

1 International Criminal Court
2 Trial Chamber I
3 Situation Democratic Republic of the Congo – case ICC 01/04-01/06
4 Hearing in open Session
5 Wednesday, 12 March 2008
6 The hearing starts at 10.10 a.m.

7 PRESIDING JUDGE FULFORD: Good morning. The Prosecution this
8 morning are represented by Ms. Bensouda and Mr. Withopf with other
9 members of their team. For the Defence Ms. Mabille and Mr. Biju-Duval,
10 together with other members of their team are present. For the Registry
11 Marc Dubuisson, Mr. Vaatainen, and other representatives from that organ
12 of the court. For the victims, those currently appearing, Ms. Bapita and
13 Mr. Walley and Ms. Massidda and Ms. Pellet are here for the Office of
14 Public Counsel for Victims.

15 Before we move on to today's agenda, there are one or two matters
16 that need to be dealt with first of all. We have today two
17 demonstrations. One is to test the videolink connection so that we can
18 explore the technology in relation to hearing evidence remotely.

19 The proposal that we have at the moment is that we should deal
20 with legal issues between now and half past 11.00, then have a break
21 until 10 past 12.00, and at that stage move straight into the videolink
22 presentation. The reason for doing it that way is that if any gremlins
23 have got into the machinery, it then gives an opportunity for them to be
24 rectified and expelled over lunch, and we can then try again in the
25 afternoon. I'm worried about leaving this until the final thing that we

1 deal with today, because we may not have a demonstration at all.

2 The Citrix demonstration, if there's time, can follow straight on
3 from the -- the videolink demonstration, but we'll have to see how we go.

4 Now, one issue is whether the videolink demonstration is in
5 public or in closed session. The court will be assembled as we are now.
6 This is part administrative, part judicial, because we are going to be
7 looking at the arrangements for receiving evidence in this way, but in
8 due course there could be submissions over whether or not this is an
9 appropriate way to receive evidence.

10 So, Mr. Withopf or Ms. Bensouda, should the shutters be up or
11 down?

12 MR. WITHOPF: Mr. President, your Honours, this is indeed a
13 complicated question, and on its face one would have thought this can be
14 done in closed session, and I do not even want to use the word "session,"
15 but the latter point you raised is the crux of the question, and it can
16 be anticipated, and I fully agree with that observation, Mr. President,
17 your Honours, and you are aware the Office of the Prosecutor has paid
18 particular attention to trying to examine the capabilities, the technical
19 capabilities of this videolink presentation, against this background the
20 Office of the Prosecutor would be in favour, would be very much in favour
21 to have this in public session and in the context of a proper court
22 hearing.

23 PRESIDING JUDGE FULFORD: So forth demonstration shutters up.

24 MR. WITHOPF: Exactly right, Mr. President.

25 PRESIDING JUDGE FULFORD: Thank you, Mr. Withopf.

1 Ms. Mabilie.

2 MS. MABILIE (interpretation): Your Honour, the Defence is in
3 favour of the demonstration taking place in public session.

4 PRESIDING JUDGE FULFORD: Very clear. Thank you.

5 Mr. Dubuisson.

6 MR. DUBUISSON (interpretation): We would like to perform without
7 a net, so in public.

8 MR. WALLEYN (interpretation): No observations.

9 MS. BAPITA (interpretation): No observations.

10 PRESIDING JUDGE FULFORD: In public it will be. It needs to be
11 understood that we have created a complete fiction for this test in a
12 neutral way, and I just hope that if somebody stumbles into the public
13 gallery whilst this is taking place that they won't be too shocked at the
14 subject matter of what they will then be hearing, but this is clearing
15 just a script that's been prepared for the demonstration.

16 Right. That's issue one. Thank you all very much. We will try
17 that, then, at 10 past 12.00.

18 The next matter to be raised is that during the last Status
19 Conference we canvassed submissions from the parties and the participants
20 as to the possibility of part of this trial taking place in the
21 Democratic Republic of the Congo, and as everyone is aware, that there
22 has been a detailed feasibility study as to the possibility of this
23 taking place.

24 Since that hearing when helpful submissions were made as to the
25 respective attitudes of those in court to this proposal, a letter has

1 been sent from the Democratic Republic of the Congo in which the Minister
2 of Justice has informed us that in the view of the host state, the
3 location selected by the court for this hearing, and that was the
4 location which the feasibility study has been focusing on, is
5 inappropriate because it could lead to ethnic tensions in an area this is
6 considered to be potentially unstable.

7 For reasons that we need not go into now, the particular location
8 under consideration was, on all of the information we received, clearly
9 the -- the best in terms of holding a hearing in the Democratic Republic
10 of the Congo. It was, on investigation, certainly on the information
11 that the Chamber had available to it, the only real viable option.

12 The hearing -- a hearing in the Congo can only take place with
13 the consent of the government, which now has not been given for that
14 location, and in the result the entirety of this trial will be conducted
15 in this courtroom in The Hague.

16 The third issue relate to the date of trial, which again was
17 alluded to during the last Status Conference, two dates in June, one
18 towards the beginning, one towards the middle, were canvassed as options.
19 Since that Status Conference, inquiries have been made as to the
20 suitability of either of those dates to ensure that they didn't cause
21 internal difficulties.

22 Because the proposed confirmation of charges hearing in the
23 second case arising out of the Democratic Republic of the Congo is due to
24 commence on the 21st of May, it has been suggested to us that it would be
25 visible to move the last of those proposed dates back by a week to the

1 23rd of June to ensure that there is no overlap between the confirmation
2 of charges in the Katanga case and the commencement of this trial, and
3 that is not least because of the availability of interpreters. And so at
4 the moment we are going to ask the parties to focus on this date, which
5 is a week later, the 23rd of June.

6 However, there are some other issues relating to the start date
7 of the trial that we are going to have to resolve during the course of
8 this Status Conference, and we'll turn to those later today.

9 So those are the preliminary issues. If we can then turn to the
10 agenda, the first issue relates to whether if a Judge is absent from the
11 court, for instance through illness, whether it is possible for a Chamber
12 of two to sit even if the purpose of two Judges sitting is simply to hear
13 evidence and submissions without making any decisions.

14 We are grateful for the submissions that we have received, and
15 there appears to be a joint submission from the parties and the
16 participants that for the Bench legally to function it has to be a Bench
17 of three, and there have been no suggestions advanced indicating that
18 there are any tasks which a Bench of two is able to fulfil.

19 In those circumstances, our intention is not to explore this
20 issue further. It seems that in the absence of any provisions permitting
21 this and given the unanimous approach adopted by the parties and the
22 participants, it would be inappropriate for this suggestion to be taken
23 further.

24 The only subsidiary issue that it may be worth just mentioning is
25 that in some of the submissions we received there was reference made to

1 Article 74 and the possibility of an alternate Judge sitting. Certainly
2 speaking for myself, and I think I speak for all three of us on this
3 issue, our preliminary view is that an alternate Judge could only start
4 to participate if one of us on a permanent basis ceased functioning as a
5 Judge of this Chamber, and our preliminary view is it would be
6 impermissible for an alternate Judge to step in for a period and then to
7 hand the baton back to an existing member of the court once he or she
8 returned.

9 Now, can I ask if there are any contrary views to that
10 proposition? A deafening silence, and so -- oh. Mr. Withopf, was there
11 something you wished to say?

12 MR. WITHOPF: Very briefly. Obviously there are no contradictory
13 views, but I wish to use this opportunity to again encourage the Chamber
14 to think about to have an alternate Judge sitting in the trial. It's the
15 first trial of this court.

16 PRESIDING JUDGE FULFORD: Well, that's an interesting question,
17 Mr. Withopf. I think we would need, wouldn't we, and perhaps this isn't
18 the time to deal with this, it may be a little bit of thought on
19 everyone's part needs to go into this issue, and I say that for this
20 reason: At the moment the Prosecution have 35 witnesses or thereabouts
21 on its list. On that basis, this is -- this shouldn't be the longest of
22 trials. The Prosecution are not fielding hundreds of witnesses, which
23 can sometimes happen in cases of this kind.

24 If the assumption is right that this is, therefore -- on the
25 scale of things this ought to be a relatively short trial, what is it

1 about this case that would justify taking up the time of a Judge in this
2 court to sit silently for the entire duration of our proceedings, because
3 if an alternate Judge should sit in this case, I could see an argument
4 that really an alternate Judge should sit in all cases.

