

1 International Criminal Court  
2 Trial Chamber I  
3 Situation Democratic Republic of Congo, ICC 01/04-01/06  
4 Status Conference – Open Session  
5 Wednesday, 13 February 2008  
6 The hearing starts at 10.06 a.m.

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

9 JUDGE FULFORD: Good morning. For the benefit of the record,  
10 Ms. Bensouda, Mr. Bulmer, Ms. Samson, together with their case  
11 manager, appears for the Prosecution. For the Defence, Ms. Mabilie is  
12 present together with Mr. Desalliers and certain other members of her  
13 team. The victims representatives, Ms. Bapita and Mr. Walleyne are  
14 present. Ms. Massidda is present together with Ms. Pellet for the  
15 Office of Public Counsel for Victims.

16 We are grateful to the partisan participants for attending at  
17 this hearing at relatively short notice, and I want to begin,  
18 Ms. Bensouda, by putting a question to you which you may need a moment  
19 to liaise with other members of your team over. But by the  
20 calculations that we have made, out of a witness list of about 40  
21 Prosecution witnesses, it appears that 16 thus far have been disclosed  
22 in full to the Defence in an unredacted version. Can I ask you to say  
23 whether, not necessarily being absolutely precise, whether that  
24 "figure" sounds right.

25 MS. BENSOUDA: That's correct, Mr. President.

1 JUDGE FULFORD: Thank you very much, Ms. Bensouda. That's right.  
2 You may resume your seat if you wish. Thank you.

3 MS. BENSOUDA: Thank you.

4 JUDGE FULFORD: Ms. Mabilile, thus far the failure, for whatever  
5 reason, to disclose -- on the part of the Prosecution to disclose its  
6 case in full by this date in mid-February is not an issue that you  
7 have raised. However, the Bench has been reflecting on whether or  
8 not, in the light of the fact that under half of the Prosecution's  
9 witnesses have been disclosed in full, on whether the current trial  
10 date of the 31st of March is fair to the Defence and accordingly  
11 achievable.

12 We made an order some time ago, which reflected a decision that  
13 we'd reached, that a minimum period of 12 weeks was required for the  
14 Defence to be able to properly prepare its case once full disclosure  
15 had occurred. And without repeating myself excessively, that clearly  
16 hasn't yet happened.

17 So the first issue that I will ask your assistance on in a moment  
18 is what the Defence's attitude at this stage is to the fact that, I  
19 think I'm right in saying, you've only had full disclosure of the  
20 material from some 16 of the Prosecution's 40-odd witnesses. That's  
21 issue 1.

22 The second issue relates to the applications that are currently  
23 before the Chamber for leave to appeal. Without at this stage giving  
24 a firm indication, I am able to say that certainly part of the  
25 decision of the Chamber in relation to victims' participation in the

1 trial will be the subject of leave to appeal. We have had in mind,  
2 without finally resolving the matter, that at the commencement of the  
3 trial, there may be an opportunity afforded to the participating  
4 victims to make opening statements. For that reason alone it seems to  
5 us that it is necessary that the -- that any appellate proceedings in  
6 relation to victims' participation should be resolved before the  
7 commencement of the trial, because it would be inappropriate if  
8 victims participated in line with the majority decision, only then for  
9 there to be an appellate decision which may, either in part or in  
10 whole, reverse the majority decision, and that could have the effect  
11 of altering the category and the numbers of victims who are entitled  
12 to participate.

13 It is of course something along the lines of gazing into a  
14 crystal ball as to precisely how long it will take for the Appeals  
15 Chamber to resolve this matter. But without in any way being  
16 disrespectful to that Chamber or in any way being critical, I think it  
17 is fair to say for the most understandable reasons that it is likely  
18 that the consideration of that appeal - and there may be others - will  
19 extend beyond the 31st of March, which is now only a few weeks away.  
20 And there may be some pre-trial decisions on victims' participation  
21 which the Appeals Chamber may consider should be considered -- may  
22 consider should be looked at at the same time as the appeal from this  
23 Chamber.

24 Putting those two issues together in relation to which we would  
25 be grateful for your response in a moment, it seems to us that the

1 Realpolitik is that it is a fools errand now to continue striving for  
2 the 31st of March. If we're wrong on that, in your view please tell  
3 us. But if that is right then a responsible decision needs to be made  
4 as to an alternative trial date and one which is, from everything that  
5 one can tell at this stage, achievable.

6 Now, in order to give the Defence the 12 weeks that we had  
7 originally said, and without going into the content of what was said  
8 during an ex parte hearing yesterday, but in order to give the Victims  
9 and Witnesses Unit the opportunity of being able to implement  
10 protective measures in relation to certain outstanding witnesses who  
11 require protection - and that cannot be done instantaneously - it  
12 seems to us that combining those two factors we are actually looking  
13 at a trial date of either June the 9th or June the 16th.

14 Now, I hope that clearly and concisely sets out what we perceive  
15 to be the problem that needs to be wrestled with. I'm sorry it's  
16 taken a moment or two, and I would be grateful for your response.

17 MS. MABILLE (interpretation): Thank you, President.

18 First, I would like to thank you for you noting that we have 12  
19 weeks, but I would like to come back just a moment to the question of  
20 the communication of evidence to the Defence, because I do not  
21 entirely agree with the OTP and I would like matters between us to be  
22 clear.

23 We now have 44 announced witnesses, OTP witnesses. We have  
24 received the identity of 17 witnesses. Of the 17, nine statements,  
25 witness statements, unredacted statements, have been communicated to

1 us, which means that to date the Defence has approximately 20 per cent  
2 of the Prosecutor's disclosure and we miss 80 per cent.

3 Secondly, the situation has hardly changed since the 14th of  
4 December, which means that we have only had the communication of one  
5 statement since the 14th of December, and that is a point I would like  
6 to draw the Chamber's attention to. I know you are aware of this  
7 because you started your statement with statistics that are similar to  
8 ours, but it calls for two observations.

9 Does this mean that in the space of two months, 25 witnesses for  
10 which the OTP requested protection have -- none of these 25 have  
11 received sufficient protection measures in the last two months for the  
12 Defence to at least receive part of their statements?

13 And secondly, the second point concerning communication which is  
14 problematic for the Defence's team is the following: We have had  
15 limited communication, but concerning the information we have  
16 received, we have been informed that the Prosecutor is withdrawing two  
17 witnesses for which we had received the statements and that there are  
18 two new witnesses for which we only have initials.

19 I would like the Chamber to tell us, because I did re-read the  
20 decisions of the 14th of December and 31st of January, and I would  
21 like to know whether this list is cast in stone and whether the OTP  
22 can modify the list during the whole period or not, because the  
23 Defence feels that if the witnesses are changed regularly and for each  
24 new witness protection measures are requested, we won't start in June  
25 2008 but 2010, and hence at one stage the OTP has to accept that their

1 list is fixed and can't change.

2 There's a third point we have problems with, and we would like to  
3 mention this to the Chamber. When we are informed about witnesses, we  
4 try to investigate immediately, but when witnesses for which we have  
5 received statements are withdrawn, we have started to work already on  
6 these witnesses but then we have to stop working on them. And this  
7 leads to two problems.

8 The Defence has an extremely limited budget for investigations  
9 and we cannot waste our resources, President. And I would like to add  
10 that the current difficulties are real because we thought that we  
11 would have the full evidence on the 31st of January. One team went to  
12 start investigating, but we can't keep on changing our working  
13 methods. This is a prejudice against the Defence.

14 And I would like to draw the Chamber's attention to the fact that  
15 concerning the first problem, we would like a Chamber's decision on  
16 whether or not that the list of witnesses can be changed or not; and  
17 if it can be changed, shouldn't there be a Chamber's decision on this  
18 and an adversarial debate on whether or not witnesses can be added and  
19 withdrawn or not? And secondly, this situation is very problematic  
20 for our investigations budget.

21 This is what I wanted to say, President, concerning  
22 communication. And we do not have access to all the ex parte  
23 hearings, but I believe my colleague would make observations on this  
24 point later on, but I would like to know whether and why in the space  
25 of two months there has been no communication, because this is a real

1 point of concern for me.

2 I believe I have answered, through my observations, I have  
3 answered your first point.

4 Now, concerning your second point, my learned colleague Marc  
5 Desalliers would like to intervene, if you would allow.

6 JUDGE FULFORD: Mr. Desalliers, just before you intervene, I'm  
7 going to deal first of all with the matters just raised by  
8 Ms. Mabilille.

