

1 International Criminal Court

2 Trial Chamber I

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

4 Transcript ICC-01-04-01-06-T-58-ENG - Open Session

5 Tuesday, 30 October 2007

6 The hearing starts at 10.03 a.m.

7 COURT USHER: All rise. Please be seated.

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

10 COURT OFFICER: Situation in the Democratic Republic of the
11 Congo, the case of the Prosecutor versus Thomas Lubanga Dyilo.

12 PRESIDING JUDGE FULFORD: Thank you very much indeed.

13 Ms. Mabilile, can I address you straight away. We are very
14 pleased to see that the defendant is with us this morning. We
15 understand that the solution certainly for today was the lighter
16 rather than the heavier jacket. We don't know whether this
17 essentially administrative problem is now resolved or not or whether
18 the Dutch authorities are going to wish for there to be further
19 consideration as to what the transportation arrangements in that
20 regard should be.

21 Although this may well ultimately be an administrative matter
22 that doesn't really fall for our consideration, can we just make as a
23 suggestion that if the defendant's position is that because of some
24 medical reason it is inappropriate for him to wear the heavier jacket,
25 given that there has been, as we understand it, a medical assessment

1 to the effect that he is able to wear the heavier jacket, you may wish
2 to consider whether or not it would be appropriate for there to be an
3 additional report prepared by a doctor in relation to whether or not
4 it's a reasonable request for him to wear the heavier jacket.

5 MS. MABILLE (interpretation): Thank you, Mr. President.

6 PRESIDING JUDGE FULFORD: Mr. Bulmer, I think had you weren't
7 quite finished.

8 Sorry, Ms. Bapita. I didn't see that you were indicating you
9 wished to say something to the Bench.

10 MS. BAPITA (interpretation): Thank you, Mr. President. We are
11 asking to take the floor at the beginning of this hearing to mention
12 an incident that places us ill at ease. From the 19th of October,
13 when the Prosecution made its submissions on the modes of
14 participation of victims in confidential form, and the confidential
15 nature was changed and the document was made public on the 24th of
16 October, we the legal representatives of the victims have not received
17 this document, which is why our observations submitted yesterday
18 focused only on the submissions of the Defence. We are concerned
19 because we do not know what happened. We can't understand whether it
20 was a technical problem.

21 Mr. Mulenda did not receive the document. I didn't, and neither
22 did Mr. Luc Walley.

23 Secondly, Mr. President, a document that involves us, that is the
24 modalities for participation of the victims in the proceedings,
25 regarding such a document, we do not understand why it is confidential

1 when it deals with matters that involve us directly. Furthermore,
2 Mr. President, the argument provided in this document refers to page
3 2. To be told that the document refers to a matter which was
4 discussed in closed session with regard to birth certificates, but
5 when we check further, the matter was raised by Mr. Mulenda in a
6 public session.

7 So either by negligence or inadvertently we have been deprived of
8 getting knowledge of this document based on references that are public
9 but which are in fact not so.

10 PRESIDING JUDGE FULFORD: You should have been provided with this
11 document. I'm going to ask Mr. Withopf straight away to help the
12 Bench, if you can, Mr. Withopf, as to why this hasn't been distributed
13 to the representatives of the victims.

14 MR. WITHOPF: Mr. President, Your Honours, I'm very happy that we
15 have the opportunity to assist the Chamber in clarification of this
16 issue.

17 We have on the 19th of October, 2007, which was a Friday, filed,
18 and that's correct, confidential, the Prosecution's submission on the
19 role of victims in the proceedings leading up to and during the trial.
20 The cover sheet of this filing includes the Office of the Prosecutor,
21 counsel for the Defence, and it also includes counsel for the victims,
22 in particular Mr. Luc Walley, Mr. Franck Mulenda, and Ms. Bapita
23 Buyangandu.

24 We work on the basis that the Registry, the court management
25 provides such a filing to all participants that are mentioned on the

1 cover sheet of such a filing. So we believed this filing was notified
2 to the Defence and our of learned friends, the legal representatives
3 for the victims.

4 On Tuesday, the 23rd of October, 2007, we filed the same filing
5 public, and in our cover filing of the same day, we explained the
6 reason why, and it's correct why we mistakenly filed the original one
7 confidential. There was an oversight on our side in respect of one
8 particular footnote which we thought that the respective argument
9 would have been made in ex parte hearing. In reality, it was made in
10 a public session.

11 The problem of the issue is the following: Filing confidential,
12 filing confidentially in this particular context, in our view, was
13 meant to be provided to the Defence and the legal representatives for
14 the victims. This has nothing to do with the public filing. And I
15 understand correctly that not even the public filing was made aware to
16 the legal representatives for the victims. To further assist on this
17 matter, Mr. President, Your Honours, I would suggest that you ask the
18 Registry's representative to further shed light on this matter.

19 PRESIDING JUDGE FULFORD: Well, it looks, Mr. Withopf, as though
20 the Prosecution have clean hands in relation to this, yes.

21 MR. WITHOPF: Mr. President, I'm very grateful for this comment,
22 because this is what we do believe.

23 PRESIDING JUDGE FULFORD: Right. Is there anybody here from the
24 Registry who can assist me with this? I imagine no. Right. Can
25 somebody help, please, as to what happened with this?

1 MR. PREIRA (interpretation): Thank you, Mr. President. I shall
2 ask my colleague, Uros, who is in charge of notification to elucidate
3 this matter for the Chamber. Thank you.

4 COURT OFFICER: Thank you, Mr. President. As a matter of fact,
5 the confidential filing made by the Prosecution on the 19th of October
6 was not notified to through the representatives of the victims. This
7 was not done as the modalities -- the previous modalities of
8 participation obliged us to notify only public documents and no change
9 was made to that. As far as the public version of the document, the
10 one filed on the 23rd by the Office of the Prosecution is concerned,
11 this document was indeed notified to the legal representatives of the
12 victims.

13 And as soon as we heard about the problem at hand, we did check
14 in our systems, in our notification systems, whether something went
15 wrong, and I can at least today at first sight tell you that from the
16 situation at hand it seems that the document was notified. So it did
17 leave the -- how do I say, the mailbox of the court management
18 section, but somehow, probably for some technical reasons, it didn't
19 arrive at the destination. That's something that might be
20 investigated either by our technical services or -- as you wish, but
21 the document was notified indeed. Thank you.

22 PRESIDING JUDGE FULFORD: I'm very grateful to the Court Officer
23 for that.

24 Ms. Bapita, before you intervene, I think it's clear that you and
25 Mr. Walleyne must be given an opportunity before you reply to consider

1 this document. There's clearly no doubt about that.

2 In terms of the unfortunate fact that you haven't seen this
3 document to date, we will ask the Registry to investigate what
4 happened with the public version which you should have received and
5 which seems to have left the relevant mailbox. So there's clearly an
6 investigation that needs to take place as to what went wrong
7 technically.

8 As regards the private filing which the Prosecution intended for
9 you to receive, we will put that down, with a red star against it, as
10 one of the matters that needs to be included in our decision arising
11 out of this hearing as regards the modalities of participation for
12 victims. The Court Officer has quite rightly identified, as it seems
13 to me, that the Registry has been following previous decisions made by
14 other Chambers in relation to this regard, and this has highlighted
15 the need for us to address issues of this kind.

16 It's obviously to be regretted that the representatives of the
17 victims have, in the sense that you've revealed, suffered by the fact
18 that we have been really, as a matter of inevitability, applying
19 previous modalities of participation until we have made a decision for
20 ourselves as to what the new modalities of participation are going to
21 be.

22 Now, can we reflect on how we're going to proceed this morning?
23 The choices are that we rise immediately for you to read the document,
24 or we hear any outstanding submissions save for yours and
25 Mr. Walley's, and we rise before you respond so you have an

1 opportunity to consider the document before you come back finally.

2 Mr. Walley.

3 MR. WALLEYN: Thank you, Mr. President. Actually, yesterday
4 evening we had the opportunity to read the document, because it was --
5 we couldn't -- even in the afternoon we tried to see it on the web
6 site. It was not possible to open it, but at the evening we could
7 have access to it, and we are ready to respond if you give us even 10
8 minutes to -- to do some comments on it.

9 PRESIDING JUDGE FULFORD: Well, Mr. Walley, subject to the views
10 of my fellow Judges, what I'm going to propose is that we hear the
11 outstanding submissions from the others in court, and then before we
12 ask you to make your response, we'll give you 10 or 15 minutes to
13 consider the document and discuss the matters between yourselves. But
14 let me make sure.

15 [Trial Chamber confers]

16 PRESIDING JUDGE FULFORD: That's what we'll do.

17 MR. WALLEYN: That's fine.

18 PRESIDING JUDGE FULFORD: Thank you very much for raising the
19 issue.

20 Mr. Bulmer.

21 THE INTERPRETER: Microphone, sir.

22 MR. BULMER: Thank now for the opportunity to respond to the
23 additional concerns of the Chamber and make those representations this
24 morning. There's the two areas that I intend to cover, and I intend
25 to be fairly brief about, subject to any questions from the Chamber.

1 The first, Mr. President, is in response to your point taken with
2 regards to the position advanced in paragraph 8 of the Prosecution's
3 filing of October the 19th, and if I could paraphrase, and I hope I'm
4 paraphrasing correctly, whether it is the position of the Prosecutor
5 with respect to the statement in this paragraph that the legal
6 representatives ought to be limited to questioning witnesses under
7 Rule 91(3) solely on issues associated with reparations and whether
8 that's the intent advanced.

9 The issue -- I have four comments. One, the issue -- comments
10 work into submissions. The issue of whether -- when the legal
11 representatives may question witnesses on issues in addition to issues
12 associated with reparations. I would first and foremost point out, is
13 one that is difficult to discuss and present concrete submissions on
14 in a factual vacuum. Reparations is obviously one that one can put
15 flesh to the bones as it were. Other issues might be outstanding.
16 They need to be addressed on a case-by-case basis, and I'll make
17 that -- my point in that submission clear hopefully by the next
18 submission.

19 It is not the position of the Office of the Prosecutor that the
20 legal representatives ought to be barred from asking questions on
21 issues other than reparations under Rule 91(3). The position taken in
22 paragraph 8, Mr. President, is meant to be taking in context of the
23 application of regulation 56, namely issues associated with
24 reparations.

25 More generally, and I would submit and in line with the

1 submission advanced by me yesterday, that it was not the intent of the
2 Office of the Prosecutor in the submissions to limit solely --
3 participation solely to the issues of reparation. The position of the
4 Office of the Prosecutor on the application of Rule 91(3) generally is
5 that the questions proposed by the legal representatives, other than
6 those going to the issues of reparations, must be assessed on a
7 case-by-case basis as being within their personal interests and that
8 the function of the question does not overlap with the Prosecutor's
9 role of establishing guilt.

10 And my final point which is a, corollary to that last submission,
11 Mr. President, and Your Honours, in this regard it is the position of
12 the Office of the Prosecutor that the application of Rule 91(3) must
13 be guided by the principle of law stated by the Appeals Chamber in the
14 citation I made yesterday at the opening of my submissions, that an
15 assessment will need to be made in each instance whether the interest
16 asserted by the victims that will ground the area of questioning do
17 not in fact fall outside their personal interests and belong instead
18 to the role assigned to the Prosecutor.

19 Those are my submissions and I hope I've elucidated our position
20 fairly.

21 The other issue that the Chamber's kind enough to grant the
22 Prosecution some time to consider was the issue of criteria on Rule 90
23 application -- Rule 90 -- the application of Rule 90 and the issue of
24 common legal representation. I have a very short point to make on
25 this, Mr. President and Your Honours.

1 The Prosecution will be brief and submit the following criteria
2 that may be considered in addition to any other criteria the Chamber
3 considers appropriate in an application or indeed concept of common
4 legal representation under Rule 90: The Prosecution, in this regard,
5 prefers to the Chamber three criteria that I submit may be appropriate
6 in circumstances in this case, in this case specifically, to apply in
7 delineating groups of victims for the purposes of common legal
8 representation, and those very simply are the criteria of common
9 language, the criteria of common temporal range of actions that caused
10 the harm, and thirdly, the criteria of geographic regions of the
11 victims, their geographic locations.

12 Subject -- thank you for the opportunity. Subject to any
13 questions from the Bench those are my submissions.

14 PRESIDING JUDGE FULFORD: Thank you very much indeed, Mr. Bulmer.
15 Mr. Biju-Duval, is there anything else that you would wish to say
16 on any of the issues raised yesterday?

17 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President. I
18 would just like to return to one point, that is the question of
19 whether the victims and their legal representatives can, during the
20 criminal trial, the examination of the charges, present evidence, and
21 the question was raised by the Chamber as to whether victims could
22 call witnesses, especially under Rule 91(3).

23 The question of implementing Rule 91(3), the examination of a
24 witness, in this regard would this -- would it be possible for this to
25 be a witness called by the victims themselves? On this matter the

1 Defence supports the position taken by the Prosecutor and seeks to
2 emphasize a few points.

3 The first point is that Rule 91(3) does not make provision for
4 the victims to call witnesses. This Rule 91(3) should be understood
5 or interpreted in the light of other statutory provisions which
6 confirm that the victims and their legal representatives are not
7 considered as parties in proceedings. The Statute and the Rules of
8 Procedure and Evidence clearly provide that only parties can present
9 evidence or call witnesses in particular during the trial to determine
10 responsibilities.

11 So just to remind you, I shall refer to Rule 64(6), 64(8)(b)
12 64(9), 69(3), Rule 142. All of which confirm that only the parties,
13 that is the Prosecution and the Defence, can call witnesses and
14 present evidence during the trial to determine charges. But the
15 Defence is of the view that during this stage of the proceedings the
16 victims do not have the authority to call witnesses to establish the
17 facts and even to evaluate the harm caused.

18 That said, and I recall this once more, this possibility of
19 calling witnesses will be afforded them during the second phase of the
20 trial if the case arises, that is during the reparations hearing, if a
21 guilty verdict is present. We think that we should emphasise this,
22 because in our view in addition to having the Prosecutor to authorise
23 the victims and their legal representatives to present evidence during
24 the first phase of the trial, could only cause confusion in the
25 proceedings without regard to -- without actually shortening the

1 second phase. That is my first remark.

2 I think that we should bear in mind the fact that in any case
3 there will be, in case of a guilty verdict, a further hearing on
4 reparations. Why so? This is so because some victims will only have
5 made applications for reparations and not applications for
6 participation. For those victims who will only have made applications
7 for reparations, they will only have the opportunity to express their
8 wishes during their reparations hearing. Consequently, it should not
9 be hoped that blending the reparations proceedings and the criminal
10 proceedings themselves will help save time.

