

1 International Criminal Court

2 Trial Chamber I

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

4 Status Conference - Open Session

5 Wednesday, 9 January 2008

6 The hearing starts at 2.03 p.m.

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

9 PRESIDING JUDGE FULFORD: Good afternoon, and a Happy New Year.
10 For the sake of the record, the Prosecution today are represented by
11 Mr. Withopf, who is assisted by other members of the Prosecution team.
12 For the Registry, Mr. Vaatainen is in attendance with another
13 representative. For the Defence, Ms. Mabilile and Mr. Biju-Duval are
14 both present in court, assisted by others. Ms. Bapita and Mr. Walleyne
15 appear for specific victims, and Ms. Massidda, accompanied by others,
16 is here on behalf of the Office of Public Counsel for Victims.

17 There are three areas that need to be dealt with during the
18 course of this Status Conference. The first are the issues that were
19 originally set down in our Scheduling Order in relation to various
20 outstanding matters which in the view the Chamber required
21 determination before the commencement of the trial. Secondly, there
22 is -- there are a number of applications by the Prosecution in
23 relation to redactions which need to be addressed, and thirdly there
24 is a matter raised recently by the Defence which we need to find time
25 to deal with today.

1 The course that we propose is that we will take first the issues
2 originally set out in the Scheduling Order, but that will only take us
3 up until about 4.00, because at that stage we will go into closed
4 session to deal with the matter which was raised yesterday, I think,
5 by the Defence, and we will then turn to the redaction requests once
6 we have dealt with the matters set out in the original -- in the
7 original Scheduling Order.

8 I pause for a moment to see if there are any objections to that
9 course being followed.

10 We would wish to thank the parties and the participants for
11 having dealt so fully and expeditiously with the issues which we set
12 down for this Status Conference. We are conscious that this has
13 involved a considerable amount of work over the Christmas and New Year
14 holiday, and we are very grateful to all counsel for their
15 considerable assistance.

16 As I've just observed, those, the submissions that we've received
17 in writing, have been full, and they are clear, and we are confident
18 that in the result counsel following the practice that has been
19 demonstrated on other occasions will restrict their oral submissions
20 to points that they haven't already dealt with in written argument.

21 The first issue is that of the role of the Office of Public
22 Counsel for Victims, and Ms. Massidda, you may wish to take the floor
23 first in relation to this issue.

24 MS. MASSIDDA (interpretation): Thank you very much,
25 Mr. President. I would first of all just like to remind you of the

1 written submissions which were filed on the 7th of January by the
2 office, and with regards to the written submissions, I would just make
3 one small clarification with regards to paragraph 41 of the submission
4 that was made. This explains to the Chamber within the framework of
5 the legal representation of victims the type of support that the
6 office could furnish and more precisely how many groups -- or how many
7 members could a group be composed of which it could support and
8 assist, and in carrying out the submission, I noticed that there was
9 lacking some detail there, and this is that the office is ready to
10 represent, as written in paragraph 41, a group of maximum 50 persons.

11 I think that it's necessary for the Chamber to know the facts,
12 that the office currently is in the position of creating two teams to
13 represent the victims, possibly if the Chamber orders this. This
14 means that each team could represent a maximum of 50 persons. And it
15 seems that it was important to add this detail because paragraph 41
16 wasn't precise in that respect.

17 I would now like to take up certain subjects which should be
18 dealt with following the submissions of the Defence and the Office of
19 the Prosecutor and the legal representative of victims, and here I
20 would refer first of all to the issue relating to the interpretation
21 of Article 81(4) of the Regulations of the Court, and secondly, I will
22 make some observations referring to the application of Regulation 80,
23 paragraph (2) of the Regulations of the Court.

24 With regards to the interpretation and the application of
25 Regulation 81, paragraph (4) of the Regulations of the Court the

1 support -- well, it gives them general mandate to representation of
2 the general interests of the victims during the proceedings before the
3 Court, and it seems to me that following the submissions of the other
4 participants as well as the Office of the Prosecutor and the Defence
5 that there are no objections to the office being able to express this
6 function during proceedings before the Court, and I would allow myself
7 to draw the attention of the Chamber to a specific issue.

8 The Office of the Prosecutor -- or the office, rather, considers
9 that the general interest of the -- the general interest of victims
10 does not cover only the issues of law, and so it cannot ever have a
11 conflict of interest between the office and the legal representatives
12 because the office appears to deal with a particular point which
13 concerns the general interest of victims, the specific issue dealing
14 with the general interest of victims. And I would also stress that
15 this function could be carried out by the office, because when the
16 office gives legal advice and legal research, the office isn't
17 involved in the facts of the case. And just to give you an example of
18 this, your Honour, for the moment the office is supporting Mr. Walley
19 and Bapita without having the -- knowing the content of the
20 applications for participation which their respective clients have
21 filed before the Chamber. So I would like to highlight that this role
22 could continue to be developed by the office according to the
23 orders -- in accordance with the orders of the Chamber.

24 The same issue of a possible conflict of interest is also -- or
25 has also been raised by certain participants, and here I'm referring

1 in particular to the submission of Counsel Bapita who refers to the
2 possibility that the office could enter into a conflict of interests
3 representing -- by representing a group of victims or groups of
4 victims and at the same time providing support, legal support and
5 research to the legal representatives. Well, the office would like to
6 stress that in the legal -- common legal -- common legal
7 representation, I'm saying common because here we are taking as a
8 basis the concept that the office would represent a group of victims,
9 and this is what's already indicated in our submissions in the legal
10 representation which is carried out at a common level. Then it would
11 be up to each victim -- well, they would -- each victim -- the
12 interest of each victim would have to be addressed. Each individual
13 within the group should be taken into consideration, their interest,
14 and it is at that point that the members of the Bureau would become
15 cognisant of the facts which are in the applications for
16 participation. And here I would like to stress that the office as
17 its -- in terms it's structured in such a way it tries, I say try
18 because we don't have so much practice in this regard, but it has
19 tried to avoid any type of conflict of interest and within the office
20 the teams who will be responsible for representing the victims will
21 not also be responsible for providing legal support to legal
22 representatives.

23 To be clear, Mr. President, the members of the office who are
24 acting as counsel will be responsible for the representation of
25 victims and the lawyers within the office, legal offices, will also be

1 working for the legal representatives in such a way that we avoid that
2 these people who are providing assistance to the legal representatives
3 can be contaminated, as it were, by knowledge of certain facts and
4 with regards to certain cases.

5 Where it concerns more specifically Regulation 80, paragraph (2)
6 of the Regulations of the Court, the function of legal representation,
7 the office just has one observation to make with regard to the
8 submission of the Office of the Prosecutor, and here I'm referring to
9 paragraphs 3 and 4 of the submissions of the Office of the Prosecutor,
10 dated the 7th of January, in which the Office of the Prosecutor
11 mentions the decision of the 17th of August, 2007, decision of the
12 Pre-Trial Chamber which appointed the Offices of Legal Representative
13 of Applicants until the Chamber ruled on the status of victims.

14 In submissions the Office of the Prosecutor indicates that in
15 these proceedings the Office of Public Counsel for Victims should
16 simply appear in the context, in the few instances in which the
17 Registry automatically requests additional information for any
18 incomplete application. And the Office of the Prosecutor also asks
19 that the Office of Public Counsel demonstrates that each person it
20 represents at this stage meets these criteria.