9 Ms. Mabilille, you have requested and you are fully entitled to a  
10 Chamber's decision on the issues that you have raised, and you will  
11 receive a decision on the matters that you have raised.

12 As regards the Prosecution witness list becoming fixed in stone,  
13 one of the reasons that we have been looking at a date in either early  
14 or mid-June is that it seems to us that that would give the  
15 Prosecution a few weeks in which to finally resolve what appear to be  
16 problems which haven't yet been rectified, and although I can't at the  
17 moment finally commit the Chamber to this, there is at least a real  
18 prospect that once that date has been -- is passed, that will be seen  
19 as a final irreversible date. The only sensible variation would be if  
20 witnesses drop off the list, because of course if witnesses become  
21 available or unwilling to participate, then the Prosecution cannot be  
22 forced to call them. But I suspect - and I say at the moment I cannot  
23 commit the Bench to this - but I suspect our view will be that any  
24 proposed additions to the Prosecution's list at that stage will be  
25 treated with a high degree of scorn.

1           In relation to the lack of knowledge which you currently have in  
2   relation to the ex parte hearings that have taken place on this  
3   subject, it is our intention to deliver a part-public, part-private  
4   decision on the hearings that have taken place so as to ensure that  
5   you are given the maximum possible information as to what has  
6   transpired, and I anticipate that we should be able to enlighten you  
7   very considerably over what has in fact been taking place since  
8   mid-December.

9           That said, Mr. Desalliers.

10          MR. DESALLIERS (interpretation): President, concerning your  
11   observation about the starting date of the trial, within the Defence  
12   team we have come to the same conclusions. We believe it will be  
13   difficult to start the trial before these points are settled and we  
14   cannot foresee the decision of the Chamber on the points on appeal  
15   yet. However, there are -- if some of the points on the participation  
16   of victims are granted, it will still be difficult to say we can still  
17   start the trial and change matters thereafter.

18          So for the Defence, if the appeal is authorised, this would mean  
19   the commencement of the trial will have to be postponed depending on  
20   the Appeals Chamber's decision on the mode of participation and  
21   admission of victims.

22          As regards your proposal for the 9th or 16th of June, that would  
23   be acceptable for the Defence. The Defence wants to commence a trial  
24   as soon as possible, but everything, your Honours, depends on the  
25   moment we will have had full disclosure of evidence. So concerning

1 the decision on the participation of victims in appeal, the biggest  
2 concern for the Defence is at what stage will we have full disclosure  
3 of evidence and from that point we will need 12 weeks for preparation.  
4 The Defence has nothing against starting on 9 or 16th of June as long  
5 as we have access in good time to the evidence from the OTP.

6 JUDGE FULFORD: Well, that's extremely helpful, Mr. Desalliers.  
7 Thank you very much indeed.

8 Now, Mr. Walley.

9 MR. WALLEYN (interpretation): Thank you, President, your  
10 Honours.

11 A first point is that if a appeal is authorised, the Appeals  
12 Chamber will have to have given its decision before the trial  
13 commences. I believe everybody agrees on this. But concerning  
14 victims, there's an additional point, it depends on the scope of  
15 appeal authorised. If it is only granted for points which do not  
16 affect us directly, for instance, the way in which other participants  
17 will be authorised to participate, this will not necessarily influence  
18 our preparation for trial. But if an appeal is authorised, for  
19 instance, on the possibility of requesting disclosure of part of the  
20 evidence, this will affect our whole preparation for trial because  
21 it's only at the stage when we will know for sure which evidence we  
22 will have access to and which -- we'll know which our mode of  
23 participation will be that we will be able to commence preparing the  
24 hearings. And it's not only the evidence but how we can compose our  
25 legal teams, for instance, depending on the assistance we provide.

1 This will influence our preparation.

2 So after the date that the Appeals Chamber has ruled on our  
3 appeal, we would need time to prepare our case, and depending on the  
4 scope of your decision, of course, even mid-June could cause a  
5 problem.

6 And I have also heard that the Court intends to have a judicial  
7 recess in July – I don't know the exact dates – but I believe there is  
8 a recess that is planned for the Court staff and therefore I wonder  
9 whether it makes sense in practical terms to start a trial that will  
10 then be interrupted for a judicial recess for a while, because in that  
11 case I believe it might make more sense to start the trial after the  
12 summer recess.

13 JUDGE FULFORD: Thank you. There's a particular issue arising  
14 out of that which I will come to in a moment, Mr. Walley, but before  
15 I do, Ms. Bapita.

16 MS. BAPITA (interpretation): Your Honours, I would particularly  
17 like to address the point raised by Luc Walley, principally in  
18 connection to access to public documents filed in the various cases.

19 It is difficult for me to say at what point in time I will be  
20 ready to go to trial, given that access to public documents is  
21 problematic for me. I only have access to them when I am present here  
22 in The Hague, at the Court. From my base in Kinshasa, the technical  
23 facilities have not made it possible for me to access LiveNote and  
24 other materials, for instance. We have tried to use various IT  
25 networks and systems but without success. In order for me to prepare

1 for trial, it would be most useful if a decision were issued allowing  
2 the Court Management Services to produce CD copies of the LiveNote  
3 content so that I can have access to it. I only have access to it  
4 when I'm here at the seat of the Court. When I'm not here, I do not  
5 have access, which slows down preparation for trial.

6 There may well be documents which are of direct interest to the  
7 people, the victims, I represent which I am not able to work on. So  
8 oddly I'm able to spend about one-quarter of my time preparing for  
9 this trial; three-quarters of the time I'm not able to make any  
10 progress.

11 Given the high tech systems used by the Court, it is tricky from  
12 the DRC to use the systems. So I would be most grateful if the Court  
13 Management Service could be asked to produce documentation and  
14 resources on CD-ROM.

15 It is said that we are also to choose documents which we find of  
16 interest to us, that is to say, we need to have access to the index in  
17 order to make that choice. Therefore, I would call upon the services  
18 here at the Court to produce that index here to us. These are two  
19 technical difficulties, practical difficulties, which are impeding our  
20 ability to prepare.

21 JUDGE FULFORD: Ms. Bapita, have you raised this formally with  
22 the Court Management Services, and have you received any kind of final  
23 reply in relation to these problems that you've just adumbrated and  
24 the solution that you've suggested?

25 MS. BAPITA (interpretation): Your Honour, we raised this

1 difficulty about two months ago with the VPRS section which deals with  
2 the practical working conditions of counsel. They made contact with  
3 Court Management Services and Mr. Alvaro, I believe, approached us  
4 with CDs and software for our system. However, when we returned to  
5 the DRC the system which had been put in place did not work.  
6 Unfortunately from Kinshasa we still have no access.

7 In fact, even yesterday I raised the technical issue. The  
8 technicians who came by to try and resolve the problem. They did not  
9 resolve it. In fact, the situation is worse than before.

10 (The Trial Chamber confers)

11 JUDGE FULFORD: Mr. Bapita, we are entirely sympathetic to the  
12 problem that you've raised. We propose to order the Court Management  
13 Services to investigate this matter so that they are going to be in a  
14 position to report to the Chamber as to what is feasible and what  
15 isn't feasible, together with full explanations in both regards. I'm  
16 loathe to fix a deadline for that before we've given Court Management  
17 Services an opportunity to inform us as to how long it will take for  
18 them to respond.

19 So what I'm going to say is you will get that order, and I'm  
20 going to ask that somebody from Court Management Services informs the  
21 Chamber by 1.00 as to how long they need to prepare that report.  
22 Thank you.

23 Now, Ms. Bensouda, do you have any observations in relation to  
24 what has transpired? Just before you do, Ms. Bensouda, I see  
25 Ms. Mabilille on her feet.

1 Yes, Ms. Mabilille.

2 MS. MABILLE (interpretation): Just to step in in support of my  
3 colleague, Ms. Bapita. At the outset we spoke to you of the IT  
4 problems we were encountering on this case. We have been told that  
5 the case file can be accessed very easily, even our system in Paris,  
6 C-trix (phoen), regularly does not work and our access to the case  
7 file is limited. So the problem is not totally in Kinshasa but also  
8 in Paris.