11 In any case, and in the case of victims who will only have
12 applied to the court for reparations, there will necessarily be in
13 case of a guilty verdict, a reparations hearing.

14 We just like to highlight this point so that might also be clear.

15 Now, regarding the grouping of victims, the Defence doesn't have
16 much to add. It seems to us that the fundamental criterion that will
17 help us to -- or that will help the creation or the formation of
18 groups regardless of what cases will be brought before the
19 International Criminal Court, it could well be the crime concerned.
20 This is a general remark.

21 In the case at Bar, the crimes charged are limited. There will
22 be other cases. There is already one, and there are many counts and
23 charges. It is therefore clear that you can determine the groups of
24 victims depending on the crime that is being examined. This seems to
25 us to be the major criteria that should be adopted.

1 For our cases, we conclude that it does not seem useful or
2 necessary, because many distinct -- that many distinct groups be set
3 up. The crimes are limited, legally speaking. It is enlistment and
4 conscription of children less than 15 years and their participation in
5 hostilities.

6 In view of the crimes charged, all the victims are, for the most
7 part, in our view, members of the same group even though one might we
8 will make distinctions based on the type of action as suggested by the
9 Prosecutor.

10 That is what we wish to add, Mr. President.

11 PRESIDING JUDGE FULFORD: Thank you very much.

12 Mr. Preira, out of an abundance of caution, I just want to check
13 at this stage that there's nothing that you wish to add.

14 MR. PREIRA (interpretation): Mr. President, thank you. For the
15 time being we have no submissions to make. Thank you.

16 [Trial Chamber confers]

17 PRESIDING JUDGE FULFORD: Ms. -- I hope it's -- is it Pellet or
18 Pellet.

19 MS. PELLET: Depends on what language I guess.

20 PRESIDING JUDGE FULFORD: Well, shall I be British and say
21 Pellet, then. Ms. Pellet, thus far we haven't asked you, whether --
22 given this is a victims issue, whether you would wish to intervene,
23 perhaps particularly in relation to Rule 85. And before I ask you to
24 respond to that, please remain standing, but can I indicate to the
25 Defence that we still haven't, as yet, heard any submissions on that

1 issue, and so before we rise, I am going to ask the Defence whether
2 there are any submissions at all that they wish to address on Rule 85.
3 But before I do that, Ms. Pellet, anything you'd wish to say?

4 MS. PELLET (interpretation): Thank you, President. At this
5 stage of the proceedings, the office of public counsel for victims
6 could give views on the various points raised. However, as you will
7 have noticed, the principal counsel is not present at the seat of the
8 court through illness. If you wish, therefore, the OPCV could provide
9 its submissions in writing in the course of the following week.

10 PRESIDING JUDGE FULFORD: I'm extremely sorry to hear that,
11 Ms. Pellet, as I'm sure my judicial colleagues are as well. Would it
12 help if we gave you the opportunity of putting in submissions in
13 writing within a -- within a fixed time frame?

14 MS. PELLET (interpretation): Yes, Mr. President. I think that
15 in the course of the coming week we could submit to you the comments
16 of the office of public counsel for victims.

17 PRESIDING JUDGE FULFORD: Is it realistic for us to ask for those
18 to be supplied to us by the end of next week?

19 MS. PELLET (interpretation): Yes, that would be fine.

20 PRESIDING JUDGE FULFORD: 4.00 on Friday?

21 MS. PELLET (interpretation): Perfect. Thank you.

22 PRESIDING JUDGE FULFORD: Mr. Biju-Duval.

23 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President. As
24 regards the criteria of Rule 85, our first comment is that the harm
25 must be in connection with a crime within the jurisdiction of the

1 court. In connection with this concept of jurisdiction, this issue
2 must be dealt with at the current stage of the proceedings; that is to
3 say, what needs to be ascertained is which crimes are within the
4 jurisdiction of the Trial Chamber in the current case. The answer to
5 that question was given by the Pre-Trial Chamber in its decision
6 confirming the charges.

7 That decision delimits the charges confirmed against the accused
8 person, notably applying a temporal jurisdiction. The charges are in
9 relation to crimes committed during a specific set period of time
10 confirmed by the Pre-Trial Chamber in its decision.

11 So the first check to be made is to ensure that the harm suffered
12 by the victim is as a result of an action which can be assigned to the
13 accused person falling within the time period specified by the
14 Pre-Trial Chamber in the confirmation of charges. That is the first
15 matter.

16 The next important issue is the causal link. Who are the people
17 who may allege a direct prejudice in connection with an action
18 assigned to the accused person within the time frame specified by the
19 Pre-Trial Chamber?

20 On this point, the position of the Defence is not far removed
21 from that already adopted by the Pre-Trial Chamber. To our mind,
22 those who may claim to be victims are, naturally, children who are
23 alleged to have been direct victims of the crimes with which the
24 accused person is charged. That is the first point, and I think does
25 not present any difficulties.

1 However, to what degree can this circle of victims be enlarged?
2 We believe that it can be enlarged to the relatives, the mothers and
3 fathers of the children. We believe that beyond the parents of the
4 victims, the circle would become too broad. We believe that the
5 immediate family circle only should be considered, that is to say the
6 mother and father of the child. If the circle were to be further
7 enlarged, it would be very difficult to set limits. I believe that
8 the need for a causal link and a direct harm would mean that this
9 circle of victims would be limited to the child and his or her
10 parents.

11 The Pre-Trial Chamber has also considered the situation of
12 persons who have suffered harm when they have attempted to oppose an
13 enlistment or have attempted to assist a given direct victim. On this
14 point the Defence believes that there may be grounds to review on a
15 case-by-case basis the crime that has taken place and the individual
16 case which has been brought forward.

17 These are the submissions of the Defence on Rule 85. That is to
18 say that the crime must fall within the temporal jurisdiction set out
19 in the decision on the confirmation of charges. The victims must be
20 able to justify that they are the children directly concerned or the
21 parents of those children or on an exceptional basis, based on a
22 case-by-case review, that the person is a victim of harm or has
23 suffered harm by -- that has suffered harm through the commission of
24 the crime.

25 PRESIDING JUDGE FULFORD: Thank you, Mr. Bijou-Duval. That's very

1 clear.

2 [Trial Chamber confers]

3 PRESIDING JUDGE FULFORD: Ms. Bapita, Mr. Walley, what we
4 propose to do now is in fact to rise for half an hour rather than 10
5 minutes or quarter of an hour, because at half past 11.00 we would
6 have to rise for half an hour anyway to give the interpreters a break.
7 So we're going to have a longer break now so that we can then sit for
8 an hour and a half after that. So we'll sit again at 10 past 11.00,
9 and I hope that gives the two of you a sufficiently full opportunity
10 to look at the filing. Is that acceptable? (No microphone).

11 Recess taken at 10.39 a.m.

12 On resuming at 11.16 a.m.

13 COURT USHER: All rise. Please be seated.

14 PRESIDING JUDGE FULFORD: Have you had sufficient time,
15 Mr. Walley?

16 MR. WALLEY (interpretation): Yes, Mr. President. Thank you.

17 PRESIDING JUDGE FULFORD: Before you begin your submissions, we'd
18 like to indicate to you and to the other advocates in court that one
19 issue that it seems to us is going to require discrete determination
20 by the Bench is the position of victims who are also witnesses, and
21 there is, as it seems to us at the moment, a separate or there are
22 potentially separate considerations which apply to victims who are
23 witnesses. We therefore intend to give everyone an opportunity to
24 make such representations as is thought appropriate on that issue.

25 Now, I don't want to bowl you a fast ball, Mr. Walley. If

1 you're able to deal with that now, all well and good, but in any
2 event, when we sit after lunch we will ask for submissions on that
3 subject.

4 MR. WALLEYN (interpretation): Thank you, Mr. President, Your
5 Honours. I am ready to respond to your question.

6 For us what is most important is that a rule is set as early as
7 possible so that victims who are also witnesses can comply with the
8 Rule. If the Rule were to be that a witness can subsequently submit
9 an application for reparations, then of course the victims could take
10 account of this and could first participate without applying for
11 reparations and only make their application for reparations after
12 having given testimony. That is what happens in a commonplace fashion
13 in civil law systems.

14 Or the inverse could be the situation that is that certain people
15 have approached us to participate. We have not yet lodged those
16 applications for participation because we would like to know what the
17 situation is in this connection. It is in our interests that the
18 Chamber adjudicate this matter as early as possible.

19 As I said in earlier submissions, nothing in the texts prohibit a
20 victim who has applied to participate in giving testimony under oath.
21 I think in fact that this could be the case also for a victim who
22 applies for reparations, but I do understand that between the two
23 there will be differentiation or different degrees and it's up to the
24 Chamber to adjudicate the matter.

25 Now, as regards the submissions of the Office of the Prosecutor,

1 the submissions which we first saw yesterday, I would like to make a
2 number of points, and I would need approximately 10 minutes for this.

3 The first point is the issue of confidentiality. On the 19th of
4 October, the Office of the Prosecutor made submissions which were
5 labelled confidential. It has been said that they could not imagine
6 that that confidential document would not be communicated to the
7 victims representatives. I'm somewhat surprised at that, because I
8 think the Office of the Prosecutor must be aware of the decisions in
9 this connection taken by the Pre-Trial Chamber.

10 Furthermore, it is the Office of the Prosecutor who has -- who
11 backed that Rule and in its submissions of the 19th of October, in --
12 at paragraph 11 asks that that very Rule be confirmed and that
13 victims' access to documents be -- continue to be limited to public
14 documents. So I must express my amazement.

15 It is important that if victims are to be able to participate in
16 the proceedings, that at the very least they have access to the
17 documents of the proceedings. If there are issues of confidentiality,
18 these must be dealt with on a case-by-case basis. There may be
19 documents which it would be dangerous to provide to the Defence.
20 There may also be documents which it would be dangerous to provide to
21 the legal representatives of the victims. There might be documents
22 that could be provided to the counsel of certain individuals but not
23 to the parties as a general rule.

24 So we are in fact against a general rule whereby confidential
25 documents would not be communicated to us. I think that this incident

1 reveals much. Victims participating in these proceedings have a
2 specific role, a necessary role, and it is not the Office of the
3 Prosecutor who defends the interests or the role of victims. This is
4 a perfect example of that.

5 Thirdly, regarding the discussion on the status of victims at the
6 very stages in the proceedings, either as a participant or as a
7 fully-fledge party, we observe that the position of the Defence is
8 closer to that of the victims than the Office of the Prosecutor and
9 once again we are very surprised by this. It seems clear that a -- to
10 the Defence that a victim who applies for reparations becomes a party
11 to the case, but this is not obvious to the office of the Prosecutor.

12 Fourthly, victims may present their views and concerns. The
13 Prosecutor says, and you yourself, Mr. President, have said that these
14 views and concerns should be related purely to the matter of
15 reparations or matters of protection. I think that here we're talking
16 about a very fundamental interpretation of the role of the victim in
17 the proceedings.

18 It is true that it is not the role of the victims to prove
19 anything. It is the role of the Prosecutor to prove the charges
20 brought. However, this does not mean that the victims may not have
21 views on what happens here, views which go beyond the matter of
22 reparations or their limited financial interests or their protection
23 issues.

24 If for instance, a group of victims feels that the accused person
25 is an innocent man, then I believe the Court should be able to hear

1 that group of victims. And also the inverse is true. We certainly do
2 not have to approve our views and concerns.

3 Point five: When victims can participate and have access to
4 documents and can examine and have access to witnesses. This is so
5 not because they have applied for reparations but because victims have
6 rights which are internationally recognised, and one of those rights
7 is to know the truth. This is a right which is anchored in the United
8 Nations principles and directives. Victims and their representatives
9 must be given the opportunity to obtain information regarding the
10 causes of their victimisation and the causes and conditions of the
11 flagrant violation of international human rights and international
12 humanitarian law and has the right to learn the truth on those
13 violations.

14 So if we wish to put certain questions to witnesses, it will not
15 necessarily be to prove the harm suffered, and certainly not to prove
16 the innocence or guilt of the accused person, but simply to arrive at
17 the truth, and that is a right which I do not see reflected in the
18 views expressed by the Office of the Prosecutor.

19 PRESIDING JUDGE FULFORD: You've helpfully referred to UN
20 principles and directives in connection with the victims' rights to
21 documentation. I'm going to ask you to be a bit more specific, either
22 now or by sending us a note in due course. Do you have chapter and
23 verse of the principles and directives to which you're referring?

24 MR. WALLEYN (interpretation): Yes. I have cited principle
25 number 10.24, Mr. President.

1 PRESIDING JUDGE FULFORD: Thank you very much. I wanted to make
2 sure that it wasn't just going to be a general submission without
3 having given us the detail. Thank you.

4 MR. WALLEYN: Thank you. (Interpretation) this right to know the
5 truth is also the reason why it is necessary that certain documents be
6 provided. The Office of the Prosecutor is of the view that the rights
7 of the victims -- and I agree that these are the only rights which are
8 ensured by the texts. That is to say that the victim has the right to
9 access is documents, materials adduced in evidence.

10 The Office of the Prosecutor accepts this but almost unwillingly.
11 We are sorry to see that the view of the Prosecutor is not that we
12 have the obligation to disclose to the Defence all items, material,
13 which are in the interests of the Defence, and that even if it is not
14 written textually in the basic documents of the court, I believe that
15 the Prosecutor also has an obligation to disclose to the victims
16 information which concern the victims directly. And I'm thinking, for
17 example, of evidence which the investigation may have yielded which do
18 not have probatory value for the Prosecution but which may be of
19 direct interest to us.

20 If, for example, we were to learn at exactly what place the son
21 of victim number 3 is buried, that would be of great interest to us
22 even if it has no value for the proceedings to establish innocence or
23 guilt.

24 If it were to be discovered that Mr. Lubanga had assets in a bank
25 in Belgium, for a victim who had lodged application for reparations,

1 this would be a matter of interest even if it had nothing to do with
2 the proceedings to establish guilt or innocence.

3 I don't know if the Court can encourage the Office of the
4 Prosecutor, but I would request of the Office of the Prosecutor that
5 it recognise this moral obligation to provide to the victims at as I
6 early as possible not only the materials and documents which are of
7 interest to the Court but also documents and materials which are of
8 interest to victims.

