

1 International Criminal Court

2 Trial Chamber I

3 Situation Democratic Republic of the Congo – Case Lubanga

4 ICC-01/04-01/06 - Open Session hearing

5 Tuesday, 11 December 2007

6 The hearing starts at 10.00 a.m.

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

9 PRESIDING JUDGE FULFORD: Good morning. For the sake of the
10 record, the Prosecution this morning are represented by Mr. Withopf,
11 who is assisted by members of his team. For the Defence
12 Mr. Biju-Duval appears, and again he is assisted by various members of
13 the Defence team. Ms. Massidda this morning appears, as I understand
14 it, not only for the office of public counsel for victims, but she's
15 also representing those victims who are usually represented by
16 Mr. Walley and Ms. Bapita.

17 MS. MASSIDDA: Correct, your Honour. Just to let the Bench know
18 that powers of attorney has been filed in the case record this morning
19 at 9.00.

20 PRESIDING JUDGE FULFORD: And we have seen them, Ms. Massidda.
21 Thank you very much indeed.

22 And finally as regards the Registry, Mr. Vaatainen and
23 Mr. Roussos, both from the Victims and Witness Unit are in attendance
24 today along with other representatives of the Registry. Thank you
25 very much.

1 Mr. Withopf, I think although there are a large number of issues
2 which fall for consideration this morning, so that we can proceed in a
3 reasonably orderly and coherent fashion, it would be useful to
4 separate them out and to deal with them to an extent separately, if
5 this is going to be convenient with you, given that I think in all
6 instances you are in fact the applicant.

7 The suggestion, therefore, that we make is that we begin with the
8 filing which you made on the 31st of October, and again the filing
9 which you made on the 7th of December last Friday in relation to
10 certain witnesses, and in particular the submissions that you've
11 advanced in relation to serving the statements and the supporting
12 materials relating to those witnesses in redacted form, coupled with
13 submissions in relation to lifting some of the redactions that exist
14 in relation to those witnesses.

15 Will it be convenient with you if we take that issue first?

16 MR. WITHOPF: Mr. President, your Honours, that is indeed
17 convenient for us.

18 PRESIDING JUDGE FULFORD: Thank you very much indeed.

19 Well, I'm going to begin -- we're going to begin this topic by my
20 asking Mr. Vaatainen if he is able to assist the Chamber as regards
21 certain time periods, and really two are of particular concern to us.
22 The first time period is when the process of assessment will be
23 completed, and most particularly for those victims in relation to whom
24 the referrals were made at the end of September of this year. That's
25 the first time period.

1 The second time period is that once that assessment process has
2 been completed, if a decision is taken that some or all of them should
3 be entered into the protection programme, with as much precision as is
4 possible, how long will it take to, as it were, have those applicants
5 fully within the protection programme?

6 MR. VAATAINEN: Good morning, your Honours -- your Honours. In
7 relation to your first time line, the situation regarding the 10
8 witnesses referred to in Prosecutor's submission, seven of those
9 applications are currently with the director of regional court
10 services --

11 PRESIDING JUDGE FULFORD: Sorry, some of those are with?

12 MR. VAATAINEN: Director of Division of Court Services. So we
13 have completed our assessment procedure and now it's up to the
14 Registrar's representative to make a decision on those applications.
15 We expect that these decisions will be communicated to us either today
16 or tomorrow.

17 Two of the ten witnesses, we met with one of them twice, the
18 efforts to interview the person, and there's been -- first time around
19 there was a no-show, and last week that person has been interviewed,
20 and we expect that we will complete our assessment before Christmas
21 and then the file will go to the Registrar.

22 A second person, one of his adult family members was unavailable
23 for the interview last week, so that application will continue to be
24 pending, and then the tenth case, a decision has been made but there's
25 a suggestion between the Office of the Prosecutor and the Registrar's

1 office on that case. Now, this with this small reservation that we've
2 been able to accurately identify the individuals that are subject of
3 OTP's submission.

4 PRESIDING JUDGE FULFORD: Can I ask you just to be slightly more
5 specific with this second person, that there's therefore outstanding
6 an interview with a family member; is that right?

7 MR. VAATAINEN: That's correct, your Honour.

8 PRESIDING JUDGE FULFORD: That's the first thing. And the second
9 thing is there have been discussions with the Office of the
10 Prosecutor, but are you able to give us any indications as to what the
11 likely outcome is of this application as far as the assessment's
12 concerned or is it too early to say?

13 MR. VAATAINEN: The assessment procedure from our point of view
14 has been completed.

15 PRESIDING JUDGE FULFORD: Right.

16 MR. VAATAINEN: There was a decision by the Registrar or
17 Registrar's representative on the matter, and then yesterday the
18 Office of the Prosecutor has taken this issue up with the Registrar.

19 PRESIDING JUDGE FULFORD: Oh, I see. Right. Yes. Right. I
20 follow you. Thank you very much.

21 MR. VAATAINEN: Then in regards the second question of your time
22 line, provided that any or all of these applications would be accepted
23 to the court's protection programme, because of the holiday period
24 approaching and other obligations that we have, it is not feasible to
25 have these measures implemented before the end of January. That, of

1 course, will be impacted by the number of potential cases that might
2 be accepted to the programme.

3 PRESIDING JUDGE FULFORD: Now, does -- does that mean that that
4 date may be a later date, or are you saying that you are confident
5 that they will be within the programme by the end of January?

6 MR. VAATAINEN: May I consult with Mr. Roussos for a second,
7 please?

8 [VWU confers]

9 MR. VAATAINEN: Your Honours, there are factors that are outside
10 of our control, and I think these factors would extend potentially the
11 time line if the decision by the Registrar is to defer, whereby we
12 would need to do additional work, seek additional information. That
13 of course would postpone the time line. I think if we assume that as
14 we've said before it will take for the unit about 30 days to implement
15 the measures from the moment of the decision once there's a final
16 decision made, then it takes about 30 days for us to implement the
17 measures.