9 At the Defence we have a plan B. Currently we print those  
10 documents which strike us as being essential because the IT system is  
11 not yet sufficiently trustworthy for us to be sure that we will be  
12 able to access C-trix when we need to. So there is a problem when we  
13 are offsite and no longer in The Hague. It is not only Counsel Bapita  
14 who encounter this problem. We too. And we discuss the matter  
15 regularly with IT. They seem to be working hard on it, but it's a  
16 problem continues to be considerable.

17 JUDGE FULFORD: Well, in order for this Court as an e-court to  
18 function properly, these concerns have got to be addressed. So there  
19 is no misunderstanding as to what the nature and extent of the  
20 problems are, could I ask you both to set out the difficulties that  
21 you've encountered, along with any solutions that you propose, by  
22 4 p.m. on Friday of this week?

23 First of all, can I ask you, Ms. Bapita, would that be a feasible  
24 objective?

25 MS. BAPITA (interpretation): Yes, your Honour.

1 MS. MABILLE (interpretation): Yes.

2 JUDGE FULFORD: We interrupted you, Ms. Bensouda. Any  
3 observations you'd like to make?

4 MS. BENSOUDA: Thank you, Mr. President.

5 Mr. President, your Honours, the Chamber have established the  
6 31st of March as the date for the commencement of the trial and the  
7 Office of the Prosecutor has been preparing, and continues to prepare  
8 today, up to today, for the trial to start on the 31st of March. We  
9 never, Mr. President, believed that it would be changed or it would be  
10 rescheduled, and we were working towards that. We believe that the  
11 fairness of the proceedings demanded that, and we were working on the  
12 basis that there is no valid excuse to postpone.

13 JUDGE FULFORD: Ms. Bensouda, I'm going to interrupt that.

14 MS. BENSOUDA: Very well, Mr. President.

15 JUDGE FULFORD: Ms. Bensouda, we are in a position today where,  
16 out of 40 or more witnesses you're proposing to rely on, the  
17 identities of only 17 have been revealed, of that list of 17 there is  
18 only a small proportion in relation to whom the documentation and the  
19 statements have been revealed in full.

20 MS. BENSOUDA: Yes.

21 JUDGE FULFORD: Now, how is a trial date of the 31st of March  
22 consistent, given that position with our order back in November or  
23 December of last year that the Defence must have three months after  
24 there has been full service of the Prosecution case?

25 MS. BENSOUDA: Mr. President, today we have a final list of 35

1 and we will go into details, with 16 being fully disclosed and 16  
2 redacted, according to the authorised redactions, and summaries or  
3 non-disclosure of information that we have aimed to protect the  
4 witness.

5 Mr. President, the whole Court is facing the challenge, and the  
6 duty that we all have is to protect the witnesses. We were asked to  
7 do this on the 31st of January, and if I may just quote,  
8 Mr. President, the Court has said that "For the Victims and Witnesses  
9 Unit to implement any security measures and for other security avenues  
10 to be investigated and secured by the Office of the Prosecutor."

11 Mr. President, I can say that today, today the Office of the  
12 Prosecutor has only four witnesses, four witnesses, Mr. President -  
13 and we are willing to go into detail, my colleague can do that - and  
14 these are the four witnesses who require protection. And I think now  
15 as we stand the Court has managed to provide for the protection of 90  
16 per cent of the witnesses today.

17 And I think, Mr. President, we were working on the basis that  
18 with the assistance of the Chamber and VWU, we will be able to -- we  
19 will be able to implement these other security measures that we needed  
20 to do, but unfortunately the issue, as you know, remains to be  
21 resolved. But if it is -- the Office of the Prosecutor is stating  
22 right now that we are in a position to disclose forthwith,  
23 Mr. President, the remaining.

24 We have, the Office of the Prosecutor, Mr. President, has  
25 disclosed all the incriminating evidence that we need to disclose and

1 we have done this three months before the start of the trial, and this  
2 was following your 13th of December decision.

3 Mr. President, we --

4 JUDGE FULFORD: Ms. Bensouda, forgive me for interrupting again,  
5 and I will not put this point again. I'm going to put it one last  
6 time: The order of the Chamber in the fall of last year was that the  
7 Defence require three months to prepare their case once full  
8 disclosure has occurred.

9 MS. BENSOUDA: Yes.

10 JUDGE FULFORD: As of today the Defence have the identities of  
11 about half of your current witness list, and of that half they only  
12 have complete statements and documents from a relatively small  
13 proportion of those witnesses.

14 In light of that, how do you say that the trial date of the 31st  
15 of March is achievable? At the moment I'm afraid I don't follow your  
16 argument.

17 MS. BENSOUDA: Mr. President, I don't know whether I am able to  
18 go into details as to what the Office of the Prosecutor has been doing  
19 regarding the disclosure, but I can say that 17 statements have been  
20 fully, fully disclosed. Today the Office of the Prosecutor's list is  
21 35 - 35 - and, Mr. President, 16 have also been disclosed redacted,  
22 which gives the total of 32 today that have been disclosed, fully  
23 disclosed or disclosed redacted.

24 JUDGE FULFORD: Yes, Ms. Bensouda, that's precisely the point.  
25 It means that half of the witnesses have not been disclosed in full,

1 and this Chamber has said that in order for there to be a fair trial  
2 there needs to have been full disclosure three months in advance.  
3 Now, I said I wasn't going to repeat the question. I'm going to have  
4 one more go. In light of the fact that we are now mid-February, how  
5 does the Prosecution suggest, in light of what we have said is the  
6 basic ingredient of fairness, how do the Prosecution say that we can  
7 maintain the date of the 31st of March?

8 MS. BENSOUA: Mr. President, we have in our January 29th filing  
9 asked the Chamber for a ruling for responsibility, Mr. President, of  
10 witness protection. Mr. President, we are saying, the Office of the  
11 Prosecutor is saying, that if we had this ruling today, either way,  
12 the Office of the Prosecutor is able to disclose forthwith everything.

13 JUDGE FULFORD: I'm not going to take it any further,  
14 Ms. Bensouda. Can we just deal with the main points. Do I take it  
15 from your submission, therefore, that you are saying that the trial  
16 date of the 31st of March can fairly be maintained?

17 MS. BENSOUA: Yes, Mr. President.

18 JUDGE FULFORD: All right. Not --

19 MS. BENSOUA: From the Office of the Prosecutor, we were working  
20 on starting on the 31st of March.

21 JUDGE FULFORD: Yes. We understand that you were working towards  
22 that, Ms. Bensouda. It's a question of whether, looking at the issue  
23 now in the round and maturely, whether that is sensibly achievable.

24 MS. BENSOUA: We believe so, Mr. President. I believe so.

25 JUDGE FULFORD: We understand your position, Ms. Bensouda.

1           Now, what about the pending appeal in relation to victims'  
2   issues? Do you say notwithstanding the fact that the Chamber today  
3   indicates that we are minded to grant leave certainly in part in  
4   relation to the applications that have been made, that notwithstanding  
5   that and the fact that there is an appeal that's to take place, we  
6   should nonetheless plow on with a trial date starting on the 31st of  
7   March?

8           MS. BENSOUDA: That is not what the Office of the Prosecutor is  
9   saying, Mr. President.

10          JUDGE FULFORD: Well, what are you saying?

11          MS. BENSOUDA: The Office of the Prosecutor also is very mindful  
12   of the fact that the scope and modalities of victim participation has  
13   to be determined before the trial starts, and we respect that,  
14   Mr. President, and we support that. We were just hoping,  
15   Mr. President, that there would be some form of, I'll have to say,  
16   some -- a decision, Mr. President, on the application so that this  
17   matter is expedited even before the Appeals Chamber to meet the 31st  
18   of March. This was our hope.

19          (The Trial Chamber confers)

20          JUDGE FULFORD: Anything else you want to say, Ms. Bensouda? Is  
21   there anything else you want to say?

22          MS. BENSOUDA: That's all, Mr. President. Thank you.

23          JUDGE FULFORD: Thank you.

24          Ms. Mabilile, I imagine that you have some difficulties with some  
25   of what has been said. I don't in any way want to cut you short, but

1 it would in fact be of considerable assistance to us if we could have  
2 set out shortly in writing what, from your point of view, is the  
3 position today as regards disclosure to the Defence, which statements  
4 you've received, identifying, we'd be grateful, the witnesses by name  
5 and number; those in relation to whom you have received the material  
6 in full and those in relation to whom you have received the material  
7 in a redacted version. We would also be grateful if you could tell us  
8 which witnesses you have been informed have, as it were, dropped off  
9 the Prosecution's list, and if you were informed that, when, because I  
10 think today certainly in open court is the first time that the figure  
11 of 35 has been mentioned. Hitherto I've been working to a figure over  
12 40.