9 PRESIDING JUDGE FULFORD: This really impacts on -- in part on
10 our decision to the e-court protocol, doesn't it? If you're right,
11 there is a separate disclosure obligation on the Prosecution in
12 relation to participating victims in that the Prosecution are going to
13 have to ensure that all material which is relevant to individual
14 victims in their possession is passed over to those participating
15 victims.

16 MR. WALLEYN (interpretation): Mr. President, this seems to be an
17 obvious obligation to me even if it is not so indicated in the text.
18 I can admit that it is not a legal obligation set out in the text, but
19 perhaps the course -- the Court might impose this obligation.

20 The same applies when we wish to examine witnesses called by the
21 Prosecution or the Defence. Our goal, and I would like to emphasise
22 this, would never be to prove the innocence or guilt of the accused.
23 Our goal would be to elucidate the truth on what happened and all the
24 truth.

25 It is true that regarding the leeway afforded victims to present

1 evidence, I note that the Defence is closer to our viewpoint than the
2 Prosecutor because the Defence at least admits that at a specific
3 phase in the proceedings where reparations are being discussed, the
4 applicant victims should obviously be able to prove the harm, and if
5 the need arises, present evidence, documents, and testimony.

6 In the Prosecution's submissions I note, at least this is how I
7 understand it, that there is a general operation to victims calling
8 witnesses to court, and therefore they cannot call to testify a doctor
9 or a psychologist who handled one of our clients or a professor or
10 teacher one of the children, or a person working in the institution
11 that sheltered these children. This is only the Prosecutor who can
12 call these people, whereas these are elements that are directly
13 relevant to reparations.

14 So I think that in an application for reparations, the victims
15 should have the right to call witnesses themselves. It is up to the
16 Court to decide when this should occur. If the Court should decide to
17 apply mixed or blended proceedings based on Rule -- Regulation 56, it
18 is up to the Court, which will decide whether these witnesses should
19 be called after the sentencing or before. It is not of great
20 consequence.

21 The position of the Office of the Prosecutor on Regulation 24(2),
22 and this is the eighth point, the Prosecutor suggests that the
23 Regulation be changed for this particular trial in any case.

24 The Regulation provides that we have the right to respond to any
25 submissions of the parties, and the Prosecutor -- the Regulation says

1 that "Unless the Court otherwise decides in exceptional
2 circumstances."

3 The Prosecutor suggested that the Rule be reversed. For this
4 trial he says there should be no allowance to file a response unless
5 the Court so allows.

6 This is a change to the Rule. We are somewhat surprised at this,
7 and we consider that it cannot be done within the context of a
8 specific trial.

9 Point nine: On the application of Regulation 56, we agree with
10 the office of the Prosecutor that for reasons of efficiency a
11 procedure could be developed that would be somewhat specific or mixed
12 in regard to examining the guilt of the accused in which context
13 questions may be put to witnesses which would involve future requests
14 for reparations.

15 However, the application of such a procedure should not reduce
16 the rights of the victims, because Rule 91(4) provides that during a
17 hearing devoted to reparations, the victims have exactly the same
18 rights as the other parties in terms of presenting evidence, examining
19 witnesses, and so on and so forth.

20 So if the two phases of the proceedings are blended, the victims
21 must not lose their rights. The Court may then find a means of
22 organising this, practically speaking, and I imagine that, for
23 example, we could have a witness being examined, cross-examination by
24 the Defence, which could take a day or two, and then a specific period
25 of time could be granted to the representatives of the victims, if

1 they so wish, to examine the witness as well based on the harm caused.
2 This will be up to the Court to decide and organise, but we support
3 such a proceeding insofar as it does not negatively affect our rights.

4 The last point regarding Rule 85: We're not in a good position
5 to be giving opinions on this issue, because the victims who have
6 already been authorised to participate in the proceedings are either
7 children who were recruited into the UPC before they were aged 15
8 years, or their parents, and the decision of the Pre-Trial Chamber is
9 a bit broader than what the Defence is proposing, and it could be
10 people who were educating the child at the time that the child was
11 recruited.

12 The only time -- thing that we ask in regard to victims that
13 would be admitted to participate in the proceedings on other bases is
14 that the decision should be taken at the earliest possible time. They
15 could be victims that could have interests that are diametrically
16 opposed to ours, but it is in the interests of everyone that this
17 matter be decided as early as possible.

18 Thank you, Mr. President.

19 PRESIDING JUDGE FULFORD: Thank you very much indeed,
20 Mr. Walley, and we'd like to thank you as well for having very
21 carefully explained to us exactly by what the position was in relation
22 to the filing, which in fact you did see but only late last night.
23 That was very helpful.

24 Ms. Bapita, anything to add? Certainly.

25 MS. BAPITA (interpretation): Yes, Mr. President. I just wish to

1 add a point which was addressed by Mr. Biju-Duval yesterday --
2 yesterday evening. This is the matter of opening and closing
3 statements, which was also mentioned this morning by the Office of the
4 Prosecutor and emphasised by Mr. Walley. But I would like to
5 emphasise a particular point which I think, having listened to all
6 that has been said, that has not been particularly well addressed.

7 Mr. Biju-Duval said that no basic documents provide for the
8 closing statement at the end of the hearing on behalf of the victims.
9 There is only an opening statement.

10 We believe the opposite. Mr. Biju-Duval examined or mentioned
11 international texts that govern the International Criminal Court,
12 saying that nothing was mentioned in them, but anything that is
13 fitting with common sense and fairness should be -- can be selected.
14 We do not have the same mission as has been said before, as the
15 Prosecutor. Either at the time when the procedures regarding the
16 guilt of the accused are being conducted or during the reparations.
17 Each of the parties or participants in court would like to hear what
18 is being said and also to follow the various pieces of evidence
19 submitted.

20 We are the best placed, because we have suffered harm, having
21 perused the evidence in the record, after having considered how the
22 Defence will cross-examine, after how -- having seen how the
23 Prosecutor is going to present evidence, to tell you which evidence
24 provided by the Prosecutor or Defence is of best use to us. The only
25 opportunity we will have to prove and emphasise this can only be at

1 the end of the hearing. That is through the final statement. But to
2 be told that you can only make an opening statement and not a closing
3 statement would mean that our right to represent our views and
4 concerns is limited only to the opening phase. But we have heard this
5 during the Confirmation Hearing. We made opening statements, and at
6 the end we also made a closing statement.

7 But what was the consequence? Some evidence on which the
8 Prosecution and the Defence agreed, the way in which the Prosecutor
9 used this evidence was not the way we used it. I'll give a stupid
10 example. Amongst the maps of camps for training and the scenes of
11 conflict, we were able to see where our victims had acted in the camps

12 and in the battlefields, which the Prosecutor was unable to do.

13 This means that he is not forced to use this evidence in the same
14 way that we do it. The only difference is that we have suffered harm.
15 We have suffered the harm that has occasioned these proceedings, and
16 we are therefore in the best position to tell you what X, a victim, X,
17 Y, Z, A is in relation to the proceedings.

18 So to deny us the right to submit our views and concerns at the
19 end, after hearing all the parties to examine, sort out, and select
20 the evidence that agrees with the case of both parties would be in a
21 way a violation of the rights of the victims. Which is why,
22 Mr. President, although it is not presented -- included in the text,
23 we would like to ask leave to submit closing remarks for the reasons I
24 have submitted. Thank you.

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

1 Mr. Withopf, I think what that leaves, therefore, in relation to
2 victims is that after the luncheon adjournment, we will give an
3 opportunity for you -- rather, Mr. Bulmer and Mr. Biju-Duval, to come

4 back on the issue of victims who are also witnesses, but we'll, as it
5 were, park that issue for the time being.

6 The next issue on the agenda is the instruction of expert
7 witnesses. Your team may wish to go first on this, and who is going
8 to be presenting the Prosecution's arguments on this?

9 MR. WITHOPF: Mr. President, Your Honours, I'm going to represent
10 the Prosecution's points.

11 PRESIDING JUDGE FULFORD: You have the floor then, Mr. Withopf.

12 MR. WITHOPF: Thank you very much, Mr. President, Your Honours.
13 What I'm going to address is the agenda item, the procedure to be
14 adopted for instruction, expert witnesses, whether in order to improve
15 efficiency it will be feasible for the parties to jointly instruct
16 expert witnesses or to use common witnesses who will be instructed
17 separately.

18 PRESIDING JUDGE FULFORD: Mr. Withopf, forgive me for
19 interrupting so early, but can I ask you and the other advocates when
20 discussing this issue to make sure that you directly address what
21 seems to me to be, as it were, a hidden issue that stands behind the
22 formal agenda item and it's this: In the process of instructing an
23 expert, depending of course always on the circumstances, the process
24 of instruction may involve revealing one of two things.

25 First, it may reveal something that a party is considering but

1 hasn't yet decided whether or not they are necessarily going to pursue
2 during the course of the trial, and the question that arises: Should
3 they be under an obligation through the process of joint instruction
4 of an expert to reveal lines of inquiry that they are contemplated but
5 which they haven't yet made a firm decision about. That's question
6 one.

7 Question two is that the process of instruction may reveal a line
8 that a decision has been made is definitely going to be deployed
9 during the course of the trial. So it may be a line of argument, an
10 area that is going to be developed. And the second question,
11 therefore, is whether once a firm decision has been made to deploy
12 that line of argument, that area of evidence, should the party, or
13 indeed the participant, be obliged to reveal through the process of
14 instructing the joint expert that particular line of inquiry or area
15 of evidence.

16 Now, it seems to me that those two questions are fundamental in
17 relation to this whole issue, and can I ask you, please, to ensure
18 that you address during the course of your submissions those two
19 points.

20 MR. WITHOPF: Thank you very much, Mr. President. And this is
21 indeed the dilemma, Mr. President, Your Honours, the parties and the
22 participants are in and that's one of the reasons why in our written
23 submissions we did not go into too much detail. This is the exact
24 reason why. For that reason, I believe I can address the questions
25 that have been asked.

1 Having talked about previous filings, I make reference, and I
2 will limit in to it to our 29 March filing and specific references
3 made to paragraph 7, 8 to 12 and to our 12 September 2007 filing,
4 specific references made to paragraphs 2 and 4.

5 I will come to the concrete situation, but I also believe very
6 limited general observations should be made. Regulation 54(m),
7 Mr. President, Your Honours, provides for the Trial Chamber in the
8 interests of justice, for the purposes of the proceedings, issue
9 orders on the joint or the separate instruction by the participants of
10 expert witnesses, and this provision is mirrored in regulation 44(2).

11 The Trial Chamber can also proprio motu appoint court experts.
12 This authority, in our view, is provided for in Article 96(3) which
13 invests the Trial Chamber with the authority to request to the
14 submission of all evidence that is considered necessary for the
15 determination of the truth. This view is confirmed by Rule 97(2) that
16 provides for the Court's appointment of experts on the assessment of
17 reparations, but also Rule 113 and Rule 135 provide for
18 Court-appointed experts.

19 Joint instruction, Mr. President, Your Honours, joint instruction
20 of experts, and it may be the reason you, Mr. President -- maybe for
21 that reason you have mentioned earlier on appears to be a feature that
22 is new to international criminal justice. We have done research on
23 the ICTY's, and the ICTR's, and the Special Court of Sierra Leone's
24 practice, and to the extent we can tell there, such research has not
25 revealed any case of joint instruction.

1 Joint instruction of experts or even more the Trial Chamber
2 appointing a court expert in our view, Mr. President, Your Honours,
3 has a number of advantages, and the advantages are significant ones.
4 And I understand from having read the various filings of the parties
5 and the participants that in respect of that starting point there is
6 actually agreement between the participants.

7 Coming back to the advantages, I want to list them, and it will
8 become very obvious that these advantages are interlinked, and they
9 are indeed closely interlinked.

10 The main point is that there will be fewer challenges to the
11 expert. What I'm referring to are the qualifications of the expert
12 and/or the experience of the expert.

13 Fewer challenges will serve the purpose of expedience of the
14 proceedings, it will also serve the purpose of judicial economy and,
15 finally, it will save costs. Also consideration, Mr. President, Your
16 Honours, that should be taken care of in our context.

17 For that reason, the Prosecution is advocating for either joint
18 instruction of experts or, where not possible, at least to use a
19 common expert instructed separately, or for a Court-appointed and
20 instructed expert. Where there would be a Court-appointed expert, the
21 Prosecution submits that prior to instructing the expert the parties
22 should be given the right to make submissions to the court on the
23 complete questions the expert should be asked.

24 I'm going to briefly address the list of experts pursuant to
25 Regulation 44(1). That's the Registry's list of experts. The

1 question arises, Mr. President, Your Honours, whether the parties and
2 participants are bound to use the experts that are included in the
3 list of experts as it is maintained by the Registry pursuant to
4 Regulation 44(1).

5 In our submission, Mr. President, Your Honours, we are of the
6 view that there is not such a duty to select an expert or experts from
7 that list, and I'm going to explain why. The criteria used in
8 Regulation 44(1) for the inclusion of an expert in that list, and the
9 provision says and I quote: "Appropriate indication of expertise in
10 the relevant field." It's too vague. It's actually far too vague to
11 make an assessment on the suitability of the experts on the list. And
12 I wish to add at this occasion that the criteria on the qualifications
13 should be developed by jurisprudence.

14 In addition, the current list of the Registry, the current list
15 of experts is a very limited one. It only comprises a few names. I
16 believe there are 15 names on that list, and from what we can read,
17 these potential experts would not provide for the specialised
18 expertise, the Office of the Prosecutor believes, is required in the
19 present case and that list does not appear to serve the purpose of
20 providing sufficient basis to select suitable experts in the areas we
21 believe that acquire expert testimony.

22 This makes us conclude, and this is my last remark on that
23 context, this makes us conclude that the parties and participants
24 should at the very least be able to seek leave, in the interests of
25 justice, to instruct experts that are not on the Registry's list, if

1 not at all be free to select any expert they deem appropriate. The
2 latter observation, Mr. President, Your Honours, appears to be the
3 preferred one in light of the very limited population of the
4 Registry's list.

5 Mr. President, Your Honours, with your leave I'm now coming to
6 the concrete situation in the case against Mr. Thomas Lubanga Dyilo.

7 The favoured approach of joint instruction, or at least separate
8 instruction of a common expert, or appointment of experts by the Court
9 will depend, and it will have its limits. And it became already very
10 clear in the Defence filing of 18 October that it has its limits in
11 the concrete matters that require the testimony of expert witnesses.
12 The situation experts are potentially needed very widely, and indeed
13 there will be situations where the parties have an overarching reason
14 to separately instruct experts, and this goes to the very heart of the
15 question, Mr. President, you have asked us to address.