21 So I have two observations on this subject. The first is that
22 the decision of the 17th of August, 2007, of Pre-Trial Chamber I
23 appointed the office of legal representative to provide support and
24 assistance to applicants, full stop. In the decision of the 17th of
25 August, 2007, there was no specification with regard to the mandate of

1 the Office of Public Counsel for Victims. There was no restriction
2 with regards to the mandate as legal representative, and the office
3 there say that providing support and assistance to victims means that
4 the office has a power to assess and verify when this support and this
5 assistance is necessary to protect the interests of victims.

6 And the second consideration for certain victims who are already
7 applicants in the Lubanga case before the Pre-Trial Chamber, well, in
8 that regard the office already filed proclamation, powers of attorney,
9 and here I'm referring to the four applicants who appointed the office
10 as legal representatives. So the office considers that these powers
11 of attorney were given to the principal counsel of the office in
12 accordance with Rule 90, paragraph (1) of the Rules of Procedure and
13 Evidence, which envisaged that the victims can freely choose their
14 legal representatives.

15 And finally with regard to the issue of representation, I would
16 like to ask a practical question which I consider should be examined
17 by the Chamber. Each time that the office or members of the office
18 are appointed as a legal representative, the office proceeds directly
19 contacting the persons concerned. This means that we look for the
20 person. We're going to see the person, and we also try to understand
21 what are the interests of that person in the proceedings. We consider
22 that the only way for the legal representative and, therefore, also
23 for the office, when it's appointed as legal representative, to be
24 able to help the victims to present their views and concerns and to
25 know the views and concerns of victims, and it is therefore for that

1 reason that the office directly talks to the person concerned. It
2 seems and here I've only got one minute more, Mr. President. Here it
3 seems to me that it would not be possible to continue to guarantee
4 this presence of the office if the Chamber -- if the Trial Chamber
5 also doesn't recognise the fact that the office represents applicants
6 in the Lubanga case. Thank you.

7 PRESIDING JUDGE FULFORD: A question. As part of your
8 representations in writing, you've indicated that your office would
9 wish to see certainly parts of the confirmation decision that were
10 redacted and which either do or may relate to six victims represented
11 by Office of Public Counsel for Victims. The question I have is this:
12 Who has ownership of the confirmation decision? Is this a matter for
13 us or is it in fact a matter for the Pre-Trial Chamber because it is
14 their decision, and they ordered that it should be produced and
15 circulated in a particular way being made -- being given wider
16 distribution to some than it was to others? Now, do we have the
17 power, Ms. Massidda, to amend that order given there is no hierarchy
18 between the pre-trial and the Trial Chamber?

19 I'm sorry, you weren't necessarily expecting that question to
20 come, so do take your time.

21 MS. MASSIDDA: Thank you, your Honour. I have a first answer,
22 but maybe I would like then to address also something else later. The
23 entire record was sent to the Trial Chamber. So in our submissions
24 dealing with the request to access the documents, I think it's in
25 paragraph 2 or 3 of our request, if I'm not wrong, I'm saying that

1 considering that the Presidency transferred the entire case record to
2 the Trial Chamber, the Trial Chamber is in a position and is the only
3 one, in our opinion, at the moment in the position to deal with the
4 issue of access to any documents contained in the case record,
5 including the decision confirming the charges. That's the reason why
6 we decided to file the request before Trial Chamber I.

7 PRESIDING JUDGE FULFORD: That may very well be the short and
8 simple answer. Thank you very much indeed.

9 Mr. Withopf?

10 MR. WITHOPF: Mr. President, your Honours. On behalf of the
11 Prosecution, my colleague Mr. Bulmer will make the submissions.

12 PRESIDING JUDGE FULFORD: Mr. Bulmer.

13 MR. BULMER: Thank you very much, Mr. President and your Honours.
14 Good afternoon.

15 In respect, Mr. President, to your question, insofar as legal
16 mechanisms that would permit the Trial Chamber to act in the direction
17 that you've inquired, I would just indicate that Article 61, paragraph
18 11 which I'm sure the court is obviously aware of, permits you to
19 exercise those powers. There's also a provision in the -- now, I
20 can't remember if it's the Rules or Articles, but allows the Trial
21 Chamber to also refer a question back for a solution to the Pre-Trial
22 Chamber, and I'm sure you're aware of it and I'm sorry I don't have it
23 at my fingertips but those are the statutory mechanisms.

24 I've taken, Mr. President, your comment with respect to the
25 submissions made in writing and I'll try to be brief.

1 With respect, to break up the Prosecution's submission on the
2 issue of the OPCV, the Trial Chamber in the Scheduling Order has
3 delineated the two facets, if I will, legal representation relating to
4 specifically -- the victims as legal representative and then the 81(4)
5 issue.

6 I would just raise -- I rely on the written submissions
7 obviously, but on the issue of specific legal representation and how
8 that issue plugs into the calculus of the application to access
9 confidential documents. The OPCV as their basis for making the
10 application relies on the 17th of August decision of the Pre-Trial
11 Chamber and the order making them -- giving them the representative
12 status. The Pre-Trial Chamber then on the 10th of sent, and the
13 citation is in the filing, defined that in the scope that the
14 Prosecution has put forward in the -- in the filing on this matter, in
15 my respectful submission limits it to a certain class of persons and
16 that in my respectful submission, and I think this is where we differ
17 with the OPCV's submission on this point, is an issue of uncertainty
18 with respect to the scope of their legal representation.

19 Now, there are solutions to this matter, and it's not within the
20 Office of the Prosecutor to suggest to the OPCV how to proceed with
21 respect to clarifying its scope of retainer, if I can use those
22 language, but in my respectful submission it is a live issue and one
23 that ought to be considered and determined by the Trial Chamber in the
24 context of ordering documents over. And this is an issue that
25 obviously has come up after the parties in the OPCV made their filings

1 on this matter.

2 I would only draw also for the purposes of helping the Court with
3 this particular matter on the specific issue of what was the scope of
4 the power that was -- or the authority that was vested with OPCV by
5 the Pre-Trial Chamber in the 17th of August decision, and I'll just
6 provide if I may the citations to the Chamber. At paragraphs 41 and
7 42 of that decision, the Chamber considers the issue of whether this
8 is a designation under Regulation 80(2). In my respectful submission
9 in paragraph 41 and 42 it's clear that they're not. So we're not
10 dealing with a whole designation. They're not acting, in my
11 respectful submission, at least on the basis of the order that they're
12 relying on just as the other legal representatives, the full legal
13 counsel for these people, for these victims, and that in my respectful
14 submission is the issue that needs to be determined and clarified.

15 Those are all the submissions I intend to make on this particular
16 matter subject to any questions. With respect to the general role, I
17 rely on my written submission subject to any questions from the
18 Chamber.

19 PRESIDING JUDGE FULFORD: One question from me, Mr. Bulmer. The
20 Office of Public Counsel for Victims has indicated that they wish to
21 be able to access certain documents in the case record. They limit
22 the request to those documents which may impact on the personal
23 interests of the victims that they represent, and they submit that
24 that can only be achieved if they have access to the index of the case
25 record.

1 As I recall it, the Prosecution oppose this application, and I
2 see Ms. Massidda nods, I think, to indicate that's right. If that is
3 right, that you do oppose it, what are the reasons for the opposition,
4 Mr. Bulmer?