5 Now, I'm not particularly inviting responses on this now because
6 there is quite a lot for us to deal with today, but I think if this
7 suggestion is going to be made, Mr. Withopf, we need a written -- we need
8 a filing, please, setting out why the Prosecution advance that suggestion
9 and what the Prosecution say are -- what the Prosecution say the criteria
10 are that should be applied to the decision that an alternate Judge is to
11 sit.

12 Would you have any objections to putting in a filing?

13 MR. WITHOPF: Mr. President, your Honours, we don't have any
14 objections. We will -- we will submit written observations on this
15 issue.

16 PRESIDING JUDGE FULFORD: Two weeks?

17 MR. WITHOPF: That's fine.

18 PRESIDING JUDGE FULFORD: Friday, fortnight, 4.00 p.m.

19 MR. WITHOPF: Yes. Indeed.

20 PRESIDING JUDGE FULFORD: Thank you very much.

21 Well, that I think, therefore, deals with issue one on the
22 agenda.

23 Issue two, the protocol on practices used to prepare and
24 familiarise witnesses for testimony and psychosocial assistance.

25 Can we park psychosocial assistance for a moment, and what we

1 propose is to take each of the live issues briefly in turn asking for
2 submissions on each as we go down the list.

3 The first relates to whether or not witnesses at the relevant
4 time should be kept together or should be separated. The joint position,
5 as I understand it, of the Prosecution and the Defence is that separation
6 should really be the approach has -- that is taken, and therefore given
7 that united view, it's really, I think, in the first instance of greatest
8 convenience to hear from the representative of the Registry so that we
9 can understand, insofar as this can be explored in open court, what the
10 anticipated difficulties are.

11 Mr. Vaatainen, I suspect you're going to be fielding this. We
12 recognise that there may be some things that can only be said in closed
13 session, but we would encourage you to deal with this to the maximum
14 extent possible in open session but to inform us if there are any
15 discreet areas that you are unable to refer to in open court. And this
16 now needs to be dealt with against the background that all of the
17 witnesses will be giving their evidence with the court being located in
18 The Hague.

19 MR. VAATAINEN: Thank you, Your Honour. Well, I'll be very
20 brief, and I think I'll be able to speak in -- in open court.

21 I think we've advanced our position in our filing, and we
22 respectfully sought the guidance from the Trial Chamber in that regard.
23 Just a couple of things I would like to mention, which is that the
24 practice of similar courts, the ad hoc Tribunal, ICTR, ICTY, and also the
25 Special Court of Sierra Leone, functions almost on the same principles as

1 we propose, that is that for the sake of efficiency and the -- because of
2 the logistical constraints, witnesses from the same case appearing for a
3 party will travel together unless there are specific circumstances that
4 would require their separation. And the separation is then done in
5 consultation with the Victims and Witnesses Unit and the party calling
6 the witness.

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

8 Mr. Withopf, before I ask you to intervene for the Prosecution,
9 it may be that one should have in mind possible refinements to, as it
10 were, extreme approaches both ways, and I just use this example: It may
11 be that if witnesses give overlapping testimony that there are
12 particularly strong reasons why they shouldn't be given an opportunity to
13 speak with each other and, in particular, shortly before they're about to
14 go into the witness box. On the other hand, if their evidence really
15 covers entirely separate factual areas, does the objection really stand
16 with the same degree of force?

17 So could you now make your response but perhaps address that
18 issue.

19 MR. WITHOPF: Mr. President, your Honours, our submissions in
20 that respect will be made by my colleague Mr. Bulmer.

21 PRESIDING JUDGE FULFORD: Thank you.

22 Yes, Mr. Bulmer.

23 MR. BULMER: Thank you very -- thank you very much, Mr. President
24 and your Honours.

25 The point is well-taken, and in response to the specific fine

1 point that the Chamber has put to respond to, in the Prosecution's filing
2 where we make our observation on this issue we -- we obviously address
3 that issue of overlapping, and certainly the Prosecution can work to --
4 with the VWU with respect to its witnesses to tweak the process, and I
5 think that's combined of the intimation, Mr. President, that you're
6 making when you say "refinements," to identify these risk areas. So the
7 overlapping issue, if one accepts the principle that overlapping
8 witnesses ought not to be grouped together because of the risk of
9 contamination, that is one solution to the process.

10 There certainly are types of witnesses who are completely
11 separate, who give different types, different areas, either
12 territorially, temporally of evidence, and they can arguably -- under
13 that basis could presumably travel together. But I would just raise the
14 other issue which the Prosecution raises in its filing, is there is the
15 risk of direct contamination where we know where witnesses -- the risk
16 that the witnesses will have overlapping testimony and may talk to one
17 another or discuss their evidence.

18 There is also more subtle risk, and that is what I would
19 paraphrase as indirect contamination where if I know -- if I'm a witness
20 and I know the other person is also a witness and they are known to me
21 although we do not have overlapping testimony, let may have a conscious
22 or unconscious effect on my willingness or what I -- how I testify. So
23 admittedly it's a more issue to put walls around, but there also is that
24 risk. And to the extend that may be minimised -- or that risk may be
25 minimised to the degree possible, perhaps the solution might be, if that

1 has to be done because of the of reasons advanced by the Registry, a
2 completely dissimilar witness, if it's possible, could be accommodated
3 such that they would have no idea that they are even witnesses.

4 I hope that's helpful to submission.

5 PRESIDING JUDGE FULFORD: Well, Mr. Bulmer, if they're -- if
6 they're all in The Hague together at the same time just before giving
7 evidence, I mean they're going to know it they're witnesses, aren't they.
8 So I think it's going to be rather optimistic to disguise one from the
9 other that they're going to be witnesses in a case. But it's really a
10 question of -- as to whether or not there's a sufficient risk of
11 adversely affecting the way in which they give evidence if they live and
12 travel together.

13 I suspect that the Registry's theory it one's got to therefore
14 arrange quite a few separate flights and quite a few separate secure
15 locations within this city for each of the witnesses, and that could be
16 logistically difficult and expensive.

17 MR. BULMER: You've put the hail directly on the head,
18 Mr. President. To eliminate to the maximum extent possible this problem,
19 all witnesses, arguably, should be travelled and accommodated and brought
20 to the court in completely separate means and at completely different
21 locations. That would -- that is the highest degree of eliminating the
22 risk. And the Registry, as I understand it, is indicating logistical
23 problems in assuming that. So if that is not the possible and the
24 Chamber doesn't advocate that high level in response, then there are
25 other mechanisms such as identifying as much as disparate witnesses as

1 possible to go towards minimising that risk.

2 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Bulmer.

3 MR. BULMER: Thank you.

4 PRESIDING JUDGE FULFORD: Ms. Mabilille.

5 MS. MABILLE (interpretation): Mr. Marc Desalliers will be making
6 our submissions on this point. Thank you.

7 MR. DESALLIERS (interpretation): We do understand,
8 Mr. President, that the constraints that have been raised by the VWU are
9 financial. We are not saying that it's impossible or that there are
10 major constraints or financial contains. Is that enough to say we're
11 going to create a category of witnesses that we're going to separate
12 adequately in order to avoid a situation where there would be
13 contamination of testimonies and this will not apply to witnesses that
14 are not protected? The Defence is at pains to explain this distinction.

15 In any case, the rule is that we do not try to protect the
16 witness in that specific case but the witness's testimony. It is the
17 testimony that is at issue.

18 So if we are told that there are constraints with respect to
19 logistics it, since today we have been told -- or at least I understand
20 that this applies to issue of transport, it is true that the costs would
21 be higher, but issue is important.

22 This is also the question of accommodation, but the same argument
23 applies. Obviously the witnesses should be transported and accommodated
24 in separate locations so that they should not be in contact. I would
25 also add that the constraint is not that significant if we take -- we

1 assume that the parties will make every effort possible.

2 It is not all the witnesses who will be brought at the same time.
3 We were going to -- we're going to make efforts to cooperate with VWU to
4 ensure that the witnesses are transported in an order that would prevent
5 a blocking of witnesses or a large number of witnesses waiting on site.
6 So if we have a reduced number of witnesses, then the constraint is
7 reduced.

8 Our position is the same for protected and unprotected witnesses.
9 They must be kept separate.

10 PRESIDING JUDGE FULFORD: Does anyone else want to make
11 submissions on this?

12 Yes, Mr. Walley.

13 MR. WALLEYN (interpretation): Mr. President, just one thing. I
14 think that in this matter we must also listen to what the people in
15 question have to say and not -- we should not just draw up rules in
16 advance.

