this only fact of -- mere fact of stating
19 that one was enlisted in the UPC does not grant victims the right to
20 participate in the proceedings and to prevent -- present their views
21 and concerns on all issues.

22 I think common sense should guide us all so that we can realise
23 in regard to the temporal jurisdiction which you fixed, that is
24 regarding the crimes, that if the victims then fall within this
25 period, normal logic would expect or require them to participate at

1 all stage of the proceedings, because in some way the Defence itself
2 maintains either under Regulation 56 or regarding the reparations
3 stage that our interventions should not be fixed or should not refer
4 to other than the personal interests of the victims. So how shall we
5 be able to know whether it is now that our interests will be affected
6 and so we must participate if we do not participate at all stages of
7 the proceedings?

8 We are of the opinion that we must be given the opportunity to
9 participate in all stages of the proceedings so that we may be
10 afforded the opportunity to decide and to find out at what point we
11 may intervene.

12 And so, Mr. President, our participation regarding the temporal
13 jurisdiction which you set should normally allow us to participate at
14 all stages of the proceedings and to participate when we will be
15 required to follow the regulation 56 or the reparations proceedings.

16 For the rest I support the submissions of Mr. Walley, and I may
17 return to this later if the Defence requires me to do so, forces me to
18 do so, and I shall do so if I may do so with the leave of the Court.

19 PRESIDING JUDGE FULFORD: Mr. Preira, we are shortly going to
20 have to give the interpreters a rest in five -- five or six minutes.
21 Had you intended to participate during these submissions or not, or do
22 any of those sitting with you intend to participate?

23 MR. PREIRA (interpretation): Thank you, Mr. President. We are
24 here today to assist the Chamber. We did not come with the intention
25 of making any specific submissions whatsoever. We shall do so if the

1 Chamber considers this to be necessary. And if it happens that based
2 on the submissions by any of the participants the registry is required
3 to provide any clarification to assist the Chamber in its
4 deliberations, we shall do so.

5 PRESIDING JUDGE FULFORD: We'll just have a short discussion
6 between ourselves.

7 [Trial Chamber confers]

8 PRESIDING JUDGE FULFORD: Ms. Bapita, we're going to rise now for
9 half an hour to give those doing the interpretation a rest. However,
10 just to warn you that when we return, if it's convenient we're going
11 to ask for the Defence submissions next, given particularly that
12 there's been quite a lot of references thus far to the Defence
13 position, and it would be helpful to us if you were in a position to
14 respond to those points when we return.

15 So we'll rise now for half an hour and sit again at 10 to 4.00.

16 Recess taken at 3.20 p.m.

17 On resuming at 3.56 p.m.

18 COURT USHER: All rise. Please be seated.

19 PRESIDING JUDGE FULFORD: Ms. Mabilille, can I apologise to both
20 you and Ms. Bapita. Just before we rose, I confused your names, but
21 I'm sure you understand that I was referring to you and not to
22 Ms. Bapita.

23 MS. MABILLE (interpretation): No, worries, Mr. President,
24 especially as I think that you said Ms. Mabilille, and I think it's the
25 translation that said Ms. Bapita, but perhaps it was a mistake on my

1 part.

2 Regarding the victims, Mr. President, my colleague Mr. Jean-Marie
3 Biju-Duval will provide the answers.

4 PRESIDING JUDGE FULFORD: Thank you very much.

5 MR. BIJU-DUVAL (interpretation): Mr. President, your Honours, in
6 listening to my learned colleague Mr. Luc Walley, and my learned
7 colleague Ms. Bapita, I get the feeling that a misunderstanding may
8 arise for the Court and for the people who are listening to or
9 attending this hearing.

10 I would like it to be clear to everyone that we are all of the
11 view in regard to victims that we have the same fundamental
12 objectives. We share the fundamental objectives which have been
13 raised by my learned colleagues Mr. Luc Walley and Ms. Carine Bapita.
14 Where our views differ is on the method; that is, the methodology for
15 a fair and efficient means of attaining these objectives.

16 It is clear to everyone, and particularly to the Defence, that
17 the access of victims to international criminal justice is a major
18 advance in terms of law and justice. It is obvious to everyone that
19 the Defence, first and foremost, amongst others, is there to make it
20 actually possible for the right of victims to be fully and concretely
21 guaranteed. This means that for the victims to be able to enjoy fair
22 and expeditious proceedings in which the victims themselves can
23 have -- see their rights guaranteed is one of the intentions of the
24 creators of the International Criminal Court, and as we know, the
25 legal instruments are the result of a compromise seeking to attain

1 these objectives.

2 This compromise took account of the major legal systems and
3 traditions, that is common law and civil law. And I would like in
4 this regard for matters to be clear. When I listen to my colleague,
5 Mr. Luc Walley, I get the feeling that the system applicable in
6 common law countries would be anti-victim, that it ignores the issue
7 of victims and their right to reparations. Each system has checks and
8 balances, none of which ignore the central interests of the victims
9 and their right to reparations.

10 So the text we have are the outcome of a compromise, a compromise
11 which has brought about a procedure which is largely adversarial in
12 nature and of a common law nature but with concessions to civil law.
13 The procedure distinguishes between two types of proceedings,
14 proceedings to achieve reparations for victims and the harm suffered
15 by them, and there are provisions in the text regarding the
16 participation of victims which regulate their participation in the
17 trial proper, that is to say the review of the charges.

18 In interpreting the texts, the Chamber will note that on the
19 essential points the Defence and the Prosecution are in agreement also
20 with the legal representatives. Mr. Walley earlier, when he
21 presented his submissions, expressed them largely as a reply to the
22 Defence, the Defence who he claimed wanted to sideline the victims
23 from the proceedings. I would say that in fact we are largely in
24 agreement with the position expressed by the Office of the Prosecutor
25 which the Prosecutor will set out in a few moments. So the Defence

1 has analysed the texts and agrees largely with the Prosecutor on his
2 interpretations to arrive at a number of conclusions.

3 The first point, victims may participate in the proceedings in
4 two different areas, the application for reparations and in the trial
5 proper. The texts provide for a time and a place and a procedure in
6 which the victims are fully fledged parties, a party to the
7 proceedings, and that is at the time of the proceedings on reparations
8 at which they shall defend the rights of the victims.

