

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 Thursday, 10 January 2008

6 The hearing starts at 10.02 a.m.

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

9 PRESIDING JUDGE FULFORD: Good morning. In order to assist the
10 representative of the Registry today, Mr. Vaatainen, we have decided
11 that we'll take the two issues that most particularly affect him
12 first. So we propose to deal with the audio and videolink issue as
13 the first issue, and the manner in which traumatised and vulnerable
14 witnesses should present their evidence as the second issue. I hope
15 that is not inconvenient to anyone. No. I see no objections.

16 We'll therefore take audio and videolink testimony first, and I'm
17 going to ask Mr. Vaatainen to address the Court in the first instance
18 on this for a particular reason. One of the issues, probably the most
19 particular issue that's arisen in relation to the use of audio and
20 videolink technology is the extent to which warnings should be given
21 to the Registry that it is proposed that such technology should be
22 used. On behalf of the Defence, it has been suggested that there
23 should be 15 days written notice before the witness is called that
24 this proposal is to be made, with the possibility of responses being
25 made within five days thereafter, and certainly one question,

1 Mr. Vaatainen, is whether that is sufficient for the registry or
2 whether you would need longer. So if you could help us with that and
3 any other issues that arise as far as the Registry is concerned on
4 this issue.

5 MR. VAATAINEN: Thank you very much, Mr. President, your Honours,
6 and thank you for your kind consideration and changing the agenda of
7 this hearing.

8 Well, first of all, if I would -- I would like to [indiscernible]
9 just a little bit just to give you a little bit background but very,
10 very shortly. In terms of the technology for the videolink testimony,
11 the Court side is completely ready. We could have such a testimony
12 even tomorrow.

13 The problem is at the end other, and I have been told by the
14 Information Technology Section that by the start of the trial the
15 Court will have the technical capability to conduct videolinks from
16 the field regardless of the location. However, there's a point in
17 that, which is that depending on the location -- well, let me correct
18 myself. The location will have an impact to the quality of the
19 videolink testimony your Honours will see in front of you, and for
20 that reason we would -- the Registry would like to propose that we
21 could organise a presentation to the Chambers, and to the parties if
22 that's considered appropriate, whereby the different levels of quality
23 could be clearly explained to you and showed in real terms. Namely,
24 there are three levels of quality depending on the location, starting
25 from the very high TV-type quality to a very basic video phone

1 conferencing quality.

2 In terms of the notification and the time required, technically
3 two-week notification would be sufficient, but certainly from the
4 Victims and Witnesses Unit point of view, we would like to make a
5 comment on that, that generally the planning cycle for the witness
6 appearance in court is 35 days, and because the witnesses who come to
7 the court and the videolink witnesses, the planning for both of these
8 appearances will have to be completely interlinked. In my mind that
9 logically would mean that the notification, even though technically,
10 not strictly speaking required, from the planning point of view would
11 need to be 35 days.

12 Thank you very much your Honour.

13 PRESIDING JUDGE FULFORD: That is very clear. Just before you
14 sit down, Mr. Vaatainen, are we therefore to take it that there is
15 potentially a significant difference between the three levels of
16 quality?

17 MR. VAATAINEN: Indeed, your Honour. For those of us who are
18 used to ICTY quality, the solutions that we have seen so far provided
19 by the Information Technology Section fall very, very short of that
20 quality, and I think in that sense the Bench could be assisted if you
21 could see yourself what we're talking about. So very concretely you
22 would see what the quality is.

23 PRESIDING JUDGE FULFORD: Yes. I think it is highly likely,
24 Mr. Vaatainen, that the Bench will take up the offer that is now being
25 made by the Registry in this regard.

1 One thing that would be very useful to know is the areas where
2 each level of quality relates to so that we can know that a particular
3 area that's going to be potentially relevant to the witnesses who are
4 going to be called has a particular level of quality. Would it be
5 possible to provide us with a map which reveals what levels of quality
6 are available in particular areas? Or is that -- or is that asking
7 too much?

8 MR. VAATAINEN: We can certainly look into that if it's possible,
9 but as a principle, the more mobile we will be the lesser the quality.
10 So the more there is already existing infrastructure, the higher the
11 quality. But I think if we would give you the presentation, then I
12 think we'd be more free to speak about exact locations in terms of
13 quality and also give you our views from the Victims and Witnesses
14 Unit point of view which locations would be most an appropriate for
15 this kind of a testimony.

16 PRESIDING JUDGE FULFORD: That's very clear. Thank you very much
17 indeed.

18 Mr. Withopf, anything on this?

19 MR. WITHOPF: Mr. President, our submissions will be made by my
20 colleague, Ms. Solano.

21 MS. SOLANO: Good morning, your Honour.

22 PRESIDING JUDGE FULFORD: Good morning.

23 MS. SOLANO: Mr. President, the topic associated in the agenda
24 referred only to the notification required when the parties propose to
25 use audio or videolink, but we of course are prepared to make

1 submissions on the substance on the actual use of the audio or
2 videolink if that's of assistance.

3 PRESIDING JUDGE FULFORD: Well, this morning we'd really like
4 your submissions on any relevant issues relating to audio and
5 videolink testimony, so please take your own course in relation to
6 this.

7 MS. SOLANO: Certainly Mr. President. In terms of the
8 notification we are only making reference to our filing, our 7 January
9 filing, and we wish to emphasise what we already said there in terms
10 of the Chamber deciding on the use of audio videolink on a witness by
11 witness case. And we would wish to add in this regard that the
12 witnesses, of course, should be consulted. Their views should be
13 sought by the Chamber in each case.

14 In terms of the actual use of the audio -- may I continue,
15 Mr. President? In terms of the actual use of the audio or videolink
16 technology, the Prosecution submits that as -- as laid out in Article
17 69(2), the general rule is live in-court testimony but that the
18 Statute does foresee some exceptions including testimony being given
19 by audio or videolink but that these exceptions are set boundaries by
20 the Statute itself and that the boundaries are set by making reference
21 to certain types of witnesses.

22 For child victims or witnesses and victims of sexual abuse, the
23 presumption in Article 68(2) appears to be that special measures will
24 be taken, that special measures are the rule, and the special measures
25 could include in camera proceedings or electronic or other ways of

1 presenting the evidence, but for victims other than and witnesses
2 other than children or victims of sexual violence, the Prosecution
3 submits that the general rule should still be that the testimony
4 should be delivered live and in the courtroom.

5 Given that testimony by audio or videolink is a departure from
6 the general rule, any use of the audio videolink would certainly
7 require an authorisation by the Chamber according to Rule 67(1). And
8 the Prosecution submits that the Chamber's power to authorise the use
9 of this technology is subject to one condition and one requirement.
10 The condition, as laid out in Rule 67(1), is that the technology being
11 used actually permits the witness to be examined by the court, by the
12 parties. And in this sense, the Prosecution would also welcome the
13 opportunity to be present at the presentation that the Registry would
14 propose to -- to provide of the available technology so that we could
15 make our own submissions.

16 As I said, the Chamber's power to authorise the use of audio or
17 videolink technology is also subject to one requirement, which is that
18 the Chamber seeks to obtain the consent of the victim or witness, and
19 this, your Honours, is consistent with Rules 87(1) and 88 on
20 protective and special measures.

21 Your Honours, in addition to recalling our request that the
22 Chamber take a witness-by-witness approach, I will now make brief
23 submissions on one specific category of vulnerable witnesses who, as
24 you know, is relevant to this case, meaning the former child soldiers,
25 if I may.

1 Your Honours, the testimony of the former child soldiers is
2 critical to the case, because these witnesses will give evidence not
3 only on what happened to them but also on what happened to others,
4 other children in their position, as well as on the policy and
5 pattern, including in particular the role of Mr. Lubanga and the
6 co-perpetrators named in -- in the charges.

7 The Prosecution is of the view that this critical evidence should
8 be presented in circumstances that best allow the Chamber to control
9 the questioning and ensure that the witnesses feel at ease, and that
10 best allow the Chamber, the Prosecution, and the Defence to assess a
11 weight of the evidence being given.

12 With this in mind, the Prosecution submits that at least in
13 principle it would be best to have the testimony of these witnesses
14 being delivered in the courtroom live. However, if for security or
15 other reasons the Chamber decides that these witnesses shall be heard
16 through audio or videolink, the Prosecution will not oppose. We would
17 merely request to be heard on the modalities of the taking of this
18 testimony prior to the Chamber making a decision on the use of the
19 audio or videolink.

20 And finally, your Honours, again simply to stress that we would
21 encourage the Chamber to in the case of each witness, including the
22 child witnesses, the Chamber would seek to obtain the views of each
23 one of them.

24 PRESIDING JUDGE FULFORD: Ms. Solano, I think in the first
25 instance the obligation to establish the views of the individual

1 witnesses must rest with the party calling them. Would you agree with
2 that?

3 MS. SOLANO: I would agree, your Honour, but I would also submit
4 that pursuant to the Chamber's decision on the interviews of these
5 witnesses on the preservation of evidence, we are under certain
6 constraints to inquire how the witnesses would -- would feel. But if
7 the Chamber considers that it's appropriate for the Prosecution to
8 seek the views of these witnesses, we would certainly be prepared to
9 do so, and we would do so.

10 PRESIDING JUDGE FULFORD: That's a useful and helpful
11 intervention to be informed that the Office of the Prosecutor
12 considers that there may be a limitation in relation to communication
13 on this issue that results from a decision that we've already made on
14 a related topic. So we will address that specifically in the decision
15 that we hand down in relation to this issue, and thank you for raising
16 that, Ms. Solano.

17 MS. SOLANO: Thank you, your Honours.

18 PRESIDING JUDGE FULFORD: Thirty-five days, does that present any
19 problems for the Office of the Prosecutor in terms of providing
20 notification?

21 MS. SOLANO: No, your Honours. The Prosecution would be in a
22 position to comply with that.

23 PRESIDING JUDGE FULFORD: Right. So aside from the issue as to
24 whether or not the Office of the Prosecutor can talk to its witnesses
25 about this subject, otherwise you will be making individual

1 applications for the use of this technology where relevant.

2 MS. SOLANO: Yes, your Honour, that's right.

3 PRESIDING JUDGE FULFORD: Good. Very clear. Thank you very much
4 indeed.

5 Ms. Mabilille.

6 MS. MABILILLE (interpretation): Mr. President, we practically
7 agree with the Prosecutor's position. In our view, the principle is
8 that a maximum number of witnesses come to give testimony here in
9 court, and that video-conferencing should be used exceptionally. That
10 is our principle.