16 We have in our filing of 29 March identified three main areas
17 where we believe experts' testimony will be required, and we that
18 maintain this view, but in responding to your inquiry, Mr. President,
19 Your Honours, this view is to an extent, actually to a high extent,
20 influenced by the positions the learned colleagues from the Defence,
21 or the previous Defence, more correctly the previous Defence team, has
22 taken in the context of the Confirmation Hearing.

23 There are three areas, Mr. President, Your Honours, we have
24 identified. The first one is context, the second one is matters that
25 concern the anticipated testimony, testimony of the children victim

1 witnesses, and the third one is the specific military position and
2 role de facto and de jure Mr. Thomas Lubanga has played in the FPLC.

3 On context, I wish to it elaborate what's meant by context with
4 your leave, Mr. President. Talking about context, we talk about the
5 political, military, ethnic, economic, and historical aspects of the
6 background of the conflict, and starting point for using an expert on
7 context is a statement, an observation, the Pre-Trial Chamber made in
8 their 29 January decision on the confirmation of charges, and I make
9 specific reference to paragraphs 152 and 153.

10 In paragraph 153, the Pre-Trial Chamber and I quote: "On this
11 last point, the Chamber can only regret that the Prosecution did not
12 see fit to plead with greater specificity the context in which the
13 crimes with which Thomas Lubanga Dyilo is charged occurred."

14 We are of the view, not only based on the observation of the
15 Pre-Trial Chamber, we are of the view that an expert on context at the
16 very beginning of the upcoming trial providing insight in the
17 background of the conflict will be beneficial obviously to the
18 participants but in particular to the Trial Chamber to understand the
19 broader context in which Mr. Thomas Lubanga Dyilo has committed the
20 crimes he is charged with.

21 This is different, and I wish to emphasise, this is very
22 different from the question on the characterisation of the armed
23 conflict. It does not address the matter whether this has been an
24 international or a non-international armed conflict, and it's worth to
25 mention that also the Pre-Trial Chamber has not raised this particular

1 question and made its observation in this particular context.

2 The Prosecution has identified at this stage three names of
3 potential experts, and I can add to the information that has been
4 provided. We have met with one of them, the one we preferred, and in
5 the context of that meeting, Mr. President, Your Honours, we refrained
6 from discussing the substantial matters with the expert, and this is
7 in line with paragraph 12 of our 29 March submission.

8 For your information, Mr. President, Your Honours, and also for
9 the information of the participants, the potential expert has denied
10 the suggestion to testify as an expert in the present proceedings.
11 The Prosecution is therefore currently assessing the suitability of
12 two other experts who are potentially suitable.

13 I move on with your leave, Mr. President, Your Honours, to the
14 second point where we believe the Trial Chamber would benefit from the
15 expertise of an expert, and this point are matters that concern the
16 anticipated testimony of the children victim witnesses, and I'm going
17 to specify this to the extent that such matters include the memory of
18 the children victim witnesses and the impact of trauma on their
19 testimony.

20 In this context, Mr. President, Your Honours, the Prosecution
21 favours a Court-appointed expert to keep the issue at stake as
22 narrowed as possible. If there would not be a Court expert,
23 conflicting opinions would be provided. That would mean that the
24 Court would have to appoint a third expert to scrutinise the expert
25 opinion of party experts.

1 The parties would, of course, and this is in line with what I
2 said earlier on, would of course like to submit their respective own
3 sets of questions to such a Court-appointed experts, and a joint
4 instruction in this context would, of course, again be preferable.

5 We believe that such an expert should meet a number of criteria,
6 should be an psychologist, an academic with strong, practical, and in
7 particular field experience. He should have -- he or she should have
8 experience as a court expert, and should be internationally
9 recommended. Obviously African experience is key in this context, and
10 it would also be preferable if the person in question would be fluent
11 in French.

12 The third aspect, and on this point I can be short --

13 PRESIDING JUDGE FULFORD: Can I interrupt you, Mr. Withopf. One
14 question from me in relation to an expert to deal with child
15 witnesses. Do you have in mind that expert only giving, as it were,
16 general expert evidence in relation to child witnesses in this
17 situation generally, or do you anticipate such an expert looking at
18 the individual testimonies of individual witnesses and potentially
19 interviewing the individual witnesses so as to provide a report on
20 matters that particularly relate to the trauma experienced by and
21 memory problems of individual witnesses?

22 MR. WITHOPF: Thank you, Mr. President, for asking this question,
23 and it allows me to clarify what the Office of the Prosecutor is
24 aiming at.

25 Such an expert should, of course, provide general information on

1 the situation children who were used as child soldiers are in. In
2 addition to it, and to complement such observations, such an expert
3 should also be present in the courtroom whilst the children are
4 testifying and that such an expert should then be in a position to,
5 after the testimony of the children, to assist the Trial Chamber in
6 respect of questions that may or may not come up in respect to the
7 memory of the children victim witnesses and the impact of trauma on
8 the testimony. So to keep it short, the answer to both questions is
9 yes.

10 PRESIDING JUDGE FULFORD: Because one can imagine a situation
11 where having heard from a particular witness, there doesn't appear to
12 be any issue that arises out of trauma affecting that individual
13 witness' memory. And in a sense therefore, and in those
14 circumstances, the evidence of an expert may be of less value.

15 MR. WITHOPF: Mr. President, Your Honours, at this stage of
16 course such a situation cannot be excluded. Nevertheless, in our
17 belief it can reasonably be anticipated that such question will arise
18 and will need to be addressed.

19 With your leave, Mr. President and Your Honours.

20 PRESIDING JUDGE FULFORD: Please carry on.

21 MR. WITHOPF: There's one further aspect I wish to address, and
22 this is the expert who should cover aspects of military nature, but
23 the moment I say military nature, I want to specifically clarify
24 orally now what's meant by it. We mean the political-military
25 interfaces. In this context obviously the interfaces between the UPC

1 and the FPLC and in addition such an expert at this stage should also
2 be able to cover senior level command and control in military
3 organisations such as the FPLC.

4 We have identified at this stage four such experts, and they are
5 all not on the list, and the same observation applies to all the other
6 experts I was making reference to earlier on. We have identified four
7 military experts, and we have sent requests for assistance to four
8 African countries. At this stage we are at the very early stage of
9 contacting such experts, and we have not met any of the experts we
10 deem and we think that they are suitable to provide the expertise we
11 would require.

12 But this, Mr. President, Your Honours, this now goes exactly to
13 the question you were asking us to specifically address. In
14 particular, the last point on the military expert is widely dependent
15 and is largely dependent on the position the Defence team will take.
16 We are exploring opportunities to talk to a military expert for the
17 main reason that the previous Defence team has, in the context of the
18 Confirmation Hearing, repeatedly emphasised that Mr. Thomas Lubanga
19 Dyilo is a politician only and had never any dealings with the
20 military side in the FPLC, which as we all know is the military wing
21 of the UPC.

22 Of course it would be interesting to know whether the learned
23 colleagues from the Defence are pursuing this line of defence. If so,
24 then the Office of the Prosecutor deems it necessary to request the
25 expertise of a military expert to provide expert opinion on the

1 matters I was just mentioning.

2 Revealing a defence line at this stage of the proceedings,
3 Mr. President, Your Honours, I'm not expecting, and there's no duty on
4 the side of the Defence, to reveal any defence lines at this point in
5 time, and I would agree with such an observation.

6 How can one solve such a problem? By maintaining the general
7 observation that a joint instruction would be beneficial to the
8 efficiency of the proceedings.

9 One could still use a common expert for the main purpose to avoid
10 questions and challenges on the expertise of the expert concerned, and
11 the expert could be instructed separately, and the parties and, where
12 applicable, the participants could provide for the questions without
13 the knowledge of the other party. I can envisage such a situation,
14 but it's not entirely without any problems.

15 PRESIDING JUDGE FULFORD: Yes. I mean, the clear and obvious
16 problem, Mr. Withopf, is that although information may be provided
17 privately to the expert, when the expert comes to write his or her
18 report, it is highly likely that in order to deal with the points
19 raised they're going to have to reveal the nature of the instructions
20 they've received and so it doesn't really provide a solution to the
21 problem, does it?

22 MR. WITHOPF: I would necessarily -- I would not necessarily
23 entirely agree, but I agree with the observation that the expert not
24 only has to reveal the instructions when he provides the report. The
25 expert would also probably have to reveal the materials on which his

1 report is based upon, which actually aggravates the problem you are
2 describing, Mr. President.

3 PRESIDING JUDGE FULFORD: Well, what part of my observation is
4 left, Mr. Withopf, which you don't agree with?

5 MR. WITHOPF: I think there's a matter of timing coming with it.
6 An expert report, Mr. President, Your Honours, is regularly submitted,
7 and you know it as good as I, obviously, at the beginning of a trial.
8 If there would be a Prosecution's case and a Defence case, and that's
9 the basis the Office of the Prosecutor is working upon, the bit on the
10 Prosecution's case could be revealed prior to the commencement of the
11 Prosecution's case, and the portion on the Defence case -- on the
12 Defence bit could be revealed to the other party and, where
13 applicable, to the participants prior to the Defence case.

14 I think a common instruction, and I acknowledge that there come a
15 lot of difficulties with this, are not excluded necessarily by that
16 challenge.

17 PRESIDING JUDGE FULFORD: Mr. Withopf, I think I need to make it
18 clear as well that -- and this is in no way expressing any kind of
19 preliminary view of the Bench that that needs to be very heavily
20 emphasised, but nonetheless, I think you must not take it as being
21 automatically a given proposition that there is no obligation on the
22 Defence prior to trial to reveal the lines of defence that are going
23 to be advanced. That is an issue which we consider needs to be
24 addressed. So don't found your submissions on the basis that that is
25 an inevitable conclusion that we're going to reach, namely that

1 there's no obligation to reveal at any stage lines of defence that are
2 going to be taken.

3 MR. WITHOPF: Mr. President, Your Honours, this is a very
4 encouraging remark, obviously, and I appreciate it very much.

5 If the Defence would be obliged to reveal their defence lines,
6 then of course it should be in sufficient time prior to the
7 commencement of the trial in order to enable the Office of the
8 Prosecutor to address these defence lines. And of course, only once
9 these defence lines are revealed to the Office of the Prosecutor, then
10 we are in a better position to identify the areas where expert
11 opinions are needed.

12 Mr. President, Your Honours, I actually came to the end of my
13 submission. I stand ready for questions that may be asked.

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

16 Ms. Mabilille, who is fielding the Defence submissions on this
17 issue?

18 MS. MABILLE (interpretation): My colleague Caroline Buteau.

19 PRESIDING JUDGE FULFORD: Yes.

20 MS. BUTEAU (interpretation): Thank you, Mr. President.

21 Mr. President, Your Honours, the Defence would like to summarise for
22 the Bench its position as in its submissions of paragraph 71 onwards.

23 The Prosecutor puts forward the principle of the parties
24 selecting and instructing expert witnesses jointly. The Defence can
25 agree on this principle. At the same time as we might be in agreement

1 with the use of jointly appointed experts, we would want to instruct
2 them separately. We would also be -- only be in agreement with
3 jointly appointed expert witnesses where we consider this to be
4 possible.

5 The Defence would want to jointly hear expert witnesses, jointly
6 instruct them on technical issues such as linguistic matters, matters
7 of transcription, or matters related to the e-court, for instance, as
8 have come up recently. And secondly, when the expert view would be in
9 relation to more controversial subject matter, there the Defence would
10 like to take a decision on a case-by-case basis. That is to say the
11 scope for jointly instructing an expert witness would need to be
12 reviewed on a case-by-case basis.

13 When it comes to expert witnesses who would be testifying on
14 matters which are not exact sciences, it could prejudice the Defence
15 if those experts were jointly instructed. It would also be up to the
16 cost of richness, I say. An expert witness in history, for instance,
17 might not -- it may not be possible to choose an expert which is
18 equally agreeable to the two parties. So there will be the issue of
19 when and where a consensus is possible. This might be the case when
20 it comes to history and certain other matters. It will depend on the
21 methods which are used by the expert and the evaluation of the facts
22 by the expert. This will have an important impact on the conclusions
23 which are presented by the expert.

24 We believe that it would be useful for the Chamber to be able to
25 hear different theories and to be able to challenge the expert. It is

1 important that the parties have the opportunity to put to the test the
2 theses put forward by the experts. This would be of benefit to the
3 Chamber and would enrich the proceedings.

4 I'd like to refer you to paragraph 77 onward of our submissions
5 where reference is made to the right to a full and integral defence
6 and to the right to silence. That is to say the accused person should
7 be able to hear all of the evidence which is presented against him
8 before being obliged to call witnesses or to divulge in part the lines
9 of his defence.

10 Regulation 44(2) to our minds refers only to technical matters.
11 In that connection, it might well be possible to jointly instruct
12 witnesses, but only on those technical matters such as e-court.

13 I would like to conclude on a minor point. The Defence is not in
14 a position to give a view on what subjects they would like to hear
15 experts on and will not know until they have heard the evidence of the
16 Prosecutor. At this point in time, we cannot be sure. For instance,
17 we can well imagine that in the case of historical analysis it may
18 well be the case, but we cannot be sure as regards all subjects.

19 PRESIDING JUDGE FULFORD: Thank you very much indeed.

20 Mr. Walley.

21 MR. WALLEYN (interpretation): Mr. President, just a brief
22 comment. I think that I have mentioned it in our conclusions. If
23 witnesses are jointly instructed, it may in some cases be very useful
24 that those instructions be shared with the victims' representatives
25 and in line with Regulation 44 which provides explicitly for this.

1 Furthermore, I've already referred to an issue; for instance, the
2 appointment of experts by the Court and in the framework of
3 reparations.

4 It may well be useful to consider, perhaps at a later stage, the
5 adversarial nature of that expert testimony if the expert is to give a
6 view on the harm suffered. I think that this -- that it is important
7 that representatives be present during the expert's work, and I would
8 be delighted to have the views of the other participants on this
9 point.

10 For instance, if there were to be a medical or forensic piece of
11 work done, it would be useful for the different parties to the case to
12 be able to appoint a doctor, for instance, to attend the proceedings.