5 MR. BULMER: If I may have one moment, Mr. President.

6 PRESIDING JUDGE FULFORD: Certainly. Absolutely. Do collect
7 your thoughts.

8 MR. BULMER: I would just like to be able to direct the Chamber
9 to filing on that matter. The filing was made on the 8th of November,
10 2007, Mr. President, and you'll recall that the Prosecutor conceded to
11 give them access to the specific documents, and this was done within
12 the context of understanding that they are full legal representative
13 retained. On the other issues, it is the Prosecution's position which
14 is advanced at paragraph 6 and 7 of those filings.

15 The general principle of access, Mr. President and your Honours,
16 the Prosecution advances at paragraph 4 of that filing which is - and
17 I apologise I'll just have to read this out - but that the Prosecution
18 submits that access to confidential portions of the record by
19 applicants should only be granted in exceptional situations once an
20 applicant has established the compelling case that the specific
21 material sought directly affects his or her interests.

22 So while it might be helpful in these other requests for access
23 to the -- the index, they haven't made in my respectful submission a
24 compelling case to bring it within that test.

25 PRESIDING JUDGE FULFORD: I think what is said to be the problem

1 is that until they know what is there, they're unable to make the
2 request, and having access to the index enables them to direct
3 requests to specific documents.

4 Is there an answer to that, Mr. Bulmer?

5 MR. BULMER: That -- I understand the position. It's a bit of a
6 chicken and egg situation. All I can indicate to the Chamber is that
7 in all of these cases, regardless of whether before this court, even
8 national jurisdictions, when third parties are trying to access
9 documents courts always impose limitations on their ability
10 demonstrated to access those documents, and I'm making a general
11 statement here absent a compelling case. So there's always an onus on
12 them to -- to discharge, to show something more than just a helpful
13 nature. I appreciate that may not be that helpful, but it cannot
14 simply be by stating that would be of assistance to us that a person
15 grants -- that a person can be granted access to.

16 PRESIDING JUDGE FULFORD: I think one needs to be careful about
17 describing the Office of Public Counsel for Victims as a third party,
18 Mr. Bulmer. If they are participating before the Chamber, I think it
19 is probably inappropriate to describe them as a -- as a third party.
20 Certainly there may be particular considerations which apply if
21 requests are being made on behalf of victim applicants who have not
22 yet been granted status before the Chamber, but just a word of caution
23 in relation to that.

24 MR. BULMER: I appreciate that. Thank you very much, but if I
25 may be just permitted to make one comment.

1 THE PRESIDING JUDGE FULFORD: Of course.

2 MR. BULMER: If I could step back. My position is premised on
3 the fact that the original application was based as a legal
4 representative acting qua-effectively [phoen] counsel for each
5 litigant separately. So I certainly appreciate the comment but if I
6 could explain my comment, and I understand where the Chamber is coming
7 from.

8 PRESIDING JUDGE FULFORD: I understand the principle position
9 that you've advanced. Are there particular aspects of prejudice that
10 you can identify if the index was to be revealed? So stepping away
11 from the position in principle, are there practical problems,
12 prejudicial factors that you can identify that could flow if the
13 Office of Public Counsel for Victims was given access to the index?

14 MR. BULMER: If I might just have a minute -- or the Court's
15 indulgence for a minute just to confer.

16 [Prosecution counsel confer]

17 MR. BULMER: Thank you for the indulgence, Mr. President. I just
18 conferred obviously with my colleague.

19 The request is to access the index in toto, so that -- in my
20 understanding, and this is the only answer I can provide to the
21 Chamber at this point in time on my feet, conspiring with Mr. Withopf
22 here, that -- my understanding it would give them access to the titles
23 of all the documents. It may be documents that don't even concern
24 them and may impact on other issues that are engage in protection
25 issues or that type of thing. So because they're not asking for a --

1 a redacted index, they're asking for the full index, there could be
2 issues where they are provided with description of documents that are
3 inappropriate for them to see.

4 PRESIDING JUDGE FULFORD: I think that's very clear, Mr. Bulmer.
5 You're particularly concerned, then, that this request if granted in
6 its entirety may reveal certain documents which for good reason are to
7 remain completely protected and not disclosed to anyone beyond either
8 the Prosecution alone or the Prosecution and the Defence.

9 MR. BULMER: I think you've put the point better than I could,
10 Mr. President.

11 PRESIDING JUDGE FULFORD: Well, I don't know whether I did,
12 Mr. Bulmer, but thank you for the comment.

13 MR. BULMER: Thank you very much.

14 PRESIDING JUDGE FULFORD: Thank you very much indeed.

15 Ms. Mabilille.

16 MS. MABILILLE (interpretation): Mr. President, on the role of the
17 OPCV, I have heard Paolina Massidda tell us that the Defence was in
18 agreement on the points which she put this morning. I think that
19 there is one point, however, on which we are not in agreement and I
20 would like to go into that.

21 To our minds, if we read the texts, and here I'd like to draw a
22 parallel between the role of the Office of Public Counsel for the
23 Defence and for victims. If you compare the two texts, you will see
24 that the roles are highly comparable. So regarding Regulation 81(4),
25 that is to say the representation of victims and providing support and

1 assistance in respect of specific issues and appearing before the
2 Chamber in relation to a specific issue, there we have no particular
3 difficulty. However, when it comes to Regulation 80, paragraph (2),
4 that is to say where the Office of Public Counsel for Victims, where
5 the Office of Public Counsel for Victims wishes to act as a counsel on
6 the behalf of victims, I would say that we see a difficulty there.

7 The difficulty which we see is that even though the Pre-Trial
8 Chamber appointed the Office of Public Counsel for Victims to
9 represent victims who had not yet been granted participation rights,
10 when it did so that was a temporary measure. And here I would now
11 turn to the Office of Public Counsel for Defence. That office can act
12 in the place of Defence counsel in a certain number of cases.
13 However, I would insist upon the point that this role of the OPCV is
14 only temporary. If the victims are given participatory rights in the
15 proceedings, they should have appointed legal representatives who are
16 not the Office of Public Counsel for Victims. And indeed,
17 Paolina Massidda herself, in putting her argument said that there's no
18 problem. In my office we have two teams. There will be no
19 difficulties between the two teams. They will not discuss matters
20 between them. I exaggerate a little bit, but she was describing how
21 there would not be conflicts of interest. However, we can all imagine
22 such conflicts of interest.

23 One cannot, on the one hand, address the collective interests of
24 victims in a general fashion and, at the same time, speak on the
25 specific interests of victims.

1 I believe that on that point there is a real contradiction. I
2 would say that, yes, representation is possible, but on a temporary
3 basis. When we enter the trial phase, it would be preferable that the
4 representation be by other legal representatives other than the Office
5 of Public Counsel for Victims.

6 Mr. President, these are my submissions on these points.

7 PRESIDING JUDGE FULFORD: Mr. Walley, anything to add to your
8 written submissions?

9 MR. WALLEYN (interpretation): Thank you, Mr. President. Indeed
10 I do have some additions to make, particularly as this is a matter
11 which is of direct interest to us.

12 The Regulation of the Court provide, amongst the functions of the
13 Office of Public Counsel for Victims, assistance the legal
14 representatives and to victims, and also where appropriate the
15 possibility to appear before the Chamber in respect of specific
16 issues. This is a state of affairs which has been highly useful for
17 us, the legal representatives of victims, over the last year or so.

18 We are somewhat concerned by the prospect that this might be
19 endangered. It is true that Regulation 80 provides that the Chamber
20 may appoint counsel from the Office of Public Counsel for Victims.
21 However, to my mind I believe that this Regulation should be read with
22 the following Regulation, which specifies that that counsel would
23 appear before a Chamber in respect of specific issues. This is
24 exactly what has happened up until now.