11 Secondly, we would like that each time the Prosecutor or even the
12 Defence wish to use these means, we shall discuss them with you on a
13 case-by-case basis. It is therefore in our view important we -- for
14 us to explain why we think it is important for this witness to give
15 testimony other than here in court.

16 So first the principle should be that they should all come here,
17 subject to exceptions. We know that when we use video-conferencing we
18 do not have the same quality as when the witnesses are present here,
19 which is why the -- we suggest that the Chamber should decide on a
20 case-by-case basis after a discussion as to whether our witnesses or
21 the Prosecution witnesses can use these means to give testimony.

22 I have no other particular submissions to make.

23 PRESIDING JUDGE FULFORD: [Previous translation continues] ...
24 days, Ms. Mabilille?

25 MS. MABILILLE (interpretation): I have no particular submissions.

1 We indicated a time limit because we do not really know the real
2 constraints that are faced by the services in question. So we suggest
3 that 15 days. But in our view we were trying to do this to provide
4 warning that we would prefer a case by case decision, and this is why
5 we suggested that a time limit should be proposed prior to the
6 issuance of a decision on the use of audiovisual means.

7 PRESIDING JUDGE FULFORD: You would wish to be present at the
8 Registrar's demonstration if we agree that it should take place.

9 MS. MABILLE (interpretation): Of course, Mr. President. Thank
10 you very much.

11 MR. WALLEYN (interpretation): Mr. President, we have nothing
12 much to add to that. We just recall that if the witness has chosen a
13 legal representative it should be ensured that the legal
14 representative is involved in discussions as to the modalities of the
15 way he will give evidence, and the legal representative should also be
16 present when there is a taping being made.

17 PRESIDING JUDGE FULFORD: Ms. Bapita. Yes.

18 Thank you very much. I think that really does conclude that
19 issue.

20 Mr. Vaatainen, can we then turn to the manner in which
21 traumatised and vulnerable witnesses shall present their evidence. Is
22 there anything particular that the Registrar would wish to say to us
23 about this issue?

24 MR. VAATAINEN: Yes, Mr. President, your Honours. With your
25 leave I would like to make a few observations. Some of them don't

1 relate directly to the testimony to be given but relate to the -- what
2 happens before and what is in the background that will facilitate the
3 testimony of vulnerable or traumatised witnesses.

4 First of all, as your Honours are well aware, under Rule
5 17(2) (b) (iii) and 17(3), the Victims and Witnesses Unit is required to
6 take gender sensitive measures to facilitate the testimony of victims
7 of sexual violence and give due regard to the particular needs of
8 children and other vulnerable witnesses. What this and other parts of
9 our mandate as described in the Statute and the Rules mean is that the
10 Victims and Witnesses Unit's role is to make it possible to a witness
11 regardless of his or her conditions to come here and testify feeling
12 supported and protected in best possible circumstances.

13 So I would also very much to support the person who appears here
14 in the court.

15 As a principle, any re-traumatisation or causing further harm to
16 that person as a consequence of his or her testimony should be
17 avoided. That in mind, we would like to propose some concrete steps
18 to facilitate the testimony of such witnesses. In addition to that,
19 I'd like to say a few words about the needs assessment that I will be
20 referring to, the related services the Victims and Witnesses Unit
21 would provide to such witnesses, and bring to your attention some
22 concrete proposals that the Chamber would consider when such witnesses
23 would testify.

24 First of all on this concrete steps to facilitate the testimony
25 of traumatised witnesses. We believe that early determination of

1 vulnerability is crucially important, and there the obligation
2 obviously lies with the party who is calling the witness. That early
3 determination of vulnerability should lead to a needs assessment
4 vis-a-vis that person that is conducted jointly between the party and
5 the Victims and Witnesses Unit. At that individual needs assessment
6 leads to tailor-made support services to that witness to -- to allow
7 the person to testify in the best possible circumstances.

8 I'll say a few words about that -- about those circumstances
9 later.

10 In our view, equally important would be an early notification to
11 the Chambers by the party calling the witness of the specific
12 vulnerability or specific nature of a witness so that the Chamber is
13 aware of that as early as possible.

14 When the person comes and testifies, of course the Victims and
15 Witnesses Unit will have a special monitoring in place outside the
16 courtroom. During of the testimony of that traumatised or vulnerable
17 witness and we will be giving special attention to that witness. And
18 finally, under the Regulations of the Court 41, we have the
19 possibility to draw any matter to the attention of the Chamber under
20 Rule 87 and 88 and particularly 88 is here relevant so that if
21 something happens outside the courtroom after the person has started
22 testifying that we -- and -- and if that has an impact on the person's
23 ability or the condition in which the person is testifying, that we
24 will bring that to your attention.

25 On the needs assessment that lead to tailor-made services, some

1 of the services that are envisaged are that the Victims and Witnesses
2 Unit would allow an accompanying support person to travel with the
3 witness, and this support person should be most appropriate for the
4 witness in question, like maybe legal guardian, family member, child
5 support person, or psychologist and so forth. However, this in our
6 view shouldn't be confused to the possibility of the Chambers to allow
7 a counsel legal representative, a psychologist, or family member to be
8 present when the person testifies, because I think that's -- there has
9 to be different determination who would be the most appropriate person
10 to assist the person here in the court. The qualities of an
11 accompanying support person might not be sufficient for somebody
12 sitting in the courtroom.

13 Your Honours have directed the Victims and Witnesses Unit to
14 conduct courtroom familiarisation to all the witnesses who come to
15 testify, and of course when it concerns vulnerable or traumatised
16 witnesses, we will be paying special attention to these witnesses as
17 properly understood information will facilitate their testimony, but
18 also be taking care of the -- any special medical cares, paying
19 special extra attention to them during the breaks, accommodation, and
20 also conduct a debriefing or kind of a close of process after the
21 person has testified.

22 Turning to the concrete proposals during the testimony, as your
23 Honours and all of us are very well aware, testifying particularly --
24 if a person is testifying of traumatising events can be extremely
25 difficult, and from our point of view it would be very important that

1 the witness would maintain some sense of control during the testimony
2 and doesn't feel that he -- his or her role is reduced to an object of
3 the proceedings. For example, the witness should clearly know that he
4 or she can ask for a break if the experience of testimony becomes too
5 overwhelming or that there's another person, maybe a person that's
6 allowed by the Chambers to accompany the witness to the box to ask for
7 that kind of a break. Also, in our view, this is very important, is
8 to grant sufficient time for the witness to answer questions and not
9 to feel pressured. Also, we'd like to submit that the Bench could
10 consider to give enough time to the person to tell more of -- of his
11 or her story rather than just purely specific points of evidence. And
12 the of course most importantly, the person would need to be -- would
13 need to feel protected during the cross-examination.

14 A few other concrete proposals. The language used in the
15 courtroom should be adopted to the educational level of the witness
16 and where possible to avoid using legal jargon. A consideration
17 should be given to -- to limiting the number of individuals in the
18 courtroom to the bare minimum, and also considering of excluding the
19 public from the public gallery even though the testimony still could
20 be conducted in open session, but the public wouldn't be attending.

21 We believe that these measures and of course there could be more,
22 will show that the Court's appreciation to the pain and efforts of
23 some of the witnesses will go through when they have chosen to come
24 here to testify.

25 Thank you, your Honour.

1 PRESIDING JUDGE FULFORD: Mr. Vaatainen, just before you sit
2 down, two issues. The first relates to familiarisation in advance of
3 giving testimony. Has the -- the Registrar established a package of
4 measures whereby this is done in a formal and reasonably consistent
5 way with all witnesses, because it would be of interest to the Bench
6 to be informed of what happens during the course of that
7 familiarisation process so that we can be assured that the steps that
8 are being taken in advance of the evidence are sufficient and
9 appropriate for the individual witnesses.

10 MR. VAATAINEN: Certainly, your Honour. We are in the process of
11 drafting a protocol, because we're fully mindful of the fact that the
12 process of court familiarisation has to be systematic and equal and
13 identical to all the witnesses of course taking into account the
14 specific nature and requirements of individual witnesses. As I said
15 we're in the process of drafting that protocol and once it's finished
16 we'll be happy to provide that to you and would be pleased to have any
17 comments from your -- from you on that.

18 PRESIDING JUDGE FULFORD: I think I'd like to set a deadline in
19 relation to this, Mr. Vaatainen, to make sure it is properly in place
20 before this trial takes place. Would it be unreasonable to ask
21 that -- that this is in a form for us to consider by mid-February?

22 MR. VAATAINEN: Most certainly because it is a high priority for
23 us because we want to be really well prepared for the trial. Our
24 target date was actually 31st of January that I was thinking.

25 PRESIDING JUDGE FULFORD: 31st of January it will be.

1 MR. VAATAINEN: Thank you.

2 PRESIDING JUDGE FULFORD: Thank you very much indeed. The second
3 question is this: Some of those who may accompany witnesses are
4 obviously not going to be secured by the Registrar. Legal guardians,
5 for instance, are probably going to be in place in any event. But
6 others such as psychologists may well need to be provided by the
7 Registry. Now, we need reassurance that there is going to be an
8 adequate pool of professionals available to assist witnesses in
9 advance of the trial, and again the Bench would wish to see the
10 definite proposals or in fact more than that, not the proposals, the
11 definite steps that have been taken and will be taken in advance of
12 the trial by, for instance, either the end of January or mid-February,
13 Mr. Vaatainen.

14 MR. VAATAINEN: Could I just ask for a small clarification; that
15 is, when it comes to the accompanying support persons, these are the
16 persons who would accompany witnesses to come here. I believe that we
17 are, you know, ready in that because it will depend -- the identity of
18 the person who will accompany the witness will depend on the witness
19 which is most appropriate. So I believe you are referring to a pool
20 of individuals who might be sitting here next to the witness to assist
21 the witness.

22 PRESIDING JUDGE FULFORD: These are the court-provided people.
23 There will be some situations, and for instance Ms. Mabelle has
24 suggested that frequently or always there should be a psychologist
25 present. I'm not sure whether in fact this can be dealt with other

1 than by a witness by witness consideration, but putting that to one
2 side, if there is to be a psychologist present, it's highly likely
3 that that person is going to be provided by the court and by the
4 Registrar in particular, and we are anxious to ensure that well in
5 advance of the trial that there is a sufficient pool of people such as
6 psychologists who can be called on to accompany witnesses where that
7 is appropriate, and we want to make sure all necessary steps have been
8 taken well in advance of the beginning trial. Now, this isn't
9 necessarily limited to psychologists. There maybe others who it would
10 be appropriate to accompany witnesses in court and can look after
11 their needs immediately before and immediately after they've given
12 their evidence, and who are going to be provided by the Registrar.