9 In relation to the reparations proceedings, I won't get into the
10 detail of the text, but the Chamber will note that it takes place
11 after the trial, that is to say the proceedings to discover -- to
12 establish the truth, establish responsibility, and examine the
13 charges. Most of the provisions of the Rules of Procedure and
14 Evidence and Statute speak of the reparations proceedings taking place
15 after the trial as such, after the establishment of criminal
16 responsibility.

17 To ensure that there is no confusion between the fundamental
18 objective of the trial as such which is to establish the facts and the
19 responsibilities, on the one hand, and the other objective of the
20 trial, which is to ensure that the victims can exercise their rights
21 and can obtain reparations. This distinction is made in the texts,
22 the distinction between the two objectives, the establishment of the
23 facts with occasional participation by the victims and the examination
24 of reparations with greater participation by the victims. The texts
25 also provide for certain exceptions to the basic system or systems.

1 However, there is a point on which we differ in our
2 interpretation to the Prosecutor, and that is in relation to
3 Regulation 56. Regulation 56 gives the Chamber the possibility to
4 examine certain evidence during the proceedings to establish the facts
5 and the responsibilities, to examine those evidence in light of
6 possible reparations. It seems to us that Regulation 56, even if not
7 expressly provided for, in fact, relates to an exception. That is to
8 say that there may, in certain cases, be evidence presented during
9 the -- the trial as such which can also be viewed in relation to the
10 reparations, and this is notably in the case when the accused person
11 has admitted guilt.

12 In such a case there is a trial based on the charges which have
13 been confirmed, but during that trial the -- the harm suffered might
14 be examined in the same context. Notably also an examination of
15 evidence will be made in light of establishing the right sentence.

16 Now, we are not against the Court considering examining the harm
17 suffered during the trial, because the trial is there to establish the
18 facts, and those facts relate to what is supposed to have happened to
19 the -- those who have the status of victim. Therefore, there will be
20 a link with the harm suffered. However, establishing the facts is
21 very much the job of the Prosecutor.

22 So having circumscribed this domain, this area, in which victims
23 have rights to be exercised and may participate fully, that is to say
24 in the area of the reparations proceedings.

25 Now, as regards the trial proper, which is -- the objective of

1 which is to establish the facts and the responsibilities, there are
2 three questions at this stage. Who is to participate? Which victims
3 may participate in the criminal proceedings, criminal trial?

4 Here the Chamber must be vigilant to ensure that the trial
5 doesn't become a kind of community trial. We should avoid that at the
6 International Criminal Court. Opposing groups confront one another,
7 and that is why it is important to establish who the direct victims
8 are of the crimes being prosecuted. There is an obligation to
9 circumscribe the -- the victims to be granted participation rights on
10 a prima facie basis vis-a-vis an identified accused. So there's an
11 obligation to be precise and to circumscribe clearly who is to be
12 involved.

13 The Chamber must also be vigilant on the causality link between
14 the -- the harm suffered and the crimes alleged in the case of these
15 crimes regarding the enlistment of child soldiers. The -- those
16 suffering harm are child soldiers and their parents. Another factor
17 is the temporal jurisdiction; that is to say, it must be verified that
18 the victim claims harm suffered during the period which has been
19 stipulated in the confirmation of charges. That is to say, a time
20 period which is more restricted than that which appeared in the arrest
21 warrant. Mr. Luc Walley knows that we have received redacted
22 versions of the applications of victims, so sometimes it is not
23 immediately apparent whether that criterion is met.

24 Another factor is the identity of the victims. The Defence, like
25 all the other participants in these proceedings, has as a priority the

1 protection of victims and witnesses. We want everything possible to
2 be done to ensure that no one incur any risk as a result of their
3 involvement in these proceedings. The question is whether anonymity,
4 which has been the rule up until now, is compatible with the trial
5 that is to take place and whether anonymity is absolutely necessary to
6 the protection of victims.

7 I won't deal with the issues which we have already looked at or
8 dealt with in writing; for instance, whether the victims appear --
9 also appear on the Prosecutor's list of victims, et cetera.

10 One thing which is clear today is that the fairness of the trial
11 at this stage requires that victims do not remain anonymous. Why not?
12 It is true that a victim is not a party in the file, but the act alone
13 of alleging harm suffered against the accused person is to make
14 accusations. That situation, to our mind, demands that the accused
15 person should be able to respond to his accusers based on full
16 information.

17 There is a fundamental principle, in fact, which prohibits the
18 anonymity of victims and the participation of anonymous victims in
19 proceedings.

20 The victims have been allowed to enjoy anonymity up until now,
21 because at the point in time when anonymity was granted, according to
22 the Pre-Trial Chamber, it was the only measure which allowed
23 protection to be ensured. Today, I believe that it is not the only
24 measure available and that the Registry has the necessary means and
25 can put in action the necessary means to ensure the protection of

1 victims using measures other than anonymity. Anonymity may in the
2 past have been the only means. Today, I am convinced that other
3 measures could replace this measure which is prejudicial to the
4 interests of the Defence.

5 Moving on now to the second question: When and on what topics
6 may the victims participate in the proceedings designed to establish
7 the facts? Here, once again, the position of the Defence is entirely
8 in line with that expressed by the Prosecutor.

9 The system in which we are operating is largely accusatorial.
10 The Prosecutor produces his evidence, adduces it in the courtroom. It
11 is an accusatorial system which has its strong points but which also
12 requires balance. It is important that this largely accusatorial
13 system not have aspects brought into play which would create an
14 imbalance. The texts are clear on this.

15 There is the concept of the appropriate stage of the proceedings
16 and the concept of personal interest of the victim. The texts provide
17 for victims requesting to participate when their personal interests
18 are affected. The -- those personal interests are not the general
19 interests of the Prosecution. The texts provide that when victims
20 wish to participate, they may do so when they are personally
21 concerned, and may do so by adducing proof, or they may be interested
22 due to the adoption of proof or due to another aspect of the
23 proceedings.

24 How does a victim participate or request to participate? The
25 classic rule I think is Rule 91. This should guide us, I believe. It

1 grants the legal representative of the victim the right to
2 cross-examine a witness. This is the classic example.