25 When the Pre-Trial Chamber asked the OPCV to represent victims

1 who did not have counsel in specific proceedings regarding the
2 establishment of their status as victims. We saw a similar situation
3 mirrored on the Defence side where ad hoc counsel were appointed for
4 the Defence. Another matter, however, is the organisation of a legal
5 representation of a group of victims which has been recognised by the
6 Trial Chamber. That would be a novelty which has not yet been
7 encountered.

8 Our concern would be that if your Chamber were to allow that
9 the -- the OPCV were to constitute a third group of victims or a
10 fourth group of victims in the framework of these proceedings, the
11 very core functions of the office would be endangered.

12 Now, it might be said that, well, that wouldn't happen, because
13 if by definition all of the victims are child soldiers or former child
14 soldiers or their families that conflicts of interest are difficult to
15 imagine. I think that that would be overly simplified and that indeed
16 there may well be specific conflicts of interest between victims who
17 share a general common interest.

18 Secondly, there may well be different views and concerns within a
19 group of victims who have common interests or who at least do not have
20 any opposite or opposing interests. There may emerge from that group
21 various analyses. We have seen that in relation to the discussions on
22 the e-court, as you have seen in that connection. On the victims'
23 side there is not general agreement.

24 For us this represents a difficulty. If we are both to benefit
25 from legal and technical assistance in preparing for trial and the

1 trial and in determining our position, we may have to obtain that
2 support and assistance from a body that may not share our views and
3 that may represent or put forward entirely differing views in this
4 courtroom. I think that we must avoid that. I believe that the OPCV
5 may have its own analysis and views on certain issues if that view may
6 differ to that of certain legal representatives of victims. That
7 isn't a difficulty in itself. The Court will make its rulings as it
8 sees fit. But I think we should avoid confusion of roles. That is to
9 say that a body both assist a counsel, a legal representative, in
10 developing his position, and at the same time be himself or a member
11 of that body be a legal representative also. Possibly appointing
12 different people for these different functions could avoid such a
13 problem. We have the same thing in law firms, but one has the same
14 difficulty which arises.

15 Now, as regards access to the index, to the case record or to the
16 entire case record, personally I have no difficulty. The OPCV does
17 have access, and the legal representative should a fortiori have
18 access to the record. The office works either to assist us or to
19 represent victims who have not yet had their status recognised, and
20 therefore it seems clear to me that they should have additional rights
21 in relation to those accorded the legal representatives.

22 PRESIDING JUDGE FULFORD: [Previous translation continues] ...
23 said that you have received considerable and valuable assistance from
24 the Office of Public Counsel for Victims as part of your preparation
25 for these hearings and the trial.

1 MR. WALLEYN (interpretation): Mr. President, I can say here in
2 open session that as regards the preparation of our submissions and
3 also occasionally by representing us in hearings, hearings that are
4 not of primary importance to us, in some instances it was judged
5 unnecessary for us to travel from the Congo or from Belgium, and
6 therefore it was very helpful for us to have the principal counsel
7 attend in our stead, and indeed the legal work which has been done for
8 us.

9 MS. BAPITA (interpretation): Thank you, Mr. President. I just
10 have one or two things to add following on from what Mr. Walleyne has
11 said.

12 As regards the specific issues, I believe that this is a key
13 factor and which will allow us to elucidate what the different roles
14 should be. What does the Chamber understand by "specific issues" in
15 connection with the legal representation by the OPCV. As
16 representatives of applicants, they have a certain job of work to do,
17 to assist those applicants before they obtain victim status. However,
18 once their status has been decided upon, we believe that a legal
19 representative -- separate legal representative should be assigned to
20 those victims from the list of counsel.

21 Excuse me. Rather than what we see, however, is that the OPCV
22 has been called upon to continue playing that role after status has
23 been established. But this is also unsuitable if you consider that
24 there are legal representatives, counsel who are waiting to be
25 appointed. Perhaps there is a financial aspect to this, but we see

1 counsels -- counsel, rather, who are on the list but who are being
2 passed over, sidelined entirely, although this is, of course, the
3 opportunity to appoint them.

4 I see no difficulty with the OPCV representing applicants, but
5 for a short period only. The longer that time rolls on, it becomes
6 unacceptable, I believe, that the victims are not given their own
7 legal representatives.

8 So we can definitely agree with the principle, but we do believe
9 that the legal representative should be appointed at an early stage to
10 familiarise himself with the case to represent their clients as best
11 possible. They do not understand why they're being excluded in this
12 way.

13 PRESIDING JUDGE FULFORD: Ms. Massidda.

14 MS. MASSIDDA: Thank you, Mr. President. I would like first to
15 address the issue of the index, because maybe it's useful to give the
16 Chamber an idea of why we are asking for the index.

17 We have one index which has been composed by ourselves with our
18 filings, et cetera.

19 Now, to give you an example, this is what I can read in my index:
20 Document number 101, dated 12 May 2006, which for us is a -- is not
21 accessible. Document under seal, ex parte, title of the document:
22 Prosecution submission to inform the Pre-Trial Chamber regarding
23 protective measures.

24 Is it possible to track certain titles of documents in reading
25 public documents filed in the case records and/or in the situation

1 record. So to a certain extent we are able to know the titles.

2 Now, for instance, in this case this is something concerning
3 protective measures. I simply want to note that the office at the
4 moment is assisting four people who are also protected witnesses by --
5 protected by the Court. Maybe the office has an interest in reading
6 documents contained in the case record dealing with protective
7 measures for these persons we are representing.

8 And I can give you also other example.

9 The second issue: I think we need to confine the discussions to
10 three provisions. The first one is Rule 90, paragraph (1) of the
11 Rules of Procedure and Evidence. Now, Rule 90 paragraph (1) provides
12 that a victim can choose his or her own legal representative.

13 The second is Regulation 81 of Regulations of the Court, which
14 the office considers the core regulation in relation to the mandate of
15 the OPCV. And Regulation 81, in particular paragraph (4), is phrased
16 with a general chapeau plus specific tasks which, in the opinion of
17 the office, are not the only one the office could perform. This
18 Regulation 81(4) cannot be read as being part or in interpreting
19 Regulation 80 paragraph (2) of the Regulations of the Court.
20 Regulation 80 paragraph (2) is simply saying that the Chamber can
21 appoint the office as legal representative if the interests of justice
22 so require.

23 PRESIDING JUDGE FULFORD: Forgive me interrupting. I think the
24 main thrust of the objections isn't so much a legal and technical one,
25 it's more a practical one from the point of view of the limited

1 resources of your office, coupled with the risk that conflict of
2 interest will put you in a difficult position and will diminish or
3 could diminish the assistance that you're able to provide to for
4 instance Mr. Walley and Ms. Bapita. So isn't that really the issue
5 you've got to address, Ms. Massidda, rather than the technical
6 niceties of what is possible and what isn't?

7 MS. MASSIDDA: Well, in my understanding of the submission, there
8 was also an issue in principle in interpreting Regulation 80 and
9 Regulation 81. But I can come to your issue, your Honour.

10 PRESIDING JUDGE FULFORD: I think reflecting the views of the
11 Bench, Ms. Massidda, I'm directing you gently towards the practical
12 rather than the legal issues.