13 MR. VAATAINEN: Yes, your Honour. Of course the Victims and
14 Witnesses Unit, we have our support staff that is available to the
15 witnesses 24/7 outside the courtroom, but it is true that these court
16 staff made not -- might not be the most appropriate persons to sit in
17 the -- in the -- with the witness here in the box. So certainly, your
18 Honour, point taken. We will look into that and ensure that there is
19 a pool of psychologists or other sufficiently qualified people who
20 could be drawn to fulfil that role in the court.

21 PRESIDING JUDGE FULFORD: And can we be provided with the
22 Registrar's definite proposals in this regard by the 31st of January?

23 MR. VAATAINEN: Let me consult a little bit.

24 [Victims and Witnesses Unit consult]

25 MR. VAATAINEN: I think there already -- there have been efforts

1 taken to identify suitable candidates for the list of experts which I
2 believe that is what you're referring to. Where that process is
3 completed by the 31st of January I doubt, but we could give you the
4 status report by the 31st of January who are the list of experts that
5 have been accepted by the Registry.

6 PRESIDING JUDGE FULFORD: Can we have an interim report, please,
7 by the 31st of January, 4.00 p.m.

8 MR. VAATAINEN: Certainly, your Honour.

9 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Vaatainen.

10 Mr. Withopf, in addition to your written submissions, anything
11 else to add?

12 MR. WITHOPF: Mr. President, there are a few things I'd like to
13 add, but I can be very short I can promise you and the Bench.

14 The ICC law, and we believe for very good reasons, pays
15 particular attention to the manner in which traumatised and vulnerable
16 witnesses shall present their evidence, and I make particular
17 reference - and as examples only obviously - to Rule 88(5) but also to
18 Article 68(2). Vulnerable witnesses as defined by the law are in
19 particular victims and children, and obviously in the context of the
20 present case against Mr. Thomas Lubanga, the former child soldiers
21 witnesses meet both criterion.

22 These witnesses were, and they were without any doubt, exposed to
23 dramatic events, and it can be anticipated and it can reasonably be
24 anticipated that them testifying is not unlikely to have a serious
25 impact on their psychological well-being. We are all aware, and it

1 has been mentioned by Mr. Vaatainen today, about -- of the possibility
2 of re-victimisation or re-traumatisation if the examination of such
3 witnesses is not conducted in an appropriate manner.

4 Against this background the Prosecution advocates and very
5 strongly advocates for a non-adversarial manner to present the
6 evidence of the witnesses concerned which naturally in our view
7 results in the Chamber strictly controlling the examination of the
8 witnesses and, in particular in this context, the questioning of the
9 witnesses concerned by the party not having called the witnesses.

10 In first instance though, Mr. President, your Honours, the
11 Prosecution is of the view that the witness's interest is best served
12 if the Chamber makes extensive use of its powers under Rule 142(C)
13 namely to question the witnesses concerned before the witnesses are
14 questioned by the parties.

15 A few remarks, if I can please proceed, in respect of the
16 submissions that have been made by Victims and Witnesses Unit. The
17 Prosecution agrees with everything that has been said, and we, in
18 particular in this context of the presentation of evidence, concur
19 with the view and the suggestion that the vulnerable witnesses should
20 be given an opportunity to tell their story and to tell their story in
21 an uninterrupted way rather than being asked very narrowed down and
22 very focused questions. We obviously also agree with the suggestion
23 that there should be a need assessment jointly done between or by the
24 Victims and Witnesses Unit and the party calling the witnesses. And
25 it's needless to say, and this concludes my submission, Mr. President,

1 your Honours, that the debriefing after the testimony, the importance
2 of such a debriefing, cannot be overestimated.

3 Thank you very much.

4 PRESIDING JUDGE FULFORD: And do I take it, Mr. Withopf, that --
5 that you agree that whether or not a witness is accompanied by a
6 particular individual is something that's going to have to be assessed
7 case by case really?

8 MR. WITHOPF: Absolutely right. We do agree.

9 PRESIDING JUDGE FULFORD: Thank you very much indeed. Very
10 helpful.

11 Ms. Mabilie, anything to add to your written submissions?

12 MS. MABILLE (interpretation): My first comment, which just made
13 me react quite significantly, was the proposal of having no publicity
14 of the debates, including the hearings being public. You know,
15 Mr. President, that this proposal which was made by Mr. Vaatainen
16 immediately made us all, well, react in the Lubanga team. As far as
17 we're concerned, it doesn't seem to be a proposal that we can accept
18 in any way. That's the first point that I wanted to make.

19 The second point was -- what I'd like to say is also that the
20 Defence, of course we've come across child soldiers as well, and I
21 think that we have to really evaluate things on a case-by-case basis.
22 We don't consider that because they are child soldiers they are
23 necessarily in the vulnerable, traumatised category. There are people
24 who haven't been child soldiers who are effectively vulnerable and
25 traumatised. So I think that we should be careful, and we should try

1 and evaluate on a case-by-case basis to the maximum extent what we
2 understand by this motion of vulnerable and traumatised. That's what
3 I wanted to say.

4 I don't think that there's a general principle that should be
5 drawn with regard to the fact that child soldiers would be necessarily
6 in the category of vulnerable and traumatised, but this doesn't mean
7 that the Defence don't take full awareness of the difficulties that
8 are linked to the testimony of these child soldiers, but I would just
9 say I wouldn't put them systematically and immediately in this
10 category, bracket. We have this problem in common, of course, because
11 the Defence will also call child soldiers. So I would say we have
12 this problem. It's a common problem, and for us it's important to say
13 that on a case-by-case basis we will try to verify if these children
14 have a particular vulnerability, and we will inform the Chamber of
15 that.

16 We have proposed, Mr. President, well, I think that this is also
17 a proposal of the Defence always well that what we consider as
18 vulnerable and traumatised is the assistance of a psychologist.
19 Without any doubt this is a difficult period. This is something --
20 one of the suggestions that we made. But I would like to draw the
21 attention of the Chamber to the fact that we would wish that the
22 rights of the Defence be really respected, including if we have people
23 who have to be examined. I hope that the Chamber will put confidence
24 in us and that we will be working under your control.

25 We will be asking questions in such a way that we won't increase

1 the traumatism. We are extremely vigilant in the way that we will be
2 putting questions to them. I hope that you can trust us on that
3 point, but at the same time, we will do our work as a Defence team,
4 and it can't be said to us that we can't correctly carry out what is
5 the work which we're meant to be doing.

6 So those are the observations that I'd like to make.

7 PRESIDING JUDGE FULFORD: You're quite right that you were at
8 pains to stress in your written submissions that you entirely accept
9 and properly accept the question as must be respectful and courteous,
10 and they should at all times refrain from conduct that would either
11 harass or intimidate the witness, and that is undoubtedly a correct
12 proposition. Thank you very much.

13 Mr. Walley, anything to add?

14 MR. WALLEYN (interpretation): Just one comment that I wanted to
15 make, Mr. President, and this is from personal experience. I would
16 say that the assistance of a psychologist isn't necessary, totally
17 necessary, during a hearing but often the day after the hearing, and
18 it would be particularly useful to have a psychologist who speaks the
19 common language of the children who might have to speak here -- come
20 here, and that's Swahili.

21 PRESIDING JUDGE FULFORD: Thank you all very much for your
22 submissions in relation to those points.

23 Sorry. Judge Odio-Benito.

24 JUDGE ODIO BENITO: Thank you. A short remark, but especially to
25 Mr. Vaatainen. I would like to be sure, probably you have thought of

1 this, that in all this process it's very important to take seriously
2 into consideration the opinion of the person, the victim or the
3 witness. Sometimes, and I am speaking on behalf of my own experience,
4 we in these kind of trials tend to overprotect certain victims.
5 Sometimes what they, and I am speaking specifically about women that
6 have been raped, they want to speak openly and in public. So they
7 don't want to be overprotected. And in the previous experience in the
8 ad hocs, this has been the case on many opportunities. So I would
9 like to be sure that we are not going to make the same mistake.

10 Thank you, Mr. Vaatainen.

11 MR. VAATAINEN: Your Honour Judge Odio-Benito, absolutely. I
12 couldn't agree with you more, and, yes, everything we do by the
13 Victims and Witnesses Unit will be done only with the consent of the
14 witness and given due regard to the opinion of -- of the witnesses.

15 And, Mr. President, may I comment on which I think was a -- maybe
16 a misunderstanding on behalf of the Defence?

17 PRESIDING JUDGE FULFORD: Certainly, Mr. Vaatainen.

18 MR. VAATAINEN: When I said excluding public from the public
19 gallery, I didn't mean that the hearing wouldn't be conducted in
20 public so that it wouldn't be conveyed to the field. It was only the
21 point that there wouldn't be persons sitting in the public gallery.

22 PRESIDING JUDGE FULFORD: That is how I understood your
23 submission in fact, yes.

24 MS. MABILLE (interpretation): I'm sorry, I misunderstood.

25 PRESIDING JUDGE FULFORD: I understood it as being a quite

1 understandable mistake on your part.

2 Mr. Vaatainen, thank you very much for your attendance. We will
3 not consider it a discourtesy if you withdraw at this stage. Thank
4 you very much indeed.

5 We turn next to the scope of examination by parties not calling a
6 particular witness, and of course this extends to participants as
7 well.

8 Mr. Withopf, anything in addition to your written submissions?

9 MR. WITHOPF: Yes, Mr. President, your Honours, a few remarks,
10 and I will be a bit more concrete compared to the written submission
11 if you allow me to do so.

12 As a first general remarks it appears that in respect of this
13 matter there is with the various exception of the third tier of the
14 item, a significant overlap between the Prosecution and the Defence's
15 submissions. Nevertheless, I want to briefly address the scope of the
16 other relevant matters as referred to in Rule 140(2)(b) in our view
17 those matters are matters that go beyond the testimony of the
18 witnesses elicited by either the party calling the witness or by the
19 Bench. Depending on the questions the party calling the witness, the
20 other -- other relevant matters may include, and I say inter alia, all
21 questions that relate to the ultimate issue being the guilt or the
22 innocence of the accused person, but also questions that relate to the
23 determination of the sentence, meaning aggravating and mitigating
24 factors, and here I make particular reference to Rule 145. And of
25 course reference is also made to Rule 147, questions on the property

1 or essence which has been possibly derived from the crime.