18 Now, of course the Christmas and New Year intervening, this will
19 extend the period until the end of January.

20 PRESIDING JUDGE FULFORD: Would it be a fair summary,
21 Mr. Vaatainen, that the likelihood is that most -- that the -- that
22 most of the ten witnesses will be in the programme by the end of
23 January, but there may be some in relation to whom it takes slightly
24 longer?

25 MR. VAATAINEN: Your Honours, that is assuming that the Registrar

1 accepts them, and there are -- how should I put it? Our
2 recommendation to the Registrar are not going to be in all these cases
3 positive in that sense.

4 PRESIDING JUDGE FULFORD: This is very helpful. Final question:
5 You're confident that there will be a decision either today or
6 tomorrow in relation to these applicants as far as the Registrar's
7 concerned?

8 MR. VAATAINEN: Yes, I am, your Honour.

9 PRESIDING JUDGE FULFORD: Thank you.

10 MR. VAATAINEN: I would have if I may another general observation
11 to make that I think would be useful for the Chamber to be aware of
12 when it comes to also these applications, but I don't know if this the
13 appropriate time to raise that issue.

14 PRESIDING JUDGE FULFORD: Please continue, Mr. Vaatainen.

15 MR. VAATAINEN: Thank you, your Honours. Now, first of all, I'd
16 like to ask you to bear in mind what I'm going to say will be said
17 very strictly from the VWU's narrow point of view, and we don't take
18 consideration issues that fall under -- that fall outside our mandate.

19 I would like to recall three key principles when it comes to the
20 protection. First one, the first principle is that -- the principle
21 of proportionality. The protective measures need to be proportional
22 to the risk that is -- that is posed to the witnesses, raising from
23 their interaction with the court.

24 As we all know, Article 68(1) gives the court the responsibility
25 to protect safety, physical and psychological well-being, dignity and

1 privacy of victims, witnesses, and others at risk. From our point of
2 view there follows clear, and particularly because of the protection
3 obligation vis-a-vis the psychological well-being, that the measures
4 of protection that are least intrusive but adequate to the individuals
5 in question should always be applied first.

6 Relocation or resettlement will have to always be the last result
7 measure not least because of the impact this drastic measure has on
8 the lives of the individuals who are subject to the programme.

9 The second principle is that any measure that is taken will need
10 to be based on assessment on the threat and the risk. In order to be
11 able to apply these proportional measures, the assessment of the
12 threat and the risk on witnesses will have to take place, and this
13 assessment will have to be based on the facts.

14 The third element is the threat. As your Honours recall, we
15 defined the threat in our ex parte filing 18 October this year
16 concerning the report on the redactions. We said the threat is a
17 substantial likelihood that an individual or organisation acting with
18 malicious intent seeks to harm, kill, or otherwise negatively
19 influence a witness in order to have an adverse impact on the
20 proceedings before the court or retaliate against a witness, and we
21 believe that there is a high probability that the threat already has a
22 well-developed understanding of the events that form the basis of the
23 case.

24 For the threat to act on his or her ill-intentions, the threat is
25 the information. And to get the information of witnesses it's a

1 question of where do you get the information? In our view this is
2 also public hearings without protective measures. From the
3 investigative activity either by the Office of the Prosecutor or by
4 the Defence; monitoring the activity of the -- the court, the
5 investigators in the field; leaks within the court; and possibly from
6 the defendant.

7 In our view it is possible to address all this and mitigate all
8 these risks, public hearings, the Chamber may order procedural
9 measures to protect the identities of the witnesses. Investigative
10 the activity, if all the investigators follow the good practices, that
11 will mitigate the risk that the investigative activity will expose
12 witnesses. Monitoring by outside source of our activities once again
13 if everybody applies good practices, adheres to the information or
14 communications security, that will mitigate the risk. Leaks from
15 within the organisation, betting on the staff, for example.

16 And then of question of a defendant. One way of addressing that
17 issue would be to try to verify the claims that the instructions or
18 information was given out from the detention unit by monitoring
19 non-privileged communications.

20 If we look at what the -- what the approach adopted by the Office
21 of the Prosecutor both in the submission that led to this hearing, but
22 also in the applications for protection that they have submitted to
23 us, the underlying assumption is that the witnesses will face a risk
24 as a consequence of the identities being disclosed to the Defence.

25 We, the Victims and Witnesses Unit, we've always maintained in

1 the Pre-Trial Chamber as well, for example ex parte hearing 23rd of
2 August last year and our filing 24th of July last year, that in our
3 view we don't have any information to -- to suggest that the Defence
4 would pose an international -- intentional risk to the witnesses.
5 Defence team of course is bound by the code the ethics and the rules
6 of the court, the Regulations of the Court, the orders of the Chamber,
7 and we cannot imagine that the Defence team would be issuing
8 instructions to the field to harm some witnesses.

9 It is of course possible that through the Defence's investigative
10 activity, identities of the Prosecution witnesses might be
11 unintentionally disclosed to the community where the witnesses live.
12 There, we would submit, if the good practices are properly applied and
13 due consideration is given, this risk should be mitigated.

14 We have said this a number of times before, that we don't, as the
15 VWU, we don't have any reliable information of the intentions of the
16 accused. However, it's clear that it is not beyond the realm of
17 possibility that he could have intentions in this regard. He is,
18 after all, accused of very serious crimes. However, we, as the
19 Victims and Witnesses Unit, we don't have any reliable information to
20 that effect.

21 In our view, and this is crucial for the -- not only for this
22 case but other cases as well, and in particular because the
23 applications for protection are based on the assumption that the
24 disclosure to the Defence equals risk, we believe that it would be
25 very important to take a very close look on the matter, and I think

1 that requires the Chamber's attention, in our respectful submission.

2 From our point of view, a solution could be simple. If either
3 us -- may I continue? If either Victims and Witnesses Unit or the,
4 for example, Office of the Prosecutor, has information suggesting that
5 around a certain period of time instructions were given in the field
6 or witnesses were contacted in a threatening manner, and there was a
7 suspicion that those actions originated from the detention unit, it
8 would be possible to try to verify this from the recordings of
9 non-privileged communication by the defendant.