3 It indicates that in the system provided for victims can attend
4 or follow all of the proceedings through their legal representative,
5 of course, but can only participate in what are basically bipolar
6 proceedings, Prosecution/Defence. They can do so on an occasional
7 basis based on case-by-case authorisation by the Chamber, and it is
8 the Chamber which will set the -- the criteria or the modalities of
9 their participation.

10 When we examine the texts, I do not think that we can accept the
11 proposal made by Mr. Luc Walley, and that is to act as if we were in
12 the French or Belgian criminal justice system. Well, we are not in
13 France or in Belgium. We are operating in a system in which, during
14 the criminal trial, victims may participate on an occasional basis and
15 only under the authorisation of the Chamber and not as do the parties,
16 that is to say not to participate at all times.

17 Regarding the issue of opening statements, the Defence is not
18 against the parties, and yes, I'm -- my lapsense [phoen] is revealing,
19 the parties or indeed or the victims express themselves. That's what
20 the rules say. The victims must be able to express their views and
21 concerns. That is the central rule of the system.

22 However, the Defence notes the following based on the texts: The
23 texts do not allow for the victims or the legal representatives of the
24 victims to make closing statements at the close of the trial. It is
25 not provided for. It is provided to that the Defence and the

1 Prosecution make closing statements. It is not provided the victims
2 or the representatives do so. However, the Defence is not necessarily
3 against it. It simply wants to point up that the precision of the
4 texts is such that the victims should not interfere or overlap in a
5 harmful fashion, a negative fashion, on the terrain the Prosecutor and
6 that there should be no imbalance in the trial.

7 Balance in the trial, in an adversarial system such as the one we
8 have here, requires that when the charges are reviewed the involvement
9 of the victims should be limited to defending their personal interests
10 only and only with the authorisation of the Chamber.

11 As the Court knows, the civil law system also provides for this
12 type of distinction in France and in Belgium. When one appears before
13 the Court of assizes, for instance, in criminal proceedings. The
14 civil hearing regarding reparations to victims who have joined the
15 criminal proceedings takes place after the conviction.

16 This indicates that even in the systems where victims have
17 enjoyed equal status with other parties, even in the civil law system,
18 the issue of reparations is dealt with after the conviction is handed
19 down.

20 It is true that specific problems will arise, particularly when
21 it comes to examining victims. The status of victims giving testimony
22 before the Chamber will be of significance in this connection. It
23 strikes the Defence as important that in that scenario when victims
24 are to be heard by the Chamber, that they should be given the status
25 of witness. That is to say Rule 140, the possibility for

1 cross-examination, et cetera, so that the Defence can exercise its
2 rights, put forward its position as it would in relation to any
3 Prosecution witness in connection with the testimony given.

4 Now, Mr. President, there are other issues which I could address,
5 but they are matters on which we are in agreement with the Office of
6 the Prosecutor. For instance, in connection with whether or not the
7 victims and their representatives may adduce evidence, whether or not
8 victims and their representatives may discuss evidence. On those
9 issues I would be happy for the Prosecutor to express his position.

10 We believe, once again, that in the interests of the victims and
11 the fairness of the proceedings, it is important that there not be
12 confusion between the need, on the one hand, to establish the facts,
13 and on the other hand, to repair the harm suffered by the victims. We
14 believe that it would be best to deal with these two matters as
15 separately and that this would be in the interests of the rapidity of
16 the proceedings.

17 We believe that the proceedings would not be more expeditious if
18 the two are dealt with together. I believe that if the hearings to
19 establish the facts were dealt with at the same time as hearings
20 regarding reparations, we will gain time if these issues are dealt
21 with in an effective factor. We believe that it is in the interests
22 not only of the Defence but also the victims to work within the
23 perimeters allowed by the texts.

24 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, just before you sit
25 down, on a -- I was going to say a relatively minor matter, I'm not

1 sure whether it is, in fact, you advanced some submissions in relation
2 to whether or not the victims have the right to make opening and
3 closing statements, and as I've understood it, your submission is that
4 really that is something that is reserved for the Prosecution and the
5 Defence and isn't available in the same way for victims.

6 Could I ask for your help on Rule 89, which provides in the last
7 three lines that "The Chamber shall specify the proceedings and the
8 manner in which participation is considered appropriate, which may
9 include opening and closing statements." So that this is something
10 which is considered by the Rules, but of course ultimately remains
11 within the discretion of the Chamber.

12 Do you have any particular submissions to make in relation to
13 that Rule?

14 MR. BIJU-DUVAL (interpretation): My first comment: These texts
15 based on compromise are not always crystal clear. What I would simply
16 like to highlight -- in fact, there are two things I would like to
17 flag up. Three things.

18 First of all, the Defence is not hostile or against the victims
19 expressing their views and concerns at the point in time chosen by the
20 Chamber whenever that may be.

21 Secondly, the procedural rules specify clearly that there is a
22 difference between the parties, the Prosecution and the Defence, and
23 the participants, that is to say the victims and the representatives.

24 It seems to us that when Rule 141 provides that the Prosecutor
25 and the Defence may make closing statements, that this has

1 repercussions for the hearing. Perhaps the opening statements could,
2 like the closing statements, only apply to the parties and thus the
3 Prosecution and the Defence and not the victims.

4 Finally, in the texts the word "hearing" is not clearly defined.
5 A hearing could be one day in court, or it could be a whole phase of
6 the proceedings.

7 Rule 89 does indeed leave it to the discretion of the Chamber to
8 decide when the victims may express their views and concerns,
9 including in opening or closing statements. But at the same time,
10 opening and closing statements are indeed something very specific.

11 PRESIDING JUDGE FULFORD: Mr. Withopf, I think -- I'm sorry.

12 [Trial Chamber confers]

13 PRESIDING JUDGE FULFORD: Mr. Withopf, let me explain what has
14 just been going on. One of the issues that everyone has been asked to
15 consider is Rule 85 and the definition of "victims" and linked to that
16 issues of criteria in relation to participation. I think it's fair to
17 say that thus far the submissions haven't directly addressed that
18 point, and so rather than returning now to the representatives of the
19 victims and Mr. Biju-Duval to ask for their submissions on that, we'll
20 put that issue over till tomorrow. So if anybody wishes to come back
21 to us on Rule 85, they can, but I think now it's fairest to turn to
22 you to give you the opportunity of advancing the Prosecution's
23 position.