2 I leave it as such in that context, and with your permission,
3 Mr. President, I would move on to the second tier of the item, the
4 extent to which the parties are to disclose lines of questioning in
5 advance of the timing and of that disclosure. Here I make reference
6 to our written submission, Mr. President, your Honours.

7 We believe that the disclosure of lines of questioning is neither
8 necessary nor appropriate. The questions in cross-examination depend,
9 in our view, and here appears to be common ground with the submission
10 of the Defence, depend entirely on the answers the witnesses provide
11 during the questioning of the party calling the witness, and the mere
12 knowledge of the statement that has been disclosed does not
13 necessarily mean that one can already at the stage prior to the
14 witness testifying determine what the questions in cross-examination
15 may be. We all know practice and experience shows that there may and
16 there will be changes, at least in nuances in that context.

17 And of course, and this is the main point I also wish to make,
18 disclosure of such lines of questioning runs, and not to
19 underestimate, risk to mislead the other party and/or the Court. In
20 any event, and I come to the conclusion of this point, if the Court
21 would conclude that the lines of questioning should be disclosed, we
22 would request that the party in cross-examination is not bound by the
23 lines of the disclosed questioning.

24 That's our submission in respect to the second tyre of the agenda
25 item. I come to the third tyre with your leave, Mr. President, your

1 Honours. The question is put to us whether the parties are to
2 disclose in advance or at all the documents which will be used in
3 questioning witnesses, and of course in that context there appears to
4 be a significant difference in the submissions of the Prosecution and
5 the Defence.

6 PRESIDING JUDGE FULFORD: Regulation 52 of the Regulations of the
7 Registry clearly comes into play in relation to this doesn't it?

8 MR. WITHOPF: It does, definitely.

9 Disclosure, and I really put the term "disclosure" in this
10 context in quotation marks. Disclosure of documents is governed by
11 Rule 78 which provides for an inspection, an inspection right of the
12 Prosecution of the evidentiary materials as detailed in the Rule which
13 the Defence wishes to use at trial. Use at trial in our submission,
14 Mr. President, your Honours, includes your use during the
15 cross-examination of Prosecution witnesses. We concede,
16 Mr. President, your Honours, that there may be exceptions in
17 situations where the witness during cross-examination goes -- during
18 examination-in-chief goes significantly beyond the scope of the
19 disclosed statement. In such a situation, Mr. President, your
20 Honours, we submit the Court should decide on a case-by-case basis.

21 These are our submissions on this agenda item, Mr. President,
22 your Honours.

23 PRESIDING JUDGE FULFORD: Just one thing, Mr. Withopf, before you
24 sit down. A discrete submission made by Mr. Walleyne was that although
25 in normal circumstances in his submission it's not necessary for a

1 participant or a party calling a witness to elaborate in advance on
2 what -- the party or the participant intends to raise, and I take it
3 from that or from his submission that he's really including those who
4 have not called the witness but who are going to question, that
5 although in general terms, therefore, it's not necessary to elaborate
6 in advance on what is going to be raised, with fragile or traumatised
7 witnesses and particularly with minors and with those who have been --
8 those who are the direct victims of serious violence, that for this
9 particular category there should be a degree of advance notice of the
10 issues that are going to be raised with the witness so as to ensure
11 that they are properly protected by the Court during the process of
12 giving evidence.

13 Now, is that a submission that you agree with, Mr. Withopf,
14 disagree with, or have a different view on?

15 MR. WITHOPF: Mr. President, we certainly do not disagree. We
16 tend to agree with it, and I believe Regulation 54(b) of the
17 Regulations of the Court provide for the legal basis to request such a
18 submission.

19 PRESIDING JUDGE FULFORD: Ms. Mabilille.

20 MS. MABILLE (interpretation): Mr. President, with regards to the
21 cross-examination, I'm not going to say anything in addition to what
22 I've already said yesterday. We consider that in agreement with the
23 explanations of the Prosecutor that we can't provide the lines of
24 cross-examination, but the second issue is obviously -- the last issue
25 that you've just taken up is obviously a bit more complex as far as

1 we're concerned.

2 If we interpret Rule 52, there are two different aspects to it.
3 Firstly there's the presentation of evidence at the hearing and the
4 fact that we give to the Registry as provided for in paragraph(2) for
5 the needs of this presentation the participants provide this whenever
6 possible to the Registrar the electronic version of the evidence which
7 they intend to use at the hearing at least three working days before
8 the hearing. For us this isn't really a disclosure as far as we're
9 concerned, but we give the Registrar these evidence three days before
10 the use of this evidence. This is, firstly not really disclosure in
11 the sense that we're giving it to the Registrar. And secondly, it's
12 just our evidence. That is to say that we don't find in Regulation 52
13 anything that would oblige us as the Defence to disclose at the time
14 of the cross-examination, because this is what we're speaking about
15 here, the time of the cross-examination to disclose the evidence as
16 the Prosecutor asks us to do.

17 Our position remains that that I mentioned yesterday and which
18 you understood, Mr. President, which is that we consider that even
19 during the cross-examination we use a certain number of documents, and
20 it is at this time that we will give them to the Prosecutor. We do
21 not think that we should disclose them beforehand. This is our
22 position, because we think that there's no binding force in the text
23 with regards to this point.

24 Mr. President, those are our comments.

25 PRESIDING JUDGE FULFORD: Very clear, Ms. Mabilie. Thank you

1 very much indeed.

2 Mr. Walley.

3 MR. WALLEYN (interpretation): No further comments,

4 Mr. President.

5 PRESIDING JUDGE FULFORD: Thank you very much.

6 I turn now to the issue of statements made by the parties and the
7 participants at the commencement and of the conclusion of the trial,
8 and I think it is important that we should indicate at this stage that
9 we are considering giving the representatives of victims -- of giving
10 victims the opportunity of making - possibly time limited - but of
11 making speeches at the beginning and at the end of the trial. And so
12 when the parties are addressing this issue, they ought to bear in mind
13 that that possibility is actively under consideration.

14 I think it may also be helpful to indicate as well that the
15 current view of the Bench, subject, of course, to any submissions
16 today, is that irrespective of any decision that we make as regards
17 pre-trial disclosure by the Defence of issues, defences, and matters
18 of that kind, we are provisionally of the view that the Defence cannot
19 be ordered to make a statement at the commencement of the trial, that
20 in a sense it will depend essentially, if not entirely, on whether the
21 Defence wish to take advantage of that possibility.

22 Well, bearing in mind those remarks, any submissions from you,
23 Mr. Withopf?

24 MR. WITHOPF: Very few, Mr. President, your Honours. In respect
25 of the issue whether the victims should be given an opportunity to

1 give speeches at the beginning, at the end of the trial,
2 Mr. President, your Honours, we concur, we explicitly concur with this
3 view, and I make reference to the very positive experiences that have
4 been made at the occasion of the confirmation hearing.

5 In respect to the question whether the Prosecution and the
6 Defence should be required to make an opening statement in order to
7 explain their respective cases, I again make reference to Regulation
8 54, and in this context to Regulation 54(a) of the Regulations of the
9 Court where opening statements are specifically mentioned, and
10 obviously the legislator taking into account the very positive
11 experiences at the other international tribunals has considered
12 opening statements being of added value to the trial proceedings. And
13 again Regulation 54 serves the main purpose to further the proceedings
14 in the interests of justice.

15 In that sense, we submit that opening statements serve as a road
16 map for the presentation of the case for all participating in the
17 trial but also, and in particular, for the public. We believe,
18 Mr. President, your Honours, that the opening statements are likely to
19 have a significant overlap with the summary of presentation of
20 evidence, but there may also be other aspects included due to time
21 having passed by at that point in time. Therefore, an opening
22 statement will provide for the most updated is summary of the key
23 issues of the case presentation.

24 Who is supposed, Mr. President, your Honours, who is supposed to
25 make an opening statement? In our view, Mr. President, your Honours,

1 both parties at the beginning of the trial, but I will address the
2 concern that has been raised by you, Mr. President.

3 Why do I say this? Such an approach would not only mirror the
4 Pre-Trial Chamber's respective decision in the context of the
5 Confirmation Hearing, it will also be in line with Regulation 54(a)
6 whose language refers to opening statements, in the plural obviously,
7 and is in our view indicates that there should on principle or as a
8 matter of principle also an opening statement of the Defence.

9 PRESIDING JUDGE FULFORD: Mr. Withopf, forgive me interrupting.
10 I anticipate that Ms. Mabilille may suggest that to require the Defence
11 to make an opening statement may breach the defendant's right to
12 silence. Isn't -- isn't the defendant entitled to sit entirely
13 silently during the trial, not saying a word at any stage, putting you
14 to proof if that is a tactical route that he chooses to adopt?

15 MR. WITHOPF: Mr. President, I was just about to exactly address
16 that point, because I agree. I agree with your observation.
17 Mr. Thomas Lubanga has a right to silence, and he may or may not
18 exercise that right. Nevertheless, in our respectful submission,
19 Mr. President, your Honours, we believe the Defence is obliged at a
20 certain point in time make a determination as to whether Mr. Thomas
21 Lubanga wishes to exercise his right or not. And against this
22 background we believe he should and is obliged to make such a
23 determination prior to the beginning of the trial. In the event he
24 exercises his right to remain silent, obviously there is no opening
25 statement of the Defence.

1 In the event, however, he informs the Trial Chamber that he does
2 not exercise his right, in our respectful submission, there should be
3 an opening statement of the Defence.

4 PRESIDING JUDGE FULFORD: Very clear. Anything else,
5 Mr. Withopf?

6 MR. WITHOPF: Mr. President, this was our submission on this
7 issue.

8 PRESIDING JUDGE FULFORD: Thank you very much indeed.
9 Ms. Mabilille.

10 MS. MABILILLE (interpretation): Thank you, Mr. President. Well,
11 you said very much what I wanted to say, and that is that the Defence
12 may make opening statements, may not make opening statements. At this
13 point in time it is not a fixed position on the matter. If we do want
14 to make opening statements, we may not do it at the opening of the
15 trial but after having heard from the Prosecutor.

16 Also, Mr. President, I would like to make it absolutely clear
17 that I am not working for the public. I am working to defend my
18 client. I would only choose to make opening statements if it were in
19 the interest of my client. If we were to judge that it was not in his
20 interests we would decline entirely to make opening statements.