10 Another alternative which we also have proposed to the Pre-Trial
11 Chamber would be to order active monitoring of the defendant's
12 non-privileged communications at the crucial periods of time. For
13 example, at the time when the identities may be disclosed to the
14 Defence.

15 A final alternative: If the Chamber agrees with the view that
16 the disclosure to the Defence is a problem, a possible solution would
17 be for the Chamber to consider to disclose the identities of the
18 Prosecution witnesses only to the Defence team but not to the
19 defendant.

20 Thank you, your Honour. That was all I had to say on this
21 subject.

22 PRESIDING JUDGE FULFORD: So in terms of positive requests,
23 Mr. Vaatainen, that you're making of the Chamber, they really have
24 been encapsulated during the last few moments of your submissions in
25 relation to, particularly, monitoring, possibly intercepting,

1 communications from the defendant in the detention unit, together with
2 what you've just said about limiting his knowledge of identities of
3 Prosecution witnesses.

4 MR. VAATAINEN: I'm sure, your Honours, I wasn't probably clear
5 enough. We're not saying that the identities shouldn't be
6 communicated to the defendant. My last proposal was -- or last point
7 was that of course there's a possibility for the Chamber to consider
8 that the identities would be communicated only to the Defence team but
9 not to the defendant.

10 The reason we're making this point is that because we are flooded
11 with these applications for protection, and the basic assumption there
12 is that Defence is going to pose a problem. Now, as I said, we don't
13 believe that a Defence team would leak identities of witnesses or will
14 have ill-intentions vis-a-vis witnesses, but we just don't know what
15 the intentions of the defendant are. And if we don't know, we don't
16 really have a possibility to assess and evaluate these requests based
17 on that kind of an assumption.

18 PRESIDING JUDGE FULFORD: I think I probably anticipate what one
19 of the things that Mr. Biju-Duval may say in relation to the defendant
20 not being told the identities of the witnesses is it then becomes
21 impossible for him to give instructions, certainly full instructions,
22 in relation to those who are going to be called to give evidence
23 against him.

24 Now -- I mean, that's a problem, Mr. Vaatainen. I don't know if
25 you have any observations in relation to that.

1 MR. VAATAINEN: Yes, your Honour. I fully agree with you because
2 that's a logical conclusion. This is the reason: From the very
3 outset I said we're looking at this from a narrow point of view of
4 Victims and Witnesses Unit mandate, and the practical problem we have
5 been faced with these applications coming to us. It puts us into a
6 very difficult position, because we -- without having information, we
7 can't really say whether the OTP's assumption is correct or not. And
8 I think it's probably beyond our powers, then, to make that kind of
9 assumption unless we have information, and that's why we bring this
10 matter to your attention, your Honours.

11 PRESIDING JUDGE FULFORD: And I think it follows that although
12 you're concerned that communications may be coming out of the
13 Detention Unit which are not in the best interests of the witnesses,
14 at the moment you don't have any firm evidence that that has been
15 taking place. This is a concern of yours rather than something which
16 is evidence based.

17 [VWU confer]

18 MR. VAATAINEN: It's -- there's some material in the referrals
19 from the Office of the Prosecutor that could be interpreted that way,
20 and that is something that we are now taking a closer look and maybe
21 requesting for more information from the Office of the Prosecutor.

22 PRESIDING JUDGE FULFORD: Now, that is potentially very
23 important, Mr. Vaatainen, and I'm going to ask you, please, to discuss
24 this further with the Office of the Prosecutor, and in the first
25 instance if there's anything of substance which should be brought to

1 our attention to reduce it to writing and to send it in an appropriate
2 confidential filing as soon as possible. I think it's going to be
3 inappropriate to put a time period on this because it all depends on
4 what emerges from your discussions with the Office of the Prosecutor,
5 but could this please be speedily investigated and then communicated
6 to us?

7 MR. VAATAINEN: Yes, we will contact the Office of the Prosecutor
8 on this straight after the hearing, and we believe we should be able
9 to communicate something to you by Friday.

10 PRESIDING JUDGE FULFORD: Thank you. Well, we'll say Friday,
11 4.00, then. Thank you very much indeed. Thank you, Mr. Vaatainen.

12 Mr. Withopf, I think we can break it down in this way, can't we:
13 There are some redactions currently in place which you wish to lift.
14 I would imagine that Mr. Biju-Duval is not going to be objecting to
15 that. For those redactions that require our authorisation, I think it
16 will be necessary for the hearing to take place in closed session in
17 case our view is the redactions shouldn't be lifted. So I think that
18 is going to have to be considered a little bit later today.

19 There are some redactions which, as I understand it, you wish to
20 remain in place irrespective of a decision by the Registrar in
21 relation to protective measures, and those proposed redactions are
22 also, I think, going to have to be considered by us during the course
23 of a confidential hearing. Right.

24 The -- the bulk of the material that otherwise falls for
25 consideration are the redactions which you only wish to remain in

1 place until the witnesses are within the protection programme, and it
2 looks as though we -- insofar as one can make an accurate prediction,
3 we have a date somewhere around the end of January for that to take
4 place, although Mr. Vaatainen has been quite clear that it may be a
5 bit before or it may be sometime afterwards depending on the factors
6 that he has referred to.

7 So that will mean that the Defence will receive, on the 14th of
8 December, the information from these witnesses, but it will either be
9 in redacted or summary form in the first instance, with hopefully the
10 full detail being provided at the end of January or thereabouts.

11 Now, is that a fair summary of the position in relation to your
12 October filing and your December filing on this issue?

13 MR. WITHOPF: Mr. President, your Honours, this is certainly very
14 close to a fair summary what our position would be, and the main
15 reason why we have requested the Chamber to schedule on an urgent
16 basis a hearing was exactly to get instructions as to what we can
17 disclose by Friday.

18 We know that we are supposed to disclose all the incriminatory
19 evidence by the 14th, which is Friday this week, and we also know that
20 we have, whenever we want to serve redacted or summarised material to
21 the Defence, to bring this to the attention and justify it to the
22 Trial Chamber. We have done so in our 31st of October submission and
23 also in our application of 7 of December, and we have already
24 anticipated that a further application will be filed in the very near
25 future and certainly by 14th of December.