13 MS. MASSIDDA: Before submitting our written submissions, we
14 consider the practical consequence of being at the same time someone
15 who is representing victims and also someone who is providing legal
16 assistance and legal advises. We also checked in the last two years
17 and four months, I think, if this issue was ever came up for the
18 office. The answer was negative. At the moment, I'm not saying that
19 in the next five years the office will be in a position to perform
20 both functions, but at present, the office is in a position to perform
21 both functions without conflict of interest. This is also what is
22 written in our submissions. Of course, considering the limited human
23 resources and limited financial resources, it may be that in the
24 future the office will not be in a position to perform the function.
25 But we focus on what the office can perform at the moment, and at the

1 moment with the structure of the office and with the limited resources
2 we have, what we can grant is both assistance to legal representatives
3 and limited, because a group of 50 people in principle it's not an
4 enormous group. You can provide also the function of the legal
5 representation if the Chamber deems it necessary.

6 And this is why I wanted to clarify a little bit Regulation 80
7 and Regulation 81, because it is clear that Regulation 80 provides the
8 possibility for the office to be appointed legal representative only
9 following an order of the Chamber.

10 What remains to be discussed, and this is, I agree, with all the
11 submissions, this remains maybe a question mark for the next, I don't
12 know, five years, what about Rule 90 paragraph (1) of the Rules of
13 Procedure and Evidence? Because the problem is what if a victim
14 autonomously decides to appoint one member of the office who can
15 appear before -- before the Chamber. And we already have this
16 situation. Not only in the Lubanga case. We have this situation in
17 the Uganda case and in the Uganda situation and the Kony case, we are
18 waiting for a determination by Pre-Trial Chamber II, and we have the
19 same situation also in the DRC situation. Why? Because until now we
20 have provided assistance. We have a trust relationship with the
21 person. The person can trust us. They want us to provide their views
22 of and their concerns to the Chamber, and this is also something that
23 maybe the Chamber needs to consider. What if a new legal
24 representative is then appointed for the well-being of the person and
25 even for the protection of the person in certain specific case in

1 which, for instance, the person cumulate the dual status of victims
2 and witnesses. Thank you.

3 PRESIDING JUDGE FULFORD: Thank you very much indeed.

4 We turn next to the issue of disclosure by the Defence, and I
5 shall ask in a moment Ms. Mabilie to take the floor in the first
6 instance on this issue.

7 Ms. Mabilie, before you do, can I make this observation which I
8 hope will be of some assistance: The filing of the Office of the
9 Prosecutor of the 21st of December is perhaps a demonstration of a
10 situation when it would be of assistance to the Defence, to say
11 nothing of assistance to the Chamber, for there to have been an
12 indication of the issues which the Defence anticipate will arise
13 during the course of the trial, and I say that for this reason: The
14 request, as you will be aware, is that in relation to 88 witnesses who
15 potentially provide exculpatory material, redactions which are
16 currently in place should continue in place indefinitely.

17 In deciding whether or not it is in the interests of justice for
18 those redactions to be maintained, whether or not that is a tenable
19 position, it may be useful for us to know what the live issues in the
20 trial are so that we can make a determination of whether or not the
21 material which the Prosecution seeks to remain redacted in fact
22 provide exculpatory material that would be of assistance to the
23 Defence. And whilst the Chamber remains unaware of what the real
24 issues are for the defendant, it is in all likelihood more difficult
25 for us to make a decision on that subject that will be of the greatest

1 assistance to the defendant.

2 So that is an issue which I flag up at this stage when
3 submissions are advanced this afternoon given that, as I understand
4 it, there is fairly fulsome resistance on the part of the Defence to
5 any kind of pre-trial disclosure.

6 MS. MABILLE (interpretation): Might I have a few moments,
7 Mr. President.

8 [Defence counsel confer]

9 MS. MABILLE (interpretation): Mr. President, did you make your
10 remarks for -- expecting a response? Is it for tomorrow that you
11 expect a response, or would you like us to start discussing this
12 matter today?

13 PRESIDING JUDGE FULFORD: Ms. Mabilille, we'd like to deal with
14 disclosure by the Defence this afternoon, and I was merely using the
15 Prosecution's 21st of December filing as an example of how it may
16 positively assist the Defence if the Chamber has been provided with a
17 substantive indication in advance of what the issues in the trial are
18 going to be for the defendant.

19 MS. MABILLE (interpretation): Mr. President, regarding the first
20 matter that you raised, that is disclosures by the Defence, generally
21 we always try to be as brief as possible and as precise as possible.
22 However, I should like to say that on this issue, in light of the
23 Prosecutor's response, I would like to make a general observation.
24 The Defence does not at all agree with the Prosecutor who considers
25 that we have reciprocal obligations. I might even say that the

1 Prosecutor considers that we have the same disclosure obligations as
2 he does.

3 On this issue, we are in complete disagreement. The principles
4 as we perceive them are as follows: The burden of proof lies squarely
5 on the Prosecutor, and the Prosecutor must inform us as completely, as
6 thoroughly as possible, including, Mr. President, on exculpatory
7 materials of what he has. However, the Defence does not have the same
8 obligation. The Defence has the fundamental right, the accused has a
9 right to be silent. He may not incriminate himself. Therefore, in
10 principle, there is total disclosure on the part of the Prosecutor.
11 On the other side you have the Defence, which does not have the same
12 kind of obligation. That is, in our view, the principle.

13 It is clear that the Prosecutor has the burden to prove the guilt
14 of the accused person beyond a reasonable doubt. The Defence has, as
15 a role to challenge this evidence or this proof, to provide evidence
16 that will counter this -- the proof from the Prosecutor, but it does
17 not have to prove the innocence of the accused. We do not have the
18 same obligations.

19 Consequently, it seems to us that we do not have the same kind of
20 reciprocal obligation in terms of disclosure. That is the main part
21 of our observations.

22 Next there is mention of Rule 79(4), in particular the fourth
23 paragraph of this Rule. In our view, the principle is no disclosure
24 obligation unless the legal instruments provide for exceptions, and
25 this is done in Articles -- in Rule -- Article 79, or Rule 79, that is

1 alibi and criminal responsibility.

2 So this is very clear and we -- and we are also told that we must
3 provide the names of witnesses. However, however, since this is the
4 only Rule that can be enforced against us, I'm not ruling to Rule 78
5 which can be discussed later, but in respect of Rule 79, you have the
6 exceptions to the principle of disclosure.

7 And the fourth paragraph of Rule 79 says that it should not be
8 dissociated or considered separately from paragraphs (1) to (3).

9 When the Defence provides elements or notice of alibi, the
10 Chamber may order us to provide further information regarding such
11 alibi, but in our view Rule 79(4) does not establish a general
12 disclosure obligation for the Defence. It may not be interpreted
13 except as part of Rule 79 as a whole.

14 This is our position, Mr. President, and from this position I
15 might tell you the other answers we have to the questions that you
16 raised, but that is our basic principle on whose basis it seems
17 important for us to -- not to agree with the Prosecutor as such, but
18 at least we have to be clear on the interpretation given to the
19 Statute and the Rules of Procedure and Evidence and perhaps the rules
20 of international law as whole which I am summarising here.

21 Mr. President, I shall now move on quickly to the various other
22 issues that you raised, and I can tell you that regarding the line of
23 defence and materials to support this line of defence, in my view the
24 only obligation that we have here is the obligations that are bound --
25 set out in Rule 79. We have the alibi and exculpatory materials, and

1 this is all we need to provide evidence for because this is the
2 principle.