17 If there is a witness who has been a victim and expresses a wish
18 not to meet other people, or if in the course of the witness's stay in
19 The Hague this witness says that other witnesses have approached him or
20 her to exert pressure on him or her, then we have to meet such requests.

21 I have nothing further to say.

22 MS. BAPITA (interpretation): Thank you, Mr. President. Nothing
23 much to add, but I think that whether witnesses or protected or not, they
24 should be kept separate.

25 MS. MASSIDDA (interpretation): No observations, Mr. President.

1 Thank you.

2 PRESIDING JUDGE FULFORD: Anything by way of reply,
3 Mr. Vaatainen?

4 MR. VAATAINEN: Thank you, Mr. President. My apologies if I
5 wasn't clear enough. I think there's a maybe slight misunderstanding
6 in -- in what we've said.

7 Of course there's an issue of resources and finances, but that is
8 not the only issue. It's also the question of isolation. Basically
9 isolation of witnesses and our ability to provide psychosocial care and
10 assistance to these individuals.

11 If -- let's say if we have five witnesses it at the same time
12 here, we would need (indiscernible) five locations and provide identical
13 services to these individuals in five location.

14 Let's say the impact is obvious both on us but also on the
15 quality of services that are provided.

16 PRESIDING JUDGE FULFORD: I think it probably needs to be said,
17 Mr. Vaatainen, that the stance of the Victims and Witnesses Unit is that
18 if witnesses are in the protection programme, they will travel separately
19 unless they're living together at the moment.

20 MR. VAATAINEN: Yes, your Honour. That is absolutely correct.

21 PRESIDING JUDGE FULFORD: And presumably that means they will not
22 only travel separately to The Hague, they will also be accommodated
23 separately once they're here.

24 MR. VAATAINEN: Absolutely. That is correct.

25 PRESIDING JUDGE FULFORD: Right. Good. Thank you all very much.

1 The next issue on which there is fairly substantial disagreement
2 between the Prosecution and the Defence is over the procedure that should
3 be applied to a witness reading their statements and looking at any
4 relevant documents before they give their evidence. There is a
5 pronounced disagreement. It's clear. I'm not going to summarise it now
6 from the Bench.

7 Mr. Withopf, are there any further matters that the Defence (sic)
8 wish to address in relation to this issue?

9 MR. WITHOPF: Mr. President, speaking for the Prosecution, we
10 have nothing to address --

11 PRESIDING JUDGE FULFORD: Thank you very much.

12 MR. WITHOPF: -- in relation to our original submission.

13 PRESIDING JUDGE FULFORD: Ms. Mabilille, I think the position for
14 the Defence are -- or the Defence is that this should be strictly
15 controlled and that the only thing that should happen is that the witness
16 should be given an opportunity, without discussion, to read his or her
17 witness statements.

18 Is there anything else you wish to say on this subject?

19 MS. MABILILLE (interpretation): That is exactly our position,
20 Mr. President.

21 PRESIDING JUDGE FULFORD: I don't know whether the Registry has
22 an interest in this. Mr. Dubuisson.

23 MR. DUBUISSON (interpretation): Yes, Mr. President. I would
24 like to return to the question or the concept or definition of
25 "declaration" or "statement." There are fundamental points there in our

1 view. Proofing, as it is referred to in English, is not something that
2 we're going to say anything support now. It is very -- it should be
3 clear what the statement is. It should be clear.

4 A statement is a document that is signed and it has a certain
5 number of pages. What we mean is that we should not receive radio (sic)
6 cassettes or CD-ROMs and then we're told that a person has given
7 testimony for a certain number of hours. So we shouldn't have a
8 certain -- the same number of hours to show the film during -- of this
9 person's interview.

10 So to be clear, what we are saying is that we refer to a
11 statement as a written and signed document.

12 We also know, and this applies no other courts as well, we work
13 in the language of the investigator and not the language of the witness.
14 This means that we are faced with a document which is a document that the
15 witness cannot read or understand.

16 So it seems to us that it is very important that we should
17 provide the person, to the extent that this person can read, that the
18 person (sic) should be provided to the person in a language that he or
19 she can read and understand. That is very important. And the experience
20 in the ad hoc tribunals has shown that very often there is a problem
21 either at the level of the interpretation or in the writing out of the
22 transcript of the interviews.

23 So we need a document that is as close to the truth as possible,
24 that cannot be contaminated in any way by any error which will come to
25 add, for instance, to a problem of memory that an a witness might have.

1 So it is important for us that this document at our disposal, which we
2 should give to the witness, should be in the best possible condition so
3 that it would enable the witness to read a statement and remember. And I
4 think that's the important point.

5 The Prosecution say that it would be good to have a first
6 conversation with the Prosecution to see the direction to be taken by the
7 examination-in-chief. We might also have this on the part of the
8 Defence, which might say, "We would like to have a cross-examination that
9 would take a certain tack."

10 We, the Registry, are neutral in the proceedings. We are not
11 there -- or it is not our place to say or to recall for the witness's
12 benefit to pay particular attention to parts of his testimony or his
13 statement which refer to parts that the parties might find important. I
14 think we should just say, "You've made a statement. Read your statement,
15 and if you have any problems, we shall act as a communication channel."
16 And of course we might return to the Chamber or return to the party that
17 called the witness.

18 So it seems to be very simple. When you say you want to give a
19 statement, that's very clear, but I want to be more precise. I want a
20 statement that is precise, that does not allow for anyone to say that we
21 have played a particular role in the proceedings. That is not the role
22 of the Registry.

23 Thank you.

24 PRESIDING JUDGE FULFORD: Well, thank you very much indeed,
25 Mr. Dubuisson. That has clearly raised an issue that I think we need to

1 make sure there's understanding about, that where one is talking about
2 memories being refreshed by reading statements, and if somebody can't
3 read, having them read over to them, that what we are talking about are
4 the signed witness statements of the witnesses and any documents that
5 they are personally producing, rather than watching, for instance, the
6 video recording of other occasions when they may have given evidence.

7 Now, does anyone suggest that this procedure should extend beyond
8 the witness statements prepared by the witness and any documents that
9 that witness personally produces? No.

10 So I think on that, Mr. Dubuisson, it's clear what is very much
11 in issue is whether or not there ought to be the kind of discussion that
12 the Prosecution advocate rather than the complete silence which the
13 Defence support, and that's something we're going to have to resolve
14 between ourselves.

15 So before I close the door on this point, anyone else wish to
16 intervene in relation to the member-refreshing and witness-statement
17 reading exercise? No. Thank you all very much.

18 Mr. Dubuisson, I'm going to return straight to you on the next
19 subject, which you've already touched on, which relates to translations.

20 You'll very much be aware that the Prosecution suggest that the
21 Registry should have the obligation of ensuring that the original witness
22 statement is translated, is put into a language which the witness
23 understands. So if Swahili is the first language of the witness and if
24 the statement is in French, that the Registrar has the obligation of
25 having it translated into Swahili.

1 Do you have any submissions on that suggestion?

2 MR. DUBUISSON (interpretation): With your leave I would like to
3 take the floor to provide some clarifications on this issue.

4 This is something that is well-known to us because of our work in
5 ad hoc tribunals. I shall express the similarity in terms of procedure
6 under Rule 92 bis in the ad hoc tribunals.

7 This procedure has enabled us to see as officials of the court
8 that problems were raised by the manner in which some of the work was
9 done in some of the courts. The Prosecutor, to take an example, has an
10 investigator who speaks English. This investigator meets somebody
11 speaking Kiswahili. He interviews this person and takes a statement in
12 English with an interpreter. The entire statement is in English. At the
13 end of the interview the investigator asks the person who speaks only
14 Swahili to sign the statement.

15 This is a document the witness cannot read, because he does not
16 read or understand English. So this is done through a re-reading
17 provided by the interpreter in normal circumstances. And the
18 participants were correct me if I'm wrong.

19 Is so this approach has shown us that under Rule 92 bis, if we
20 took a statement and went back to the statement and asked the witness
21 whether this was the statement, in fact, we realise that there were many
22 mistakes, and the witness would say, "I was -- I signed because I was
23 told this." That is: "When the interpreter read back the statement or
24 reinterpretation -- a site translation of the document, there were errors
25 in this work, and therefore I consider that I need a translation." So to

1 apply Rule 92 bis in ad hoc tribunals, we provided a translation in
2 language understood by the person.