24 Can I straight away put down a marker, Mr. Withopf. A question
25 that I am going to want your help on, please, is that at paragraph 8

1 of your written submissions of the 19th of October, and this is really
2 the last two lines on page 6 of that document, the way that you
3 describe the operation of Rule 91(3)(a) appears to indicate that you
4 are submitting that victims are only entitled to question witnesses on
5 issues relating to reparations; and if that is your submission,
6 certainly for me, you're going to have to make it good, because that
7 is not how up until this point in time I have read Rule 91(3)(a). I
8 haven't seen it as being limited to reparations-only questioning.

9 So I'm just putting you -- putting down a marker that that is
10 something I'm going to ask your help with, and you can deal with it
11 either this evening or tomorrow morning, but the floor otherwise is
12 now yours.

13 MR. WITHOPF: Mr. President, your Honours, I use this opportunity
14 to introduce new Prosecution team members; namely Mr. Ian Bulmer, a
15 trial attorney, and Ms. Desiree Lurf, an assistant trial lawyer, and
16 it will actually be Mr. Bulmer who will make our submissions today.

17 PRESIDING JUDGE FULFORD: I'm very grateful to them for their
18 attendance.

19 MR. BULMER: Sorry, at the conclusion of my submissions, perhaps
20 today you might afford me the opportunity just to confer with
21 Mr. Withopf on the question that you just posed to the Prosecution,
22 Mr. President, obviously for -- hopefully for obvious reasons, and
23 depending on the answer that I receive from him, I may ask leave from
24 the Chamber to address the question tomorrow.

25 PRESIDING JUDGE FULFORD: Absolutely. I see it as quite an

1 important question, because if questioning is limited solely to
2 reparations issues, then that potentially has a dramatic effect on
3 what victims otherwise will be able to do during the trial and so I
4 think it is an important question, and I've only raised it because of
5 the particular wording that has been advanced in your paragraph 8,
6 which appears to carry that limitation. But enough said on that.
7 Come back on it tomorrow.

8 MR. BULMER: Thank you very much, Mr. President. I think that's
9 what the Prosecution will ask to do.

10 By way of preliminary remarks to the Chamber, the Office of the
11 Prosecutor echos similar comments made by the parties and participants
12 this afternoon, that being that the Office of the Prosecutor submits
13 that the framework established by the Rome Statute regarding victim
14 participation represents a key and innovative feature unique to this
15 court. Provisions of the Statute permitting victim participation is a
16 milestone in international criminal justice and those provisions are
17 fully supported by the Office of the Prosecutor.

18 In this instant case before this Chamber, the legal
19 representatives for the victims have made specific requests in their
20 filing to participate in several different manners under the Statute.
21 In the submissions that I'll be making with respect to the Chamber
22 this afternoon, it's my intention to address these as specific as
23 possible to give some concrete flesh to the Prosecutor's position, and
24 I do so on the basis that groups, some of their requests in what I
25 will call genres or areas that basically are the same in their request

1 to participate.

2 The submissions that I also that I make to you this afternoon are
3 made in the context of a particular statement made by the Appeals
4 Chamber in the Prosecutor versus Lubanga decision of the Appeals
5 Chamber of the joint application of victims, and if I may just to cite
6 the particular statement that I would draw the attention of the Court
7 because this really frames the Prosecutor's submissions, and that is:
8 "An assessment will need to be made in each case as to whether the
9 interest asserted by victims do not in fact fall outside the personal
10 interests and belong instead to the role assigned to the Prosecutor."

11 The Office of the Prosecutor relies on this statement as I said
12 in framing its submissions that follow.

13 I would move on directly to the application of Regulation 56.
14 That is covered in the Office of the Prosecutor's filing of on October
15 the 19th in paragraph 7 and 8 when, Mr. President, you've already
16 drawn my attention to.

17 The application of Regulation 56 in the trial proceeding is an
18 important factor on the issue of victim participation in the trial
19 proceedings. And since a great deal of the requests made by the legal
20 representatives for the victims relate to participation on reparations
21 issues, it's appropriate, as they started out, that it be given some
22 regard first and foremost in the scope of determining participatory
23 rights.

24 I think it's trite but I will state it's obviously if the Chamber
25 elects to apply Regulation 56 in these proceedings that the -- that

1 the participation, the amount of participation by the legal
2 representatives will be greater. It will be expanded as opposed to if
3 it is not applied. And in that case, some of their requests for
4 participation that are linked to issues of reparation may disappear
5 depending on the Chamber's decision and have to wait until the
6 conclusion effectively until after the verdict. Probably an obvious
7 point.

8 The Prosecution's position with respect to Regulation 56 is that
9 it ought to be applied in these proceedings and additionally in the
10 filing that the Chamber has before it from the Office of the
11 Prosecutor, we propose a certain type of blended trial under
12 Regulation 56, and this is done in order to propose an effective kind
13 of concrete submission that the Trial Chamber can consider to apply.
14 And just for reference, that is outlined at -- at the filing at
15 paragraphs 8 and 9.

16 I'm going to refer to this as the blended approach, Mr. President
17 and your Honours, and the approach proposes the blended approach,
18 effectively has a primary portion of the case during which the -- the
19 Prosecution and the Defence litigate the primary issue, that being the
20 guilt or the non-guilt of the accused in that primary portion.

21 During that primary portion, the Prosecution and the Defence
22 would submit the evidence to the Chamber in the manner that the
23 Chamber would determine, obviously that evidence is to be submitted,
24 party-called witness, and tender witnesses before the Chamber on
25 issues relevant to the guilt of the accused.

1 The case of witnesses testifying during the primary part of the
2 of case, which the legal representatives wish to question, they may do
3 so in my respectful submission under the rubric established by our
4 Rule 91.

5 Preserving this -- or establishing this route granting the -- the
6 primary portion of the case and the legal representatives to the
7 victims, access to the witnesses called by the parties under Rule 91,
8 ensures that the economy of the case is preserved and it would obviate
9 the need obviously to recall any witnesses later if the issue of
10 reparations is required later on post-verdict.