13 PRESIDING JUDGE FULFORD: Ms. Bapita? No. All right. Thank you
14 very much indeed.

15 Mr. Preira, anything that the Registry wants to say on this?

16 MR. PREIRA (interpretation): Thank you, Mr. President, Your
17 Honours. The Registry would like to provide some clarifications
18 regarding the list of experts under Regulation 44, and I would ask my
19 colleague Simo Vaatainen to take the floor on the matter.

20 PRESIDING JUDGE FULFORD: Thank you very much.

21 Yes.

22 MR. VAATAINEN: Mr. President, Your Honours, I would have only
23 two very short and practical point. First of all in relation to the
24 expert witnesses vis-a-vis the child soldiers that the -- or the
25 experts vis-a-vis the child soldiers the Office of the Prosecutor

1 mentioned, I would just like to point out that this shouldn't be
2 confused with, for example, a psychologist that a Chamber could allow
3 to accompany the child soldier to sit here in the courtroom, just for
4 the clarification of all concerned.

5 On the other point on the issue of list of experts as they are
6 foreseen in Regulations of the Court 44, and Regulations of the
7 Registry 56, of course one approach could be that for the benefit of
8 the Court as a whole and other pre-trial or Trial Chambers, or even
9 maybe the Appeals Chamber, the experts who appear would be required to
10 be included on that list, because they -- they could be utilised in --
11 in other situations as well, and I would believe that could be
12 beneficial to the Court as a whole.

13 Thank you.

14 PRESIDING JUDGE FULFORD: Thank you very much indeed.

15 Ms. Buteau, do you want to come back at all on the issue raised
16 by Mr. Walley in relation to an appropriate situation, there being
17 presence during the work of an expert, so as to ensure that victims'
18 interests are appropriately dealt with? Do you have any observations
19 on that?

20 MS. BUTEAU (interpretation): We have no further submissions on
21 this. Thank you.

22 PRESIDING JUDGE FULFORD: Anything finally, Mr. Withopf?

23 MR. WITHOPF: Mr. President, very, very briefly in addressing one
24 point that has been made by my learned friend from the Defence. I can
25 see the difference in Regulation 44(2) between technical matters and

1 any other matters. It's just that mentioned in the law, and I don't
2 think there's any reason to believe that it could be interpreted in
3 that way.

4 I very much agree with the observations that have been made by
5 Mr. Vaatainen on the list of experts.

6 In respect of the submission by the legal representatives for the
7 victims, I think I can re-emphasise what we said earlier on as long as
8 it is not going to the ultimate issue, the guilt and the innocence, or
9 the innocence of the accused, then there's obviously no reason why the
10 legal representatives should not have a say in it within that limits.

11 PRESIDING JUDGE FULFORD: Mr. Withopf, one final matter from me.
12 An issue obviously has arisen in relation to the Registrar's list of
13 experts, and one could easily foresee a situation where either because
14 the list is too short or because an area of expertise arises which
15 hasn't been provided for in the experts who have been placed on the
16 list that even if one said that experts should come from the list,
17 notwithstanding that the list may not cover every situation.

18 Would there, in the view of the Prosecution, be any merit in
19 there being some kind of procedure such as exists with counsel who are
20 entitled to appear before the Court of ensuring that certain minimum
21 criteria are satisfied for experts before they are allowed to give
22 expert testimony in court proceedings before the ICC?

23 MR. WITHOPF: Mr. President, Your Honours, there's a straight
24 answer to your question. Yes. The answer is yes. It would be
25 beneficial, not only for the Lubanga trial but for future trials, if

1 the Office of the Prosecutor and, obviously, also the legal
2 representatives and the Defence could raise questions that go to the
3 qualifications of the experts. The list is currently comprised of 15
4 names, and from what I can see certainly not all of the three
5 anticipated areas where expert opinion is needed would be covered by
6 the individuals on that list.

7 I have mentioned that the criteria in 44(2) and Regulation 44(2)
8 is very vague and it needs to be further elaborated. It can be done
9 in a concerted effort of the Office of the Prosecutor, the Defence,
10 and the legal representatives where applicable. It can also be done
11 and complemented by jurisprudence to be developed by the Chambers
12 concerned. We certainly would be able to develop criteria at least in
13 respect of a number of fields of expertise. There would be fields of
14 expertise the Office of the Prosecutor simply would not be in a
15 position to provide for criteria.

16 PRESIDING JUDGE FULFORD: Thank you very much.

17 Ms. Buteau, anything on that last point?

18 MS. BUTEAU (interpretation): Mr. President, in fact the Defence
19 would just have a question to put. We don't have the answer, but we
20 would like to put the following to you: A definition of the status of
21 the expert, for instance in relation to his qualifications, perhaps
22 this must be put to the Chamber as it is at the other ad hoc
23 tribunals, that is to say the parties approach to the Chamber and
24 request to be able to hear from an expert, and then the Chamber would
25 hear a discussion of the qualifications, et cetera, of the expert and

1 take a decision on it in the event that the expert does not already
2 appear on the list.

3 PRESIDING JUDGE FULFORD: Thank you very much.

4 Mr. Withopf, we've now got witness proofing. We've got 10
5 minutes. Do you want to make a start?

6 MR. WITHOPF: I will make a start, Mr. President, Your Honours.
7 I will make the submissions myself, but I need a second to actually
8 reorganise my materials.

9 PRESIDING JUDGE FULFORD: Are you happy to begin now or would you
10 prefer to begin at 2.00?

11 MR. WITHOPF: No. I'm very happy to begin now if you give me one
12 minute.

13 PRESIDING JUDGE FULFORD: But we will need to rise at 20 to.

14 MR. WITHOPF: That's well understood.

15 Mr. President, Your Honours. Mr. President, Your Honours, what
16 I'm going to address are the two aspects that are detailed in the
17 agenda for this week's court hearings that concern the broader aspect
18 of the witness proofing. The first one would be witness
19 familiarisation and the second one, witness proofing proper. I will
20 start with witness familiarisation. I believe that's an area which I
21 can cover within the 10 minutes that are left, and it will be very
22 straight and it will be short.

23 PRESIDING JUDGE FULFORD: It's pretty uncontentious, I think.

24 MR. WITHOPF: That's exactly point, Mr. President, Your Honours.

25 I want to make a few observations, but I don't believe that this is an

1 area where the parties and participants have very different views.

2 In respect of witness familiarisation, the Prosecution agrees
3 that Rule 16(2) and 17(2) and in that respect the latter provision
4 provide for the Victims and Witnesses Unit to -- and now,
5 Mr. President, Your Honour, now comes the important part, and I quote
6 the law in consultation with the office the Prosecutor: "To undertake
7 the practice of witness familiarisation."

8 Important, however, Mr. President, Your Honours, is what witness
9 familiarisation actually encompasses, and in this context the
10 Pre-Trial Chamber in its decision of 8 of November, 2006, which is the
11 starting point of the -- today's submissions, has provided guidance to
12 the extent that a detailed witness familiarisation encompassing the
13 following: Namely, assisting the witness to fully understand the
14 court proceedings, its participants and their respective roles,
15 reassuring the witness about his or her role in proceedings before the
16 court, ensuring the witness -- that the witness clearly understands
17 that he or she is under strict legal obligation to tell the truth when
18 testifying, explaining to the witness the process of examination and
19 cross-examination, and finally, the last point, discussing matters
20 that are related to the security and safety of the witness in order to
21 determine that a necessity of applications for protective measures
22 before the Court.

23 Obviously here, Mr. President, Your Honours, in this context and
24 in light of the fact that the Prosecution, pursuant to Rule 87, can
25 apply for the witness, on behalf of the witness for protective

1 measures, the Prosecution, in addition, has an own and an independent
2 role to play.

3 In translating these five areas of witness familiarisation into
4 practice, and this is for the information of the Trial Chamber, the
5 Office of the Prosecutor's Children's and Gender Unit, obviously
6 having particular expertise on these matters in close consultation
7 with the Prosecution's trial team in this case, initiated a process of
8 consultation with the Victims and Witnesses Unit in order to ensure
9 that the OTP's views on how the various aspects of witness
10 familiarisation should be conducted are duly taken into account. I
11 can only invite my learned friends from the Defence to also
12 participate in such an exchange.

13 This process has started last week with the first meeting between
14 the Office of the Prosecutor and the Victims and Witness Unit, and
15 this process, Mr. President, Your Honours, will obviously continue,
16 and I limit my observations on witness familiarise to what I have
17 said.

18 PRESIDING JUDGE FULFORD: I think you can make a start on the
19 next area then, Mr. Withopf.

20 MR. WITHOPF: I'm very happy to do so, Mr. President, Your
21 Honours, and you're probably not surprised at all to hear that the
22 Pre-Trial Chamber's decision of 8 of November 2006 has given -- or has
23 given raise to serious concern within the Office of the Prosecutor.
24 What I'm going to talk about is witness proofing proper.

25 PRESIDING JUDGE FULFORD: Now, Mr. Withopf, perhaps in fact given

1 that the time is running out, can I draw to your attention and can I
2 make it clear at the moment, I'm only expressing a point of my own.
3 This has not been the subject of any detailed discussion between the
4 Judges at all, but the Pre-Trial Chamber's decision at paragraphs 40
5 and 41 is founded on, as I understand it, certainly at that point, an
6 understanding of the law as applied in England and Wales, and there
7 are three aspects of witness proofing that the Pre-Trial Chamber dealt
8 with at that point, allowing the witness to read his or her witness
9 statement, refreshing his or her memory in respect of the evidence
10 that he or she will give, and, three, putting to the witness the very
11 same questions.

12 Now, as I understand the Pre-Trial Chamber's decision, they say
13 that each one of those three processes are prohibited by the law of
14 England and Wales, and I have a difficulty with that. It seems to me
15 that (i) and (ii), reading the statement and refreshing his memory,

16 are in fact permitted by the law of England and Wales, but (iii), is
17 absolutely prohibited.

18 Now, as I see it, in that regard, there may be a difficulty with
19 this aspect of Pre-Trial Chamber I's decision. Whether or not that
20 overall works to invalidate the decision generally is another matter,
21 but there is that particular problem which I would like your
22 assistance with, and the assistance of the other advocates who are
23 going to be making representations.

24 Now, having laid down that marker, Mr. Withopf, rather than
25 asking you to embark on the -- the generality of your submissions now,

1 perhaps we can leave that until 2.00. Thank you very much indeed.

2 Mr. Pereira, we've been extremely grateful and continue to be
3 extremely grateful for the presence of a large team, as it were, from
4 the Registry today. I am highly conscious of the fact that by being
5 here we're taking a number of people away from their desks and from
6 other work that they would undoubtedly wish to be engaged in.

7 Although we are very pleased for each and every one of your team
8 to remain here, please understand it will not be taken as any kind of
9 discourtesy to us if at this stage some of your team were to
10 disappear.

11 Thank you all very much. We'll sit again at 2.00.

12 Luncheon recess taken at 12.36 p.m.

13 On resuming at 2.02 p.m.

14 COURT USHER: All rise. Please be seated.

15 PRESIDING JUDGE FULFORD: Good afternoon. Yes, Mr. Withopf.

16 MR. WITHOPF: Thank you very much, Mr. President, Your Honours.
17 I'm going to address witness proofing proper, and of course I will
18 take particularly into account the statement that has been made
19 yesterday by the Presiding Judge and also the further statement that
20 has been made today.

21 Your Honour the Presiding Judge has already mentioned the
22 Pre-Trial Chamber's decision of 8th of November, 2006, and we all know
23 that the Pre-Trial Chamber at the time ordered the Prosecution not to
24 undertake the practice of witness proofing with the sole Prosecution
25 witness that was called for the purpose of the Confirmation Hearing.

1 Prior to that decision, Mr. President, Your Honours, witness
2 proofing was not only permitted, but it was a well-established
3 practice before the international courts and tribunals, and of course
4 I'm making reference to the ICTY, the ICTR, and also to the Special
5 Court for Sierra Leone. And it was well-established and well
6 recognised because of the obvious benefit of having proofing sessions
7 with witnesses for the presentation of evidence. And here,
8 Mr. President, Your Honours, I haste to add with respect of the
9 presentation of the Prosecution's and the Defence's evidence, the
10 benefit of witness proofing applies to both the presentation of the
11 Prosecution's and the Defence's evidence.

12 And very important, Mr. President, Your Honours, the practice of
13 witness proofing has subsequently, following the Pre-Trial Chamber's
14 decision, and in particular in light of it, has been confirmed as a
15 permissible practice at the ICTY. I make reference to the respective
16 decisions in Milutinovic and others, and at the ICTR. Here I make
17 reference to the decisions in Karemera and others. And it has
18 confirmed, as I said, as a permissible practice in particular in light
19 of the Pre-Trial Chamber's decision of 8th of November, 2006.

20 What does this tell us, Mr. President, Your Honours? It tells us
21 that the decision of the Pre-Trial Chamber of 8th of November, 2006,
22 is unique in international criminal law. It stands alone. No other
23 tribunal or court follow it, and they have not follow it for good
24 reasons, for very good reasons. Not only because the decision is
25 legally questionable, and the Presiding Judge has already identified

1 two aspects, two significant aspects of that have decision, but also
2 because the quote in paragraph 34 of that decision is enlightening as
3 to the underlying thinking process of the 8th November, 2006,
4 decision.

5 We believe, Mr. President, Your Honours, that thinking in
6 categories of civil law and common law practices and the underlying
7 reasons for such practices is not helpful, and it's not helpful at all
8 in this context. The sole, the sole determining factor in our view
9 and in our submission should be whether proofing of witnesses or the
10 result of it, and in particular the result of it assists the Trial
11 Chamber to discharge its burden to establish the truth.

12 Against this background, Mr. President, Your Honours, it appears
13 to be necessary and also in light of the submissions that have been
14 made by my learned friends from the Defence and by the legal
15 representatives for the victims, it appears to be necessary to explain
16 what witness proofing is about. There appear to be great
17 misunderstandings, almost myth, as they are reflected in paragraph 12
18 of the Pre-Trial Chamber's 8th November decision where proofing of
19 witnesses is used, and very unfortunately is used as a synonym to
20 "preparation of a witness," "training of a witness," "coaching of a
21 witness," and even "tampering with the evidence of a witness."

22 Mr. President, Your Honours, all of this is not proofing. For
23 the benefit of the Trial Chamber, but also for the benefit of those
24 participants who are not familiar with the practice of proofing, I
25 will explain in more detail, Mr. President, Your Honours, what

1 proofing is about. And that's the way, Mr. President, Your Honours,
2 the Prosecution's trial team in the case against Mr. Thomas Lubanga
3 envisages proofing sessions to take place. I will be very transparent
4 in that respect.