3 So I think here we have to draw the line. If we take a witness
4 statement -- if you ask the witness to sign the statement, the person
5 should be in a position to understand what he or she is signing. In
6 any -- in any case, I wouldn't sign a statement that is not in a language
7 that I understand. I think that would apply to most of us in this
8 courtroom. So I think that there needs to -- there's work that needs to
9 be done from the very outset, because there reference here to interviews
10 that were taken or recorded more than two years ago.

11 So why is it that this time was not used to produce a translation
12 which would be a working document, which would be the ideal working
13 document both for the witness, both -- and for the participants and the
14 Defence, and even in some cases the accused, who might be in a position
15 to better understand if this is a language that he understood, whereas
16 the nuances might escape in other cases?

17 So in my view, it is not up to the Registry to produce such a
18 document, but in any case, it is up to the parties and the participants
19 to work on this translation.

20 Of course we are aware that in the case of the Defence on the
21 legal aid scheme we might find a system of mutual assistance. In the
22 Office of the Prosecutor, however, that is specific translation service
23 which was approved to carry out such work, that is, working on
24 statements, and it seems to me that the Prosecutor should be in a
25 position to transmit such documents in a language understood by the

1 witness.

2 I also recall your decision which said that the participants and
3 the parties should state beforehand what language which will not be
4 spoken but used by the witnesses during the hearing. So your intention
5 was expressed in this decision, you asking for consistency and logic.

6 Since a person is asked to speak in a language or to express
7 himself or herself in a language, the person should the witness in a
8 language that he or she understands.

9 Thank you.

10 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Dubuisson.

11 Mr. Withopf, Ms. Bensouda, there's clearly some -- some very
12 interesting general points raised there by Mr. Dubuisson that may merit
13 careful consideration in relation to future cases. What steps are taken
14 at the time of the original statement-taking process to ensure that at an
15 early stage there is a statement in the language which the witness speaks
16 and principally uses to make sure that the witness agrees at the early
17 stage with what is recorded in that statement, but I think we must
18 approach this on a more practical basis, looking at the situation we're
19 confronted with today.

20 Can you help us, please, Mr. Withopf, as to what the extent of
21 the problem is potentially in this case? Do you have any sense of the
22 number of witnesses in relation to whom there is a real possibility that
23 it's going to be said that, "Although my statement is in French, I in
24 fact would prefer would see a Swahili version of it"?

25 MR. WITHOPF: Mr. President, a few general observations before I

1 hand over again to my colleague Mr. Bulmer.

2 PRESIDING JUDGE FULFORD: Certainly.

3 MR. WITHOPF: Reference has been made to the ICTY's Rules of
4 Procedure and Evidence Rule 92 bis, and having some experience in that
5 respect I'm a bit surprised that it has been portrayed as a regular
6 occurrence that witnesses have had problems with the translation of their
7 statements. I do admit that in rare instances this indeed happens, but
8 what I would not like that the Chamber gets the impression that this was
9 something that occurred on a regular basis.

10 In respect of the second general observation as to how the Office
11 of the Prosecutor takes its statements, I agree with the observation of
12 your Honour, the Presiding Judge, there are issues that need to be
13 carefully considered and reconsidered, and I emphasise the word
14 "reconsidered," and I wish to indicate that the Office of the Prosecutor
15 will certainly in future pay particular attention to, in more instances
16 than ever before, tape interviews, which would partially solve these
17 problems.

18 But I also agree with your Honour Mr. President's, remark that we
19 have a situation now and that's the one we need to deal with, and for the
20 Office of the Prosecutor, I believe we can say that it can be dealt with,
21 but I hand over to my colleague Mr. Bulmer.

22 PRESIDING JUDGE FULFORD: That's very helpful, Mr. Withopf.

23 Yes, Mr. Bulmer.

24 MR. BULMER: Thank you, Mr. President and your Honours. I do
25 have that -- I think you're looking for a number or something as close to

1 a number as I can refer to you.

2 PRESIDING JUDGE FULFORD: I'm looking for a number, Mr. Bulmer.

3 MR. BULMER: That number is 14, Mr. President, of the current
4 Prosecution witnesses, and by that number I mean 14 in which a statement
5 was taken, primarily the written statement being in French, which would
6 be required to be re-interpreted back to the witness during the review
7 process.

8 PRESIDING JUDGE FULFORD: Mr. Bulmer, isn't the -- isn't the
9 short answer to this problem that given that we're now mid-March and the
10 trial is not, in all likelihood, going to start until the 23rd of June,
11 that between now and then for those 14 there needs to be a Swahili -- a
12 Swahili version of the witness statement?

13 MR. BULMER: In -- it has never been the position of the Office
14 of the Prosecutor, Mr. President, just to answer your question with a
15 little bit of extra verbiage, that the statements wouldn't have to be
16 re-interpreted. The point -- the submission that the Prosecution has
17 made in its filing is to -- was an issue as to a potential of objectivity
18 in that translation, and that was the position advanced by the
19 Prosecution in the filing.

20 Certainly if the Chamber deems it appropriate the Prosecution can
21 conduct those translations and make them available. The question, in my
22 respectful submission, is more of an objectivity one, and the
23 Prosecution, just to be clear, took the position it did because of the
24 Chamber's very precise ruling on the familiarisation process not wanting
25 to be involved or accused, in the general sense of the word, of being

1 involved in the familiarisation process, and it's a bit a -- any time
2 that a statement is converted from an interpretation perspective, there
3 is a chance that words are tweaked, and the Prosecution wishes to be
4 absolutely clear that its position is taken on this issue in an attempt
5 to avoid that potential, if I could put it like that, allegation.

6 PRESIDING JUDGE FULFORD: Well, that's very clear, Mr. Bulmer,
7 and, if I may say so, a very sensible precaution to have raised this
8 issue rather than simply going ahead and doing it, then being met with
9 criticisms.

10 What I have in mind at the moment is that once we've decided who
11 should undertake this task, given that there is a potential problem that
12 may arise that when the witness sees for the first time the statement
13 written down in a language that he or she is familiar with and that that
14 may produce a statement that parts of it aren't accurate, whether in fact
15 in these exceptional circumstances the statements ought to be provided to
16 the witnesses now so that any problems over accuracy can be dealt with at
17 this stage rather than them emerging minutes before the witness walks
18 into the door -- balks through the door of the court.

19 Perhaps if you could think about that. I'll return to you on
20 that subject in a moment. Thank you very much.

21 Just before I ask Ms. Mabilie to contribute to this,
22 Mr. Dubuisson, this then is the Prosecution being cautious, not wanting
23 for any suggestion to be made that because they have an interest there
24 has been a deliberate framing of the translation in a way that's
25 inappropriate, therefore, safer for the Registry to do this in relation

1 to the 14 witnesses.

2 What's the Registry's stance on that?

3 MR. DUBUISSON (interpretation): We had tremendous discussions on
4 this when this court was created. At that time, the respective task of
5 the respective translation sections of the Office of the Prosecutor and
6 the Registry were discussed. We agreed that any evidence - I'll use that
7 word, "evidence" - which was to be discussed, that is to say challenged,
8 by the parties or the participants would be revised by Registry revisers.
9 That is to say that the initial translation would be checked and become
10 approved as an official translation of the court.

11 Now, there were tremendous difficulties at the beginning of the
12 likes of the ad hoc tribunals in the production of documents in various
13 languages, and that is why this continuing mode -- modus operandi was
14 adopted.

15 Now, in the specific case at hand, the notion of objectivity has
16 been raised. I would say quite simply the Prosecutor has a statement.
17 It is in a certain language. The Prosecutor said, "If I translate that
18 document, the translation may not be objective."

19 Why wouldn't we have full trust until the Prosecutor? We trust
20 the Prosecutor to carry out his investigations. Why would we not have
21 full trust in the translations of his services?

22 It is only when there is a challenge in the courtroom on the way
23 in which evidence has been taken that the translation of the Office of
24 the Prosecutor would need to be reviewed by the Registry. There might
25 be, for instance, a challenge regarding how to translate "commandant."

1 Is it a commander or simply a leader? What hierarchical status does a
2 commandant have?

3 For instance, that might be an example of an aspect of a
4 statement which is challenged, in which case the Registry is there as a
5 neutral body to review the translation, have its experts review the
6 translation and offer a view.

7 Where there is no challenge to the translation of a statement,
8 there is no reason why the Prosecutor should not produce a translation.
9 A translation is necessarily a version of -- a mirrored version of an
10 original document.