1 We are aware that the material that comes with these applications
2 or that the volume of the material that comes with these applications
3 is a very big volume, and we work on the basis, Mr. President, your
4 Honours, and I'm certainly not underestimating the Trial Chamber's
5 ability to deal with it, that by the 14th there won't be decisions
6 rendered, which puts us in a position that we have to decide whether
7 we disclose or whether we don't disclose the respect -- the respective
8 statements at all or whether we disclose the redacted or summarised
9 versions of these statements to the Defence pending the decision of
10 the Trial Chamber. And if I understood you correctly, Mr. Presiding
11 Judge, you have indicated that you would be in favour that we disclose
12 the redacted and/or summarised versions of the statements concerned to
13 the Defence.

14 PRESIDING JUDGE FULFORD: Not at the moment indicating any view
15 at all, Mr. Withopf. Simply trying to summarise what I understand to
16 be the Prosecution's position.

17 MR. WITHOPF: That would be indeed our position, but I wish to
18 use this opportunity and for that reason I'm grateful that the Chamber
19 reacted very quickly in scheduling a hearing. I wish to use this
20 opportunity to add two observations to this, and this is based on an
21 experience we made when we were in a similar situation before the
22 Pre-Trial Chamber.

23 It happened due to the follow of the material that the Pre-Trial
24 Chamber detected a number of areas where the Prosecution had
25 overlooked names of witnesses, and the Pre-Trial Chamber then

1 obviously ordered the Prosecution to also redact such portions of
2 statements. And on top of it, and this is also something,
3 Mr. President, your Honours, we want to bring to your attention, the
4 Pre-Trial Chamber for reasons of victims and witness protection,
5 sometimes ordered the Prosecution to redact beyond what has been
6 suggested to the Pre-Trial Chamber at the time.

7 Obviously, we're talking about experience we made, and I'm not
8 suggesting that we are in the same situation again, but I cannot
9 exclude it, obviously, at this juncture. For that reason, our
10 suggestion would be, and this is mainly in order to allow the Defence
11 to continue its case preparation, that we, on Friday, disclose to the
12 Defence the redacted and/or summarised versions of the statements
13 concerned, and in light of what Mr. Vaatainen just has said, which
14 actually matches our own views on this matter, we would like to
15 disclose to the Defence and solely to the Defence and the Defence
16 provides for an undertaking that they are not providing the materials
17 concerned to Mr. Lubanga. This is obviously a temporary situation.
18 Once the Trial Chamber has decided on our respective applications, of
19 course we would disclose or re-disclose where necessary the materials
20 to both the Defence and Mr. Lubanga.

21 PRESIDING JUDGE FULFORD: Let me understand this, Mr. Withopf.
22 This is, therefore, an additional application that you're now making
23 not only to be permitted to serve by way of redactions or summaries,
24 thereby protecting the identity of the witnesses, but additionally
25 this material isn't to go to the defendant until the end of January.

1 Is --

2 MR. WITHOPF: Until the point in time the Trial Chamber has
3 decided on the pending applications for redactions for the reasons I
4 just outlined, which would not -- presumably would not be end of
5 January only. It would be a temporary measure in order to avoid a
6 situation that Mr. Lubanga gets information which the Trial Chamber
7 may or may not believe that he should get.

8 PRESIDING JUDGE FULFORD: We understand, Mr. Withopf. Please
9 carry on.

10 MR. WITHOPF: This is the suggestion, Mr. President, your
11 Honours, the Prosecution makes in respect of the disclosure that is
12 due on Friday.

13 If you would allow me, Mr. President, your Honours, to provide
14 for a few comments to the information that has been provided by
15 Mr. Vaatainen, and this would cover both the statistics that have been
16 provided and also some remarks on the observations on the threat in
17 the region. I believe that in particular the statistics will be of
18 added value for the Trial Chamber to get the full picture. What
19 Mr. Vaatainen was referring to and obviously based on the question
20 that the Trial Chamber asked were solely there -- of ten referrals
21 that were pending based on submissions by end of September.

22 I know that my learned colleague, Mr. Vaatainen, is always
23 reluctant and not in favour of mentioning figures and, in particular,
24 numbers of witnesses, and I would request the Trial Chamber to grant
25 either leave to do so in this particular context or to go into closed

1 session, because I have to indicate numbers of witnesses.

2 PRESIDING JUDGE FULFORD: Mr. Withopf, I'm just quickly looking
3 back at your public filing in relation to this first issue that we're
4 considering today, and in the -- in the public filing which I have
5 been careful to work from during the course of any observations that
6 have come from the Bench on this issue, I note that in that filing you
7 do deal with numbers.

8 Now, of course if it is necessary, the Bench will go into closed
9 session, but given that numbers have been dealt with in public
10 filings, is there any advantage to us now going into closed session?

11 MR. WITHOPF: Mr. President, your Honours, in our view there is
12 no need for doing so, but we are always appreciative to the advice
13 that was given by the Victims and Witnesses Unit. There is a
14 discrepancy in view, and we, the Office of the Prosecutor, does not
15 think that it is necessary to go into closed session for that
16 particular reason. We would be prepared to, in open session, provide
17 for the numbers, but it would be beneficial to the Bench probably to
18 hear Mr. Vaatainen.

19 [Trial Chamber confers]

20 PRESIDING JUDGE FULFORD: Mr. Withopf, I just want to try to make
21 sure I fully understand this. In your 7th of December public filing
22 you deal with particular numbers. You're absolutely clear as to how
23 many witnesses we're dealing with and their particular positions, and
24 the same applies to your filing in October in that -- in the public
25 filing you there also refer to the numbers of witnesses in relation to

1 whom redactions are sought.

2 Now, are those the only witnesses that you wish to refer to now
3 or are there other witnesses above and beyond those mentioned in the
4 public versions of these filings?

5 MR. WITHOPF: Mr. President, your Honours, this is exactly the
6 case. We want to provide for the full picture. The numbers we have
7 provided in the public filing concern the very issue and the witnesses
8 related to the very issue, but in order to provide the Chamber with a
9 full picture, we need to elaborate on these numbers.