11 At the conclusion -- under this model, at the conclusions at the
12 primary portion of the case, then it would be cases proposed to the --
13 the form of the proceeding is proposed to shift then to the legal
14 representatives, and this is all under obviously the rubric to
15 Regulation 56 still, and it will shift to the legal representatives to
16 make their observations, submissions, and material -- material
17 available to the Chamber on the issue of reparations within the
18 confines -- or within the area contemplated by Regulation 56.

19 Under the approach proposed by the Prosecution, all evidenced
20 materials are packaged together in one complete proceeding and then
21 can be relied upon for the decision-making process, and if necessary
22 post-verdict determinations on reparations. In my respectful
23 submission, it would maximise the economy of the proceeding by
24 allowing the Chamber to act in one unified factual collection mode, if
25 you would, and then proceed to the next stage that being decision or

1 verdict and then depending on that an appropriate stage following
2 that.

3 Any prejudice that would be suggested by the Defence in
4 proceeding in this fashion can be protected against, in my respectful
5 submission, by an appropriate limiting self-instruction by the Chamber
6 to itself which segregates the trial evidence from the reparation
7 materials and submissions.

8 I would note at footnote 12 of page 6 of the Prosecution's
9 October 19th filing, there are effectively in fairness manners of the
10 application -- of the potential application of Regulation 56 are
11 outlined. The approach that I just proposed, the blended approach,
12 and then what is could be entitled a bifurcated approach which would
13 involve splitting the case. It would involve the reparations issues
14 being dealt with partly during the currency of the trial and then
15 partly following the verdict, and what I -- it's outlined in the
16 footnote what that effectively means is the legal representatives
17 would have access by way of questioning to the witnesses called by
18 parties, but any further material would be delayed till after the
19 verdict.

20 As I've indicated, the Prosecution advocates for the blended
21 approach to encapsulate the fact-finding process completely in one
22 rather than break it up across different post-decision.

23 Those are my submissions with respect to the application of
24 Regulation 56. The next submissions I would make relate to what I
25 have called access to documents registered in case and list of

1 witnesses and statements, and there's just really three points if I
2 could make them. They are encapsulated in paragraphs 9 through 12,
3 Mr. President, and your Honours, of the filing.

4 As the -- as has been pointed out as participants in the
5 proceedings, the legal representatives are not entitled to receive
6 disclosure from parties or do they have any -- a right of inspection.
7 It's the Prosecution's respectful submission that instead the legal
8 representatives for the victims are entitled to have access to the
9 record of proceedings as permitted by Rule 131(2).

10 It is the Prosecutor's submissions that 131(2) represents
11 exhaustively the rights of the legal representatives to gain access to
12 the record of proceedings and that additional access is not required
13 to permit them to -- to permit them to participate in the proceedings.

14 PRESIDING JUDGE FULFORD: Mr. Bulmer, can I interrupt you a
15 moment. Can we just rewind, slightly. And I'm sorry to interrupt
16 your submissions in relation to Rule 131. Can we just go back to the
17 blended approach for a moment. I just want to make sure I've truly
18 understood what you're saying. Is it that all -- all evidence in all
19 evidence in relation to reparations should be considered during the
20 trial with submissions in relation to reparations following any guilty
21 verdict, should there be one, or do you envisage some evidence under
22 the blended approach being put over to the post-verdict time should
23 there be a guilty verdict?

24 MR. BULMER: I think in fairness since we have representatives or
25 participants that -- let me take -- let me answer your question

1 directly and give you an explanation.

2 My -- my direct answer is that the blended approach would
3 encapsulate all evidence because to put evidence over to be heard
4 post-verdict, if I may, Mr. President, would be effectively be the
5 bifurcated approach that I described separately, to move it.

6 PRESIDING JUDGE FULFORD: Can I just then test this with an
7 extreme example, and let's forget this case for a moment. Let's say
8 in the context of a case where genocide was alleged there, was in fact
9 a lot of evidence that the accused in the case had substantial
10 holdings in a lot of bank accounts across the world.

11 Now, would you be suggesting that within the context of resolving
12 whether or not the accused was guilty of genocide, one should hear all
13 the evidence pertaining to his bank accounts during the course of the
14 trial procedure rather than putting that sort of material over to a
15 post-verdict hearing?

16 Now, I've taken an extreme example, but I think extremes can
17 sometimes reveal whether or not it is possible to have just one model
18 that you apply.

19 MR. BULMER: Well, in short answer to your question,
20 Mr. President, I don't think it's possible just to have one model, and
21 I don't want to be taken as saying that the position the Prosecutor
22 advances is this is the only -- the blended model obviously is the
23 only that applies under Regulations 56. To take your point exactly in
24 the factual scenario which is obviously not the factual scenario
25 before us here, which I would just add as an aside informs the

1 position that the Prosecutor takes, but I think obviously when one is
2 considering expediency of the proceedings and knowing what I do
3 personally of financial cases and financial investigations, I don't
4 think, with the greatest of respect, that would be a practical
5 approach to the -- a speedy trial to do that -- to lump that in a
6 blended -- in a blended -- in a proposed blended hearing.

7 So what I'm trying to say to the Chamber, Mr. President, it's
8 factually determinative, and I take your point quite well.

9 PRESIDING JUDGE FULFORD: So on -- on these facts, on what you
10 understand to be the sort of broad factual matrix of the Lubanga case,
11 you believe that really all evidence can fairly be dealt with during
12 the trial itself, and including evidence that touches on reparations.

13 MR. BULMER: That's the position advanced on this specific case.

14 PRESIDING JUDGE FULFORD: That's very helpful. Sorry to have
15 distracted you. Please go back to Rule 131.

16 MR. BULMER: I knew I took that risk, Mr. President, when I took
17 a drink of water after finishing the last submission.

18 I would then move on to general aspects with respect to
19 participation in the proceedings. As a -- the first submission I
20 would make is just one point, Mr. President and your Honours, and that
21 being indicated at paragraphs 12 and 13 of the Prosecution's filing;
22 namely, that the Prosecution submits that as a general -- general
23 principle, inclusion ought to be extended to the legal representatives
24 for the victims for hearings leading up to and at the trial itself.

25 Under certain circumstances, it may be necessary to exclude the

1 legal representatives of the victims from a particular session. For
2 example, it might be prudent to excuse the legal representatives from
3 a session that deals with, for instance, protective measures with
4 respect to Prosecution witnesses or a closed session related -- a
5 closed session related to national security information, for instance,
6 a proceeding of the type under Article 72. But generally the position
7 is one -- from the Office of the Prosecutor is one of inclusion for
8 all hearings and proceedings.