13 Now, I don't want to stop you making any submissions you wish to  
14 now, but in any event I would ask you, for our convenience, by 4.00 on  
15 Friday, to give us that information in writing.

16 MS. MABILLE (interpretation): Thank you, your Honour.

17 Excuse me, but I really am rather annoyed. On the 31st of  
18 January the Prosecutor provided me with a list, on the 31st of  
19 January, announcing 44 witnesses. Now, perhaps for the Prosecutor  
20 nine witnesses, more or less, is not a difficulty, but I have the  
21 Prosecutor's list, the letter from the Prosecutor here before me.  
22 Let's be serious about this. There are 44 witnesses. There are not  
23 35 witnesses; 44 is the number announced on the 31st of January.

24 My second point, your Honour. We thought that you might ask us  
25 for such information, and therefore we have produced a table

1     indicating for which witnesses we have nothing, for those we have  
2     light redactions, heavy redactions, et cetera, using a colour system.  
3     I can tell you that of the 44 witnesses, we have unredacted witness  
4     statements for nine. For nine to 17 we have the names and redactions.  
5     For the rest we only have initials and that's about it.

6             I would say that the Office of the Prosecutor is not taking this  
7     seriously. We come to a hearing with a list of 44 witnesses, dated  
8     31st of January, and I would like to tell the Chamber that on that  
9     list -- of that list, two have been removed, three have been added,  
10    two of whom have been identified to us by initials only.

11            Your Honour, I'm quite a flexible person, but I think that this  
12    is no longer reasonable. There were deadlines for the Office of the  
13    Prosecutor, as for the Defence. That the Office of the Prosecutor  
14    should come here and say, We're ready to start on the 31st of March,  
15    whereas the situation we have today is far removed from what is  
16    announced on this list. I think it's quite ridiculous. In fact, I  
17    think there's a clear lack of professionalism here, your Honour.

18            JUDGE FULFORD: Well, I think it is fair to say, Ms. Mabilie,  
19    that there is a substantial divergence between what you have just said  
20    and what Ms. Bensouda said to the Chamber a moment ago - and I'm  
21    reading now from page 15, line 18, and I quote - "the Office of the  
22    Prosecutor, Mr. President, has disclosed all the incriminating  
23    evidence that we need to disclose. We have done this three months  
24    before the start of trial following your 13th of December decision."

25            Now, I'm not going -- we're not going to investigate this further

1 now in open court, but I make it clear that the competing submissions  
2 on these issues are going to be investigated minutely by the Chamber  
3 prior to the delivery of a written decision by us in relation to this  
4 history, and there will be conclusions reached during that decision.

5 We would be grateful, Ms. Mabilille, either for the table that you  
6 have provided, either in its current form or, if you wish to expand  
7 it, in expanded form, by Friday, 4 p.m. And of course we extend the  
8 same thing to the Prosecution, if they wish to set out in writing what  
9 they say has been the extent of disclosure to date, they are entirely  
10 free to do so. As you understand some of these matters have been  
11 investigated by us during closed session.

12 MS. MABILILLE (interpretation): Your Honour, if permit, this is  
13 one observation I would like. I am reading here but perhaps I  
14 misunderstood Ms. Bensouda. She seems to say that 80 per cent of the  
15 witnesses have been protected to date. That's what I thought I read  
16 of the comments of Ms. Bensouda. If that is the case, your Honour, if  
17 they are protected, why have we not had the evidence? What is wrong?  
18 Where is the gap between the 80 per cent of witnesses who are  
19 protected and the much smaller percentage of documents which have been  
20 disclosed?

21 JUDGE FULFORD: It's understandable why you raise that question.  
22 The difficulty that the Bench has in answering directly now is that  
23 some of this relates to discussions that have taken place in closed  
24 session. I can reassure you, Ms. Mabilille, that by the time this  
25 process is over, you will have a sufficiently full answer as to

1       whether or not that representation is accurate or otherwise.

2             Yes, Ms. Bensouda.

3             MS. BENSOUDA: Mr. President, if I may just say that the Office  
4       of the Prosecutor is constrained to discuss these things because some  
5       of it is being discussed already in closed session, but I take,  
6       Mr. President, strong objection to Ms. Mabilille saying that the Office  
7       of the Prosecutor is not serious. I think this is inappropriate.

8             JUDGE FULFORD: We will take on board that remark, Ms. Bensouda.  
9       Thank you.

10            Yes, Mr. Bulmer.

11            MR. BULMER: Mr. President, I just rise to raise a point that you  
12       asked us to raise on a previous occasion, and that being an issue of  
13       admissibility. I had the sense that you were close to closing.

14            JUDGE FULFORD: Not at all. We're not close to closing,  
15       Mr. Bulmer. Thank you for raising it. It certainly hadn't escaped my  
16       attention.

17            MR. BULMER: Please accept my apologies, then.

18            JUDGE FULFORD: Not at all, Mr. Bulmer.

19            Mr. Walley, I want to return to the important point that you  
20       made in relation to whether or not even a date as far distant as  
21       mid-June is a sensible one for the commencement of this trial. One of  
22       the matters that we have borne in mind is not only the disclosure of  
23       documentation to the victims who are permitted to participate, but  
24       also that we will need, subject to something I'm about to say, a  
25       decision from the Appeals Chamber sufficiently far in advance of the

1 commencement of the trial to allow victims who are entitled to  
2 participate to prepare for that trial.

3 We propose to write to the Appeals Chamber setting out the  
4 timetable that we wish to adhere to. And of course we can't in any  
5 way tie the hands of the Appeals Chamber, but I am hopeful that there  
6 will be a sufficiently concrete response in due course from them to  
7 enable us to make sensible listing decisions. So at the moment the  
8 mid-June date has an aspirational element to it, but it is one that we  
9 are very concerned to achieve if we possibly can.

10 Now, that leads into two further points for which I'm going to  
11 ask the assistance of the parties and the participants.

12 The first is in relation to what work, if any, the Trial Chamber  
13 can sensibly continue to do whilst a decision on victim participation  
14 is under review. By way of introduction can I make it absolutely  
15 clear that there is no intention on our part at all to seek to  
16 undermine the opportunity which the parties have of applying to the  
17 Appeals Chamber for an order of suspensive effect. That is a matter  
18 for the parties to raise if they wish and for the Appeals Chamber to  
19 grant if they consider it appropriate, and we do not trespass on that  
20 territory.

21 However, that said, it may be possible to identify areas of work  
22 which we can continue doing because on any sensible appraisal,  
23 whatever the Appeals Chamber decides, there is an area which is  
24 secure, and in relation to that secure area it seems to us on a  
25 preliminary basis that it may be possible for us to continue

1 functioning. And can I give some substance to that.

2 Undoubtedly the main area that could cause difficulties is the  
3 category of victims who are entitled to participate, whether the  
4 majority decision, the minority decision, or some other approach is  
5 appropriate. The question I pose is this: Is it correct as a  
6 sensible conclusion to assume that those victim applicants who are  
7 alleged to be the victims of the crimes that are laid at the door of  
8 the accused and who have suffered direct harm as a result are, given  
9 all of the competing submissions and all of the sensible possible  
10 approaches to this, inevitably going to be within the category of  
11 those who are going to be entitled to participate? Because if that is  
12 right then it means that applications from those in that category  
13 could be considered and determined by the Bench, leaving of course on  
14 hold all others, all those who fall in some other category, for  
15 determination after the Appeals Chamber decision.

16 It seems to us that this may be important because that will  
17 probably involve a very significant body, or a significant part, a  
18 significant number, of those victims who will be applying to  
19 participate in this trial.

20 So the question we pose first is whether we can continue to do  
21 that very specific piece of work. If we can, that probably makes a  
22 trial date of mid-June more achievable because it means that a large  
23 body of applications will have been processed in any event. Question  
24 1.

25 Question 2, and this relates to the issue you've raised in

1 relation to judicial recess, we have on an earlier occasion raised  
2 with the parties and the participants the possibility of the Chamber  
3 sitting for a period in the -- within the Democratic Republic of the  
4 Congo. If that is to occur and if the defendant is to be present when  
5 that occurs, if the procedure has been rightly identified that that  
6 would at the very least give an opportunity for opening speeches from  
7 the parties - that's the Prosecution and the Defence if they wish to  
8 make one and from the victims - possibly hearing an amount of evidence  
9 if that is convenient, then that could be all undertaken before the  
10 summer recess. Possibly there would be time to have additional  
11 hearings back in The Hague after that is completed, but it would  
12 permit there to be an identifiable piece of work and an important  
13 piece of work to be undertaken by this Chamber before the summer  
14 recess.