10 PRESIDING JUDGE FULFORD: Right. Who do you say should be
11 present at and who should be excluded from the closed-session hearing
12 that you're now suggesting should take place?

13 MR. WITHOPF: Solely the public, Mr. President, your Honours.

14 [Trial Chamber confers]

15 PRESIDING JUDGE FULFORD: Mr. Withopf, it is regrettable that
16 this wasn't made clear earlier, that even in relation to this aspect
17 there was going to have to be a confidential hearing, because as you
18 will understand, there are certain technical problems which exist
19 whenever the court has to go from open session into closed session,
20 and it now means at a quarter to 11.00 we're about to lose a
21 potentially a significant period of time while this is put in place,
22 and I think the Court Officer wants to say something to me.

23 [Trial Chamber and Court Officer confer]

24 PRESIDING JUDGE FULFORD: I'm being over-harsh, Mr. Withopf. It
25 seems as though so long as we're only excluding the public, this can

1 be done very quickly and in fact without us rising. So I will not
2 chastise you further in relation to that point.

3 I am afraid therefore, for the reasons that have been set out
4 before us, we will have to move from open session into closed session
5 in the sense that the public will be excluded, and can I ask for the
6 necessary processes now to be put in place.

7 MS. MASSIDDA: Sorry, your Honour. The office is being assisted
8 by an intern, so I will request that the intern be allowed to leave
9 the courtroom, please.

10 PRESIDING JUDGE FULFORD: Yes. Thank you very much.

11 [Closed session starts at 10.43 a.m.]

12 [expunged]

13 [expunged]

14 [expunged]

15 [expunged]

16 [expunged]

17 [expunged]

18 [expunged]

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Closed Session

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11 [Open session starts at 10.53 a.m.]

12 PRESIDING JUDGE FULFORD: Mr. Withopf, one -- please carry on,
13 but one aspect I'm going to invite you to deal with is this: You've
14 observed that during the course of the proceedings before the
15 Pre-Trial Chamber the Chamber, as a result of their reading, in fact
16 indicated that they felt there should be greater redactions than were
17 being requested by the Office of the Prosecutor. Now, that was
18 something that happened as result of their reading of the case.

19 That is now, in fact, being elevated by you in the way that this
20 has been described into something that comes akin, doesn't it, to an
21 obligation on the Chamber to check and investigate the material that
22 the Prosecution are suggesting should be disclosed to the Defence to
23 make sure that there is nothing there which in fact should remain
24 redacted for the purposes of the protection of victims and witnesses.

25 Now, doesn't that impose a heavy positive burden on the Chamber,

1 Mr. Withopf?

2 MR. WITHOPF: Mr. President, your Honours, if the Chamber would
3 indeed take the same approach as the Pre-Trial Chamber, we are very
4 well aware that this would impose an extremely heavy burden on
5 the Chamber, that's correct.

6 PRESIDING JUDGE FULFORD: Thank you. Please carry on.

7 MR. WITHOPF: And not guessing on what the Pre-Trial Chamber
8 made, the Pre-Trial Chamber believe to do what they have done, I
9 believe that they thought they are under an independent obligation to
10 provide for the protection of victims and witnesses.

11 What I wanted to add, Mr. President, your Honours, in respect of
12 the observations that have been made by Mr. Vaatainen is the
13 following: The security situation on the ground in the DRC and, in
14 particular, in Ituri and in Bunia is worrisome and is extremely
15 worrisome, and I make particular reference to our yesterday's
16 application to extension for time limit of disclosure paragraph 7 to
17 11 without going into more detail in public session.

18 Nevertheless, there is general insecurity in the DRC, and in
19 particular in Ituri and in Bunia. UPC members are in control of Ituri
20 and certainly of Bunia, resulting in a serious threat to the
21 Prosecution witnesses who realise more and more that situation with
22 unfortunately very serious consequences. The threat, Mr. President,
23 your Honours, is living in Bunia.

24 That all boils down to the fact that the OTP is investigating in
25 ongoing conflicts, in areas of ongoing conflict and insecurity, with

1 the state authorities to the extent that they are existent are not in
2 a position to provide for security.

3 The Office of the Prosecutor is under legal duty to provide for
4 the protection of its witnesses, Article 68(1), and for the Office of
5 the Prosecutor as for every other organ in the court, the security of
6 the witnesses is of utmost concern. It's indeed a priority.

7 And these general statements, Mr. President, your Honours, lead
8 me to the following observation, and this is directly addressing what
9 Mr. Vaatainen said: Of course there is not the slightest suggestion
10 that members of the Defence team would cause a risk to the
11 Prosecution's witnesses.

12 Our view is the following: Providing for the identities to
13 Mr. Lubanga, and this is obviously tied to the disclosure of
14 unredacted statements, causes a threat to the Prosecution witnesses
15 not only to the extent that Mr. Lubanga may or may not be involved in
16 such threats, but what is more importantly and what goes beyond what
17 Victims and Witnesses Unit is saying, it's not only Mr. Lubanga. It's
18 the supporters of Mr. Lubanga in the region, and the region is in the
19 control of the UPC, that volunteer, that volunteer to intimidate the
20 Office of the Prosecutor's witnesses, and this is the real threat,
21 Mr. President, your Honours, and it goes beyond what Victims and
22 Witnesses Unit just has you informed about.

23 Mr. President, your Honours, I leave it as such for the moment,
24 but I wish to emphasise that the situation is becoming more serious
25 each and every day, and it has a serious impact on the preparedness of

1 the Prosecution witnesses to testify.

2 PRESIDING JUDGE FULFORD: Those are your submissions on the
3 first -- on the October and the -- the October filing and the Friday
4 filing.

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

6 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf.
7 Mr. Biju-Duval.

8 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President, your
9 Honours.

10 First of all, I'd just like to make a preliminary remark.
11 Yesterday, we received in the afternoon -- or at the end of the
12 afternoon the two applications of the Prosecutor which we're speaking
13 about today, and it was clear that we haven't been able to either
14 respond to them or even analyse them seriously, and in particular the
15 second one, which is 17 pages and does concern the application of the
16 Prosecutor to have an extension of the time limit. This application
17 is something that we haven't even been able to read or understand.