11 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Dubuisson.

12 Ms. Mabilille, do the Defence have submissions on this?

13 MS. MABILILLE (interpretation): Yes. Marc Desalliers shall take
14 the floor on this point.

15 MR. DESALLIERS (interpretation): The Defence is entirely in
16 agreement with the view of the Prosecutor in that the translation of a
17 statement which is to be resubmitted to a witness or re-read to a witness
18 must be entirely neutral. If a translation has been produced by the
19 Prosecutor, there is always a possibility, there's always that doubt that
20 the translation been -- or may have been slanted in some way, the
21 translation which is provided to the witness.

22 Mr. Dubuisson has said that the Registry is a neutral body, and
23 this is exactly the reason why we would ask the translation be provided
24 by that organ, that is to say to ensure that there is no whiff of witness
25 proofing in the production of the translation, but also to ensure that

1 there will be no question about the framework in which the witness is
2 operating.

3 The best solution, I must say that anything untoward should
4 happen, but it would be preferable that organ, a neutral organ such as
5 the Registry, be at the origin of the translation and not one of the
6 parties.

7 (Trial Chamber confers)

8 PRESIDING JUDGE FULFORD: Mr. Withopf, if in fact in future there
9 is to be a tape recording of the statement-taking process, and if the
10 intention of the Prosecutor is that in future there should be the early
11 production of a statement in the language that the witness uses and
12 understands, this is going to be revealed, isn't it, to be a short-term
13 problem?

14 MR. WITHOPF: That is likely to be correct, Mr. President. And I
15 wish to emphasise that it's not the intention of the Office of the
16 Prosecutor, despite the reconsideration, to in future tape all
17 interviews. We will have to carefully select which sort of interviews we
18 want to tape. There will, however, always be situations that there will
19 be statements taken in the way as they were taken in the past. The
20 number of such statements will be limited.

21 In respect of the general observation, the Office of the
22 Prosecutor maintains its view as expressed in its filing that it's up to
23 the Registry, for the reasons that are outlined in the filing, to provide
24 for the translation of the statements concerned.

25 One last remark, and I listened carefully what Mr. Dubuisson has

1 said, and I make reference to his observation that there should only be a
2 review, what there will be situations only of a review if there's a
3 challenge of a review by the Registry's translation services following a
4 challenge of the Office of the Prosecutor's translations, in our view,
5 not obliged to be provided.

6 In this particular instance where the statement is handed over to
7 the witness in the (indiscernible) process, this situation is not likely
8 to be -- to arise, because this statement, this translation, will never,
9 under usual circumstances, make it to the courtroom. So I don't quite
10 understand that point that has been made in this context.

11 I leave it as such, Mr. President.

12 PRESIDING JUDGE FULFORD: Thank you all very much. Bearing those
13 submissions in mind, we will in due course resolve this issue.

14 The next issue is whether or not the witness, having read their
15 statement, having considered it, should then keep it or whether they
16 should return it to the representative of the Victims and Witnesses Unit
17 who has given it to them.

18 There is apparent consensus between the Prosecution and the
19 Defence that this process should be one where the statement is read and
20 then returned, and additionally there seems to be agreement between the
21 parties that the witness should not bring either the statement or any
22 documents with them into court. So essentially having read statements
23 and documents, they're returned.

24 Given that consensus exists, is -- are there any additional
25 submissions from anyone on this point? I take silence as being no.

1 The next issue is any contact between a witness who is also a
2 participating victim with their legal representative.

3 At paragraph 23 of their submissions, the Prosecution has
4 indicated that they generally do not object to the presence of the legal
5 representative during the statement review process. Are there in fact
6 any submissions on this -- on this point? Does anybody wish to
7 contradict the suggestion of the Prosecution that there is nothing
8 objectionable in the presence of the witness's legal representative
9 whilst they are reading their statement and any accompanying documents?

10 Anything on this, Mr. Desalliers?

11 MR. DESALLIERS (interpretation): Mr. President, the Defence has
12 no objections to the presence of the legal representative in the case of
13 a witness with dual status. The only thing that the Defence would add is
14 that that would not confer a different status on the person appearing as
15 a witness. The fact that his legal representative is present should not
16 grant him any further rights. For instance, he would not have the right
17 to keep his statement or anything else. It would simply mean that the
18 person is assisted and accompanied by their legal representative.

19 With that in mind, the Defence has no objections.

20 PRESIDING JUDGE FULFORD: Yes. I think the Defence position,
21 Mr. Desalliers, is very clear. You suggest this should be an entirely
22 silent process. So the legal representative could be present, but he or
23 she should not engage in any kind of suggestion with the witness about
24 the evidence that they're reading.

25 MR. DESALLIERS (interpretation): That's absolutely right,

1 Mr. President. Certainly in the case of witnesses, this changes nothing.
2 As regards any discussions on this substance of the statement, there
3 should be no discussion on the substance of the statement.

4 PRESIDING JUDGE FULFORD: I see your hand moving towards the
5 microphone, Mr. Dubuisson.

6 MR. DUBUISSON (interpretation): Yes. I had taken note of the --
7 that observation by the Defence in their -- their written submissions.

8 We need to be absolutely clear on what the roles of each comer
9 are in regards to witness familiarisation. A person who is accompanied
10 by a lawyer, let's take that example. In no case will the Registry
11 intervene in the relationship between a person and his lawyer. We would
12 not do it for the Defence, and we would not do it for a victim.

13 It is not the job of the Registry to report that a lawyer has
14 spoken about one tonic or another with his client. If he were to do so,
15 we would be told this is privileged communication. We have no intention
16 of monitoring privileged communications between a lawyer and his client.

17 So I certainly wouldn't like it to be interpreted from the fact
18 that the registry allows real representative to be present with his
19 client that there are any further repercussions or implications of this,
20 not at all.

21 Normally the document, the statement - this is certainly the case
22 in most countries, I think - once the person signs their statement a copy
23 is provided to him.

24 Now, we understand that for protection reasons that it is not
25 advisable in most cases for a statement to -- a copy of a statement to be

1 provided to the person. Certainly not in Ituri or other unstable places.

2 If a victim is here and has his legal representative with him, he
3 will also in that case not be allowed to walk away with a copy of the
4 statement. That said, the legal representative could certainly have a
5 copy of the statement, and I would not be against that.

6 If the Chamber were decide that, any legal representative
7 assisting a victim, or even a witness to ensure that he does not
8 incriminate himself or whatever, there may be reasons why a -- a counsel
9 might be provided to a witness.

10 It's important that an aspect be managed by the Chamber and that
11 we, the Registry, receive clear instructions from the Chamber. We only
12 follow instructions from the Chamber.

13 Thank you.

14 PRESIDING JUDGE FULFORD: Very pleased to hear it, Mr. Dubuisson.

15 In a moment, Mr. Walley.

16 Mr. Withopf, I think something off potential significance has
17 just arisen in what Mr. Dubuisson has said, and it is the procedures in
18 relation to what happens to witness statements once they've been taken.

19 Now, as a matter of practicality, Mr. Dubuisson has indicated
20 that protected witnesses don't keep their witness statements because it
21 may be dangerous for them to do so, but for other witnesses they may.

22 First of all, can I ask what the procedure is as far as the
23 Prosecution are concerned once a witness has provided a witness
24 statement. Are they given a copy of the witness statement or not?

25 That's question one.

1 MR. WITHOPF: To answer question one, there's a very straight
2 answer, and it's the policy of the Office of the Prosecutor, and it's
3 complied with in literally all instances, there may be very, very few
4 instances where it's different, but in general the Office of the
5 Prosecutor does not provide a copy of the statement to the witnesses once
6 they have been interviewed.

7 There is, of course, a difference in respect to the
8 transcript -- transcripts of Article 55 to interviews where the person
9 concerned has an explicit right to get the transcript. In such
10 situations we usually encourage, in the event that the person is
11 represented by counsel, that the counsel keeps the copy of the
12 transcripts. The basis for this policy of the Office of the Prosecutor
13 are security concerns. The Office of the Prosecutor's concerned that the
14 witnesses who live in that region, or in any other region, may be exposed
15 to situations that he or she has to display the statement or by way of
16 negligence displays it inappropriately.

17 PRESIDING JUDGE FULFORD: What would be the position, though,
18 Mr. Withopf, if those security concerns didn't arise? Let's say a
19 witness is relocated outside of the DRC and is living securely in
20 Amsterdam, interviewed in Amsterdam. At the end of the interview, once
21 the statement has been signed, would the witness be provided with a copy
22 of the statement or not?