5 Proofing encompasses the following in chronological order:
6 First, to hand out the witness his or her statement a few days prior,
7 usually the day prior to the proofing session, and thus to allow the
8 witness to read his or her statement in order to refresh his or her
9 memory prior to the proofing session. I wish to add in this context,
10 Mr. President, Your Honours, that there is a policy within the Office
11 of the Prosecutor that the witnesses, once the statement-taking
12 process has concluded, are not provided with a copy of their
13 respective statements, and this is a policy mainly for security
14 reasons. We want to protect the safety and the security of the
15 witnesses concerned.

16 When the statement is handed out to the witness, Mr. President,
17 Your Honours, the sole comment that is made is that the statement is
18 handed out for the purpose of refreshing the witness's memory. And
19 already here I add that statements, and quite a significant number of
20 statements, in this particular case, were taken in 2004 and 2005,
21 meaning two or three years or even more prior to the witnesses
22 concerned testifying in court.

23 But, Mr. President, Your Honours, to continue with what the
24 practice of proofing means. Once the statement has been handed over
25 to the witness concerned, we meet with the witness on the premises of

1 the Office of the Prosecutor a few days prior to the actual testimony
2 of the witness. Such meetings usually take place with the trial
3 attorney who is assigned to examine the witness in court and one
4 investigator and/or one analyst to assist the trial attorney.

5 The witness is then reminded of his or her role and emphasis is
6 given to the fact that the witness has to assist the Trial Chamber in
7 its duty to establish the truth and that therefore the witness is
8 under strict legal obligation to tell the truth. Then in the context
9 of a proofing session, the representatives of the Office of the
10 Prosecutor discuss with the witness any issues that could potentially
11 result in the Prosecution, on behalf of the witness, requesting the
12 Trial Chamber to order protective measures. And then, and I believe
13 I'll come closer to the area that, in our submission wrongly raises
14 concerns, then on the basis of the statement that has been provided by
15 the witness, the representatives of the Office of the Prosecutor
16 address with the witness the areas in the statement that the assigned
17 trial lawyer will address with the witness in court, and we take notes
18 about the statements the witness makes in the context of the proofing
19 session.

20 In this context, and this addresses the inquiry, Mr. President,
21 you have made prior to the lunch break, in this context we ask indeed
22 questions. Questions are put to the witness by the trial lawyer.
23 However, and this is now the important point we wish to make, in any
24 event the series of questions put to the witness in court is not, is
25 not a rehearsal of the questions asked during the proofing session,

1 and in no instance any of the participants in a proofing session is
2 making comments on the statements of the witness in the presence of
3 the witness concerned.

4 Not being able to ask questions in the context of a proofing
5 session, Mr. President, Your Honours, would contradict the purpose of
6 a proofing session; namely, to establish in which areas a witness can
7 contribute to assist the Trial Chamber in establishing the truth.

8 Where applicable, Mr. President, Your Honours, the witness is
9 also shown potential exhibits, documents, video footage, for example,
10 that the trial lawyer intends the witness to comment upon during the
11 testimony of the witness and in that context also respective questions
12 are asked. And of course in the context of such questions the
13 representatives of the Office of the Prosecutor inquire about possible
14 additional information of both potentially incriminatory and, of
15 course, also of potentially exculpatory nature in line with the
16 statutory duties of the Office of the Prosecutor.

17 Mr. President, Your Honours, this is how we envisage a proofing
18 session look like, and there's nothing else that comes on top of it,
19 and we don't think that there's anything in it that is contrary to the
20 law.

21 PRESIDING JUDGE FULFORD: All right. Mr. Withopf, I'll ask you
22 to pause there. I want to make sure that -- certainly I, I imagine I
23 speak for my judicial colleagues, that we understand exactly what you
24 envisage.

25 So do I take it from what you've said that the proofing session

1 is not, as it were, a dry run of the evidence -- or the questions and
2 answers that are -- that it's intended should be asked in court? Now,
3 first of all, is that right?

4 MR. WITHOPF: It's certainly not a dry run. It's not a
5 rehearsal. What will happen in court is not a rehearsal of what
6 happened during the proofing session. The Office of the Prosecutor
7 prior to such a proofing session identifies the areas which it intends
8 the witness concerned to testify in court, and based on the statement,
9 yes, we ask questions. Depending on the answers; we may or may not
10 ask the same questions or similar questions in court, but there's no
11 rehearsal that this is exactly same line of questioning because - and
12 this is also one of the aims of proofing - is to establish whether the
13 witness can actually contribute to the areas which are in dispute and
14 which need to be proven by the Office of the Prosecutor. It's not a
15 dry run.

16 PRESIDING JUDGE FULFORD: I mean, there are a number of ways of
17 doing that, Mr. Withopf, aren't there. You can -- you can show the
18 witness his or her statement, and then you can conduct the exercise
19 that you've just referred to, which really could amount to a question
20 and answer session that may be very similar to that which will later
21 be conducted in court. I think, as I understand your position, there
22 could be a higher degree of overlap between what happens during the
23 witness proofing session and what occurs in court. That's one
24 possibility.

25 Another possibility in terms of finding out whether the witness

1 will indeed be able to contribute to the court proceedings is having
2 seen their statement, the witness can be asked whether or not, in a
3 general sense, they are still able to assist on the matters that were
4 set out in their witness statement, or because of the passing of time
5 or the trauma they've suffered, that kind of thing, in fact they are
6 no longer able to assist either generally or on particular issues.

7 Now, that would enable the Prosecution to establish whether or
8 not the witness can assist without going through, as it were, a dry --
9 a dry run question and answer session of the sort that will be
10 conducted in court.

11 Now, would that second scenario, as it were, sufficiently enable
12 you to identify whether the witness is still going to be able to
13 assist?

14 MR. WITHOPF: Mr. President, Your Honours, I think the second
15 scenario is a starting point. It's a starting point for the
16 representatives of the Office of the Prosecutor taking part in the
17 proofing sessions. Yes, such a question is asked. The first line is,
18 "Do you recall what you have told the investigator of the Office of
19 the Prosecutor which is mirrored in the statement that has been
20 provided to you?"

21 PRESIDING JUDGE FULFORD: Because the -- the potential danger --
22 or, rather, it could be expressed that the potential danger of what
23 you are proposing, Mr. Withopf, is that there is, in essence, although
24 it won't be called a rehearsal, something which comes very close to
25 rehearsing the witness on their evidence before they come into court

1 so as to give them an opportunity of thinking about the questions that
2 are going to be asked so they can ruminate over the answers they are
3 going to give; thereby preparing them, potentially unnaturally, for
4 the procedure that's going to take place in court.

5 I mean, what would be your response to that concern if it was
6 expressed in that way?

7 MR. WITHOPF: There's a clear response to it, and it's correct,
8 Mr. President, Your Honours, there is a potential for an overlap. I
9 would not go that far that it could be a high overlap, but there is a
10 potential, and there is a high potential for an overlap of questions
11 being asked.

12 I believe by not commenting on any of the answers the witness
13 provides in such a proofing session, by not directing the witness in
14 any direction, by just accepting what the witness is responding to the
15 questions put to him or her, the Office of the Prosecutor is in a
16 position to establish whether that particular witness is in a way or
17 is in a position to provide evidence that is of assistance to the
18 Trial Chamber. The witness in the context of such a proofing session
19 will never get to understand whether the representatives of the Office
20 of the Prosecutor taking part in such a session are happy or unhappy
21 about the answers the witness is giving. The witness would not know,
22 but of course it's right that depending on the answers, the one or the
23 other question will be asked in court in the same or a similar way.

24 What it serves is the following: By asking these questions, the
25 witness of course is to an extent "forced" to think about the answers

1 he has given one, two, three, or even four years ago. This is
2 refreshing the memory of the witness. But the witness will not be
3 given any indication whether this is in favour or not in favour of the
4 Prosecution's case. We want to establish whether the witness is in a
5 position to provide evidence that is relevant.

6 PRESIDING JUDGE FULFORD: One last intervention from me on this,
7 Mr. Withopf, and then I'll let you get on.

8 As I understand it, you've undertaken to be bound by Article 705
9 of the Code Of Conduct of the bar council of England and Wales. Is
10 that right?

11 MR. WITHOPF: That's right. That has been our submission to the
12 Pre-Trial Chamber and we stick to it.

13 PRESIDING JUDGE FULFORD: Now, that provision prohibits the
14 rehearsing, the practising, or the coaching of a witness in relation
15 to his evidence. Now, if a few days or a short while before giving
16 evidence, a witness is asked essentially the same questions that
17 they're going to be asked during the course of their evidence, how do
18 you avoid the suggestion that that procedure is practising a witness
19 in relation to the evidence they're giving? Whatever your intention
20 may be by asking the questions, isn't the result that you are enabling
21 the witness to practice the evidence they're going to be giving
22 shortly afterwards?

23 MR. WITHOPF: Mr. President, Your Honours, I think there's a fine
24 line to draw, and I understand that there is concern on the side of
25 the Chamber. There's a fine line to draw between what we intend to do

1 and practising, and in particular if practising is understood in the
2 sense of preparing a witness.

3 To make the witness -- or to put questions to the witness, we may
4 or may is not ask in the following court proceedings. In our
5 respectful submission it would only amount to practising if the
6 witness, following the responses he's giving, has given any indication
7 whether this is good or bad, to phrase it plainly, in the viewpoint of
8 the Prosecution.

9 PRESIDING JUDGE FULFORD: I'm afraid, Mr. Withopf, I find that a
10 difficult submission. You can practice something without being told
11 whether or not what you're doing is good or bad. The activity of
12 practising doesn't require a judgement to be given to you as to
13 whether or not you've done it well or badly. It is simply the event
14 during which you are, as it were, having a dry run at something you're
15 going to be doing later.

16 MR. WITHOPF: Again, I understand that there are questions put to
17 us, and this is a serious matter, and for that reason we have decided
18 to be very up-front and transparent what we are intending to do.

19 We identify prior to a witness attending a proofing session the
20 areas we are particularly interested in and then we touch on these
21 areas, but we are not asking questions along the lines, "Mr. or
22 Ms. Witness, can you confirm what you have said in your statement?"

23 In very many instances we are exposed to a situation that the
24 statement, as I mentioned earlier on, was taken years prior to the
25 proofing session, and in the course of the events over the years, the

1 Office of the Prosecutor has gathered additional evidence. And in
2 light of this additional evidence, we are putting questions to the
3 witness which may result in the witness confirming what he or she said
4 in the statement, or it may result in something very different.

5 If it's something very different, if that's relevant, whether of
6 incriminatory or exculpatory nature, we take note of that. And in the
7 event it is of exculpatory nature, obviously the Defence has and will
8 be informed in due course and in significant time prior to the witness
9 being called by the Office of the Prosecutor.

10 So it's not the same like -- like putting the same questions to
11 the witness. It's not -- it's not a repetition of the
12 statement-taking process, and it's also not an anticipation of the
13 very same questions the witness is being asked in court.

14 PRESIDING JUDGE FULFORD: Well, I think you've answered the
15 question, Mr. Withopf, and I'm very grateful. Please carry on with
16 your submissions.

17 MR. WITHOPF: Thank you very much, Mr. President, Your Honours.
18 And I am of the strong belief that my further submissions will shed
19 some more light on the matter of proofing, and will also address the
20 one or the other aspect that will help the Honourable Bench to
21 understand what we intend to do.

22 As I mentioned, if potentially exculpatory information or
23 evidence is revealed in the context of such proofing sessions, the
24 Defence will be informed and will be informed in time prior to the
25 examination of the witness in court.

1 In our 12 September submission, we have detailed the advantages
2 of witness proofing, which benefit the court and the efficiency of the
3 judicial proceedings. And whilst I make reference to paragraph 16 of
4 that submission, I highlight the two main points, and the two main
5 points are that proofing allows for a relevant, accurate, complete,
6 orderly, and efficient presentation of evidence of a witness. And the
7 second main point: The proofing provides for the Defence, or in more
8 general terms, to the other party to be put on notice of any
9 differences in recollection of the witness thereby preventing undue
10 surprise.

11 In light of the specific yesterday's request of Your Honour the
12 Presiding Judge, and I'm grateful for the explicit advice to focus on
13 this submission, I will elaborate now on the statement that proofing
14 provides for "A more accurate, complete, orderly, and efficient
15 presentation of evidence."

16 We have made this observation for a number of reasons, and to an
17 extent, and I'm going to address four reasons to an extent they are
18 overlapping.

19 First, the particularities of proceedings before this court.
20 Statements are often taken at the beginning of the investigation
21 concerning very traumatic events. Be it the victim of such events, be
22 it the witness to such events, that finally doesn't matter that much.

23 And statements are often taken, and this is also the case in the
24 present proceedings at a stage where the precise charges of the
25 Prosecution's case are not yet known. At the beginning of the

1 investigation, in this context means year prior to the testimony, I
2 have mentioned it, and I can confirm that we have witnesses on our
3 witness list whose statements were taken in 2004 and 2005, and these
4 witnesses will testify in 2008, and they will have to cover events
5 that took place in 2002 and 2003.

6 The second point I wish it to make in this context is that the
7 witnesses in the present case are to a large extent witnesses that
8 come from a different region of the world. They need to accommodate
9 to a new situation, to a highly technised courtroom, to the fact
10 that they appear in a formal setting and in a formal language, and
11 most importantly, Mr. President, Your Honours, many of these witnesses
12 over the last years were exposed to living conditions that were very
13 harsh. And to put it plainly, for many of them, for many of the
14 witnesses, the main if not the sole concern over the last years was to
15 survive. Hence the need for a process that allows them to refocus on
16 the events they were victims of or witnessed before they appear in the
17 courtroom.

18 Third, Mr. President, Your Honours, in a proofing session, the
19 trial lawyers, which at the stage of the proofing session, have the
20 full picture of the case covering both its factual and its legal
21 aspects and have the benefit, in comparison to the investigators who
22 took the statement years ago, have the benefit of the analysis of all
23 facts pertinent to the case, can in the proofing session, and I
24 mentioned it earlier on, focus on the most pertinent matters of the
25 evidence without overloading the testimony with irrelevant details on

1 the one hand side, but also elaborate on matters that at the time of
2 the statement-taking process were not yet known.