9 I move on with leave of the Chamber to make submissions on issues
10 that relate with legal representatives requested to make submissions
11 on all issues related to the conduct of the trial, including the
12 filing of responses. That's encapsulated Mr. President and your
13 Honours, in paragraphs 14 through 16 of our filing. It is the
14 submission of the Office of the Prosecutor that the legal
15 representatives for the victims should not be granted a general right
16 to make observations on all issues related to the conduct of the
17 trial. Their right to make observations must be limited to
18 circumstances in which their personal interests are directly affected
19 and not addressed to issues that are exclusive between the parties
20 such as the proof of guilt of the accused.

21 And again I would rely in support of this position found at the
22 Appeals Chamber majority, the one I read to you, with the greatest of
23 respect, earlier in my submissions and for the citation that is found
24 at footnote 17, page 9 of the filing, paragraph 28 of the decision.

25 Areas of which the legal representatives ought to be permitted to

1 make observations obviously are on the issues of protection and
2 reparations. Another example of personal interest in which it may be
3 appropriate for the legal representatives on behalf of the victims to
4 make submissions at the trial is when, excuse me, victims may be
5 situated to make observations of fact or on law in which the victim
6 may have a unique perspective that is not known or accessible to
7 either party. Such a situation may arise when the victim has
8 perspective on procedural or substantive law that is not advanced by
9 either party, for instance, or they may make -- they may wish to make
10 observations of a specific fact that affects their interests.

11 For example, I would just propose the following hypothetical.
12 The legal representative for the victims may wish to make observations
13 on language and dialects should such an issue arise during the course
14 of the trial and that may effect their interests.

15 In the cases where the legal representatives wish to make
16 observations such as this, it is submitted by the Prosecution that
17 they ought to first raise the issue with the Chamber at their earliest
18 opportunity and seek leave.

19 Similarly it's -- the Prosecution submits that it would be
20 appropriate for the Chamber to narrow the application of regulation
21 24(2) to file a responding documents that affect their personal
22 interests of the victims they represent rather than giving a blanket
23 right to respond to all documents. And I just make this submission as
24 it is in line with the previous submission.

25 With respect to the issue of opening and closing statements,

1 Mr. President and your Honours, I would rely on the submissions made
2 in our filing at paragraph 17. I would remark to -- respectfully to
3 the Chamber that Rule 89 specifically as has been pointed out by you,
4 Mr. President, contemplates the possibility of making opening and
5 closing statements.

6 The Prosecution supports the proposition that the legal
7 representatives for the victims be granted this opportunity to
8 participate in this -- in this form, and I guess in my respectful
9 submission the only issue that arises out of here, if you remember the
10 legal representatives' submission on this point, is they wanted an
11 hour per group of victims which may have to be an issue discussed also
12 under the Rule 90 issue, the Prosecution simply in this regard puts
13 forward the submission that they -- the legal representatives as group
14 be accorded the same amount of time that is accorded to either parties
15 for the opening and closing statements and they work to divide that
16 time amongst themselves in a manner that they see fit. And I make
17 those comments also hoping that the Chamber will recognise that I will
18 make an additional submission under Rule 90 as well.

19 With respect --

20 PRESIDING JUDGE FULFORD: At the moment it's too early, really,
21 isn't it, to be setting time limits. It really all depends on how
22 many victim participants there are, what the issues are, the grouping
23 in terms of common representation. There are a large number of
24 variables that are going to come into play, I would have thought, in
25 relation to determining how long any opening or closing statement

1 should be should we permit them.

2 MR. BULMER: I think that's a very erudite comment,
3 Mr. President, not trying to curry favour, obviously, but the
4 Prosecution's submission on that is based on the specific request for
5 an hour made by the legal representatives. But I would have to agree
6 obviously with the Chamber.

7 PRESIDING JUDGE FULFORD: It's unrealistic to try to resolve
8 issues of that kind of detail at this stage.

9 MR. BULMER: I would agree.

10 PRESIDING JUDGE FULFORD: Yes. It must depend on a later
11 evaluation.

12 MR. BULMER: I would -- would, with the leave of the Chamber I
13 would move on to the specific requests with respect to examination of
14 witnesses that I have grouped together, and that relates to -- and
15 I've broken this submission down into two parts. I do so recognising
16 that these submissions are made in the context of the Prosecution's
17 submission on Regulation 56. So if the proceedings are blended as
18 submitted by the Prosecution; the Prosecution, I make the following
19 submissions with respect to the interaction of the witnesses with the
20 legal representatives for the victims with the witnesses, and I've
21 broken them down into two groups.

22 The first group is on the issue of examination of witnesses, and
23 I'll just skip ahead to the second group, and that being the issue of
24 calling of witnesses by the legal representatives because they are
25 distinct issues.

1 I would just -- on the issue of the examination of witnesses, and
2 obviously with the greatest of respect I would reserve the opportunity
3 to make further comments on this tomorrow morning, but at this point
4 in time it's the Prosecution's submission that generally the procedure
5 of Rule 91(3) must obviously apply with respect to the examination of
6 witnesses. And as I said, this is done within the context of the
7 blended proceeding that the Prosecution is proposing. So at the -- at
8 the "trial process ." This is the process that would apply to when
9 the legal representatives for the victims wished to ask questions of
10 either the Prosecution or Defence preferred -- proffered witnesses.

11 PRESIDING JUDGE FULFORD: Well, Mr. Bulmer, you're going to have
12 to think about this overnight, because isn't there a further potential
13 interpretation of 91(3)(a), namely, that a victim's representative can
14 question Prosecution witnesses, Defence witnesses, or a witness called
15 by the victim in relation to an issue that concerns their interests?

16 So I raise the question whether 91(3)(a) in fact limits the
17 victims to questioning other people's witnesses only or whether it can
18 be used by them in the right circumstances to question witnesses who,
19 as it were, they have inspired to be called or they have called.