15 And so those are both issues, which I've addressed to you,  
16 Mr. Walley, but in fact are issues for everyone in court today to  
17 come back on if anybody feels able to do so.

18 Well, Mr. Walley, I've addressed those points to you, so do you  
19 have any response at this stage?

20 MR. WALLEY (interpretation): Thank you, President.

21 Indeed, I'm not sure I understood everything correctly, but if  
22 the appeal is granted only for the category of victims but does not  
23 concern directly their modes of participation in the hearing and modes  
24 of disclosure of material, then I believe we will be able to proceed  
25 rapidly. The first part of our work will consist in identifying on

1 the list of the Prosecutor's evidence or index, to identify which  
2 documents affect our clients directly, and then request disclosure of  
3 these documents to the Prosecutor. And I believe there will be issues  
4 that will have to be settled concerning these matters at the time. I  
5 can imagine, for instance, that there will be some disagreements, as  
6 they are disagreements currently with the Defence, concerning  
7 disclosure and whether or not to redact certain documents. I believe  
8 that this type of work will be able to be done by the Chamber very  
9 rapidly.

10 JUDGE FULFORD: Ms. Bapita.

11 MS. BAPITA (interpretation): On the other hand, I understood  
12 your concern differently. I believe that the Appeals Chamber will  
13 rule on the mode of participation of victims, but the Pre-Trial  
14 Chamber may -- concerning the category of victims that made requests  
15 or applications for the crimes for which Mr. Lubanga is prosecuted for  
16 will be identified as a category of victims concerning the enrolment  
17 or conscription of child soldiers in the army.

18 This will not raise problems concerning the mode of participation  
19 in the hearing. The review of the different requests for  
20 participation will not stand in the way of the Court's work on the  
21 mode of victims' participation and the decision that the Appeals  
22 Chamber has to take.

23 I believe, therefore, that the Trial Chamber can respond to  
24 victims' applications concerning the enrolment of child soldiers, so  
25 specific category applicant victims concerning the enrolment of

1 children. And as regards the mode of participation, we will have to  
2 wait for the Court to rule on this issue, but I believe that the  
3 Chamber will have to respond to the request made on this issue.

4 JUDGE FULFORD: Ms. Mabilille.

5 MS. MABILILLE (interpretation): I believe I understood the same  
6 thing as my colleague Bapita but not the same as Mr. Walley. n.  
7 Therefore, I believe concerning the question you raised, and I will  
8 try to reformulate the question you put to us as I understood it to  
9 simplify matters, can the Chamber already now receive applications for  
10 participation of victims that are directly related to the charges  
11 against Mr. Thomas Lubanga, who have received or suffered direct harm?  
12 Could the Chamber already review these applications to see whether or  
13 not they can be admitted or not? Is that the question you asked,  
14 President?

15 JUDGE FULFORD: No doubt formulated far better than me,  
16 Ms. Mabilille.

17 MS. MABILILLE (interpretation): If that was your question, the  
18 Defence doesn't have anything against this work commencing. On the  
19 other hand, as things were formulated by Mr. Walley. n, I would be  
20 opposed to that situation. If it concerns only the participation of  
21 some victims who have a -- in direct relation to the charges, I'm in  
22 agreement. And as regards the others concerning specific records, I  
23 believe that this should remain untouched until the Court has issued  
24 its decision.

25 JUDGE FULFORD: Thank you.

1 Ms. Bensouda.

2 MS. BENSOUDA: Mr. Bulmer will address the Court.

3 JUDGE FULFORD: Thank you very much.

4 MR. BULMER: Thank you, Mr. President. It doesn't stand for me  
5 to reiterate all the other submissions made by the participants and  
6 the parties. I understand you are saying -- the Chamber is saying  
7 that this is an issue really under Rule 85 interpretation, and as I  
8 understand it's an interpretation -- the proposed course of action is  
9 effectively, and I don't mean this in a pejorative sense, using a  
10 common denominator of all the issues, the logical position being that  
11 this is an issue that ultimately will be -- has to be resolved by the  
12 Trial Chamber at that level, being the specific participants in the  
13 Rule 85 interpretation, as everyone has said here. So the logic is  
14 undeniable that that clearly is one area that the Chamber could  
15 undertake.

16 On the second issue, the Office of the Prosecutor has always been  
17 in the position of being in favour of an in situ proceedings, and  
18 again the logic of the particular modalities that have been suggested  
19 by the Chamber at that stage are being addresses and possibly  
20 evidence -- the forms of evidence that you describe, Mr. President, is  
21 also something that the Office of the Prosecutor is in favour of.

22 JUDGE FULFORD: That very last observation I'm going to come back  
23 in a moment, Mr. Bulmer, but thank you very much for the time being.

24 Ms. Mabilie, what I propose at this stage, and during the break  
25 I'll discuss this in slightly more detail with my two judicial

1 colleagues, but I canvas this now for your conversation and of course  
2 with consideration of the Prosecution and the participants, that it's  
3 quite clear from the responses that we've received that there is a  
4 willingness on the part of everyone in court today to enable the  
5 Chamber to continue working to the extent that that is consistent with  
6 any appeals that are allowed.

7 What I think would probably be the best approach is that once we  
8 have filed our decision on the appeals and once the landscape is  
9 therefore clear as to what interlocutory matters are going to fall for  
10 determination, there needs to be a hearing so that we can, really as a  
11 collective exercise, identify the areas where there is broad agreement  
12 that work can continue.

13 As I say, that is not to prejudice you from later being able to  
14 apply to the Appeals Chamber for suspensive effect, but it is I hope  
15 to ensure that there isn't a blanket request for suspensive effect  
16 that will actually damage the work that can be done by the Trial  
17 Chamber.

18 So we'll discuss this between ourselves over the break. Perhaps  
19 you can reflect on this as well and let us know in due course as to  
20 whether that is a sensible approach.

21 The other issue is that and at the moment, Ms. Mabilie, I haven't  
22 detected any objections in principle to the suggestion of there being  
23 a hearing in the DRC in the presence of the accused if it seems to the  
24 Bench that that is a course which is in the interests of justice. Am  
25 I right in understanding that is your position?

1 MS. MABILLE (interpretation): President, the only request made  
2 by the Defence is for Thomas Lubanga to be present.

3 Secondly, the second point raised which is difficult for us is  
4 access to records, because we can go to the DRC but not have access to  
5 the records and that would be quite complicated. If we managed to  
6 solve that problem, then both aspects -- and both access are granted,  
7 access to our dossier, our records, and the presence of Mr. Lubanga,  
8 we have no objection. Thank you.

9 JUDGE FULFORD: Well, that's extremely clear, Ms. Mabilille. Thank  
10 you very much, indeed.

11 Mr. Bulmer, if the stance of the Office of the Prosecutor is that  
12 you consider that a trial at least in part in situ would be of  
13 positive benefit to the administration of this case, without in any  
14 way applying any pressure but as a neutral observation, the Office of  
15 the Prosecutor may wish to bear in mind the provisions of Rule 100(2)  
16 which provides you with the opportunity of making an application or a  
17 recommendation as regards changing the place where the Court sits.

18 I'm not asking for a response now. But if that is the position  
19 of the Office of the Prosecutor, for a consideration, a final  
20 consideration of this issue, it may be of help to have the  
21 Prosecutor's stance on this, fully set out and explained, in such a  
22 recommendation or application. So I simply, as it were, put that ball  
23 in your court for your consideration.

24 MR. BULMER: Thank you very much, Mr. President.

25 JUDGE FULFORD: Right. Ms. Mabilille, having canvassed some

1 matters of real substance so far this morning, there has been an  
2 exchange of e-mails concerning the manner of notification of ex parte  
3 procedures. Is there anything that you wish to say to us about that  
4 subject in addition to what has been set out in the e-mail exchange I  
5 think between your team and Ms. Godart, the legal adviser?