23 MR. WITHOPF: I'm not entirely sure, Mr. President, that I fully
24 agree with your principal observation that it's the location of the
25 interview that's the determining factor. Also witnesses who are

1 interviewed in the Netherlands, for example, or at any other place that
2 be seen as a secure place. Even if the witnesses are relocated, they may
3 be exposed to situations where they are either forced, or by way of
4 negligence, and this is a reality of life, display the statements to
5 persons who should not have access to these statements.

6 So the principal approach of the Office of the Prosecutor would
7 remain the same.

8 PRESIDING JUDGE FULFORD: So the individual -- just to make sure
9 I've really understood this, the individual doesn't get a copy of the
10 statement.

11 MR. WITHOPF: That's the regular approach that's taken.

12 PRESIDING JUDGE FULFORD: Right. There's then a refinement on
13 this which comes up in relation to a later issue, providing witness
14 statements to the legal representatives of participating victims who are
15 also witnesses. And as I understand it, although the Prosecution wish to
16 retain a discretion in relation to this, there isn't a blanket objection
17 to providing the witness's legal representative with a copy of the
18 statement.

19 MR. WITHOPF: There isn't a blanket objection, and the same
20 observations would apply as in respect to counsel representing
21 Article 55(2) interviewees. However, the Prosecution would retain the
22 opportunity to decide on a case-by-case basis.

23 PRESIDING JUDGE FULFORD: Thank you. I haven't forgotten you,
24 Mr. Walley.

25 Ms. Mabil, do you have anything to say about the -- the

1 Prosecution's approach to effectively not providing witnesses themselves
2 with copies of their witness statements?

3 MS. MABILLE (interpretation): My colleague Mr. Biju-Duval shall
4 take the floor, Mr. President.

5 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President.
6 Well, you're moving into another area and that is the issue of dual
7 status, and I will speak only on that.

8 Our first observation is that when a victim is called as a
9 witness by the Prosecutor, the circumstances whereby that person is a
10 victim with victim rights does not confer upon that person additional
11 rights when it comes to their appearance as a witness.

12 When the person is appearing as a witness, the regime which
13 applies to witnesses should be applied. The circumstance that the person
14 is a victim gives them victim's rights, and we've talked about that at
15 other hearings, but that in itself should not impact the regime in which
16 they operate as a witness. That is to say that we should take all
17 necessary precautions in the case of victim witnesses -- the same
18 precautions should be taken as for witnesses.

19 Moving on from there, there's the issue of whether or not a copy
20 of the written statement of the witness should be provided to the legal
21 representative.

22 Our first observation is that there is no obligation under the
23 texts. That is our first observation.

24 Our second observation is that to our mind, there is no need, no
25 major use or purpose linked to a fair trial or the good administration of

1 justice. We do not identify any real use in providing a copy of the
2 written statement signed by a client appearing as a witness to a legal
3 representative.

4 Our next observation, and here we agree with the Office of the
5 Prosecutor, is in relation to precautions. When it comes to the
6 precautions to ensure the security of the witness, I have nothing to add
7 in addition to what the Prosecutor has said. We would, however,
8 emphasise the need to safeguard the testimony and the precautions which
9 must be taken to safeguard the sincerity of the testimony. And here we
10 return to the discussions which we had on witness proofing and related
11 matters.

12 Allowing the witness to refresh his memory by once re-reading of
13 the statement is fine. Allowing him to keep a copy of the statement
14 through his lawyer, that, number one, seems to us not to be of any use
15 and perhaps unwise. Probably unwise when it comes to safeguarding the
16 testimony itself and sincerity at the hearing. That is why in this
17 connection the Defence has adopted the position expressed in its written
18 submissions. That is to say that we see no utility, and we do not feel
19 that it is wise to provide the statement or to allow a copy of the
20 statement to be provided to the witness or his counsel.

21 PRESIDING JUDGE FULFORD: Very clear.

22 Now, Mr. Walley, I would imagine that you don't entirely agree
23 with this consensus that's broken out between the Prosecution and the
24 Defence, and I would anticipate that you will say that it's not only
25 useful but necessary for the legal representatives of victims who are

1 also witnesses to see the statement so that you can properly make such
2 applications and interventions in the case, and including by way of the
3 application to participate in the first place it's necessary for you to
4 see the statements.

5 MR. WALLEYN (interpretation): (No interpretation). Excuse me.
6 It is possible for a witness to have counsel even if he's not a victim
7 participating. He may be a suspect in another case, for instance, and
8 there be -- and therefore have legal assistance during the giving of
9 testimony. Therefore, I believe that we should consider the position of
10 the legal representative quite independently of the status of the witness
11 in case.

12 Turning now to the actual document. When the victim is
13 recognised as a participate in the proceedings based -- and based on your
14 decision of the 18th of January, it seems to me that he should be in a
15 position to consult the document which is connected to the interests of
16 his client. If there's one document which is linked to his interests, it
17 is his statement.

18 This is an issue which arises when we speak of the dual status of
19 victim witnesses, but I do not agree with the Prosecutor when he said
20 that there must be a discretion and that certain participants would
21 receive a copy of the statement of their client but that others would be
22 refused such a copy. No. I think that there should be equality in the
23 treatment of the legal representatives. If a request is made to have a
24 copy of the statement, the legal representative should receive it. If
25 there is a security concern, one could require of the legal

1 representative that he keep the statement for himself and to maintain
2 confidentiality.

3 What about a legal representative who is not participating in the
4 proceedings? May he receive such a document?

5 Personally, I operate in a national system where each party who
6 requests has a right to receive a copy of their statement, and in
7 principle that does not cause a problem.

8 If in the case of the International Criminal Court it is
9 concerned to be unwise and prudent to provide to an individual because
10 the document may be circulated elsewhere, it may be lost or mislaid, I
11 don't think that that risk applies to a legal representative who is bound
12 by code of ethics.

13 PRESIDING JUDGE FULFORD: I'm not going to let you get off quite
14 so lightly, Mr. Walley.

15 If the -- if the position is that witnesses who don't have legal
16 representatives don't get their statements, let's say for a moment that
17 we were in favour of that general opposition for practical and other
18 reasons, isn't there then a problem that emerges that witnesses who have
19 legal representatives will be in a separate and arguably more privileged
20 position because they will have legal representatives who will have their
21 statements, and will it be possible or even desirable to try to enforce a
22 code whereby the legal representatives didn't discuss the content of the
23 witness statement with the client? But I can immediately see an
24 objection to that in that -- trying to impose that prohibition, because
25 the legal representative is going to want to be able to talk with the

1 witness about some of the content of the statement in order on it able to
2 advise them on any necessary steps that need to be taken by the legal
3 representative.

4 Now, how do we -- how do we get round that conundrum,
5 Mr. Walley?

6 MR. WALLEYN (interpretation): Well, Mr. President, I think that
7 if the victim has been authorised to participate in the proceedings, by
8 definition he has more rights than a witness who has not been authorised
9 to participate in the proceedings. Whether we like it or not, there is a
10 series of additional rights which have been granted to one witness and
11 perhaps not to another.

12 I don't see the problem for the participant. The legal
13 representative of the participating victim may also have access to other
14 statements, other people, other documents that he has been able to
15 consult.

16 We have this in national systems also, and it may well be the
17 case -- of course there will be meetings between the counsel and his
18 client regarding the events of which he has been a victim. I therefore
19 do not see why a client would not be able to speak freely with his
20 counsel, his legal representative, if he has chosen one.

21 If the legal representative has a statement of a witness who has
22 not been authorised to participate, one might say, "Well, that person has
23 more rights than the next person." Well, yes, indeed. A person who has
24 instructed a lawyer has more rights than someone who has not, but it is
25 the right of any individual involved in proceedings to choose legal

1 assistance. Any witness has a right to instruct counsel.

2 Mr. Biju-Duval is saying, "No, no," but I'm afraid yes. It is
3 the fundamental right of any person involved in proceedings, and indeed
4 of any citizen to consult legal counsel. And of course that person can
5 converse with his counsel on matters, facts, events which concern him.
6 One cannot stop it.

7 This doesn't mean that there would be a difference between that
8 person and somebody who does not choose to take counsel.