20 So you may not want to answer that directly. You may like to
21 talk about that with your colleagues overnight.

22 MR. BULMER: Thank you very much, Mr. President. I may in fact
23 answer that indirectly under the second point, and that being when
24 I've broken it up on the issue of the Defence -- or I'm sorry of the
25 legal representatives for the victims asking questions of party-called

1 witnesses at the trial proceeding, and if -- if I could take one step
2 back, please, Mr. President, it all is contingent on -- on -- it
3 almost can be examined under the envelope of the blended approach
4 proposed here, and if -- just to reiterate that approach, the trial
5 proceeding occurs first and then there's a separate pseudo -- I'm not
6 going to say pseudo-proceeding, but a separate type of proceeding that
7 precedes the decision.

8 So in that first kind of bubble, if I'm not being too analogous,
9 this is where I'm talking about the application of Rule 91(3), and I
10 would submit, and I think everyone that's spoken here today, is 91(3),
11 would apply to those witnesses assuming those witness that portion or
12 that bubble is the litigation of the facts at issue and the proffering
13 of evidence is limited to the Prosecution and the Defence, and then
14 the legal representatives are allowed to question the witnesses.

15 Moving on, then, to the second car, the second bubble in the
16 process, that being the -- the reparations component which is
17 effectively the second stage and the second point under this heading,
18 I would point out that the legal representatives have specifically
19 requested opportunity to call witnesses including the victims
20 themselves and authorisation to call experts.

21 This position -- the Prosecution's position on this is outlined
22 in paragraph 21 of our filing, and the Prosecution submits the
23 right -- that generally the right to present evidence per se is
24 preserved for the parties at the trial but it has submitted that the
25 legal representatives ought to be permitted to call their own

1 witnesses before the Trial Chamber under the rubric of making
2 representations to the Chamber on the issue of relating -- relating to
3 reparations and that would happen at this second stage. And this may
4 include the personal appearance before the Chamber of the victim him
5 or herself to -- to provide that information.

6 The Prosecution envisage -- envisions that such representations
7 through witnesses if -- if necessary will be done after the primary
8 case is finished and on the condition that the witness representations
9 would not be used in the process of establishing the guilt of the
10 accused, the trial process having finished the primary part of the
11 case. This point is made explicit in my submission at paragraph 22 of
12 our filing.

13 I would just move on to say as --

14 PRESIDING JUDGE FULFORD: Just before you do, Mr. Bulmer.

15 MR. BULMER: Okay.

16 PRESIDING JUDGE FULFORD: The difficulty that I'm having with
17 this at the moment is that Article 68(3) gives victims the opportunity
18 to permit -- to present their views and concerns where their personal
19 interests are affected. So it's quite a broad definition of their
20 rights in relation not just to reparations but to what is going to
21 happen in court.

22 Now, a great part of your submissions is really directed to
23 narrowing that to a reparations-only consideration, and it seems to me
24 that the argument that might be presented against you is that you are
25 thereby abusing the language of Article 68(3) by seeking to limit

1 victims' participation solely to reparations issues rather than what
2 may be said to be wider personal interests that they have which they
3 would wish to express their views and concerns about, whether that's
4 through statements, examining witnesses, or putting in written
5 filings.

6 Now, can you help me with this, because I do see a narrowing that
7 may not be in accordance with the Statute.

8 MR. BULMER: I think I have two responses to that, Mr. President.
9 One is the position taken by the Office of the Prosecutor is to some
10 extent a responding position advanced by the position for the legal
11 representatives, and a lot of their requests relate to reparations
12 issues. That's -- that's -- their modes propose the participations
13 are actually linked, not all of them admittedly but a great deal.

14 So if it affairs that the Prosecutor is somehow taking an
15 offensive -- the Office of the Prosecutor is taking an offensive that
16 narrows it to reparations, I would submit that that may -- that
17 appearance is based on the fact that it is a response to a great deal
18 of what has been proposed.

19 Secondly, just to -- to backtrack in my submissions, the Office
20 of the Prosecutor, in my respectful submission, I hold clearly, but
21 maybe I may just reiterate it again has, has said in addition to
22 protection -- issues of protection and reparations, there may be
23 issues that arise during the course of the trial that impacts their
24 interests, and I gave that example of -- of linguistic.

25 So I hope that I'm not being interpreted as trying to limit it.

1 It's the -- the Prosecutor -- the Office of the Prosecutor has
2 opened -- has certainly taken a position that it extends beyond areas
3 solely relating to reparations.

4 PRESIDING JUDGE FULFORD: Fairly answered, Mr. Bulmer. Thank you
5 very much.

6 MR. BULMER: Thank you, your Honour. Sorry, I forgot my venue.
7 Thank you very much, Mr. President. If I may just have your
8 indulgence for one moment to pick up ...

9 I would -- only on the issue of calling witnesses, I would only
10 make one other point, Mr. President and your Honours, and that being
11 the issue that the legal representatives have explicitly raised about
12 the expert witness on the issue of reparations, is simply to point
13 out -- draw the Chamber's attention to Rule 97(2) which on the issues
14 of reparations contemplates court-appointed experts, not participant
15 or party-called experts, and I would just flag that issue respectfully
16 with the Chamber.

17 That's not to say, and I don't want to be taken as saying that
18 the legal representatives for victims have no place in suggesting
19 victims, in fact -- or suggesting experts. In fact they may be best
20 situated to recommend certain experts to the Chamber on that issue.
21 Simply a point of statutory law.

22 Now, with respect to their specific, the legal representatives'
23 specific request on rule 64 standing, that being the ability to raise
24 objections for the admissibility or relevance of evidence, it's the
25 position of the Prosecution which has advanced at paragraph 24 of the

1 filing that as a general rule at the trial, the legal representatives
2 do not -- do not have standing in effect to raise objections to the
3 relevance or admissibility of evidence tendered through the
4 Prosecution or Defence at the trial portion.

5 Now, having said that, and I would just if I may hearken back to
6 my earlier comments about if there's a unique situation specific to
7 their interests that they wish to draw attention that impacts their
8 interests specifically with respect to the relevance or admissibility
9 of the trial, admissibility of the evidence, they may seek leave to
10 make comments on the admissibility or relevance. But I make this
11 submission under this heading as a general rule, at the trial they
12 have no standing to object to the admissibility or relevance of
13 evidence.

14 On the issue of anonymity and protective measures encapsulated in
15 paragraphs 25 through to 29, I have three points to make or three
16 submissions and they're fairly short.