21 These are my submissions, Mr. President.

22 PRESIDING JUDGE FULFORD: Well, Mr. Walley, you've heard what we
23 are actively considering. The benefits for the victims is really, I
24 think self-evident. Is there anything you'd wish to add?

25 MR. WALLEYN (interpretation): Mr. President, we would be

1 delighted, but on the other matters we have no further comments.

2 PRESIDING JUDGE FULFORD: Finally, therefore, on the Status
3 Conference issues, we turn to the subject of agreement on facts and
4 evidence.

5 To a very large extent, this is a matter for the parties, and of
6 course any agreement that's reached as regards facts is not binding on
7 the Bench. We may wish to hear the evidence irrespective of any
8 agreement that has been reached.

9 I think it is helpful to stress that reaching early rather than
10 late agreement, where that is possible, could be of very considerable
11 assistance to witnesses, and what we would hope everyone in this court
12 will seek to avoid is the risk of witnesses being brought from Africa
13 to The Hague to give evidence, only then to find shortly before they
14 are being called into the witness box that in fact there is no
15 disagreement to their testimony and there is no need for them to be
16 called. That would be wholly abusive of the position of the
17 witnesses.

18 And so bearing that in mind, we would certainly wish to set a
19 deadline, if this is acceptable to the parties, in advance of the
20 trial, a deadline by which time we would expect there to have been
21 meaningful discussions between the parties and the participants in
22 relation to agreement so that the position can be sufficiently clear
23 so as to avoid that kind of unnecessary transportation of witnesses.

24 Now, I'm going to ask, please, for the parties and the
25 participants to address that point in particular, as well as any other

1 submissions -- any other issues on this point.

2 Mr. Withopf.

3 MR. WITHOPF: Thank you, Mr. President, your Honours, and again I
4 will keep my submissions very short. Because I concur with almost
5 everything that has been said by you, Mr. President.

6 The agreement of the parties as to evidence pursuant to Rule 69
7 fall within the ambit of the parties, and naturally it is mainly up to
8 the Defence to agree on alleged facts contained in the charges. All
9 the other aspects in Rule 69, however, such as the expected testimony
10 of a witness or the content of a document concern both parties.

11 The Prosecution is very well prepared to make use of Rule 69, and
12 respective deliberations between the parties take place, although, and
13 I wish to say this, these are very initial deliberations only at this
14 stage.

15 Coming back to the procedure, Mr. President, your Honours, in our
16 view the procedure should be left to the parties, and it should be
17 left entirely to the parties who are best placed to negotiate on any
18 of the matters concerned. What the Chamber, in our view, could
19 however, and this addresses exactly the point, Mr. President, you were
20 raising, could however order and in doing so making use of Regulation
21 54 and in this context Regulation 54(n) could be a deadline of
22 submissions as to whether there is an agreement of evidence and if so
23 the details of the agreements, and I cannot more than agree with the
24 suggestion that has been made by the Honourable Bench.

25 To address the second point, the second tier of the question that

1 was put to us: Do agreements have any impact on the Chamber's duty to
2 determine the truth, obviously - and the answer I believe is very
3 obvious - it does not have such an impact. Rule 69 clearly says the
4 Chamber may consider an alleged fact as being proven. The Chamber may
5 also not consider an alleged fact to be proven, Mr. President, your
6 Honours, and I leave it as such.

7 PRESIDING JUDGE FULFORD: If we were to set a Status Conference a
8 month before the beginning of the trial, Mr. Withopf, specifically to
9 consider agreement so that the parties and participants have got that
10 date to work to, would you object to that course of action?

11 MR. WITHOPF: We would not object, Mr. President.

12 PRESIDING JUDGE FULFORD: Thank you very much.

13 Ms. Mabilille.

14 MS. MABILILLE (interpretation): Mr. President, there is a
15 sensitive difficulty in this connection, and I'll explain why. The
16 Prosecutor has provided us with a certain amount of information which
17 we are in the process of discussing. We understand entirely that we
18 need to be -- work in an economic fashion in terms of our time and
19 efforts, and it is therefore advantageous for us to agree upon a
20 number of matters which are -- can easily and -- be proven. So the
21 Defence Bench could indeed agree on a certain number of things.
22 However, the last time the Prosecutor said something which puts our
23 client in a position of some anxiety. He reserved the possibility of
24 opening a new dossier with new charges.

25 Now, this places the Defence in a particularly delicate

1 situation, because how can I -- sorry. Obviously I speak of me,
2 myself, and my team. How can the Defence today accept a certain
3 number of facts which tomorrow an entirely different case with
4 entirely different contours could prove prejudicial to a future
5 defence of Mr. Thomas Lubanga? Mr. President, for us is serious
6 difficulty to such a degree that Mr. Thomas Lubanga finds a Damocles
7 sword hanging above his head. Rather than finding ourselves faced
8 with one case with such charges, the Prosecutor speaks of another
9 possible case with other charges. And a word which springs to mind
10 which I will not use. It is a very sensitive matter.

11 PRESIDING JUDGE FULFORD: [Previous translation continues] ...
12 the Prosecution were to accept that any agreement that was reached as
13 to facts was an agreement that applied to these proceedings only and
14 could not be -- and the agreement could not be used against
15 Mr. Lubanga in any subsequent proceedings should there be any. Now,
16 that is one possibility. Do you have any immediate views on that
17 suggestion?

18 MS. MABILLE (interpretation): I'm not very -- I am not minded at
19 this stage to say that that possibility would exclude the fundamental
20 problem which I have explained. We can explore it further, but I
21 wouldn't like to make a statement on it today. I think that it is
22 unfair, in fact, to ask us to prepare for this case and at the same
23 time to say that there is likely to be a second one that will follow.
24 I would prefer to reserve my response on this point. I have heard had
25 your proposal, and I would like to discuss our reaction to it with the

1 Defence team.

2 PRESIDING JUDGE FULFORD: Mr. Withopf, do you want to say
3 anything about this?

4 MR. WITHOPF: Very briefly, Mr. President, your Honours. The
5 suggestion as it has been made by you, Mr. President, appears to be a
6 very reasonable one, and we would certainly consider to go along this
7 route.

8 The second observation I wish to make, my learned friend from the
9 Defence very rightly has said that this is an entirely -- possibly an
10 entirely different context. So there will certainly be an amount of
11 case-specific, this present case-specific facts where the Defence
12 could agree to without potentially damaging what may happen later on
13 in future.

14 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, I think this needs
15 to be the subject of meaningful discussions between the Prosecution
16 and the Defence. It would be most unfortunate if there was to be no
17 agreement as to facts in this case because Ms. Mabilie is anxious
18 about the position of the defendant in relation to other possible
19 charges. So we, I think, are going to order the parties to -- to
20 explore the possibilities for reaching agreement in such a way as will
21 not prejudice the defendant's position in relation to any other
22 proceedings that the Prosecution may in the future have in mind, and
23 if we were to say three weeks for there to be a document sent to the
24 Court informing us of the outcome of the inter partes discussion would
25 that be reasonable, Mr. Withopf?

1 MR. WITHOPF: It would be entirely reasonable.

2 PRESIDING JUDGE FULFORD: Thank you very much.

3 Any comment on that, Ms. Mabilie?

4 MS. MABILIE (interpretation): I have no difficulty with that
5 deadline, Mr. President.

6 PRESIDING JUDGE FULFORD: Mr. Walley.

7 MR. WALLEY (interpretation): Mr. President, your Honours, there
8 is one comment which wish to make following from your comments,
9 Mr. President, regarding possible calling of witnesses unnecessarily
10 to the court and their travel.

11 If the objective of their appearing was to prove, say, just one
12 fact in the case, that would certainly have to be avoided. The
13 Defence may also called child soldiers, and I can imagine that the
14 Defence may wish not to contest that there were child soldiers within
15 the UPC whilst continuing to contest responsibility, perhaps. In such
16 a case, I believe that the Court has a role which goes beyond its
17 ruling on guilt or innocence but, rather, the Court has in a way a
18 pedagogical or an educational role to play vis-a-vis the world and the
19 country in question. These are the first proceedings at an
20 international level, and -- let alone a national level regarding child
21 soldiers under the age of 15 years.

22 I believe that for the general public, for those that follow
23 these proceedings, it would be important that that matter be addressed
24 even if there were an agreement on principle between the parties.

25 PRESIDING JUDGE FULFORD: (Interpretation) Ms. Bapita?

1 MS. BAPITA (interpretation): I would just add that it is
2 possible that witnesses may be called in these proceedings not to deal
3 with evidence but to speak on the historical context, and in that
4 connection I believe that it would be preferable that the Court be
5 able to examine the witnesses who come, not only in relation to
6 eliciting evidence but also to better understand the historical
7 context.

8 PRESIDING JUDGE FULFORD: Thank you very much.

9 That concludes the Status Conference issues. There are two
10 matters that formally need to be read into the record.

11 On the 20th of December of last year, the Registrar filed an
12 application for an extension of time, and the extension of time was
13 from Monday, the 7th of January, through to Wednesday, the 16th of
14 January.

15 Given the particular circumstances that existed when this filing
16 was received, the Bench dealt with it by way of an e-mail
17 communication extending the deadline from Monday the 7th, to
18 Wednesday the 16th.

19 The second matter is that on the 19th of December, 2007, the
20 Prosecution filed a request, and on the 19th of December an e-mail was
21 sent to Ms. Bensouda suggesting, and this was an e-mail sent on behalf
22 of the Chamber, suggesting that the Prosecution should consider the
23 earlier decision made by the Bench in relation to disclosure because
24 that earlier decision effectively covered the point that was raised on
25 the 19th of December, and we consider that it is appropriate for those

1 two matters to be put publicly on the record.

2 We're now nearly half past 11.00, which is the time when the
3 interpreters should be given a break.

4 The outstanding issue relates to the Prosecution's applications
5 in relation to redactions.

6 Mr. Withopf, am I right in thinking that there is almost
7 undoubtedly a public element to this which is almost inevitably going
8 to be followed by a closed-session hearing?

9 MR. WITHOPF: Mr. President, I do agree, yes.

10 PRESIDING JUDGE FULFORD: It follows, therefore, that we will sit
11 in open court at 12.00, and at an appropriate stage, after the public
12 element has been dealt with, we will then go into closed is session.