18 So we're not in a situation whereby we can comment on it today.
19 We aren't ready -- well, we're almost in the same situation with
20 regards to the first application which we've also received yesterday
21 at the start of the afternoon, and it's therefore desirable that the
22 Chamber authorise us to give our verbal submissions today and add to
23 them written submissions, additional written submissions with a short
24 timetable certainly, but one which will make it possible for us to
25 effectively find out the content of this these documents.

1 And the second comment that I'd like to make refers to your
2 decision of the 9th of November. Everybody knows that what we wanted
3 to do as the Defence is to avoid what has happened -- something
4 happening that happened today, namely that the Chamber fixes a final
5 date which -- by which disclosure should be finished, and that was --
6 the idea of that was that the accused could be tried without any delay
7 and be tried fairly. And we can see today that this decision has not
8 been respected for the reasons that have been presented.

9 What I would like to do is just to insist on a particular point,
10 which is that today, we're just before the 14th of December, only
11 one-third of the statements have been regularly disclosed, one-third
12 of them. That is to say that today the Defence is not in a situation
13 to be able to prepare itself for the trial, quite contrary to what the
14 Chamber wished in its decision of the 9th of November.

15 So there are two-thirds of testimony left, and how is that
16 divided up today? Well, there's a second third of this which hasn't
17 at all been -- hasn't been disclosed at all to date, which means that
18 we don't know the identities of the witnesses. That's clear. We
19 don't even know a single word. We haven't even seen a single word of
20 the supposed testimony. We know nothing about it. For about 15
21 witnesses, that is, one-third of the announced testimonies.

22 And then there's another third, the third third, as it were,
23 which corresponds to the witnesses whose identity has not been
24 disclosed, and we've only received summaries or redacted statements
25 for this third third. There, too, we are also not in a position

1 whereby we can effectively investigate to be able to having an
2 effective trial, and the Trial Chamber has seen -- the Trial Chamber
3 did require that the 14th of December deadline be kept and that the
4 witness statements should be provided by then, and all the redactions,
5 including the redactions of identity should be justified.

6 And just to give a mention a point with regards to redactions,
7 redactions or summaries, the summary is a type of redaction, in fact.
8 I would like to draw the attention of the Chamber to the situation of
9 three witnesses. We only have a pseudonym for them. Of course I can
10 mention the pseudonyms without any risk. AG, AW, AE, and these are
11 part of these witnesses whose statements have been redacted. And of
12 course these redactions have a consequence, and it makes it totally
13 impossible to understand them.

14 I would like to stress this. And why would I like to do that?
15 Because we shouldn't have a situation whereby we can imagine having a
16 false good solution, as it were, an intermediate solution or temporary
17 solution which doesn't really provide a real solution, which would be
18 to authorise redactions such that the Defence can start to prepare
19 itself. What we can see in practice concretely is that the redaction
20 does make a considerable amount of the documents un-understandable and
21 unusable when it comes to the investigations of the Defence to prepare
22 for trial.

23 So the Prosecutor, in his written submissions, gives the example
24 of what's practised before the International Criminal Tribunal for
25 Rwanda, saying that before the ICTR it was admitted that one could

1 have a delay up to 20 days before the start of the trial of the
2 disclosure of the identities of the witnesses, et cetera.

3 Well, the Defence considers that what was -- what was done before
4 the ICTR is not necessarily the example that should be followed. And
5 I would also like to add, furthermore, that the example of the ICTR
6 with regards to this particular issue is, as far as I'm concerned, is
7 the example that should not be followed, because what we have noted is
8 before this Court is that there have been -- there hasn't always been
9 a fair trial in this part, and when you have -- this has become the
10 exception. So I think that the Chamber should be careful that the --
11 what is the rule doesn't become the exception. And just with regards
12 to an example, something that as far as we're concerned, it does seem
13 to be a contestable aspect with regards to a fair trial.

14 Just to say a last point with regards to a new issue which came
15 up. It's the question of whether one could imagine that there's
16 information which is disclosed to a member of the Defence team and who
17 wouldn't communicate it, and it would be prevented from
18 communicated -- prevented from communicating that information to the
19 accused. So information the accused would be deprived of. So the
20 response to that, as far as I'm concerned, can only be negative.

21 The first primary right of the accused, the first of the
22 fundamental rights of the accused is that of being informed, informed
23 precisely of the nature of the charges against him, and the first of
24 his defences is it himself. He has the right to defend himself. His
25 defenders, his counsel, are there only to assist him with his defence,

1 certainly not to represent him leaving him aside, and his defenders
2 can only act, as you have highlighted, Mr. President, with
3 instructions from the accused.

4 It is not possible to ask the Defence to -- to dissimulate to
5 the -- or to hide information from the accused which is essential to
6 his defence. That is not possible. In this case, it is preferable
7 that this information not be disclosed to the Defence rather than to
8 give the Defence an obligation to hide that from the person who they
9 have a mission to defend.

10 So, Mr. President, that is the essential part of my submissions.
11 Just one word by way of conclusion. So three years the Prosecutor's
12 been investigating, and I would just like to mention another right of
13 the accused is to be judged without undue delay, without delay, and
14 fairly. So your decision of the 9th of November was to resolve that
15 question. Now it's not applied. Now this double requirement has to
16 be met, a delayed trial and a fair trial. So we need full disclosure
17 to ensure that the exception, i.e., redactions, do not become the rule
18 within international trials.

19 And just a last point which wasn't mentioned but is something
20 that is of concern to us, because we read with concern and with
21 surprise paragraph 26 of the application of the Prosecutor, which was
22 communicated, dated the 7th of December, the first application of the
23 Prosecutor with regards to the lifting of redactions and to
24 non-disclosure of information and disclosure of summary evidence,
25 paragraph 26.

1 It is possible that the comments I'm going to make come from a
2 misunderstanding because it was an English text, and I don't rule that
3 out this theory, the possibility of misunderstanding, but in 26, the
4 Prosecutor mentions under the term "Further Investigation,"
5 investigations which are being carried out in relation to allegations
6 of crimes committed by Thomas Lubanga that go beyond the scope of
7 crimes covered in the present case.