3 And fourth, and this is overlapping with the third point, in a
4 proofing session questions clarifying certain aspects of the witness
5 statement can be asked. And if there is additional information, and
6 in particular if it's of potentially exculpatory nature, it will be
7 disclosed to the Defence.

8 I believe, Mr. President, Your Honours, that in light of the
9 results of the proofing it can reasonably be said that proofing
10 provides for a more accurate, more complete, orderly, and efficient
11 presentation of the evidence.

12 With your leave I would continue, Mr. President, Your Honours.

13 Proofing of witnesses can, and here I quote the ICTY Trial
14 Chamber in Milutinovic and others: "Can in fact enhance the fairness
15 and expeditiousness of the trial." And in doing so, and I'm now going
16 to quote the ICTR's Chamber in Karemera and others: "May contribute
17 to a proper administration of justice." Nota bene, these two
18 decisions were rendered in December 2006 following the ICC's Pre-Trial
19 Chamber's 8 November 2006 decision.

20 PRESIDING JUDGE FULFORD: You cited from those extensively in
21 your written submissions haven't you?

22 MR. WITHOPF: That's correct, Your Honour. Yes.

23 PRESIDING JUDGE FULFORD: You needn't go over that area, Mr.
24 Withopf.

25 MR. WITHOPF: Thank you very much for this advice, and I'm happy

1 to follow this advice.

2 We concede, Mr. President, Your Honours, as we have always done,
3 that the practices, as they are permitted by the ad hoc tribunals, be
4 the ICTY or the ICTR, will not necessarily have to be mirrored in the
5 ICC's practice. And this, Mr. President, Your Honours, was obviously
6 the starting point of the Pre-Trial Chamber's considerations.

7 The Pre-Trial Chamber, now I'm going to address a number of
8 considerations of the Pre-Trial Chamber, has explicitly stated that
9 the term "proofing of witnesses" cannot be found in the body of the
10 ICC's law and that the analysis of the principles of international
11 law, national law, in light of Article 21, in defining the applicable
12 law, does not support the suggested practice of witness proofing.

13 I want to address the first point first. It is indeed correct,
14 Mr. President, Your Honours, that the term "witness proofing" cannot
15 be found in the ICC's law, but this fact, Mr. President, Your Honours,
16 in our respectful submission does not detract from applying the
17 practice of proofing. The term itself is also not found in the body
18 of the law of the ICTY or the ICTR, and this was never ever a
19 conversation, and rightly so, for the Trial Chambers at the ad hoc
20 tribunals.

21 Proofing is the last contact, Mr. President, Your Honours, of a
22 party to its witnesses prior to them testifying. In our submission,
23 such contact is allowed up until the time of the testimony. And I do
24 not want to repeat in light of the advice that has been provided by
25 the Presiding Judge to our written submissions, but I wish to mention

1 briefly in this context Article 71, covering offences against the
2 administration of justice.

3 What I have described earlier on, what the Office of the
4 Prosecutor envisages to be the practice of witness proofing, does not
5 even come remotely close to any of the conduct that is described in
6 Article 61 -- 71, sorry, of the Rome Statute.

7 The fact that in a variety of national jurisdictions, and there
8 are undoubtedly such jurisdictions, the proofing, as described above,
9 is not permitted, does not make proofing prohibited in the ICC
10 context. The ICC and the Chambers of the ICC, in our submission, have
11 to take into account the specific situation it is in, the specific
12 features of the situations in which it is investigating, and even
13 more, and even more the specific situation in which the witnesses are
14 in that appear before the Chambers, and I have described to an extent
15 such situations.

16 Mr. President, Your Honours, these particularities differ, and
17 they differ very much -- I believe, Mr. President, you have a
18 question. Differ very much from the situation in national
19 jurisdictions to such an extent that the reasons why national
20 jurisdictions or some of the national jurisdictions do not allow for
21 the practice of witness proofing are not applicable, in our respectful
22 submission, in the present context.

23 I come to the end of Office of the Prosecutor's submission by
24 saying that in any event, Mr. President, Your Honours, we can assure
25 that the Prosecution will, if allowed to do so, conduct proofing in a

1 transparent way as described earlier on in my submission. And in any
2 event, the Defence will always have the opportunity to address
3 individual features of proofing sessions in the context of the
4 cross-examination of the Prosecution witnesses.

5 Thank you very much, Mr. President, Your Honours.

6 PRESIDING JUDGE FULFORD: Mr. Withopf, before you sit down,
7 Judge Odio-Benito has a question.

8 JUDGE ODIO BENITO: Thank you, Mr. President.

9 Mr. Withopf, there's another aspect in this practice of the
10 witness proofing I would like to know a little more with your
11 assistance. My concern is about the possibility to re-traumatise a
12 witness that at the same time is a victim of these traumatic events
13 you are referring to in your submission.

14 We all have listened to -- about this possibility of the victims
15 coming as witnesses to this international court to explain what
16 happened to them, what happened to their families, et cetera, and I
17 was wondering if this possibility of the re-traumatisation starts with
18 your proofing sessions, because it can be.

19 So my question is do you test with experts like psychologists,
20 psychiatrists, if you are going to call children or women under
21 certain circumstances to be part of these sessions of proofing, how
22 they had are going to -- or you or your colleagues are going to
23 conduct this session in order to avoid these problems? Thank you.

24 Thank you, Mr. President.

25 MR. WITHOPF: Thank you, Your Honour, Judge Odio-Benito. I'm

1 actually grateful that you raised this point, because it gives me the
2 opportunity to elaborate on a certain aspect I should have addressed
3 earlier on, actually.

4 It is indeed correct. I am not a psychologist, but I do know
5 from experience having had proofing sessions, very many, actually,
6 that it happens that in the context of proofing sessions witnesses who
7 appear to be strong, who appear to have strong personalities,
8 collapse. This is an experience, I believe, we all have made.

9 Based on this experience, the Office of the Prosecutor can assure
10 the Honourable Bench that we will make use of the very particular
11 expertise in this context, Judge Odio-Benito, of our Children's and
12 Gender Unit. We have very particular expertise represented in that
13 unit, and we will of course consult not only when we as lawyers or
14 investigators or analysts have reason to believe that there could such
15 a situation arise, but as a matter of course we will consult the
16 Children's and Gender Unit to assist us in such sessions, assisting in
17 the term along the lines of meeting the within concerned. And
18 whenever there is the slightest indication that the proofing session
19 or a certain way the proofing session is being conducted would result
20 in re-traumatisation, then of course we would follow, by all means,
21 the advice that is given by the experts.

22 As I mentioned earlier on, our Children's and Gender Unit is also
23 in close contact with the Registry's Victims and Witnesses Unit.
24 There is additional and equally good expertise available, and I
25 believe the combination of this particular expertise will enable the

1 representatives of the Office of the Prosecutor taking part in such
2 proofing sessions to take care and to accommodate.

3 Your Honour's concern to avoid re-traumatisation of the
4 witnesses.

5 PRESIDING JUDGE FULFORD: Final matter from me, Mr. Withopf. I
6 don't want this in any way to be resolved around some narrow
7 interpretation of what you may or may not have committed yourself to.
8 When you indicated that you accepted the strictures of the part of the
9 code 705, was it your understanding that the practice in England and
10 Wales permitted the kind of question and answer session shortly before
11 a witness gave evidence -- or gives evidence that you have described?

12 MR. WITHOPF: Mr. President, Your Honours, there is a very
13 straight answer to it, and I wish to add that I have consulted with
14 well-recommended British lawyers within the Office of the Prosecutor,
15 and it was indeed our understanding.

16 PRESIDING JUDGE FULFORD: Well, that answers the question,
17 because if, if, and I heavily underline that, if you're wrong on that,
18 then I don't think a mistake of that kind should in any way affect the
19 validity of your submissions otherwise. I just wanted to make sure
20 what it was that you really understood you were committing yourself
21 to, and that fully explains it. Thank you very much indeed. Thank
22 you.

23 Ms. Mabilille, who is fielding the Defence submissions on this?

24 MS. MABILLE (interpretation): Mr. President, I shall take the
25 floor.

1 Our position has been set out in writing, and it is -- it runs
2 entirely counter to that of the Prosecutor. We propose quite simply
3 that there be no proofing of witnesses. We have adopted a position of
4 no witness proofing, also basing ourselves on the decision of the
5 Pre-Trial Chamber. We have listened also to what you have had to say
6 on the code of ethics of the Bar of England and Wales, Mr. President.

7 I know that the Defence Bench and the Prosecution Bench know that
8 this is not the regular practice at the ad hoc tribunals and that we
9 have all had an opportunity to proof witnesses.

10 Now, having heard very clear explanations of the Prosecutor, I
11 would still be minded to believe that the objective of proofing a
12 witness is to prepare him to give testimony before the Court. I have
13 listened carefully to the reserves of the Prosecutor where he says
14 that he would not be organising a rehearsal.

15 Why has the Defence adopted its position? It has done so knowing
16 that at some point in time the question would be put back to the
17 Defence as to what would be the conduct in relation to Defence
18 witnesses. We have adopted our position in light of the testimony
19 which has been communicated to us by the Prosecutor, that is to say
20 the statements which we have received.

21 Now, I didn't make statistics, but I noted that each witness
22 seemed to have been examined five, ten, even 15 times. The testimony
23 had been taken, and the Prosecutor had been able to ensure the
24 sincerity, the reliability, all of the qualities which are necessary
25 for a piece of testimony to be considered as perfect by the Court, and

1 that is why I have difficulty understanding today that despite these
2 witness statements which are very complete, and despite the fact that
3 the Prosecutor has been able to ensure the sincerity of the witnesses
4 and the various factors, that the Prosecutor would still want to see
5 these witnesses anew and work anew with them on their testimony.

6 To a degree, I think that it would be good administration of
7 justice that witnesses, once they have given their testimony, a
8 complete, full piece of testimony, that the Prosecutor then no longer
9 have access to the substance of the testimony. I'm not saying that
10 the Prosecutor should not be able to see the witness, to welcome him,
11 to remind him of certain practical points, but that the Prosecutor no
12 longer have the opportunity to deal with the substance. The only way
13 of ensuring that would be that the Chamber set a date after which the
14 Prosecutor would no longer be able to deal with the nature of the
15 testimony with the witness.

16 The Prosecutor has said that this testimony has been taken in
17 2002, 2003, and therefore it is important that the testimony be
18 reviewed, because it will be only be given to the Court in 2008.

19 The Prosecutor has means to travel to the Congo as often as he
20 deems necessary before the witness comes to testify here, more ample
21 means than are available to the Defence. Therefore, Mr. President, I
22 would suggest that it is important to set a point in time from which
23 the Prosecutor may no longer conduct proofing of the witness. I think
24 that this would give all of us -- obviously the Office of the
25 Prosecutor needs to determine the truth. This would mean that we all

1 have testimony which is closer to the truth than if additional work
2 needs to be done with the witness.

3 This is the position of the Defence, that there should be a point
4 in time after which it is no longer possible to access the witness.

5 I do see that there are three aspects to what has been said on
6 proofing. There is the assisting of the witness and familiarising him
7 with the systems of the court, there is helping him to refresh his
8 memory on the testimony, and thirdly, to compare these statements made
9 by the witness with other statements to establish whether there are
10 any inconsistencies.

11 I believe, Mr. President, you put a question indicating that the
12 first two of these points would be permissible, but the last one would
13 not. However, I have difficulty understanding how in practical terms
14 the Office of the Prosecutor could see the witnesses but limit his
15 conduct to the first two points but not through direct or indirect
16 questions regarding the testimony move into the area of the third
17 point.

18 I don't see how we, the Defence counsel, for instance, and I
19 don't mean to be unpleasant to the Office of the Prosecutor, how we
20 cannot ensure that the Office of the Prosecutor might not have slipped
21 into area three as opposed to one or two.

22 So the position of the Defence today is to say no witness
23 proofing as defined by the Pre-Trial Chamber, that is to say as the
24 Pre-Trial Chamber has defined witness proofing. This is our position,
25 Mr. President.

1 PRESIDING JUDGE FULFORD: Thank you very much indeed,
2 Ms. Mabilille.

3 Mr. Walleyyn.

4 MR. WALLEYN (interpretation): Mr. President, just one point of
5 clarification. We do not wish to address the nature of the
6 preparation of witnesses for their appearance before the Court.
7 However, when we speak of victims and children who are victims, there
8 we would have no difficulty with the reasoning of the Pre-Trial
9 Chamber, and we would support that reasoning, that is to say that
10 those witnesses would be prepared to testify before the Court by the
11 Victims and Witnesses Unit, and that they not be subjected to a
12 preparation which might be traumatising in addition to their
13 appearance before the Court.

14 PRESIDING JUDGE FULFORD: Anything by way of reply, Mr. Withopf?

15 MR. WITHOPF: I will be very brief, Mr. President, Your Honours,
16 and I think I want to further clarify something that has been said by
17 my learned friend, Ms. Mabilille. And I deliberately refrain from using
18 the term "misleading" because that's certainly not the case, but it's
19 certainly misstating to inform the Trial Chamber that the Office of
20 the Prosecutor has interviewed or re-interviewed its witnesses
21 regularly, 15 times. What may have caused the confusion at the side
22 of my learned friends of the Defence is the fact, the mere fact, that
23 due to the complexity of the matters that were addressed in the
24 context of the one or the other statement, the statement-taking
25 processes spanned over a longer period of time, and there may be very

1 rather instances where statements were taken over a period of time of
2 five, six, seven, eight, or even nine or ten days, but this was one
3 statement-taking process and not re-interviewing the same witness 15
4 times.

5 The contrary, Mr. President, Your Honours, is actually the case.
6 The Office of the Prosecutor has not sufficient opportunity for a
7 variety of reasons, and many of these reasons are linked to the
8 complex situation on the ground in the Democratic Republic of the
9 Congo, to have continued contact to its witnesses.

10 That's the first observation I wanted to address, and the second
11 point I wish to make: My learned friend from the Defence has repeated
12 the submission in their respective filing, that the Trial Chamber
13 should set a point in time where the Office of the Prosecutor cannot
14 contact its witnesses any more or that proofing should not be
15 possible.

16 I only want to briefly respond along the lines that if such a
17 point in time would be set by the Honourable Bench, that the Office of
18 the Prosecutor would not be in a position to react to the evolving
19 processes prior to and during the trial. And if this would be the
20 case, the Honourable Bench would be deprived of the advantage of
21 making -- of the Office of the Prosecutor addressing aspects that came
22 up in the context of the trial.