6 MS. MABILLE (interpretation): Yes, President. Marc Desalliers  
7 will make observations on this point. I'm sorry, but I would like to  
8 come back on the trial site just for a minute. I forgot one essential  
9 point for the Defence and that is that we do not want the fact that  
10 the trial is in situ to postpone commencement of trial. And I'm  
11 saying this because I have noticed that at times the reactivity to  
12 some problems can be rather slow, and therefore I am concerned that  
13 the trial should start as soon as possible, and if our trip to the  
14 Congo will delay substantially the beginning of the trial, then the  
15 Defence may object to it. Thank you, President.

16 JUDGE FULFORD: Ms. Mabelle, I think I can give you reassurance  
17 that if a hearing in situ were to lead to any significant delay of  
18 itself to the trial date, that would cause this Bench to have very  
19 grave cause for concern as to whether or not it would be an  
20 appropriate step to take.

21 Now, e-mail exchanges and notification, Mr. Desalliers.

22 MR. DESALLIERS (interpretation): Thank you, President.

23 Indeed, the Defence asked by e-mail for this question of the  
24 notification of ex partes to be added to the agenda of today's hearing  
25 because we have noted that there is a sequence of numbers on the list

1 of procedures. Each procedure has a number and the Defence has noted,  
2 observing this, that there are important gaps in the sequence of  
3 numbers and there are therefore proceedings of which we were unaware  
4 and we therefore made some checks, and we came to the conclusion,  
5 President, that 15 ex parte proceedings were not notified to us. This  
6 is worrying the Defence also because if you refer to the decision of  
7 the 16th of December, 2007, concerning procedures to adopt for ex  
8 partes, in that decision it is said that, first and foremost, ex parte  
9 proceedings must be exceptional only; and, secondly, when, in  
10 exceptional cases, ex parte is necessary, the ex parte hearing should  
11 be notified to the other party, so the other party should be informed  
12 of both their existence of the hearing and also of the legal basis  
13 therefor.

14 And another conclusion we drew is that, according to our  
15 information, there were 19 ex parte proceedings in one month and the  
16 number alone is of concern to us because the Defence is excluded from  
17 the debates in at least 19 proceedings and therefore we have important  
18 concerns. Out of the 19, four were -- of these proceedings were  
19 notified to the Defence, and we saw the title of some of the  
20 proceedings, reading the decision of the 13th of -- the 30th of  
21 January, on reading the 30th of decision that we became aware of the  
22 nature of the proceedings. However, for the remaining eight we still  
23 have absolutely no information and we believe, therefore, that it was  
24 important to flag this matter to the Chamber as it's a situation that  
25 raises concerns for the Defence.

1           And what we would like to ask the Chamber is, first, for the  
2   Defence to be notified of proceedings that are filed in the record of  
3   the case and we want to know the nature of the proceedings taking  
4   place and the legal basis for the proceedings that have already taken  
5   place. The Defence therefore would like to call on the Chamber to  
6   check whether or not the Defence was notified of any ex parte  
7   proceedings, because the Defence does not know whether or not the  
8   Chamber is aware of there being any notification to the Defence or  
9   not, and therefore we would like to ask the Chamber to pay particular  
10   attention to this because we don't know which checks are actually  
11   carried out.

12           Thirdly, it appears to the Defence that on reading the titles of  
13   the ex partes quoted in the decision of the 30th of January that the  
14   very disclosure of the title of the ex parte could mean that what is  
15   going on is actually revealed. We believe there can be exceptions to  
16   exceptions. However, upon reading the titles of the ex parte  
17   proceedings that are quoted in the decision of the 30th of January,  
18   2008, which suspends the deadline for disclose, that in the Defence's  
19   view there was no reason for these proceedings not to be notified to  
20   us. And the Defence also believes that less radical measures could  
21   have been taken than total exclusion of the Defence from the debates.

22           From what we have understood from the proceedings with the  
23   Victims and Witnesses Unit which led to the decision of the 30th of  
24   January, from what we have understood the problem is that they are not  
25   able to provide protection in good time, and we can understand that

1     some information – the name of the persons and address of the persons  
2     you are trying to protect – can only be given to the Chamber ex parte.  
3     But what the Defence has difficulty understanding is why it is  
4     excluded from such an essential debate, as the debate on the  
5     postponement of disclosure -- dates for disclosure. Because the  
6     Defence believes that the Prosecution could have made its submissions  
7     on the idea, based on the idea that the unit was not able to ensure  
8     the protection of all.

9             So we, therefore, believe that less radical measures could be  
10    taken than the total exclusion of the Defence and the Defence would  
11    like to be authorised, would like to ask to be authorised to  
12    participate in these discussions. Thank you.

13            JUDGE FULFORD: Speaking for myself, Mr. Desalliers, I'm  
14    horrified to hear that there are such a large number of ex parte  
15    proceedings which you have not received proper notification of, and we  
16    will conduct an investigation in relation to this.

17            Could you please provide us in schedule form -- I suspected there  
18    may be a document on your desk. I'm not going to ask for it to be  
19    handed over now, but perhaps by 4 p.m. on Friday. Would that be  
20    convenient?

21            MR. DESALLIERS (interpretation): Yes, Mr. President.

22            JUDGE FULFORD: I indicated that one of the problems for the  
23    Bench in terms of including the Defence in relation to some of these  
24    issues is that if we receive a filing from the Prosecution at the 59th  
25    second of the 23rd hour of the last day, inviting us to suspend the

1 effect because there's a problem, the Bench has sometimes to respond  
2 in order to ensure that an order is in existence before the deadline  
3 expires and that is something that we will in due course raise in an  
4 appropriate way with the Office of the Prosecutor. Good.

5 Before we leave this subject, is there anything you want to say  
6 about notification, Ms. Bensouda?

7 MS. BENSOUDA: Mr. President, Ms. Samson will address the Court.

8 JUDGE FULFORD: Yes, Ms. Samson.

9 MS. SAMSON: We only make the point, having reviewed the  
10 information provided to us by the Defence on the 31st of January in  
11 respect of the notifications that were absent, in the e-mail we  
12 received there were 12 notifications. Perhaps others have come since  
13 then or had not been included in the e-mail. And in a review it does  
14 appear as if some of the -- some of the filings were indeed from the  
15 Prosecution, some were from another participant, and in two occasions  
16 they were Trial Chamber decisions that were at issue.

17 And the Prosecution filings in any event that weren't notified in  
18 a confidential or public matter fell largely into two groups, and only  
19 to be very brief in the discussion, a number of them, 6 of the 12  
20 indicated to the Prosecution, 6 of the 12 filings made by the  
21 Prosecution were in direct response to orders of the Trial Chamber  
22 conducted during ex parte procedures held in January. And given that  
23 the initial hearing was notified to the Defence, and in fact on the  
24 issues -- at issue they had a chance to respond on 4th of January, the  
25 subsequent orders made in the course of that hearing weren't notified

1 but they are subsidiary or ancillary to the primary reason for the  
2 hearing. And we only raise the issue that it's in that context that  
3 at least six Prosecution filings were made on an ex parte only basis,  
4 not wanting to circumvent ex parte orders of the Chamber that had not,  
5 of course, been made public.

6 For the last two filings I'll address at the moment. They relate  
7 to this issue of witness protection. Given that the process itself  
8 was commenced on an ex parte basis by another applicant and then the  
9 Trial Chamber's decision on the 30th or the 31st of January revealed  
10 the entirety of the process to the limits that were appropriate, the  
11 Prosecution didn't after the fact file a confidential versions of  
12 those materials. So I provided only that as some background, although  
13 it doesn't address all of the filings alluded to.

14 JUDGE FULFORD: Thank you very much, Ms. Samson.

15 Ms. Mabilie is going to provide us with a schedule by 4 p.m. on  
16 Friday. Can I ask you, please, by 4 p.m. on Wednesday of next week to  
17 provide any schedule that the Prosecution feel would assist us in  
18 relation to a more complete understanding of the position.

19 MS. SAMSON: Yes, we'll do that.

20 JUDGE FULFORD: As it were commenting on Ms. Mabilie's schedule  
21 and providing us with any additional information.

22 MS. SAMSON: Yes.

23 JUDGE FULFORD: Thank you very much indeed.

24 It is now half past 11. We must now give the interpreters a  
25 break. Unless there's anything that has to be dealt with immediately,

1 we'll sit again at 12.00.