9 I believe that any instructions that are given should be in
10 relation to that which needs to be protected.

11 PRESIDING JUDGE FULFORD: Ms. Massidda.

12 MS. MASSIDDA (interpretation): Thank you, Mr. President. I
would

13 just like to add one argument in addition to those presented by my
14 colleague Mr. Walley.

15 It strikes me that the Chamber's decision of the 18th of January,
16 2008, already does give certain indications in relation to the document
17 which the legal representative can request, including vis-a-vis the
18 Prosecutor.

19 I refer to paragraph 111 of the decision of 18th of January,
20 2008, in which the Chamber says and I cite: "(In English) The
21 Prosecution shall, upon request by the victim's legal representatives,
22 provide individual victims who have been granted the right to participate
23 with any materials within the possession of the Prosecution that are
24 relevant to the personal interest of victims."

25 (Interpretation) that is any material that could have relevance

1 to the personal interests of the victims.

2 It seems to me that the statement of a witness who is under the
3 victim's status as well is surely relevant for the interests of the
4 victims. It seems, therefore, that by analogy one might apply paragraph
5 111 also to the question of statements that should be provided to the
6 legal representatives.

7 Thank you.

8 PRESIDING JUDGE FULFORD: Thank you very much, Ms. Massidda.

9 I've upset to hear that there are decisions of ours that stretch
10 to over a hundred paragraphs, but there we are.

11 We are now past the witching hour, I'm afraid. I must give the
12 interpreters a break.

13 I haven't forgotten you, Mr. Biju-Duval. Is it very quick? All
14 right. If it can be a short Defence submission, we'll hear it now and
15 then break.

16 MR. BIJU-DUVAL (interpretation): Very brief. I'm sorry.
17 Because on this point: I would like it to be clear that in many national
18 systems, especially the one in -- under which I practice in Africans, a
19 witness, a mere witness, has no access to the case file, and he is not
20 given a copy of his statement.

21 Of course any statement -- any citizen can instruct counsel, but
22 if a person has counsel and is a witness, he doesn't have any his
23 statement. It is on this point that I disagree with my learned colleague
24 Mr. Walley.

25 Second point: The real substantive issue is dual status. It

1 means that there are two solutions. Either the Chamber applies to the
2 witnesses who are also victims completely the system that applies to mere
3 witnesses, and in such case under the law of evidence there will be no
4 distinction between the testimony of a victim witness and the testimony
5 of a witness.

6 However, in such case to use this solution, the victim coming to
7 testify should be completely subject with no exception whatsoever to all
8 rules that apply to simple witnesses.

9 If more rides are accorded to the victim coming to testify as a
10 witness, then necessarily the Chamber will have to consider that the
11 testimony does not have the same probative value.

12 This is what happens in many national system, particularly the
13 French system. The victim who is a party to the proceedings will be
14 heard by the Judges but does not take the oath or make a solemn decal
15 race. Such a victim is not a witness. The statement of this victim is
16 not the same as that of a simple witness. This distinction must be made
17 if the victim witness's statement has to have probative value in regard
18 to that of a witness.

19 Thank you. Thank you very much. Just for our information -- you
20 as well, Ms. Bapita? Well, I'm afraid we're going to have to do it
21 later, but thank you for -- unless it's -- is it very short?

22 THE INTERPRETER: Microphone, please.

23 PRESIDING JUDGE FULFORD: Could you just use the microphone.

24 MS. BAPITA (interpretation): I would prefer to speak after the
25 break because I will be brief. Thank you.

1 PRESIDING JUDGE FULFORD: We'll rise now and sit again at a
2 quarter past 12.00. The hope is that we will move straight into the
3 demonstration.

4 Recess taken at 11.35 a.m.

5 On resuming at 12.27 p.m.

6

7 There was a test between 12.27 p.m. and 1.15 p.m.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Luncheon recess taken at 1.15 p.m.

2 On resuming at 2.36 p.m.

3 PRESIDING JUDGE FULFORD: Mr. Withopf, if I can address the bar
4 through you, our preliminary view in relation to the -- the video
5 connection with the witness was that the quality was of an acceptable
6 level. One could see the witness, and he could be heard, and although
7 there was a little bit of a time delay, with witnesses with translations
8 taking place in any event, there's always going to be an element of
9 delay.

10 There is clearly something of a problem with being able to see
11 individual documents, and unless that can be improved, if this particular
12 route of giving evidence is to be utilised it may be necessary for all
13 relevant documents to have been sent ahead by CD-ROM so that they can be
14 viewed simultaneously here and in the field but without it having to be
15 the same copy.

16 That said, our view is subject to submissions from any of the
17 parties or participants, that the quality should not be worse than what
18 we -- and what was shown to the court today. That is really "as bad as
19 it can get." It was good enough, but it should be no worse than that.

20 Now, that, I think, was using a fixed satellite dish. There will
21 be a demonstration on Friday morning early of field equipment using a
22 mobile satellite dish, and Friday morning, if this test takes place, is
23 going to be the opportunity for the parties and the participants to be
24 present to see it so that they can make submissions on the quality in due
25 course. So I encourage all those involved in this case who are

1 interested to come and participate in that viewing on Friday morning.

2 Now, those were our preliminary views. On the -- on the
3 videolink, so in relation to the witness, is there anything that the
4 parties or the participants wish to say at this stage?

5 MR. WITHOPF: Mr. President, your Honours, we work on the basis
6 that we will be given a further opportunity to raise whatever objections.
7 As a preliminary, and I emphasise the word "preliminary," view I would
8 fully concur with your views.

9 At this stage we don't see any problem in doing an examination
10 without using any exhibits. On the documents, yes, there is a problem,
11 and there is an even larger problem in respect to the video footage that
12 has been shown. In respect of this one, our view is certainly already
13 today that it was not of sufficient quality.

14 PRESIDING JUDGE FULFORD: I agree, Mr. Withopf. I'm not sure
15 whether it was a problem with us being here and them being there, or
16 whether it was something to do with the quality of the video that was
17 shown, but I agree if one was trying to see the detail of the image it
18 wasn't good enough. I entirely agree. So that's something that needs to
19 be thought about.

20 Now, Mr. Withopf, that means, as far as the Prosecution are
21 concerned, that if there are witnesses who properly can give their
22 evidence using those kind of techniques, then that needs to be
23 considered. It may be that with important witnesses in relation to whom
24 there is going to be extensive questioning, it would be inappropriate.
25 But where there are witnesses who are perhaps less central and in

1 relation to whom there is not going to be lengthy questioning, it may be
2 that to save them the trip from the Democratic Republic of the Congo to
3 here this is a technique which may be of use.

4 MR. WITHOPF: I believe, Mr. President, your Honours, this is an
5 accurate reflection of what we are also thinking. We would like to
6 provide our views on a case-by-case basis, but the considerations we were
7 expressing will certainly play an important role.

8 PRESIDING JUDGE FULFORD: Very helpful. Thank you, Mr. Withopf.
9 Ms. Mabilille.

10 MS. MABILILLE (interpretation): Marc Desalliers will be making
11 observations on our part.

12 MR. DESALLIERS (interpretation): Mr. President, as you
13 mentioned, it also struck us as being particularly difficult to read
14 documents and to view the video. If this material is to be commented by
15 a witness, then it did strike us that what we saw was under par.

16 Turning now to translation. I don't know if the problem cannot
17 be overcome, but one can only hear the voice of the translator.
18 Therefore, it's not possible to check the quality of the interpretation
19 as it takes place or to pick up on errors. All I can hear is the
20 translation, or indeed one can choose to hear only the Swahili, but it's
21 not possible to evaluate the quality of the interpretation based on what
22 we heard this morning. So that is a concern for the Defence.

23 The Defence wishes to recall that in it's view these are
24 proceedings in which this technology should be used on an exceptional
25 basis. You mentioned rightly that it would be preferable not to use such

1 technology for key witnesses. In any case, the Office of the Prosecutor
2 and the Defence would like to be able to discuss the use of the
3 technology on case-by-case basis, but I would repeat, we see it as an
4 exceptional tool.

5 PRESIDING JUDGE FULFORD: Thank you. Ms. Massidda.

6 MS. MASSIDDA: Thank you, your Honour. I'd like simply to draw
7 the attention of the Chamber on Regulation 47 of Regulations of the
8 Registry, which provides that in case there is a participation of the
9 proceedings by videolink by a victim, and this could be a case in the
10 future, a direct telephone connection between the same persons, the
11 victims, and their counsel shall be established in addition to the normal
12 connection.