3 Similarly, the names and statements of witnesses, I want to say
4 in this regard that except for the exception set out in Rule 79, I
5 have nothing else to add there.

6 Now, the identity and content of all the documents on which the
7 Defence intends to rely. We come to Rule 78 here. On this issue,
8 Rule 78 states that: "The Prosecutor has -- may inspect the various
9 books and documents," and the question that arises here is: When?
10 When can this inspection be carried out?

11 The basic principle is this: The Defence has to have it's line
12 of defence when it hears the Prosecution evidence and when the
13 Prosecutor finishes giving such evidence. So the inspection can only
14 be conducted at the time when the Defence considers -- considers what
15 the basis is for the evidence that it intends to rely on. It will
16 only know this for sure when the Prosecutor has finished giving its
17 evidence.

18 I would also like to add that Rule 78 does not allow for final
19 inspection of our documents or materials. We have no obligation in
20 this regard towards the Prosecutor. It must be an inter partes
21 hearing. It must be fair. But we will have a basis, a certain number
22 of documents that can be inspected at that time, but during the
23 defence phase, so to speak, we will have documents that will be
24 entered or tendered into evidence. And that is how we interpret Rule
25 78.

1 I shall not go back to this, because, Mr. President, you said
2 that our filing was thorough enough, so I shall not go back to it.
3 But I say -- I see that the Prosecutor did not agree with us in this
4 regard. If we look at Rule 78, this is Rule 77, that is the
5 Prosecution obligation and our obligations, then we will see that
6 these rules are set out differently and the Prosecutor's obligations
7 are much broader than ours in this respect.

8 Now, regarding instructions to expert witnesses. On this point
9 the Defence states that when we will have decided to submit an expert
10 witness's report, if we decide to call an expert witness and we have
11 this report, then of course we shall disclose this to the Prosecutor
12 and the Court with no problems at all. However, we have no obligation
13 at all to make such disclosure before we have issued instructions that
14 we will decide to issue to our expert witness.

15 Now, regarding objections to the admissibility of Prosecution
16 evidence, that is according to Rule 61(4), that is in regard to the
17 point at which the procedure set out in 61(4) is triggered, I would
18 like to say that I was somewhat surprised by the Prosecutor's
19 submissions, because the Prosecutor is -- what he's actually
20 suggesting is that before trial begins, we shall raise all our
21 objections that we may have in respect of the materials independently
22 of the fact that I am somewhat at pains to understand how we shall
23 review 700 documents before trial begins, and how the Chamber itself
24 can decide as to the validity of some of our objections.

25 I think the texts are clear. Objections must be raised during

1 the presentation of the material and not before. And when the
2 Prosecutor writes that this practice will help to save time, I must
3 say that I was somewhat surprised. I was somewhat perplexed. Perhaps
4 I did not clearly understand my learned colleague's explanations.

5 Can the Defence be required to notify the Trial Chamber of the
6 existence of an alibi? Mr. President, the text states that the notice
7 of alibi should be given to the Prosecutor. If the Chamber wishes
8 that notice of alibi be given by us to the Prosecutor, then we have no
9 problem with that, but the instruments do not expressly provide for
10 this. That is the timeline also for the disclosure of criminal
11 responsibility or -- we agree. As early as possible we should be able
12 to do that. That is like we would do for the alibi. This would be
13 included in the challenges that have been provided for me.

14 May I proceed, Mr. President?

15 Regarding the scope of cross-examination, I think that we were in
16 agreement with the Prosecutor in this regard. It seems extremely
17 difficult for us to provide our line of cross-examination. I think
18 that in some way it will be completely counter-productive. The
19 cross-examination is done at a particular time, and if we were to
20 disclose our line of cross-examination before the witness is called to
21 testify, I think it -- even if we no longer have access to the
22 witness, then it would enable both parties to -- it will cause both
23 parties to face some problems. I think cross-examination should be
24 spontaneous, and its function is, in any case, is that we should not
25 provide the line for cross-examination before such cross-examination.

1 PRESIDING JUDGE FULFORD: We're now trespassing into the next
2 issue, in fact. At the moment, I'd like us to remain really focused
3 on the issue of disclosure by the Defence rather than going into the
4 next issue which is the scope of examination.

5 MS. MABILLE (interpretation): All right. Disclosure by the
6 Defence. In our view, there is no disclosure -- or, rather, there is
7 no disclosure before the Prosecution evidence has been given in full.
8 Next, we shall disclose in due course.

9 If you will allow me a moment or two.

10 I crave the Chamber's indulgence. I just wanted to refer to the
11 three stages of disclosure referred to by the Prosecutor. He mentions
12 one stage before the trial. That is the Prosecutor can inspect what
13 the Defence intends to rely on. My answer is no. No disclosure
14 before the Defence case. Disclosure can only take place once the
15 Prosecution evidence is over.

16 He refers to a second stage. That is what the Defence intends to
17 rely on in its defence, during it's defence. I answered that it
18 seemed to us that after the evidence was presented there would be a
19 base or core of documents and materials that we would disclose.

20 However, but excuse me for using the English term, it is an "ongoing
21 disclosure," because after one of our witnesses has been examined, we
22 may need to tender a document into evidence that we did not expect to
23 tender. So there will be a first inspection of disclosures. When the
24 Prosecution evidence is finished, then there will be disclosure,
25 rolling disclosure during the presentation of our evidence. We

1 consider that this is the appropriate answer to this question.

2 And the Prosecutor says the -- that there is a third phase. The
3 second stage is what the Defence intends to use when it is presenting
4 its case. Then you have the third phase which is after the
5 presentation of the Prosecution evidence but before the presentation
6 of the Defence evidence. I don't see the difference between the two.
7 However, I have given our position. That is disclosure after the
8 Prosecution evidence, disclosure of a core of documents that we know
9 we are going to use, followed by rolling disclosure as our own case
10 progresses.

11 PRESIDING JUDGE FULFORD: Ms. Mabilille, thank you. I think that
12 is very clear in terms of the position adopted by the Defence, and can
13 I take it, therefore, that you would resist any suggestion that we
14 should adopt some of the procedures that have been deployed at the
15 Rwandan and the Yugoslavia Tribunal, and can I just give some
16 examples. For instance, that the Defence should provide a list of
17 witnesses before the start of the case; that they should provide a
18 list of exhibits; that there should be a short pre-trial brief, as its
19 described in certainly one if not both of those Tribunal; and that at
20 some stage there should be provided a short summary of the evidence
21 that the Defence wishes to rely on.

22 I think it follows from your submissions that you would not
23 accept the imposition of any of those requirements.

24 MS. MABILILLE (interpretation): I think you understood us
25 perfectly, Mr. President.

1 PRESIDING JUDGE FULFORD: [Previous translation continues] ...

2 MR. WITHOPF: Mr. President, your Honours, I will be short. I
3 will supplement our written submissions, but allow me a few remarks, a
4 few general remarks, to the general observations my learned friend
5 from the Defence made.

6 There are several principles that govern the conduct of the trial
7 proceedings, and of course burden of proof is one of them, but there
8 are others such as the fair and expeditious conduct of the
9 proceedings. I make reference to Article 64(2). And also the
10 interests of justice, and here I make reference to Regulation 54 of
11 the Regulations of the Court. And of course, Mr. President, you have
12 rightly drawn the attention of my learned friend of the Defence to the
13 practices of the ad hoc tribunals which serve exactly that purpose.