17 It is submitted that a -- at trial the Defence is entitled to
18 know the identity of the victims participants. This is part and
19 parcel in my respectful submission with the right of the accused to
20 make answer to all -- all of the types of allegations against him
21 which include allegations of specific harm suffered.

22 Now, it is the Prosecution's position at this point that no
23 anonymous victims ought to be permitted to participate in the trial as
24 the facts currently stand before this Chamber and -- but at the same
25 time the victim participants are entitled to be secure and must be

1 permitted to benefit from the various protective measures that are
2 available to them.

3 I would move on with leave of the Chamber, Mr. President and your
4 Honours, just to some brief submissions on Rule 90. Thank you.

5 The framework in my respectful submission on Rule 90,
6 Mr. President and your Honours, basically although the Prosecution is
7 not specifically, you know, mentioned in this provision, we make the
8 following remarks about its application at the trial: It seems to the
9 extent that it is possible, it is the position of the Office of the
10 Prosecutor that it is -- would be appropriate and is appropriate for
11 the Trial Chamber to encourage the victims and the legal
12 representatives of the victims who have been granted standing to
13 participate in the case to consolidate their representations as much
14 as possible. The consolidation of representation will ensure that
15 common issues which are shared by all victims are agreed upon and
16 presented once to the Chamber in a concise and effective manner, and
17 with open candour I don't think any participant before you has
18 suggested otherwise that that is the case.

19 It's a primary conciliatory rule. I would just make an
20 additional submission that was brought up by one of my colleagues
21 earlier this afternoon or my friends with respect to the involvement
22 that the Prosecutor may have or not have in respect to the application
23 of this Rule. And I don't -- I think it's fair to say the Prosecutor
24 may wish to have input on the criteria to be applied and not
25 necessarily to -- obviously to the persons involved specifically.

1 Mr. President and your Honours, I did have a submission on Rule
2 85 as was listed in the hearing schedule, but it was unclear to me
3 whether you wish that to be -- whether you wish me to wait for that
4 until the other participants and parties make a submission, or you
5 just wish to hear from me now on that point.

6 PRESIDING JUDGE FULFORD: (No microphone) well, if you otherwise
7 completed your submissions (No microphone).

8 MR. BULMER: Thank you very much. It's not.

9 PRESIDING JUDGE FULFORD: Let me say that again. If you've now
10 completed your submissions, why not take us to Rule 85.

11 MR. BULMER: I have, thank you. It's the Prosecution -- Office
12 of the Prosecutor's submission that Rule 85 must be interpreted and
13 applied within the context of this proceeding. In order to be
14 recognised as a victim under Rule 85 with the right to participate in
15 the trial proceeding, it is -- it's my submission that an applicant
16 must provide sufficient information to establish grounds to believe,
17 (a), and these are basically just statutory languages, the applicant
18 is a natural person; (b), who has suffered harm; (c), as a result of
19 the crime falling within the jurisdiction of the court; (d), and there
20 is a sufficiently direct and genuine causal link between the harm
21 suffered by the applicant and the crime set out in the document
22 containing the charges.

23 In other words, the harm suffered by the applicant must be
24 occasioned by the alleged unlawful conduct for which the accused is to
25 be tried. To put it another way, it is not sufficient for the

1 applicant at the case stage to be a victim of alleged illegal actions
2 of the accused generally. Instead the applicant must have suffered
3 harm that has a causal nexus to the crimes that are specifically
4 alleged by the accused. In the instant case therefore where the
5 accused is facing three types of charges relating to the enlistment
6 recruitment and use of child soldiers during a specified time period,
7 it's my submission the applicants must demonstrate in order to bring
8 themselves within the rubric of Rule 85 that there are grounds to
9 believe that the harm suffered was caused by this alleged conduct.
10 Those really, in a nutshell, sorry to use the vernacular, comprise my
11 submissions on Rule 85.

12 PRESIDING JUDGE FULFORD: Very succinct, Mr. Bulmer. Anything
13 else?

14 MR. BULMER: No, thank you, subject to any questions.

15 PRESIDING JUDGE FULFORD: If the Prosecution wish to have input
16 into the criteria in relation to joint representation, which you
17 hinted at three minutes ago, you had better give us your input
18 tomorrow, because if you miss the opportunity then, it may disappear
19 for all time. So just -- just to warn you that don't just throw out
20 the possibility of input at some stage in the distant future because
21 the opportunity will, as I say, probably disappear.

22 MR. BULMER: Thank you. I appreciate the warning, Mr. President,
23 and we will do so.

24 PRESIDING JUDGE FULFORD: Thank you very much indeed.

25 [Trial Chamber confers]

1 PRESIDING JUDGE FULFORD: Mr. Withopf, if I can address the Bar
2 through you. We will take this then as an opportunity to adjourn for
3 the evening, and we will sit again at 10.00 tomorrow.

4 Can I, and I'm sorry to spend my time putting down markers, but
5 in relation to some of the -- some of the Prosecution's submissions in
6 relation to subjects to come, like such as witness proofing, don't
7 turn it up, but at paragraph 16(iv) there is a very general submission
8 made by the Prosecution that following certain international law,
9 national practices, proofing is seen as enabling a more accurate
10 complete, and orderly and efficient presentation of the evidence of a
11 witness in a trial.

12 You will need to give further and better particulars of -- of
13 that very general proposition. It -- we'll need specific help as to
14 how you see proofing actually being applied, what the mechanics are
15 going to be so as to achieve what you say is that beneficial result.
16 And there are one or two other examples which I won't take you to
17 specifically, but where the Prosecution are saying there is an
18 advantageous end, we're going to need to know the actual procedures
19 that the Prosecution are wishing to put in hand in the -- during the
20 process of speaking to the witnesses all over again after their first
21 statements have been given.

22 Good. As I say, we'll rise now. We'll sit again at 10.00, and
23 as soon as we've risen, in compliance with the direction we gave
24 earlier today, can somebody from the Registry please come and see the
25 three of us immediately to discuss the issue of bullet-proof vests and

1 Mr. Lubanga, because we wish to do everything we can to ensure that he
2 is with us tomorrow.

3 Good. We'll rise. Thank you all very much indeed for your help.

4 The hearing ends at 5.18 p.m.

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