13 MR. WITHOPF: Mr. President, I'm on my feet to respectfully
14 submit a request, and the request would be the following: That the
15 continuation of the hearing takes place after the lunch break. I make
16 this submission in light of the fact that the prospective applications
17 are dealt with by lawyers within the team who were not primarily
18 dealing with the respective submissions, and they would need the
19 respective time. If the Bench could politely consider that request.

20 PRESIDING JUDGE FULFORD: Is the lawyer not available?

21 MR. WITHOPF: The lawyer is at this stage the lawyer who dealt
22 with the applications first instance, and this at this stage is not
23 available. We are talking about my colleague Ms. Salmon. The
24 applications today will be dealt with by my colleague Ms. Struyven and
25 my colleague Mr. Bulmer.

1 PRESIDING JUDGE FULFORD: And you would wish for them to deal
2 with the confidential elements at 2.00?

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

4 PRESIDING JUDGE FULFORD: With the public elements at 12.00?

5 MR. WITHOPF: If the Chamber would consider to reconvene at 2.00
6 and to start with the public portion at 2.00 and subsequently with the
7 ex parte portion we would appreciate it, Mr. President.

8 PRESIDING JUDGE FULFORD: Can we not even deal with the public
9 elements before lunch?

10 THE PROSECUTOR: I suggest, Mr. President, I will get in touch
11 with the colleagues I just mentioned, and I will certainly inform the
12 legal officer to the Trial Chamber within the next few minutes whether
13 this is possible or not.

14 PRESIDING JUDGE FULFORD: Obviously the rights lawyers have got
15 to deal with this, Mr. Withopf, but to ensure that this is completely
16 dealt with today, we would certainly prefer to deal with the public
17 elements before lunch and the ex parte elements after lunch. So could
18 you try and secure the attendance of the relevant lawyers.

19 MR. WITHOPF: I will certainly be able to do so, Mr. President.

20 PRESIDING JUDGE FULFORD: Thank you very much indeed. And then
21 let our legal adviser know at the earliest possible stage.

22 Thank you very much.

23 Recess taken at 11.26 a.m.

24 On resuming at 12.00 p.m.

25 COURT USHER: All rise. Please be seated.

1 PRESIDING JUDGE FULFORD: Mr. Withopf, I'm going to attempt the
2 summarise the position, and in due course I'll ask for your assistance
3 as to whether or not this summary is accurate or otherwise.

4 As I understand it, there are four filings which fall to be
5 considered as regards redactions. The first is a filing of the 12th
6 of December concerning 17 witnesses, five of whom were relied on
7 during the Confirmation Hearing.

8 In relation to the 12th of December, the Prosecution apply to
9 lift certain redactions under Rule 81(4) to be permitted not to
10 disclose information in most cases, and I stress those words, in most
11 cases on a temporary basis, and thirdly, for authorisation to disclose
12 certain material in summary form only until protection is in place.

13 Now, pausing for a moment in the narrative, if that summary is
14 correct, it seems to us on a preliminary basis that our decision of
15 the 13th of December, delivered orally, deals with most of the issues
16 that arise out of the 12th of December filing. Those -- the material
17 which is dependent on protective measures is clearly covered by that
18 decision. That would mean that the outstanding issues are the
19 applications to lift redactions, which we can deal with today, but
20 also if there are some areas of non-disclosure which is going to be
21 more than just temporary. And if there are within the 12th of
22 December permanent areas where there is -- it is proposed there should
23 be permanent non-disclosure, that needs to be addressed during the
24 course of this hearing.

25 On the 13th of December, there was a filing from the Prosecution

1 concerning 71 documents for which redacted disclosure was ordered by
2 the Pre-Trial Chamber, and it concerned two documents in relation to
3 which there is no current order in relation to redactions or
4 non-disclosure but in relation to which the Prosecution seeks
5 temporary non-disclosure pending the implementation of protective
6 measures.

7 The requests are fourfold. Firstly, authorisation to lift
8 redactions to one document. That can be done today. There is
9 additionally a request to lift redactions to ten documents under Rule
10 81(2), and to the extent that our authority is needed, that can be
11 dealt with today as well.

12 There is a further request in relation to lift -- to -- sorry.
13 There is, secondly, a request for authorisation to retain redactions
14 to one document under Rule 81(2) on the basis of ongoing
15 investigations, and it seems to us that that request must specifically
16 addressed today, because it's not covered by our decision of the 13th
17 of December.

18 There is a third request, which is for authorisation to retain
19 throughout the trial redactions to 27 documents. That is clearly not
20 covered by our decision of the 13th of December and needs to be
21 addressed today.

22 Fourthly, there is an application for temporary -- for temporary
23 redactions for 42 documents, but that is only on a temporary basis
24 until protective measures are in place, and it seems to us that that
25 application is covered by our decision of the 13th of December.

1 The third application, or the third filing, was made on the 19th
2 of December and relates to two witnesses. I'm going to say very
3 little about this application, because as I understand it, that filing
4 essentially dealt with the Prosecution dealing with certain errors
5 that had occurred in relation to providing information, and if I am
6 right in summarising it in that way, and this was really just about
7 amending errors, it may be that there is very little that needs to be
8 said about that during this hearing unless the Defence have any
9 particular points that they wish to raise.

10 Fourthly and finally, that is a filing of the 21st of December
11 which is of a very different nature indeed. This filing was received
12 by the Registry at 18.50 on Friday, the 21st of December. As a result
13 of the late delivery of the filing on Friday the 21st, it was not
14 notified to the Chamber until 20 past 4.00 in the afternoon on Monday,
15 the 24th of December, which of course was Christmas Eve. There were
16 official court holidays which included Monday the 24th of December
17 through to Friday the 28th of December, and it goes without saying
18 that Judges and those representing the defendant are entitled to take
19 vacations, particularly during official court holidays. That meant
20 that the earliest that this filing was going to be attended to was
21 last Wednesday, which was the 2nd of January, meaning that probably
22 technically and certainly in reality, this filing was not made
23 available to either the Chamber or the parties until seven or eight
24 days ago.

25 On the 9th of November, in the decision that was then promulgated

1 by the Bench, we ordered the Prosecution to file any exculpatory
2 material by 4.00 p.m. on the 14th of December. At paragraph 27 of
3 that decision, we ordered the Prosecution to explain and justify to
4 the Bench if it was going to be proposed that any of the exculpatory
5 should be served in a redacted form, and each and every proposed
6 redaction had to be set out, explained, and justified. We are
7 therefore in receipt of an application to retain redactions which has
8 been made well outside of the time of the schedule that was
9 implemented by the Court on the 9th of November.

10 The Prosecution are proposing in this filing to maintain
11 redactions to 153 witness statements, screening notes, investigators'
12 notes, and transcripts from a total of 88 witnesses, and that
13 material, as we understand it in the view of the Prosecution,
14 potentially includes exculpatory information.

15 To make the matter absolutely clear as we understand it, it is
16 the Prosecution's position that the current redacted form should
17 remain in place permanently throughout the entirety of the trial.

18 Now, Mr. Withopf, there are two matters, therefore, that fall for
19 immediate consideration. First is whether the summary that I've
20 provided is, for the purposes of this hearing, accurate. The second
21 is a detailed explanation from the Prosecution as to why the 21st of
22 December filing comes to be made, as we see it, in self-evident breach
23 of the order that we made on the 9th of November. And in addition to
24 that, how the Prosecution -- how the Prosecution suggest that we
25 should proceed in relation to making evaluations as to whether or not

1 the proposed redacted statements and documents is fair for the Defence
2 in the context of the trial which is to commence on the 31st of March,
3 because we are going to have to make an evaluation as to whether or
4 not the proposals that are made in the filing of the 21st of December
5 are reasonable.

6 And finally, I underline that at the moment we have not been
7 provided with any of the underlying documents. Therefore, we have
8 none of the 153 documents which I referred to earlier. And so up
9 until this point in time, we have been disabled from making any
10 assessment as to whether or not these redactions are fair or
11 justified.

12 Now, Mr. Withopf, you have the floor.

13 MR. WITHOPF: Mr. President, your Honours, to address your first
14 question first, whether the summary the Bench has provided is correct,
15 there is a straight answer to it. It is indeed correct. There is no
16 straight answer in respect of the second issue you have raised other
17 than saying that it is again correct, that the filing was made late on
18 the 21st of December, and it concerns, and again this is correct
19 material, that can be considered and should be considered falling
20 within the parameters of the 9th November order.

21 The Chamber is very well aware, Mr. President, your Honours, and
22 this is not an excuse, this is just trying to explain the way the
23 Office of the Prosecutor has proceeded in this context, the Chamber is
24 very well aware of the volume of the materials concerned, and the
25 Office of the Prosecutor had to make a deliberate determination what

1 issues it should address first and what matters could be addressed
2 later. Again, this is not an excuse. This is trying to provide an
3 explanation.

4 As can be seen from the submissions that have been made by the
5 Prosecution, in our respectful submission, Mr. President, your
6 Honours, we have dealt with the most important matters first, and when
7 I say the most important matters I mean the most important ones for my
8 learned friends from the Defence, and the Chamber has already dealt
9 with a significant number of the applications concerned and in
10 particular with a significant number of the statements concerned.

11 The matter that relates to the filing of the 21st of December
12 concerns or relates to the excerpts of witness statements, be it
13 excerpts that contain potentially exculpatory information be it
14 excerpts that contain information that fall within the parameters of
15 Rule 77.

16 In this context I wish to note or to mention, to keep it low key,
17 Mr. President, your Honours, that this practice has been applied by
18 the Office of the Prosecutor for a considerable time, and this
19 practice was never challenged by my learned friends from the Defence,
20 which does not detract from the clear parameters of the order that has
21 been made by the Honourable Bench.

22 We do concede that we have filed late, and that's the
23 explanation, Mr. President, your Honours, I can give for this failure
24 on the side of the Office of the Prosecutor.

25 PRESIDING JUDGE FULFORD: Now, how do you propose, Mr. Withopf,

1 that we should go about the process of making decisions in relation to
2 the 21st of December material, because there is within that material
3 potentially exculpatory evidence. It may be important, and we are
4 going to have to decide whether or not the redactions that are
5 currently in place are fair. Now, how do the Prosecution suggest we
6 should go about this process?

7 MR. WITHOPF: In that respect, Mr. President, your Honours,
8 against the background that what you said is correct, that we have
9 provided the excerpts only, I wish to emphasise that in that filing we
10 have specifically mentioned that the Office of the Prosecutor is at
11 any given time prepared to submit the actual statements. Of course if
12 the Chamber so wishes, and I get the impression the Chamber does
13 indeed so wish for the reason you have mentioned, Mr. President, the
14 Office of the Prosecutor will provide the underlying statements within
15 due course, meaning as quickly as possible, obviously.