8 So you can imagine that this, from the -- that does present some
9 question marks with regards to the Defence. Yes or no? Is the
10 Prosecutor currently preparing other charges against Mr. Lubanga, or
11 beyond that, going beyond the framework. Well, this is something that
12 the Chamber is seized of today. If this is the case, then this has to
13 be told to us.

14 This is the first and fundamental thing to say to the Defence and
15 also to the Chamber. It is clear, it's capital, because we shouldn't
16 have a situation where on the occasion of the -- there's a first wave
17 of accusations and charges with regards to child soldiers, that the
18 Prosecution tries to draw the accused into a type of trap to then be
19 able to throw new charges against him with regards to other crimes
20 after the accused has taken a first position. And perhaps here we're
21 talking about a theory or a hypothesis which is without foundation.

22 Perhaps this is a misunderstanding of this paragraph 26 on the
23 part of the Defence, but it would be desirable, certainly the Defence
24 wishes that the Prosecutor gives us precisions in this regard with
25 regard to what he has stated here.

1 So, Mr. President, those are the submissions that I wanted to
2 make today.

3 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Biju-Duval.
4 Before you sit down, can I first of all indicate that we readily
5 understand that particularly in relation to the second application
6 you've had very little time indeed to consider it, and the Bench is
7 really in the same position. However, there are, I think, four
8 particular areas which are raised by the Prosecution in the public
9 version of that second filing that you may be able to provide us some
10 assistance with.

11 First, the Prosecution has returned to the general theme of the
12 October and the 7th of December filings where the position of those
13 witnesses being considered by the Victims and Witnesses Unit and the
14 Registrar is generally set out, and I think to an extent there's
15 duplication between the most recent filing and those two earlier
16 filings to that extent.

17 Second, the Prosecution has highlighted that there will be some
18 material that they're not going to be in a position to disclose that
19 relates to the re-interviews of certain witnesses, and those
20 re-interviews are to take place at some stage in the hopefully
21 relatively near future.

22 Thirdly, there are some additional witnesses who the Prosecution
23 are in the process of considering together with the collection and
24 processing of some transcripts in relation to a particular witness,
25 and that is material that the Prosecution is currently putting

1 together.

2 And finally, there is -- and this is the fourth category, there
3 is -- there are some areas of expert evidence that the Prosecution
4 wish to pursue, particularly in the light of our decision on experts,
5 which I think was filed yesterday.

6 Now, Mr. Biju-Duval, in relation to the first area, the witnesses
7 currently being considered by the Victims and Witnesses Unit, you've
8 already I think really in general terms helpfully assisted us with
9 your submissions.

10 In relation to the second area where the Prosecution wish at
11 least to have the opportunity of putting before the Chamber the fruits
12 of the re-interviews, really that is going to depend on what happens
13 during those re-interviews, but the point is raised, as it were,
14 generally, and it may be you'll be able to at least in general terms
15 assist us with that point.

16 The third area in relation to new material from new witnesses, I
17 imagine there's very little that you can say in the absence of seeing
18 that material, and unless there are specific observations that you
19 would wish to make, I think it would be premature for us to ask you to
20 advance submissions on that area now. But on the fourth area there
21 may be submissions which you could assist us on in relation to expert
22 evidence given that it's only recently that the Chamber has delivered
23 it's decision on how expert evidence should be addressed. Really it's
24 a question of whether you are objecting in principle to the
25 Prosecution at some hopefully early but at some later stage putting in

1 expert evidence or whether you accept that we will need to consider
2 each area of expert evidence on its merits and to consider what the
3 potential impact is on the trial once that expert evidence is received
4 by the Chamber and by the Defence.

5 Now, I think that's a reasonably accurate summary of - and I see
6 Mr. Withopf nod - of his most recent filing. Are you able to help us,
7 Mr. Biju-Duval, at least in a general way in relation to the points
8 that I've highlighted?

9 MR. BIJU-DUVAL (interpretation): President, with regard to the
10 issue of additional evidence, testimony, and with regards to the new
11 witnesses, I understand that this is a matter of incriminating
12 evidence which is coming, which is significant, which is going to put
13 back the point of departure or going to change the timetable which
14 is -- by which the Defence can prepare the trial, and I think
15 unfortunately we have to consider that we have to -- that we have to
16 consider that the state of this 14th December is null and void, and I
17 am constrained to maintain the observations that we made in the month
18 of October with regards to the need for this time frame with regards
19 to this deadline.

20 With regards to the issue of experts, I'm not going to hide the
21 way I feel about this. I'm not certain that I've really understood
22 all the aspects of the question. We will bring written submissions to
23 it. But with regards to experts, it does seem to be a bit different.

24 With regards to the witnesses of fact, it is necessary to be
25 extremely firm with regards to the necessary deadlines for

1 investigations and with regards to the experts and the experts'
2 statements. And this is also something that's been dealt with in
3 another way by the previous international courts in their Statutes as
4 well, but I have to say that I can't pretend that I really did
5 understand well the terms of the question that you put to me and to be
6 able to see really what's at stake in that.

7 What I would like to do is to be able to respond in writing
8 quickly to them a bit later.

9 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, if there are written
10 submissions that you wish to put -- that you wish to put in on the
11 areas that you have just identified, what sort of time period do you
12 have in mind for the submission of those written observations?

13 MR. BIJU-DUVAL (interpretation): Would Friday be possible?
14 Would that be acceptable?

15 PRESIDING JUDGE FULFORD: We'll reflect on that. Thank you very
16 much, Mr. Biju-Duval.

17 Ms. Massidda, do you wish to make any intervention on these
18 points?

19 MS. MASSIDDA (interpretation): No, Mr. President. I don't have
20 any observations to make.

21 PRESIDING JUDGE FULFORD: Thank you very much indeed.

22 Mr. Withopf, we're nearly at half past 11.00 when the court will
23 have to break in any event to give the interpreters a break. Is there
24 anything that you wish to say briefly in response to the submissions
25 by Mr. Biju-Duval?