2 Yes, Mr. Walley.

3 MR. WALLEYN (interpretation): I would just like to add  
4 something, President, concerning these ex parte proceedings, if I may.  
5 I believe that it should be possible to provide all participations at  
6 least with the information concerning the subject discussed, because  
7 on the 6th of January you said that the victims might be able to ask  
8 to participate in ex parte proceedings, so we at least have to know  
9 what is being discussed during ex parte proceedings, even if it's only  
10 in a summarised form, but we need to know what's going on. Thank you.

11 JUDGE FULFORD: Thank you, Mr. Walley. 12.00.

12 The recess is taken at 11.30 a.m.

13 The hearing is resumed at 12.05 p.m.

14 COURT USHER: All rise. Please be seated.

15 JUDGE FULFORD: Now, the general proposal was that we should list  
16 a hearing for the parties and participants once the decisions had been  
17 made by the applications for the leave to appeal so that we can  
18 discuss what work the Chamber sensibly can continue doing. Does  
19 anybody wish to raise any objections to that proposal? No. Well,  
20 that's extremely helpful.

21 Mr. Bulmer, the next matter I want to raise is this, and I'm  
22 going to be slightly elliptical to begin with. It's annexes 46  
23 through to 52, and I want to make sure that I don't say more in open  
24 court than I should. Are the Defence at the moment aware of the name  
25 of the witness in relation to whom those annexes relate?

1 MR. BULMER: I need to confer on that matter, if I may, please,  
2 Mr. President.

3 JUDGE FULFORD: Certainly.

4 (Prosecution counsel confer)

5 MR. BULMER: The answer is no, Mr. President.

6 JUDGE FULFORD: All right.

7 MR. BULMER: And if I just may, for follow-up, Ms. Samson is best  
8 situated to report to you.

9 JUDGE FULFORD: Fine. I'll address this to Ms. Samson then.  
10 Thank you very much, indeed.

11 Ms. Samson, do the Defence have a witness number for some  
12 initials for this individual?

13 MS. SAMSON: Yes, your Honour, they do.

14 JUDGE FULFORD: Could you just read it out, please.

15 MS. SAMSON: Yes. The witness number is 31.

16 JUDGE FULFORD: Thank you very much. And am I right in thinking  
17 that the Defence have had served on them the heavily redacted versions  
18 of annexes 46 through to 52?

19 MS. SAMSON: That's correct.

20 JUDGE FULFORD: Right. Thank you.

21 MS. SAMSON: You're welcome.

22 JUDGE FULFORD: That resolves the matter.

23 Ms. Mabilie, one of the matters that has been raised with us in  
24 closed session is whether or not the current redactions to the  
25 documents I've just referred to – and don't worry if you don't for the

1 moment have in mind which documents they are – but whether or not  
2 those redactions should remain in place or whether they should be  
3 lifted. It is our view that before we consider the issue of those  
4 redactions there is a preliminary question which needs to be  
5 addressed, namely, whether this material is admissible, because if it  
6 is inadmissible then it may be that, as it were, it falls away and we  
7 needn't be either concerned at all or so concerned in relation to  
8 redactions. So what we are proposing to do is to list in the  
9 relatively near future a hearing so that the admissibility of this  
10 evidence can be fully canvassed in court.

11 Now, I'm not particularly inviting a response at this stage. It  
12 is really to inform you that there is, we believe for the proper  
13 management of this case, that issue of admissibility that needs to be  
14 dealt with relatively speedily. You are of course entitled now to  
15 make any response that you wish, but it may be that there's nothing to  
16 be said at this stage.

17 MS. MABILLE (interpretation): I have nothing to add, your  
18 Honour.

19 JUDGE FULFORD: Mr. Bulmer, one matter that we asked the  
20 Prosecution and the Defence to deal with was agreements between the  
21 Prosecution and the Defence as to evidence. Given that we are clearly  
22 now looking at a June rather than a March date, some of the urgency  
23 has gone out of that, but we don't want it to disappear from view  
24 altogether. Do you have any proposals to make, bearing in mind the  
25 discussions that you've had on this subject, in relation to when we

1 can realistically hope for there to be a real measure of agreement  
2 between the Prosecution and the Defence as to facts and matters that  
3 can be the subject of admissions?

4 MR. BULMER: Thank you, Mr. President, for addressing that issue.  
5 This matter has been a subject of ongoing discussion as between the  
6 Prosecution and the Defence. It has been tasked with me this week, as  
7 I understood the matter was left with the Defence, to establish a  
8 meeting on that very issue. Given that Mr. Withopf has had carriage  
9 of the negotiation of the facts with the Defence up until now, I was  
10 tasked with carrying on this week. We haven't yet had that meeting,  
11 so certainly I appreciate your comments. I'm not in a position right  
12 now to, absent having that meeting which was going to be in one of the  
13 days subsequent to this session, indicate what the current status is  
14 insofar as agreement. I apologise, I can't be any more helpful than  
15 that -- in that regard.

16 JUDGE FULFORD: Mr. Bulmer, looking at it realistically, there is  
17 a fairly significant amount of material that is likely to come into  
18 the Defence's possession which they don't have at the moment, so an  
19 early rather than a late date isn't going to be helpful. If we're  
20 looking at a June date for trial, if we were to fix a date, say, late  
21 in April by which time the Chamber would expect there to be really  
22 agreement on admissions, would that be sensible?

23 MR. BULMER: I would certainly wholeheartedly agree with that,  
24 Mr. President, except any date you advocate on the understanding  
25 obviously with the -- what you've indicated as a possible June date,

1 with the general statement that obviously agreed facts can be very  
2 helpful to the trial process. And to facilitate the parties in  
3 reaching those agreements, certainly that would be of great  
4 assistance.

5 JUDGE FULFORD: Thank you.

6 Would you oppose a date late April, Ms. Mabilille?

7 MS. MABILILLE (interpretation): No objections, your Honour.

8 JUDGE FULFORD: Could somebody please give me the date of a  
9 Friday at the end of April. I'm afraid I don't have a calendar in  
10 front of me.

11 MR. BULMER: Was your question posed to the party, Mr. President?

12 JUDGE FULFORD: I think the -- I think it's the 25th, yes. The  
13 25th of April, 4 p.m., could we please have a written report on the  
14 state of admissions, and what we would hope for by then is a list of  
15 facts and matters which are the subject of agreement between the  
16 parties. Thank you very much.

17 As a matter of information only, we have delivered a decision  
18 which means that closed session hearings are really closed session  
19 hearings and LiveNote is not available to others who are on the  
20 network and the television link is also not available to others on the  
21 network. The parties and the participants should know that one  
22 consequence of that is that the -- during closed session the LiveNote  
23 which appears on our screen in court cannot in fact be worked on and  
24 annotations and notes made to it in the way that happens in open  
25 session, for some technological reason which I'm not going to go into,

1     probably because I don't entirely understand it, that is not possible.  
2     But that is simply a fact that we bring to the parties' and the  
3     participants' attention.

4             The final matter, I think, which falls for us to deal with,  
5     although I'm going to ask my legal adviser in a moment to make sure  
6     that I have canvassed everything, is that in document 1160 there was  
7     an application for the variation of time limits. There was a -- there  
8     had been a firm time given by the Chamber for disclosure and very late  
9     in the day there was an application by the Prosecution to extend that  
10    deadline, albeit only by a matter of an hour or two. Although in a  
11    sense this is now ancient history because it has happened, we wish to  
12    stress that we consider the timetables that we establish to be matters  
13    of very considerable importance, and although we have been indulgent  
14    to date as regards some of the breaches that have taken place in  
15    relation to our orders, the parties and the participants should  
16    understand that from now on it is highly likely that you are going to  
17    be confronted with a different approach, and if orders are breached  
18    for no good reason, it is likely that there is going to be a draconian  
19    response.

20            We also wish to emphasise that applications, unless there is very  
21    good reason for them, should not be made very shortly before the time  
22    that a deadline expires. It places the Chamber in a very difficult  
23    position when that happens. It means that the other party is not able  
24    to respond, nor are the participants, and it means that we are put in  
25    a position of having to make a decision having only heard one side of

1 the story, as it were. And in future, if applications of that sort  
2 are made when they are not fully justified, they are likely to be  
3 refused. So we wish to make sure that everyone is on notice of this  
4 and I make no secret of the fact that these remarks are principally  
5 directed at the Office of the Prosecutor.

6 I'm grateful. On a date to be fixed, there will be a  
7 presentation for the Chamber, the parties, and the participants of the  
8 videolink between here and different sites within the DRC. We're not  
9 going to fix the date today because we wish to do this in the most  
10 cost-effective way, and to do it without sending officials to the DRC  
11 unnecessarily. So we wish to coincide this with visits that are  
12 otherwise going to be planned to the DRC, but the parties and the  
13 participants are notified in relation to that.