16 PRESIDING JUDGE FULFORD: Mr. Withopf, I think this needs to be
17 made clear. There are within the excerpts comments which are of a
18 clear exculpatory nature which tend to indicate in one way or another
19 that Mr. Lubanga is not criminally liable in the way that the
20 Prosecution allege. Those excerpts in the main are taken completely
21 out of context of the statements in which they appear.

22 The question, therefore, is how are the Defence in the first
23 instance supposed to deal with that material? At the moment they only
24 have excerpts. They don't have access to the witnesses or to the
25 surrounding material.

1 And secondly, and possibly more importantly, if that evidence --
2 if those excerpts are introduced into the trial, if they remain as
3 excerpts, how does the Bench perform any kind of evaluation of the
4 merits or the value of excerpts which are, as it were, free-floating,
5 unconnected with a particular witness, and unconnected with any
6 context in which the statements were made? Now, how do you propose
7 those matters are addressed?

8 MR. WITHOPF: Mr. President, your Honours, we are very well aware
9 that exactly the problems that you are describing come with the
10 disclosure of excerpts only. The explanation that can be given I
11 frankly would prefer to give in the ex parte portion of today's
12 hearing, because it concerns matters that relate to the security of
13 certain individuals.

14 PRESIDING JUDGE FULFORD: Well, you can certainly do that, but I
15 think it has been important to place on the record that the matters
16 that I've just referred to are matters which are of concern to the
17 Bench and which we feel in one way or another have got to be addressed
18 in relation to this material.

19 MR. WITHOPF: That's absolutely right, Mr. President and your
20 Honours, and we were expecting the respective questions, and we are
21 prepared to answer them in the ex parte portion.

22 PRESIDING JUDGE FULFORD: Right.

23 Now, the legal advisor has reminded me, and I'm grateful to her
24 for it, that there are in fact, in addition to the matters which I
25 raise by way of summary, some video materials which have been

1 disclosed in full which we are going to have to deal with. And we
2 also indicated on the 18th of December that insofar as there is
3 anything outstanding in relation to it, that we would deal with filing
4 1086 during the course of this Status Conference.

5 Right. Now in the public part of this session, is there anything
6 else that you wish to say, Mr. Withopf.

7 MR. WITHOPF: Nothing else. That is indeed correct. There is
8 that other filing that you have just mentioned.

9 PRESIDING JUDGE FULFORD: So there are no other matters that you
10 wish to make in relation to these matters publically.

11 MR. WITHOPF: No, Mr. President.

12 PRESIDING JUDGE FULFORD: Thank you.

13 Ms. Mabilille.

14 MS. MABILLE (interpretation): My colleague, Mr. Jean-Marie
15 Bijou-Duval, will make submissions on this issue.

16 PRESIDING JUDGE FULFORD: Yes, Mr. Bijou-Duval.

17 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President.

18 I would like to put a question. Do you wish the Defence this
19 morning to make submissions regarding this application of the 21st of
20 December, that is regarding exculpatory extracts, or shall we be
21 discussing this matter at another time? We made a filing regarding
22 this submission this morning.

23 PRESIDING JUDGE FULFORD: Mr. Bijou-Duval, we would prefer it if
24 you dealt comprehensively with these issues today, because our view is
25 that all of these filings must be dealt with as quickly as possible

1 given that the trial is to start on the 31st of March, and so we would
2 really wish for as much assistance as possible from you.

3 We understand that your position is that you don't wish to
4 indicate the issues that may arise in the trial for the defendant, and
5 so to that extent you're not going to be able to help us with whether
6 or not the material in the excerpts is necessarily exculpatory. But
7 putting that aside, there maybe other submissions that you wish to
8 make in relation to the 21st of December, and we would be grateful for
9 them.

10 MR. BIJU-DUVAL (interpretation): Absolutely, Mr. President.

11 Regarding the submission of the 21st of December, I have two
12 remarks to make. The first is that I would like to pose the question
13 as to whether the Prosecutor is under an obligation to disclose the
14 identity of exculpatory witnesses that he identified in his
15 exculpatory investigations and which he has transmitted to the
16 Defence.

17 It appears to us that the disclosure of the identity of
18 exculpatory witnesses that the Prosecutor may have identified as part
19 of his investigative duties should be disclosed to the Defence. This
20 is because as you have recalled, Mr. President, this disclosure of
21 potentially exculpatory material should enable the Defence during
22 trial to call Defence witnesses. If the basic instruments are to be
23 interpreted appropriately, the Defence should be able to enter into
24 contact with a potentially exculpatory witness that would be indicated
25 to the Defence by the Prosecutor. This requires the disclosure of the

1 identity of the said witness.

2 The second remark I wish to make is in regard to the bases for
3 the non-disclosure measures applied for by the Prosecution. This is
4 based on security. While it is true that it can be imagined from an
5 intellectual standpoint that the accused might intend to harm
6 Prosecution witnesses, while this is true, it is no less true that it
7 cannot be imagined, except in a specific exceptional case, that the
8 accused defendant would intend to jeopardise the security of a
9 potentially exculpatory witness. There is no reasonable motive for
10 that. Nothing supports this kind of situation. Consequently, it
11 seems to the Defence that the basis of the non-disclosure to the
12 Defence of certain documents has no reasonable basis, because these
13 are potentially exculpatory witnesses against whom the accused cannot
14 have any intention to do harm. Based on ex parte material provided by
15 the Prosecution that the Court might identify a potential danger in
16 relation to the revelation of the identity, and of course the Court
17 might well order non-disclosure to the public and the media, that we
18 can imagine, but non-disclosure to the Defence for exculpatory
19 witnesses seems to us not to be reasonable.

20 The last point, and you supported this, you raised this, in fact,
21 it is obviously necessary that the Prosecution discloses for
22 potentially exculpatory witnesses should be limited -- it should not
23 be limited to extracts. It should cover the entire statement in
24 question, precisely because in this way the Defence will be in a
25 better position to fully appreciate the usefulness and appropriateness

1 of calling a witness. Consequently, this is in our reply that we
2 provided -- we filed this morning. The Defence therein applied for
3 the disclosure of the witnesses' identity but also the disclosure of
4 all the statements of potentially exculpatory witnesses mentioned in
5 the Prosecution's submissions. That is all with regard to the 21
6 December submission.

7 On the other points there are three bases. There is witness
8 protection, first of all. Secondly, there is the protection of third
9 parties. Thirdly, there is the issue of the confidentiality of
10 ongoing investigations.

11 Regarding witness protection, Article 68 and some parts of the
12 Rules of Procedure and Evidence, I would just like to say something
13 about the constant concern of the Defence, that is, fair trial. Fair
14 trial may allow for exceptions, but it cannot allow for generalised
15 exceptions. Non-disclosure, even on a temporary basis, of witness
16 identities is an exception. If this becomes the rule, the fairness of
17 the trial will be affected.

18 Regarding the temporary nature of non-disclosure, we understood
19 that this would be temporary and that a time would come when the
20 disclosure of such -- these identities would be made, but we have come
21 to a point where the Defence investigations will have to be conducted
22 at a time when trial is imminent, and at this time -- at such a time
23 we are denied disclosure of Prosecution witness identities.

24 It seems obvious to us that this non-disclosure at this
25 particular time of trial preparation when we need this disclosure to

1 investigate Prosecution witnesses runs counter, is an obstacle to the
2 effective and efficient useful investigation so that the truth may be
3 revealed.

4 On the second basis, that is third parties, this issue pertains
5 to videos. The Prosecutor is asking for the redaction of some parts
6 of video documentation because in the course of this film some people
7 are interviewed and make statements which may be accusations against
8 the accused. They are not Prosecution witnesses, but this is evidence
9 which presents accusations levied by individuals against the accused.

10 In this case, the Defence considers that of course they are not
11 witnesses procedurally speaking, but these are people who make
12 accusations or who make charges against the accused. This is evidence
13 that the Prosecutor wishes to submit to the Trial Chamber. It is
14 consequently indispensable for the Defence to know who is levying
15 these accusations during these recorded interviews. This is why on
16 this issue the Defence is of the opinion that the identity of these
17 people should be disclosed just was the identity of Prosecution
18 witnesses is disclosed.

19 Third basis, ongoing investigations. In this case,
20 Mr. President, indirectly this touches on the question that we treated
21 in brief a while ago. The Prosecutor is applying for permanent
22 redaction based on Rule 82, and this refers to some testimony and some
23 documents. He indicates in support of this that they're ongoing
24 investigations regarding other crimes purportedly committed by the
25 accused.

1 This brings us back to the problem we raised this morning but
2 from another standpoint. We would like to make the following
3 submission: The Office of the Prosecutor of the International
4 Criminal Court was given the situation or was seized of the situation
5 on the basis of investigations conducted into the situation in Ituri
6 and, in particular, based on investigations conducted into the conduct
7 of the UPC organisation.

8 The Prosecutor, on this basis, decided to apply for the issuance
9 of a warrant of arrest against Mr. Thomas Lubanga. The scope of the
10 crimes charged as a result of the investigations in Ituri was first
11 limited by the Prosecutor, that is, within the framework of the
12 application for the issuance of a warrant of arrest, and the crimes
13 was fixed by the Pre-Trial Chamber.

14 THE INTERPRETER: And the charges were fixed by the Pre-Trial
15 Chamber, interpreter corrects.

16 MR. BIJU-DUVAL (interpretation): This is what we submit: In
17 these conditions it is not legally imaginable that the Prosecutor
18 considers another trial on the basis of other crimes, other charges
19 supposedly committed by the accused within the framework of the
20 situation of which he was seized and which he investigated, that is
21 the situation in Ituri.

22 It seems to me that the spirit and letter of the instrument of
23 the court sets aside or excludes that sort of procedural approach. It
24 seems to us that the spirit and letter of the applicable law requires
25 a procedure which has been set out in detail by those who drafted the

1 Statute when additional charges are to be brought. This is the only
2 appropriate procedure. There are no other means. Why? Because it
3 would be against fair proceedings in that these would conceal from the
4 accused during the first trial the fact that without his being told,
5 other charges are being prepared against him, further charges which
6 would pertain to a single situation.