1 MR. WITHOPF: Very briefly, Mr. President, your Honours, and this
2 is mainly related to the submissions that have been made in respect of
3 paragraph 26 of our 7 December filing, and in order not to waste time,
4 I draw the attention of both the Honourable Bench and my learned
5 friends from the Defence to the 27th of June 2006 filing of the Office
6 of the Prosecutor which in detail addresses this point.

7 PRESIDING JUDGE FULFORD: And the summary, Mr. Withopf, is, in a
8 sentence or two?

9 MR. WITHOPF: I can do it in a sentence, Mr. President, your
10 Honours. The summary is the following: The Office of the Prosecutor
11 continues its investigation against Mr. Thomas Lubanga, but it has
12 informed the Defence and the Pre-Trial Chamber at the time, and this
13 would also apply to the Trial Chamber, that in the current proceedings
14 there would be no added charges.

15 PRESIDING JUDGE FULFORD: So the defendant can know that there
16 will be no application by the Prosecution in this trial to add any
17 additional charges.

18 MR. WITHOPF: That's correct. And the emphasis lies on the word
19 "this trial."

20 PRESIDING JUDGE FULFORD: Procedurally, I think it would in any
21 event mean this case returning to the Pre-Trial Chamber in order for
22 extra charges to be added, would it not, Mr. Withopf?

23 MR. WITHOPF: It would, Mr. President, your Honours, but I
24 repeat, in this particular context there won't be added charges.

25 PRESIDING JUDGE FULFORD: Thank you very much. Does that in

1 fact, therefore, conclude your submissions on the October filing and
2 the 7th of December filing?

3 MR. WITHOPF: Just a moment, please, Mr. President.

4 PRESIDING JUDGE FULFORD: Certainly.

5 [Prosecution counsel confer]

6 MR. WITHOPF: Mr. President, your Honours, we work on the basis
7 that there will be an ex parte portion on the substance of these
8 submissions.

9 [Trial Chamber and Court Officer confer]

10 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, can I return with your
11 assistance to the subject of the -- the most recent of the
12 Prosecution's filings, the one dated the 10th of December, which in
13 the public redacted version is entitled "Urgent, Prosecution's
14 application for extension of time limit for disclosure."

15 Do I take it that given you've had such little time with this
16 document, that apart from the matters that I've encouraged you to
17 address by the questions that I put to you a moment ago, having split
18 that document up into four separate areas that, you will have no
19 further submissions to make today on that document and that you wish
20 to make your submissions otherwise in writing, and the date that you
21 have proposed is Friday of this week at 4.00?

22 MR. BIJU-DUVAL (interpretation): Yes, Mr. President. The
23 situation is very simple. At this point in time, I have not even been
24 able to read this document. I only learned that it existed this
25 morning, and unfortunately, I've not been able to spend any useful

1 time on it at all. I will need to do so as soon as possible, as
2 rapidly as possible.

3 PRESIDING JUDGE FULFORD: One option, so that we can deal with
4 these matters before the Friday deadline, which would clearly be
5 desirable, would be for us to reconvene at 10.00 tomorrow morning once
6 you've been given the rest of today and this evening to consider the
7 contents of this document which, as I say, I think I fairly summarised
8 in the observations I made a few moments ago. Would that be
9 acceptable to you so that you've got some additional time to consider
10 the contents of this document?

11 MR. BIJU-DUVAL (interpretation): Mr. President, I would like to
12 do all that I can to move forward as rapidly as possible.
13 Unfortunately, I am obliged to inform the Chamber that I cannot be in
14 The Hague tomorrow for professional reasons. However, I can attempt
15 today to prepare a written response which could be filed tomorrow
16 towards the end of the morning.

17 PRESIDING JUDGE FULFORD: Well, that's extremely helpful of you,
18 Mr. Biju-Duval. Thank you very much indeed. I'll just confer for a
19 moment with my colleagues.

20 [Trial Chamber confers]

21 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, the Bench is extremely
22 grateful to you for that self-evidently cooperative approach, because
23 we well-recognise that you have been placed in a very difficult
24 position in relation to this, not least given that on such an
25 important issue the Prosecution only made this filing available

1 yesterday when we're working to a deadline of 4.00 p.m. on Friday of
2 this week, and it goes without saying that by leaving these filings
3 until this point in time, very considerable pressure is placed not
4 only on the Defence but I'm going to add on the Bench as well, and
5 whatever our decision on these issues, we wish to make it abundantly
6 clear that we deprecate matters of this weight being raised within
7 such a short time frame putting the parties and the participants under
8 great strain in relation to putting in an effective response and
9 putting the Bench under great pressure in terms of delivering a
10 decision on a very wide number of issues before the deadline expires.

11 Now, that said, our thanks again to you for your cooperation, and
12 if you could file your written submissions by close of play tomorrow.
13 So we'll say 4.00 p.m. tomorrow. Then we will incorporate them in
14 relation to any decision we make on these three filings. Thank you
15 very much indeed.

16 We will now -- ah, yes. I'm extremely grateful to the legal
17 advisor to the Chamber for reminding me that before the parties and
18 the participants disappear, that there are some additional matters to
19 be dealt with.

20 There is the need to fix a further Status Conference, and we have
21 in mind at the moment the afternoon of the 9th of January, going into
22 the 10th of January and then the 11th of January. After we've risen,
23 could the parties and participants please speak with the legal advisor
24 to the Chamber and indicate whether or not those dates are acceptable.

25 The second matter which we will give full reasons on in due

1 course, but which it would be helpful to indicate now, our decision
2 relates to the inquiry raised by the Office of the Prosecutor as to
3 whether when the re-interviews take place the period of time for
4 separation can be greater than two days and can, in fact, be up to ten
5 days. Bearing in mind the helpful assistance that we've been provided
6 on this by the Victims and Witnesses Unit, the Bench approves the
7 longer period, up to but not going beyond a ten-day separation period.

8 Good. We will rise now for half an hour and go back -- and
9 reassemble in closed session with the Prosecution only being present
10 at five past 12.00.

11 The hearing ends at 11.47 a.m.

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