14 If you allow me, Mr. President, your Honours, I come back to the
15 various matters and in the order of the Scheduling Order, and as I
16 mentioned, I will be brief.

17 The interpretation to be given to Rule 79(4), there as in respect
18 of many other issues, there are divergent views between the Office of
19 the Prosecutor and the Defence. In our view, Rule 79 provides for a
20 clear indication that the Honourable Bench can order disclosure by the
21 Defence.

22 Rule 79 provides for the Trial Chamber to rule on the disclosure
23 of any other evidence, and the emphasis obviously lies on the word
24 "other," meaning evidence that goes beyond the notification as covered
25 by Rule 79. And this, Mr. President, your Honours is perfectly in

1 line with Regulation 54(F), and also perfectly in line and in
2 particular with Regulation 54(L). Both Regulations do not, do not,
3 distinguish between a disclosure obligation between the Prosecution
4 and the Defence, and they mirror the general principles as outlined in
5 Article 64(3)(c), meaning that the Chamber has to provide for the
6 disclosure of evidence, be it Prosecution's evidence, be it the
7 Defence's evidence.

8 There's one further aspect I want to mention in this context, and
9 I draw the attention of my learned friends from the Defence to Rule
10 121(6) which provides for the Defence disclosure or at least at the
11 very minimum for the provision of a list of evidence prior to the
12 Confirmation Hearing to the Prosecution. And there's no reason,
13 Mr. President, your Honours, there's no reason why the Defence should
14 have such an obligation in respect of the Confirmation Hearing but not
15 in relation to the trial. In our view and in our submission,
16 Mr. President, your Honours, there cannot be such a difference.

17 To sum up, Rule 79(4) clearly gives the Trial Chamber the power
18 to order the Defence to provide for the disclosure of information and
19 evidence that goes beyond Rule 79(1).

20 With your permission, Mr. President, I would move on to the lines
21 of the Defence, and here again we believe that a closer look at
22 Regulation 55 is helpful. In this context I make reference to
23 Regulation 54(P) which provides for the Trial Chamber to issue any
24 order in the interests of justice and for the purpose of the
25 proceedings on the, and now I quote: "Defences if any to be advanced

1 by the accused person." And this is exactly, Mr. President and your
2 Honours, we are talking about.

3 The interests of justice, but in particular the purpose of the
4 proceedings, judicial economy on the one hand side and fair and
5 expeditious trial on the other hand side, and I again make specific
6 reference to Article 64(3)(a) require that the Defence discloses its
7 line of defence at a time in the context of the trial that allows the
8 Prosecution to address these lines of defence during the presentation
9 of its case. This implies that the Defence preferably should disclose
10 the lines of defence, at the very least the main lines of defence,
11 prior to the trial.

12 Of course, Mr. President, your Honours, we do appreciate that the
13 Defence only in the course of the trial may be able to establish
14 certain lines of defence depending on what the evidence and what the
15 witnesses the Prosecution is going to present will testify about, but
16 nevertheless the Defence already at this stage, having had the benefit
17 of reading the Prosecution's evidence for a number of months, will be
18 in a position to establish the main lines of defence.

19 I move on with your leave, Mr. President, to the next point, the
20 names of witnesses to be called and the statements of those witnesses.

21 On principle, Mr. President, there cannot be any doubt that the
22 Defence has to disclose the names of their witnesses and their
23 statements to the Prosecution. The Prosecution, as the Defence, must
24 be put into a position to prefer -- to prepare for the
25 cross-examination of the Defence's witnesses. And of course the

1 Office of the Prosecutor wants to make, and has a right to do so, to
2 make its own inquiries in respect of the credibility of the Defence
3 witnesses.

4 In respect of the timing of such a disclosure, the Prosecution
5 actually does appreciate that the Defence may only in a position to
6 make a final determination on their list of evidence and the witnesses
7 they wish to call at the end or towards the end of the Prosecution
8 case. This implies, however, that the Office of the Prosecutor must
9 be given sufficient time to read and to digest the statements of the
10 Defence witnesses and to make the necessary inquiries in respect of
11 their background and credibility prior to the commencement of the
12 Defence case.

13 There are only very few issues left, one of them being the
14 identity and the content of any documents the Defence intends to rely
15 on.

16 We believe, Mr. President, your Honours, that the same principles
17 do apply as in respect of the witness statements, meaning disclosure
18 sufficiently in advance of the Defence case.

19 There's one area, Mr. President, your Honours, there's not that
20 much of a difference in views between the Defence and the Prosecution.
21 That's the area of the instructions to the expert witnesses. I can be
22 sure as long as it remains for the Defence area there's obviously in
23 our view no disclosure obligation. The Defence may prefer not to use
24 the expert opinion and obviously the Office of the Prosecutor, under
25 these circumstances, does not need to know.

1 I move on and coming closer to the end, to the objections to the
2 admissibility. It's correct what my learned friend from the Defence
3 has said. Rule 61(4)(i) says yes, when the evidence is being
4 presented. Nevertheless, and here I may make largely reference to our
5 written submissions, I think the Defence already now is put into a
6 position to provide for any argument they can develop already now on
7 potential problems in respect of the admissibility of the
8 Prosecution's evidence.

9 Disclosure of such information and of such concerns at this
10 stage, at the early stages of the proceedings, appears to be necessary
11 to ensure the expeditiousness of the proceedings.

12 Rule 79(1)(a), whether the Defence is required to notify the
13 Trial Chamber on the existence of an alibi, the law is very clear.
14 The language is -- mere language of the law says notification must be
15 given to the Prosecutor. In this context I again make reference to
16 Regulation 54(H), which indicates that the Trial Chamber can request
17 to be notified.

18 And finally, and that's the last point I'm going to briefly
19 address, Rule 81, the timing of disclosure or for ground excluding
20 criminal responsibility. Here I make reference largely to our written
21 submission. I think in our view the Defence should disclose as soon
22 as it has made a determination, and in our view the Office of the
23 Prosecutor believes it would be helpful for the expeditiousness of the
24 trial proceedings if the Defence would be set a deadline in advance of
25 the trial, and we consider one month being a suitable time period.

1 Thank you very much, Mr. President.

2 PRESIDING JUDGE FULFORD: Thank you very much indeed.

3 Mr. Walley, I think the position from both yourself and
4 Ms. Bapita is, if I can summarise it, I hope fairly, in this way, is
5 that if there are disclosure obligations on the Defence, you would
6 wish to benefit from those to the extent that the materials disclosed
7 impacts on the interests of the victims that you represent.

8 Is there anything else that you'd wish to add to that?

9 MR. WALLEYN: There's nothing else to add, Mr. President. You
10 assumed very well.

11 PRESIDING JUDGE FULFORD: And the same applies to Ms. Bapita.
12 Thank you very much indeed.

13 Anything by way of reply, Ms. Mabilille?

14 MS. MABILLE (interpretation): Jean-Marie Biju-Duval will respond
15 to that.

16 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President. Just
17 to give a few brief comments by way of reaction to the observations of
18 the Prosecutor.

19 The Prosecutor puts forward as a central argument in his
20 argumentation. He puts forward a notion of a fair trial -- a concept
21 of a fair trial. There has to be a fair trial, and so he says that
22 there has to be reciprocity with regards to the disclosure obligations
23 and a fair trial depends on that. And a general observation that I
24 would like to make and very concrete consequences of that are that
25 yes, there has to be a fair trial, yes. And we know -- we know what

1 the notion of a fair trial is based on.