14 Finally, we simply need to inform the parties and the  
15 participants that there are some outstanding issues in relation to the  
16 e-court protocol. We have been unable to resolve them because a  
17 request has been made for a final piece of assistance from Ms. Potter,  
18 the expert who has been assisting the Chamber, to make sure that any  
19 final proposals that are put in place in this regard have her support  
20 in the sense that she is unable to identify any gremlins in the  
21 machinery if we were to implement that which is proposed. We are  
22 hoping for a response from her in the very near future so that this  
23 can be resolved in the next week or two.

24 Now, those are all the matters from the Chamber. Is there  
25 anything that either the parties or the participants wish to raise?

1 Ms. Mabilille.

2 MS. MABILLE (interpretation): Your Honour, I'm about to make a  
3 request rather late in the day. It is in connection with meetings  
4 which your Chamber has requested on the topic of the status of victim  
5 witnesses. An order was issued - unfortunately I cannot cite the  
6 date - but under which the Registry, the Prosecutor, the Defence, the  
7 Victims and Witnesses Unit, were to meet to make proposals on this  
8 topic. In your order you stipulated the names of the persons to take  
9 part in those meetings. However, the Defence would note that it would  
10 be useful for the Office of Public Counsel for Defence, the OPCD, also  
11 attend at our side. We requested that, having already approached the  
12 victims' services, but the response was that as that party did not  
13 figure in the order issued by the Chamber we should return to the  
14 Chamber.

15 I can explain to you why we feel it is important that the Office  
16 of Public Counsel for the Defence be present. It is because at one  
17 point in time during discussions the comment was made that here we are  
18 trying to resolve the issues, or issues for Thomas Lubanga's case, but  
19 in fact the issues extend beyond this case. The idea is to establish  
20 a modus vivendi and working methods which are broader than the needs  
21 of this Defence team alone, and that is why we felt that it would be  
22 important that the Office of Public Counsel for the Defence be  
23 present, because if you like they are the custodians of continuity,  
24 whereas our team is present temporarily, I might say. That is why,  
25 your Honour, I make this request.

1 JUDGE FULFORD: Any observations, Ms. Bensouda? Mr. Bulmer?

2 MR. BULMER: Thank you, Mr. President. Just one simple  
3 observation. The role of the Office of Public Counsel for the Defence  
4 is still, if I can use this, not resolved in the case. My  
5 understanding, and I stand to be corrected, is that the purpose of the  
6 negotiations that we were undertaking was to facilitate communication  
7 within the case and we have done so. So I think any involvement of  
8 OPCD must be predicated, in my respectful submission, after a  
9 determination of what their role is in the case, first and foremost.  
10 That's my only submission.

11 JUDGE FULFORD: Thank you.

12 Mr. Walley, Ms. Bapita? Ms. Bapita.

13 MS. BAPITA (interpretation): Your Honour, in fact, I am of the  
14 opposing opinion. We discussed this matter at the meeting. Indeed,  
15 it would be useful if the OPCD were present because the scope of the  
16 questions goes far beyond the matter of the Thomas Lubanga case.  
17 Better to kill two birds with one stone. Even if a decision is still  
18 pending on the role of the OPCD, one may indeed look into the role of  
19 the OPCD but it would be better to deal with this question in its full  
20 scope, because this issue of victim witnesses appears or arises in  
21 this case but will arise in others.

22 JUDGE FULFORD: Ms. Massidda.

23 MS. MASSIDDA: Thank you, your Honour.

24 (Interpretation) Of course we have no objection in trial. First  
25 of all it is a practical matter. (In English) If the final document

1 is the 16th of February, in two days, if I'm not wrong, according to  
2 the order issued by the Chamber. We are at the moment at the final  
3 step of negotiations, if I can use this term. This is the first  
4 remark.

5 The second remark is as stated by my colleague, Mr. Bulmer, the  
6 extent of the filing is essentially for application in the Lubanga  
7 case. So the objection raised by the Office of the Prosecutor has, to  
8 a certain extent, relevance in this discussion.

9 If the Chamber would want the Office of Public Counsel for the  
10 Defence to be part of the negotiations for the dual status, then I  
11 think that it will be necessary in any case to extend the deadline of  
12 the 16th of February because we are not sure that for that time limit  
13 they will be able to assess all the discussions already undertaken by  
14 the other participants to the meeting. Thank you.

15 JUDGE FULFORD: So, Ms. Massidda, there's a -- I don't have the  
16 order immediately in mind. There is a -- we asked for a final  
17 response by the 16th of February; is that right?

18 MS. MASSIDDA: Yes.

19 JUDGE FULFORD: Can you remember when that order was made?

20 MS. MASSIDDA: Yes, your Honour. Can I just have one minute.

21 JUDGE FULFORD: Please, yes, if you could help us.

22 (The Trial Chamber confers)

23 MS. MASSIDDA: In fact, I know -- sorry, I think I know by heart.

24 It should be in the decision of the 18th of January, 2008.

25 JUDGE FULFORD: Right.

1 MS. MASSIDDA: In the last part of the decision, and the order was  
2 to continue the discussions on the issues only on the remaining part  
3 of the pending issues, because a first filing was already provided to  
4 the Chamber and the first part of a filing was the manner in which it  
5 is possible to deal with persons who correlating to dual status, 1,  
6 where these persons are also protected witnesses, including in the  
7 ICCPP, in the protection programme of the ICC.

8 Then the participants to the meeting realised that it was also  
9 necessary to discuss other related issues, and the Honourable Bench,  
10 in the decision of 18 of January, granted the possibility to continue  
11 the meeting in order to solve these related issues.

12 JUDGE FULFORD: Very helpful. Thank you very much.

13 Anything you want to add, Ms. Mabilille?

14 MS. MABILLE (interpretation): Simply on the deadline. Why is it  
15 that I make my request today? Your Honour, it is because a meeting  
16 has been scheduled for the 14th of February. Now, I don't want to get  
17 into the issues related to this problem complex here and now, but it  
18 strikes me as important. If we consider that the Office of Public  
19 Counsel for the Defence has a general role, I believe it is important  
20 that the office attends that discussion, a discussion which it seems  
21 to me affects the interests or other interests. Obviously, we are not  
22 going to legislate for other cases, but I believe that there are  
23 general issues which are raised by the present problems, whence the  
24 importance of attendance by the OPCD. Well, that's it. It's simply a  
25 matter of being practical and making headway on problems with which we

1 are faced. The Chamber will, of course, decide as it sees fit.

2 JUDGE FULFORD: Thank you very much, indeed.

3 Our decision on this matter is that essentially this proposal is  
4 being raised too late in this process. There is a deadline which is  
5 about to expire. We consider that this is one of the areas of the  
6 case in relation to which it is crucial that progress is made in a  
7 timely fashion. And without in any way prejudicing the position of  
8 Office of Public Counsel for the Defence in relation to future issues,  
9 in relation to this application, as I have just said, this application  
10 for them to be participants -- them be permitted to participate should  
11 have been made at an earlier stage. If they are now given leave to  
12 involve themselves in a substantive and meaningful way in relation to  
13 this issue, it is almost inevitable that that will lead to an  
14 application to put back the deadline that has already been  
15 established.

16 And so although we're grateful to Ms. Mabilie for the suggestion,  
17 the application is refused.

18 Now, I need to have a quick word with the court officer, please.

19 (Trial Chamber and Court Officer confer)

20 JUDGE FULFORD: Ms. Mabilie, in light of submissions that you've  
21 made earlier today, you will greet what I'm about to say probably with  
22 something of a heavy heart. We are in fact about to move from open  
23 session into closed session. It takes half an hour for the equipment  
24 to be reconfigured. That would only give us half an hour before  
25 lunch. What we therefore propose to do is to rise now, to sit again

1 at 2.00, where we will then have a two-hour hearing, unless the  
2 interpreters indicate over lunch that that is an infringement of their  
3 basic human rights. I can see a thumb is being raised in a positive  
4 manner in one of the booths, so we will sit at 2.00 for two hours to  
5 deal with the next stage of the closed session hearing.

6 I repeat my thanks to the parties and the participants for their  
7 attendance today. We will rise now.

8 The hearing adjourned at 12.33 p.m.

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