23 Mr. President, Your Honours, I limit my observations.

24 PRESIDING JUDGE FULFORD: Thank you very much indeed,
25 Mr. Withopf.

1 Mr. Walley, I'm going to address the Bar generally through you.
2 There now is only, save for the outstanding question about victims who
3 are also witnesses, which we've briefly got to touch on this
4 afternoon, there is only one final issue on our agenda for this Status
5 Conference, and that is the place of trial. I'm going to introduce
6 that topic in this way so that -- so as to give you all just a moment
7 to think about it before we start dealing with the subject after we've
8 dealt with the subject of victims who are also witnesses.

9 In our attempt to ascertain whether or not it is in any way a
10 sensible suggestion that should formally be progressed through the
11 various bodies of the court who would have to become involved should
12 the court sit outside of the Netherlands, we have attempted to look at
13 the practical realities.

14 We've reached the stage where we need the assistance of the
15 parties and the participants as to whether or not there would be
16 identifiable advantages and disadvantages to the proposal of sitting
17 for all or part of the trial in Africa. Clearly this will involve an
18 assessment as to whether or not it would be helpful for witnesses and
19 for participating victims to, as it were, to play their role in the
20 case, or part of it, in Africa rather than in the Netherlands, and on
21 those issues we are to a high degree dependent on views of the parties
22 and the participants in this case. We can obviously make I hope
23 educated guesses in relation to that, but we need your assistance.

24 This also is not a -- an all-or-nothing possibility. There are
25 different stages in a trial. There is the process of hearing

1 evidence, but there is also the process of listening to opening and
2 closing statements, and depending on our decision on the modalities of
3 participation by the victims, that may include opening or closing
4 statements or statements at some stage, by victims or their
5 representatives, and that if that were to be permitted, one could
6 envisage that there may be advantages for some of those processes
7 taking place at a location nearer home rather than having to come to
8 Europe, but it all depends, and we need your assistance.

9 Now, there are certain locations within Africa which we
10 particularly have in mind, but we do not intend to discuss the
11 particularity of locations in open session, because there are possible
12 security implications that could follow from making public the three
13 particular places that we currently have been thinking about. So once
14 we have heard any outstanding submissions on the position of victims
15 as witnesses, we intend then to rise so that the Court can go into
16 closed session so that we can then identify the three locations and
17 hear any submissions that the parties or the participants would wish
18 to make at this stage on the subject.

19 We understand that it may be difficult to give us a complete
20 answer this afternoon, and we therefore would invite any observations
21 as to an appropriate time period for the delivery of written
22 submissions as regards this subject, but it is something that we would
23 wish to progress over the next week or two.

24 I hope that's clear. Good.

25 Right. Let us now turn then finally to the issue of victims as

1 witnesses. Mr. Walley, Ms. Bapita, is there anything that you would
2 wish to add to that subject?

3 MR. VAATAINEN: Mr. President, may I give some observations on
4 proofing from the Victims Witness point of view?

5 PRESIDING JUDGE FULFORD: I'm very sorry, Mr. Vaatainen, I didn't
6 turn to the right when submissions were finished. Of course you may.

7 MR. VAATAINEN: Not a problem.

8 PRESIDING JUDGE FULFORD: So if Mr. Walley and Ms. Bapita would
9 hold for a moment, please deal with proofing.

10 MR. VAATAINEN: I'm sorry I was so slow to draw this to your
11 attention. These comments of course come from a very narrow point of
12 view of Victims and Witnesses Unit and from our mandate, and we don't
13 really have a position on the proofing other than when it has an
14 impact on the safety, physical or psychological well-being, dignity,
15 or privacy of witnesses. There's a -- there are three points I would
16 like to -- to make.

17 Well, first of all, as we all know, test -- providing evidence
18 and testimony in court is very difficult, particularly where it
19 relates to traumatised witnesses. And it's clear that there is to be
20 some sort of a preparation procedure that would help these witnesses
21 to go through the testimony and testify in the best possible mindset
22 and conditions in the court.

23 On the proofing, there's one issue that concerns us a great deal,
24 and I -- I hope I understood this wrong from the Office of the
25 Prosecutor's submission, that there was a possibility that a witness

1 would be brought here, then there's a proofing session that would
2 result in a person not testifying in the court and that from the
3 victims and witnesses point of view would not be acceptable at all
4 because it exposes the individual and causes tremendous inconvenience
5 to that individual.

6 PRESIDING JUDGE FULFORD: I think it must be an inevitable
7 consequence of Mr. Withopf's submission, because if during the
8 proofing session it emerged that the witness, in the estimation of the
9 person conducting the proofing session, that the witness no longer had
10 anything useful to say, then a decision may be made at that stage not
11 to call the witness. I think Mr. Withopf agrees with that. He does.
12 And so it does create the possibility of a witness right up until the
13 last moment thinking they're going to be participating as a witness
14 and then not being relied on.

15 MR. VAATAINEN: Exactly. That from the Victims and Witnesses
16 Unit point of view would not be acceptable. That unfortunately
17 happened at the ICTY quite a few times, and it's -- it puts a witness
18 in the very, very difficult position. In our view, that kind of issue
19 should be clarified and cleared already before the person is required
20 to travel to The Hague.

21 Another point I'd like to raise, that obviously proofing will
22 extend the stay of witnesses here, which from our point of view is not
23 a big issue other than that the proofings would need to be scheduled
24 and planned as accurate as possible if they're allowed, so that the
25 inconvenience to witnesses would be minimised.

1 Final point that might be of assistance to you, Mr. President,
2 Your Honours, Victims and Witnesses Unit, we conduct questionnaires
3 after witnesses have been testified to gather their experience, how
4 they experience the whole process, coming to the court, testifying,
5 and so forth, and there might be relevant information coming out to
6 the -- to you as to the -- maybe the usefulness or not of proofing or
7 other preparation procedures such as courtroom familiarisation.

8 PRESIDING JUDGE FULFORD: Thank you very much indeed, and I'm
9 sorry to have overlooked your submissions earlier.

10 Ms. Bapita, Mr. Walley.

11 MR. WALLEYN (interpretation): We have no further submissions to
12 make in regard to what I just said before, that is regarding victim
13 witnesses.

14 PRESIDING JUDGE FULFORD: Anything from the Defence?

15 MS. MABILLE (interpretation): Mr. President, to conclude this
16 business of victims, I would like to say something briefly. I have
17 three points.

18 My colleague Luc Walley and Ms. Bapita took the floor again
19 because they hadn't had access to the Prosecution's filing, and this
20 means that I want to make three brief remarks. I am identifying only
21 the problems on which we have not reached agreement and for which in
22 our -- which in our view are important.

23 So far the first problem is anonymity. I say nothing else. I
24 just mention that, anonymity.

25 The second problem, how will victims be able to express their

1 views and concerns? It is obvious to us. I think Mr. Luc Walley
2 said this morning that the Defence considered that the -- where
3 parties. I would like to express once more what we tried to put
4 across fairly clearly.

5 In our view the victims only become parties after the verdict.
6 If there is a finding of guilt, that is when the status of the victims
7 changes. They become participants -- or they move from participants
8 to parties in the proceedings. In my view, victims only become
9 parties in the proceedings at the time when a finding of guilt or an
10 acquittal, that is in which case there would be no reparations, means
11 that there are no more victims. That is where the essential
12 difference is.

13 At the first stage, that is when the Prosecutor is presenting his
14 evidence against the accused, in that entire phase the victims are
15 only participants and not parties. It is at this first stage that the
16 Prosecutor and the Defence, in our view, alone have an essential role
17 to play. The Prosecution will seek to prove guilt, and we shall try
18 to defend our client and during that phase those are the two essential
19 roles. The victims are only participants. They may intervene, in our
20 view, only on a case-by-case basis to express their views and concerns
21 by asking the Chamber for leave and for -- and by proving the direct
22 causal link between the client and the problems that we're dealing
23 with in court.

24 So it is clear to us. I quite agree with Mr. President. I
25 believe what you said to the Prosecutor. The views and concerns are

1 not only regarding reparations for the Hademsafadi [phoen]. It is a
2 broader concept that the Court and this Chamber will appreciate or
3 weigh on a case-by-case basis; that is, when the victims want to
4 intervene, they have to prove that there is a direct causal link with
5 the clients that are being represented.

6 What follows is the second part, which is reparations, and in
7 this part the victims become parties in the proceedings. They are
8 applicant parties, and in that context they have the rights for -- of
9 parties. They can call expert witnesses if they so wish, but I think
10 it is during the second phase of the proceedings that this is
11 important.

12 I just want to emphasise another point as well which was of some
13 concern to us yesterday. When I heard the Prosecutor explain that he
14 could see three phases, first being the Prosecution evidence, the
15 second part would be the Defence case, and the victims, as he saw it,
16 would intervene in the meantime, because he was recommending one trial
17 where guilt and reparation would be blended. In such case, we would
18 have three phases. First the Prosecution, second the Defence, and
19 then the victims.

20 I must say that as far as the notion of fair trial goes, it
21 cannot be possible. It is not possible for victims to take the third
22 place. It is clear to us that it is not at this stage that they
23 cannot take part in the proceedings. If they need to do so, they
24 should do so first or after the Prosecutor, but in our view it is
25 obvious that the Defence has to have the last word.

1 I remain persuaded, this is my last point, that it would be most
2 useful for us to separate these two phases, because if we try to save
3 time saying that the victims who can give testimony both on their
4 views and concerns and on reparations in the hope that we will save
5 time, we may be wrong. My colleague Jean-Marie Biju-Duval said this
6 this morning: In any case, if obviously there is a finding of guilt,
7 which must have a reparation -- reparations proceedings. I think this
8 would be proper administration of justice, rather, to have all
9 proceedings regarding reparations after the verdict.

10 It is somewhat difficult for me to understand how there can be
11 reparations without a finding of guilt. So in my view, in the view of
12 the Defence team, there are two stages to the proceedings, and they
13 should be kept separate.

14 I shall now conclude with the question that you put -- that was
15 put regarding the victim witnesses. I would like to say the following
16 about this: First, either the victim is on the list of the
17 Prosecution witnesses, that could well happen. In such case, then the
18 victim will give testimony as Prosecution witness with disclosure
19 obligations incumbent upon the Prosecution, and we will know what it's
20 all about.

21 Secondly, the victim may wish to intervene and is not a witness
22 for the Prosecution. In that case, it seems to me that we should have
23 the same rule, that is, victims, the parties will disclose the
24 testimony of the statement of the witness they intend to call, and we
25 shall examine or cross-examine as necessary.

1 In that case, the question which remains is at what point in the
2 trial shall we then hear this victim witness who is not on the
3 Prosecutor's list of witnesses? I am convinced that such a witness
4 should be heard before the Defence evidence.

5 Mr. President, those are my further submissions.

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

7 Mr. Withopf, anything from you on this subject or not?

8 MR. WITHOPF: Mr. President, Your Honours, the submissions will
9 be made by my colleague Mr. Bulmer.

10 PRESIDING JUDGE FULFORD: Thank you.

11 MR. BULMER: Very briefly. Thank you, Mr. President, and Your
12 Honours.

13 The position of the Office of the Prosecutor is on this
14 particular very fine issue is that there is no provision in the Rome
15 Statute or subordinate rules and regulations that prevents a person
16 who has been granted victim participant status in a criminal
17 proceeding here before this court from also serving as the -- in the
18 status as a witness. If a person who has been granted victim
19 participant status in a trial is willing to appear as a witness in the
20 proceeding, the trial proceeding, it's the position of the Office of
21 the Prosecutor that there is simply no bar, statutorily or otherwise
22 rule of law, that prohibits that from occurring.

23 The Office of the Prosecutor has taken this position previously
24 on this very issue before the Pre-Trial Chamber, and in this regard
25 the Office of the Prosecutor makes reference to its publicly formatted

1 and redacted filing of September the 6th, 2006. The number for the
2 record is ICC-01/04-01/06-390.

3 In that filing, there's a fairly elaborate discussion on this
4 particular issue, Mr. President and Your Honours. Given that it's
5 arisen at this stage and that the position of the Office of the
6 Prosecutor remains exactly the same as is advocated before this
7 Chamber, we seek leave just to rely on the submissions made in that
8 document, and I have brought copies for the various participants this
9 afternoon.

10 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Bulmer. I
11 mean, that certainly explains to us what the Prosecution's view is.
12 The Bench had in fact been wondering, in posing the question, but
13 nobody's really addressed it, is whether or not with a -- a
14 participating victim who is also a witness, whether there may be in
15 those circumstances some kind of enhanced participatory role, because
16 their particular position under Article 68, with the Court being
17 enjoined to permit their views and concerns to be presented, may be a
18 route for, for instance, for their own representative to ask
19 supplementary questions of the witness during the course of their
20 testimony to ensure that all of the matters relevant to their views
21 and concerns, but also germane to the trial, are set out in evidence.
22 No one yet has addressed any points of that kind.

23 Now, it maybe unfair to -- to bowl that at you, Mr. Bulmer, and
24 to expect an immediate response, but I don't know whether you have any
25 views.

1 MR. BULMER: I think with the greatest of respect I might like
2 the opportunity to confer with my colleagues on that issue, as well as
3 learn the legal representative for the victims first before taking a
4 position.

5 PRESIDING JUDGE FULFORD: Yes. I mean, from a small gesture I
6 see, Mr. Bulmer, that appears to be Mr. Withopf's wish as well, so
7 you'll be given an opportunity to communicate. I'm sure at the end of
8 the day, after we've dealt with the trial place issue, if anybody has
9 got any significant representations that they would wish to make on
10 this point we'd hear them, but we would, I think given that we've now
11 completed all other matters, we would wish for this to be completed
12 this afternoon. We won't reconvene tomorrow just for this point. So
13 if there are any additional submission on this, we'd better be told
14 about them before we rise at the end of the day. All right? Thank
15 you very much.

16 Right. We'll rise now. We'll give the interpreters a break.
17 We'll sit again at 10 to 4.00 in closed session so that we can then
18 discuss the three locations that have been -- that we have in mind.
19 And when we say closed session, everyone who is in the court part of
20 the court may remain. I'm afraid it's going to mean that the public
21 gallery is going to be excluded from this part of the hearing.

22 We are also going to direct that any live feed that may be
23 connected to television screens around this building is to be pulled
24 out of the relevant socket, because this should be a truly private
25 session rather than witnessed by people sitting in their offices

1 around the building.

2 Thank you all very much. We'll sit again at 10 to 4.00.

3 Recess taken at 3.21 p.m.

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