7 In our view, this would be a violation of the principle of
8 fairness in proceedings, and this would be wrong procedurally
9 speaking. The only procedure for which provision is made in terms of
10 adding charges is what we know and what is set out in the instruments.
11 The instruments, and it seems to us that those who drafted these
12 proceedings did not accept or make allowance for the possibility of
13 subsequent trials, because this is the same situation. That is, there
14 is one case file, the situation in Ituri, the actions of the UPC,
15 although subsequently the file itself, the case itself, the Lubanga
16 trial, procedurally speaking, is dealt with in using the pre-trial
17 procedure.

18 Consequently, the Prosecutor cannot request a non-disclosure now
19 on the basis of ongoing investigations about which we know nothing
20 against the accused. It is not possible. It cannot be imagined. And
21 in any case, such investigations cannot have any effect on the
22 procedure. They are out of the question. The situation would be
23 different if the Prosecutor explained to us that other investigations
24 of other suspects were being conducted and that these investigations
25 against these other suspects were to be protected. Rule 81(2) would

1 be applicable in such case.

2 During a case against a given accused, there should not be the
3 risk of jeopardising another trial of another accused person. We
4 agree on that. But the Defence should not be told now that we are
5 carrying out investigations against you without telling you anything,
6 without disclosing anything to you in regard to a case file about
7 which you know nothing and about which you will know nothing up to the
8 time the first trial starts, and that when this new trial starts we
9 will give you a new warrant of arrest.

10 It seems to us that this is wrong procedurally speaking.
11 Consequently, the reasons given for non-disclosure by the Prosecution
12 seem to us to be inadmittable under Rule 81(2).

13 Thank you, Mr. President.

14 PRESIDING JUDGE FULFORD: Mr. Withopf, am I right in
15 understanding that the request to retain redactions because of ongoing
16 investigations in fact only relates to one document covered by the
17 filing of the 13th of December, or is it more than one?

18 MR. WITHOPF: Mr. President, if you allow me to confer with my
19 colleagues.

20 PRESIDING JUDGE FULFORD: Yes. It's certainly dealt with as the
21 second request in the 13th of December filing, and I don't think it
22 exists in relation to any others, but I may have overlooked them.

23 MR. WITHOPF: That is the impression I have, but I wish to have
24 certainty on this matter, Mr. President.

25 [Prosecution counsel confer]

1 MR. WITHOPF: Mr. President, my colleague Ms. Struyven will make
2 our submission.

3 MS. STRUYVEN (interpretation): Thank you.

4 PRESIDING JUDGE FULFORD: Is there an easy answer?

5 MS. STRUYVEN (interpretation): Yes, it's an easy answer.
6 Actually, there's more than one. In the 12th of December filing, we
7 submitted one document of which we requested the authorisation to keep
8 an 81(2) redaction, and in the 13th of December filing we have 13
9 documents with such a request. However, in -- I can say that in the
10 13th of December filing, those 13 documents relate only to two issues,
11 in the sense that --

12 PRESIDING JUDGE FULFORD: Which paragraph in the 13th December
13 filing?

14 MS. STRUYVEN: It's annexes 1, 6, 14, 33 to 39, 41, 42 and 71.

15 PRESIDING JUDGE FULFORD: All right. I'm going to say I
16 didn't -- I didn't find that immediately clear in the -- in the body
17 of the filing itself.

18 MS. STRUYVEN: That's correct.

19 PRESIDING JUDGE FULFORD: But not to worry. There are 13 --
20 there are 13 documents relating to two issues.

21 MS. STRUYVEN: It's really only related to two issues, so they're
22 all similar in the 13 documents.

23 PRESIDING JUDGE FULFORD: Right. Good. Thank you.

24 Mr. Withopf, one final question from me publicly, in the
25 materials served on the 21st of December, there are -- there is a body

1 of excerpts, quite a large body of excerpts, that relates to the use
2 or the existence of child soldiers generally within the relevant part
3 of the DRC broadly a relevant time, but child soldiers in relation to
4 whom it's not suggested the defendant -- the accused had any
5 responsibility.

6 Now, could you briefly explain how that could amount to
7 exculpatory material? How can the defendant be less guilty or be --
8 or not be guilty at all, I'm not sure whether there's a concept of
9 being less guilty, but you understand what I mean. How can the
10 defendant avoid criminal responsibility because others may have been
11 using child soldiers in a relevant place or a relevant time? How does
12 the argument work?

13 MR. WITHOPF: Mr. President, your Honours, on this issue I'm
14 well-prepared to provide you with an answer, because I agree which
15 appears to transpire by what you are saying, that the Chamber does not
16 consider tu quoque as a value Defence and the Prosecution concurs with
17 this view.

18 Against this background, after the Prosecution had taken a very
19 liberal approach in terms of its disclosure obligations under Rule
20 67(2) and the Chamber is very well aware how broadly this provision is
21 phrased, and also taking into account that there is jurisprudence of
22 the ad hoc tribunals but not jurisprudence of this court, we
23 specifically raised this matter with our learned friends from the
24 Defence indicating in an exchange of e-mail letters that we don't
25 consider tu quoque as a value Defence and we maintain this view.

1 We have been responded by my learned friends from the Defence,
2 whether they agree or do not agree, they would consider such
3 information falling within the parameters of Rule 77 being material to
4 the Defence if I understood it correctly and I see my learned friends
5 from the Defence nodding.

6 Based on this exchange the Prosecution has continued to provide
7 such information to the Defence, however under a different heading,
8 namely Rule 77, but I want to make it clear for the record the Office
9 of the Prosecutor is not considering tu quoque as a valid defence.

10 PRESIDING JUDGE FULFORD: So this would be under Rule 77 not
11 material that's intended for use by the Prosecutor but which is
12 material that which may be relevant to the preparation of the defence.

13 MR. WITHOPF: That's exactly the interpretation that has been
14 given to it by the Defence, and based on this we have disclosed it
15 from a certain point in time onwards under Rule 77.

16 PRESIDING JUDGE FULFORD: Thank you. That's clear.

17 MR. WITHOPF: Thank you very much, Mr. President. If I would
18 please be given the opportunity to make very few additional remarks to
19 the 21st December filing in response to what my learned friend,
20 Mr. Biju-Duval, has said.

21 PRESIDING JUDGE FULFORD: Of course you may, Mr. Withopf.

22 MR. WITHOPF: And I will keep it short, Mr. President.

23 My learned friend has repeatedly talked about exculpatory
24 witnesses, and again this subject to be complemented upon later on in
25 the ex parte portion of the hearing, but what I wish to emphasise in

1 public hearing is the following: There is no such a category as
2 exculpatory witnesses. These excerpts are from statements -- stem
3 from statements that include both incriminatory evidence and
4 potentially exculpatory information and evidence, and I wish really to
5 emphasise that point.

6 The second point I wish to make in this context is the following:
7 The Office of the Prosecutor is by a statutory obligation bound to
8 search all of its material for potentially exculpatory information,
9 and I believe it goes without saying that there are materials in the
10 possession of the Office of the Prosecutor that do not relate to the
11 ongoing or further investigation against Mr. Thomas Lubanga but relate
12 to other investigations, and of course this was one of the
13 considerations, and I will expand on it later on today, why the Office
14 of the Prosecutor has not provided the names of the witnesses but only
15 the pseudonyms.

16 I leave it as such at this juncture, Mr. President.

17 PRESIDING JUDGE FULFORD: Thank you very much.

18 Mr. Biju-Duval, you're under no obligation to provide us
19 assistance on this subject, but if you are able to, so well and good.
20 The question is this: How does the use of child soldiers by others
21 assist the defendant in the preparation of his case? Now, I make it
22 clear you're under no obligation to answer that question, but in terms
23 of us assessing whether or not this is material that properly falls to
24 be disclosed under Rule 77, it may be of assistance to have complete
25 submissions in relation to this, but it's entirely up to you.

1 MR. BIJU-DUVAL (interpretation): Mr. President, my explanations
2 are very brief that I'm going to give.

3 It doesn't seem to us certainly that these factual elements, the
4 use by other armed groups of child soldiers is part, for example, of a
5 specific reasons for excluding criminal responsibility, et cetera. As
6 the Prosecutor indicated in a clear way, it appeared necessary to us
7 in the preparation of the defence to be able to inspect a maximum
8 amount of information with regards to the phenomenon of the use of
9 child soldiers in Ituri during this period. Before setting a defence
10 line, it's necessary to understand the situation, and it appeared to
11 us that this information was useful to us and even necessary to us to
12 be able to understand the situation in Ituri at that time, and it's
13 this necessary understanding which has made us ask the Prosecutor, on
14 the basis of Rule 77, for this evidence.

15 And that's what I can say to the Chamber at this stage.

16 PRESIDING JUDGE FULFORD: So it's really only of very general
17 assistance in terms of providing you with knowledge of, as it were,
18 the overall background?

19 MR. BIJU-DUVAL (interpretation): Yes. It seems to us -- or at
20 least what I can say is that we think that in itself this information
21 or this evidence is not of such a nature to exclude the accused of
22 criminal responsibility. That's what I can say.

23 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Biju-Duval.

24 Mr. Withopf, I would imagine that in dealing with this particular
25 point the Prosecution are likely to accept, would be prepared to

1 admit, that other groups, other individuals, were using child soldiers
2 in the relevant area at the relevant time.

3 MR. WITHOPF: Mr. President, very much so indeed.

4 PRESIDING JUDGE FULFORD: All right. Thank you very much.

5 We will rise now and sit again at 2.30. I'm asked 2.30. So
6 we'll sit again at 2.30. There is going to be in closed hearing.

7 Mr. Walley. Yes.

8 MR. WALLEYN (interpretation): If I would just ask for the floor
9 before we leave this hearing. I would like, Mr. President, Honourable
10 Judges, to communicate to you a certain discomfort that the legal
11 representatives of victims are confronted with due to the fact that we
12 are two and a half months from the trial now, and we still do not know
13 what our role will be in this trial, what the modalities will be for
14 our intervention and what the --

15 PRESIDING JUDGE FULFORD: If I may interrupt you, Mr. Walley.
16 The Court is acutely conscious of the fact that there needs to be
17 finality in relation to the position of the victims. It will come as
18 no surprise to you, Mr. Walley, for me to say that we are well aware
19 of the importance of this. You are going to be put out of your misery
20 in the very near future.

21 MR. WALLEYN (interpretation): I would like to thank you very
22 much.

23 PRESIDING JUDGE FULFORD: [Previous translation continues]...
24 thank you very much. [No microphone]

25 COURT USHER: All rise.

1 The hearing ends at 12.56 p.m.

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