2 It's based on two fundamental principles. First the Prosecution
3 has the duty to completely inform the accused, to notify the charges
4 and to disclose the full body of evidence. And the second principle
5 is that the accused has also the right to silence. And these are the
6 two fundamental principles. And from these two fundamental
7 principles, what they have parallel procedural consequences which are
8 also opposing. Each principle has certain exceptions to it.
9 Disclosure, full disclosure by the Prosecution has exceptions to it,
10 for example, with regards to confidentiality. We know what they are.
11 Also, the right to silence also has exceptions to it and we're going
12 to speak about that as well.

13 Yes, there has to be a fair trial, and it's because there has to
14 be a fair trial that the Chamber has to stress the fundamental
15 difference that there is with the absence or almost total absence of
16 reciprocity when it comes to disclosure between the Prosecution and
17 the Defence. Precisely against such that the fairness of the trial be
18 respected.

19 And just to say one point with regards to Rule 79 and alibi, a
20 notification of alibi and of the special exonerating grounds. Well --
21 grounds exonerating criminal responsibility. So we have an exception
22 to principle of the right to silence of the accused, and it's because
23 it's an exception that it's explicitly stated within the text. And
24 it's also because it's an exception that we can in no case impose on
25 the basis of paragraph (4) of this paragraph that what would be a

1 general rule of the disclosure of the Defence. This would be
2 completely wrong. That would disbalance the balance of the system and
3 the fair trial envisaged by the text, because, Mr. President, your
4 Honours, if tomorrow the Chamber would decide or order the Defence to
5 disclose to the Prosecution all of its evidence, whatever it be, well,
6 that would deprive of having any sense Rule 79. And what would it
7 so -- why provide for such a Rule which means that the Defence should
8 notify where it concerns an alibi and also criminal responsibility.
9 It's because the Defence in a general way has the obligation to
10 disclose full evidence before the trial.

11 There are reasons why these exclusions are there. If that was
12 the case, they wouldn't have any meaning in this text. And we're all
13 here to give a meaning to the text that we have to apply.

14 And just to say something with regards to 78. There is a
15 principle that nobody forgets, and certainly not the Defence, which is
16 the principle of the two-party involvement, the adversarial principle.
17 This is a fundamental principle, yes. Of course it is out of the
18 question that Defence can dissimulate a piece of evidence, show it to
19 the Judges, without the Prosecution be able to see it. Of course.
20 That's the principle of the adversarial principle, but also this 78
21 should also be interpreted in the light of the fundamental principle
22 of the right to silence and -- which is a fundamental principle to the
23 right of fair trial. And as a consequence of that, this 78 is
24 applied -- has to have -- to be applied has to have a sense, but it
25 has to be interpreted in a restrictive way.

1 Concretely what does this mean? Concretely this means that of
2 course the Defence will bring to the Prosecution all evidence that it
3 intends to use during the trial. The question, the concrete question,
4 is when it should do so.

5 The Prosecutor asked that it be before the start of the trial.
6 There's nothing in the text, with the exception of the alibi aspect,
7 provides for that, and it's quite natural that when the Defence
8 submits a document, then when it will have used it, possibly -- or
9 possibly just before, when it will have decided to use it, and this is
10 something that can be done shortly before its notification, then it
11 can be notified. Well, this is also the case where the Defence will
12 have to present its evidence. But nothing in the text provides for
13 disclosure or notification prior to the commencement of the trial.

14 Rule 79 is precise in this regard. The note -- the name, just
15 the name, just the name of the witness where it concerning the alibi
16 before the start of the trial. And for this -- this Rule has to have
17 some sense.

18 So with all other issues with regards to the fact, the Defence
19 does not have to notify the names of the witnesses before the start of
20 the trial, but of course they do -- other names have to be given but
21 of course at a later stage.

22 A parallel was made by the Chamber with Rule 76 which does show
23 the difference as well.

24 PRESIDING JUDGE FULFORD: Let me interrupt you. We are of course
25 indebted to you for these submissions. They do have the feel of your

1 substantive submissions rather than a reply at the end. So can I ask
2 you please to -- to focus really on the main matters that have been
3 raised during the arguments that we've heard this afternoon rather
4 than setting out your substantive submissions ab initio, which is
5 really I think what is taking place.

6 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President, for
7 putting me on the right path. And as we talk about the path, let's
8 talk about the lines of defence.

9 Notification of the lines of the defence. Before the start of
10 the trial, as is asked by the Prosecutor, the first certain fact is
11 that it's at the commencement of the trial that the accused chooses to
12 plead guilty or not guilty, and it's at this point that in --
13 indicates the fundamental axes of the Defence, guilty or not guilty,
14 just at the commencement of the trial. Until that point he keep
15 silent. That is his right to silence. And in that regard, I think
16 that the texts are completely clear. You can't impose on the accused
17 and his Defence to notify Defence lines before the accused has even
18 made this choice, guilty or not guilty.

19 So it seems impossible for us to -- that one can ask the Defence
20 to notify lines of the defence in the same way, in a reciprocal way,
21 in the same way that the Prosecution does as is its obligation notify
22 the Prosecutor -- the Prosecution lines.

23 In the same way, these defence lines could be formulate or can
24 only be done having heard the evidence of the Prosecution. That's to
25 say after -- after the -- or before the presentation of the Defence's

1 evidence and after presentation of the Prosecution's evidence.

2 Of course the Defence is aware that it has to present its
3 principle defence lines.

4 So, Mr. President, these are a few points which I wanted to go
5 into. I'll just conclude with one observation. So what are the
6 precedents here? On the basis of what system, from what precedent
7 which is internationally recognised that it can be imposed upon the
8 Defence to have the obligation to disclose before the start of the
9 trial its evidence and its witness statements, the names of the
10 witnesses, its defence lines. As far as I'm concerned, I don't know
11 any, but on the other hand, we all know systems which come from the
12 common law and civil law systems, and in none of these systems there
13 is not the obligation -- or in a number of these systems -- every
14 system has its checks and balances, let's say. But when you have a
15 traditional civil law system, we never have the obligation to notify
16 defence lines at any time. And the system which is in Great Britain
17 envisages today the possibility to propose to the Defence to notify
18 defence lines, but to my knowledge there isn't an obligation to
19 transmit the witness statements or to notify their names before the
20 start of the trial, and I don't see how here now that there are
21 authoritative precedents such that we would or could reproduce here
22 before the International Criminal Court the system suggested by the
23 Prosecutor, which as far as I'm concerned cannot come from the texts,
24 the Statute, or the Rules of Procedure and Evidence.

25 Thank you, your Honour.

1 PRESIDING JUDGE FULFORD: Mr. Withopf, if I can address the Bar
2 through you. We've now reached the point in the afternoon where the
3 interpreters must be given a break. We will, therefore, adjourn at
4 this stage for, I think it's 20 minutes -- is that right? For half an
5 hour, sitting again at around quarter past 4.00, when we'll deal with
6 the issue that Ms. Mabilille raised yesterday, and we will then continue
7 in public session at 10.00 tomorrow morning. So when we reconvene at
8 about a quarter past 4.00, I'm afraid the public at that stage will be
9 excluded.

10 Mr. Vaatainen, I'm sorry that your time so far this afternoon has
11 been completely wasted, but I'm going to ask you to remain, please,
12 for the issue that is to be raised at 4.15. Thank you very much
13 indeed.

14 So we'll sit again in closed session at 4.15.

15 The hearing ends at 3.45 p.m.

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