13 We don't know if this is possible at the moment or not, and maybe
14 we could ask the Registry to clarify if there is a possibility to apply
15 Regulation 47 of Regulations of the Registry at this stage or if there is
16 any technical problems which will be unavoidable and in this case
17 Regulation 47, the direct connection between the victim and the counsel
18 could not be provided. Thank you.

19 PRESIDING JUDGE FULFORD: Thank you, Ms. Massidda. Can I ask you
20 to, in the first sense, liaise with the Registry and to come back to the
21 Chamber if there's a problem. Thank you very much indeed.

22 Anything from the Registry on this? No.

23 Right. That's the videolink. The point raised by Mr. Desalliers
24 we will have investigated in terms of seeing whether there's a
25 possibility of being able to hear the translation and the original

1 language at the same time.

2 I now want to move to the Citrix presentation. I understand
3 there are some specific questions that either I think the parties or one
4 of the participants wishes to raise, and it may be best if they're
5 addressed now and we'll see whether somebody from the registry can answer
6 them directly.

7 MS. BAPITA (interpretation): Thank you, Mr. President, for
8 giving me the floor. I do have one concern which I would like to raise,
9 and I would like to have some clarifications from the Registry.

10 The test that took place today was a direct videolink from Bunia,
11 Bunia field office, or MONUC used by a server, and what type of server
12 was that? Or was it carried out as mobile equipment without need of a
13 server, that is to say that it could be set up from any premises?

14 PRESIDING JUDGE FULFORD: Thank you, Ms. Bapita.

15 Is there an immediate answer to that?

16 MR. DUBUISSON (interpretation): Yes, Mr. President. I shall
17 hand the floor over to a representative of the Information Communication
18 Technology Section.

19 MR. ALVAREZ (interpretation): Mr. President, the test we saw
20 took place from Bunia field office with a direct connection and use of a
21 satellite connection. This test could not be carried out in the same way
22 at this time from Kinshasa.

23 PRESIDING JUDGE FULFORD: Yes, Ms. Bapita.

24 MS. BAPITA (interpretation): Mr. President, I think you would
25 agree with me that I have not yet had a response to my concern, because

1 based on the information available to me, the court knows that the
2 internet connection from the MONUC or the ICC premises are height level.
3 We don't have similar connections using telephone lines. I don't have
4 access. When I am not at ICC premises or MONUC premises, I always
5 encounter difficulties having access to the records and the files in the
6 case.

7 Now, pending a solution of this problem, I would suggest that I
8 be allowed to use the same server from Kinshasa for from Bunia or quite
9 simply that I be provided with a copy of all of the files on CD-ROM,
10 unless of course it's possible to carry out a test from a different
11 server and that we be able to observe the results which that gives.

12 PRESIDING JUDGE FULFORD: Mr. Alvarez, given that a server issue
13 has been identified, do you agree that the quality of the connection may
14 have been better in the demonstration today than the connection that will
15 be available to Ms. Bapita working from Kinshasa?

16 MR. ALVAREZ (interpretation): I don't have exact details on the
17 quality of the connection which Ms. Bapita has from her office in
18 Kinshasa. It will be important to make a comparison between the
19 connection which she has from Kinshasa and this. At the same time, I
20 don't at this point in time have information on the particular
21 difficulties that Ms. Bapita has encountered, notably at what point in
22 time she has been using the connection via the server. I think that it
23 would be useful for us to carry out a test whereby we assist Ms. Bapita
24 when she is making her connection to try and identify the source of the
25 problem. The problem may not necessarily be the connection but another,

1 notably the hardware which is available to her.

2 PRESIDING JUDGE FULFORD: Thank you very much. You're going to
3 be taken up on that offer, and we will direct that at a date in the near
4 future that's convenient both to the IT section and Ms. Bapita that you
5 attend at her offices in Kinshasa to try to get to the bottom of what the
6 problem is that she's experiencing, and could that happen sooner rather
7 than later, please.

8 Mr. Dubuisson, if all else fails, is there, in general terms, a
9 problem with having the back-up solution proposed by Ms. Bapita that she
10 is provided with documents via CD-ROM? I could see that there may be a
11 problem in terms of using conventional post for sensitive material, but
12 putting aside issues of security in that sense, is there a problem with
13 implementing a back-up proposal -- this back-up proposal if necessary?

14 MR. DUBUISSON (interpretation): Thank you, Mr. President. First
15 of all, there are three options open to us. First of all, to carry out
16 checks to establish exactly what the problem is and how it can be
17 resolved.

18 Our second option work to give Ms. Bapita access to our offices
19 in both Bunia and Kinshasa, and I am willing to discuss that. I have no
20 particular difficulty with it. In any case, these are discussions which
21 need not take place here. However, for one reason or another they are
22 taking place here.

23 Over time, apparently, the difficulties have not been reported
24 regularly. Today we had a test which was satisfactory.

25 Option C would be to provide the documents on CD-ROM. However,

1 sending CDs by post is clearly not an option. They could be sent by
2 diplomatic pouch or by another system to our field office and then from
3 there be transported to another location. This is not ideal given that
4 we are attempting to run an e-court. It is also not a good idea in
5 security terms.

6 I do believe that if very specific difficulties are reported to
7 us we will be able to find a solution in all cases.

8 PRESIDING JUDGE FULFORD: Well, Mr. Dubuisson, I don't want to
9 prolong this. Ms. Bapita is clearly experiencing difficulties. They
10 absolutely must be resolved. So in the first instance I'm going to ask
11 for a pretty much immediate visit to her offices to see whether the
12 problem can be identified and resolved, and can we have a report
13 immediately that's occurred so we can implement another solution if the
14 IT department fails.

15 MR. DUBUISSON (interpretation): Your Honour, I will make that
16 undertaking on behalf of the Registry for Ms. Bapita and for anybody else
17 in this courtroom who wishes such a service. Obviously there will be an
18 order of priority. We can't be everywhere at the same time, but we will
19 live up to our obligations.

20 PRESIDING JUDGE FULFORD: A similar visit to Paris, Ms. Mabilille?

21 MS. MABILILLE (interpretation): In Paris we have IT support, so we
22 have practically resolved of the problem. I won't get into the details.
23 I know we have other business to deal with today. But I would say this,
24 Mr. President: As regards the Congo, this is a matter of real concern.

25 Now, I regret that Marc Dubuisson is saying here that he has not

1 been informed of these difficulties in due time. The Defence has made
2 two filings regarding problems with Citrix. Today the system is working,
3 but my question is when IT techniques go to Bunia to resolve these
4 problems, will they be resolved once and for all? Ms. Bapita encounters
5 difficulties, but she is not the only one. When we travel to Bunia field
6 office or the Kinshasa field office, the system doesn't work. Solutions
7 may be found now, but I do hope that they will stay in place over time.

8 PRESIDING JUDGE FULFORD: Thank you, Ms. Mabelle. I can echo
9 those sentiments by asking Mr. Dubuisson, he needn't reply to this, but
10 by asking him to try to find permanent solutions rather than temporary
11 ones.

12 Now, Ms. Bapita, we interrupted you some hours ago. You were
13 wishing to make an intervention in relation to the last topic we were
14 discussing.

15 MR. WALLEYN (interpretation): Mr. President, if I might, just to
16 finish off on this point. I would like to flag up to the court that
17 Franck Mulenda is currently in Kinshasa and has reported that he is an
18 available to participate in a test tomorrow or after tomorrow from his
19 office if that could be organised.

20 PRESIDING JUDGE FULFORD: I'm going to ask you to talk directly
21 to court management. I'm not going to try and resolve that here,
22 Mr. Walley, but thank you for the observation.

23 Yes, Ms. Bapita.

24 MS. BAPITA (interpretation): Thank you, Mr. President, for
25 giving me the floor.

1 I wanted to speak on what Mr. Biju-Duval said this morning on the
2 absence of an obligation to provide witness statements to legal
3 representatives who represent individuals with dual status. He said
4 there was no obligation under the texts. He also said that it was not
5 necessary, nor was it useful.

6 Now, I would refer to a victim who is a participate in these
7 proceedings and who is called to testify on a particular fact. That
8 person has a right to be assisted by a legal representative. The person
9 with their legal representative is given a copy of his or her statement.
10 The legal representative may realise from the statement that there may be
11 consequences which will flow from it at a later stage, in particular the
12 proceedings regarding reparations.

13 Mr. President, you will remember that the witness makes a
14 statement at one time, perhaps not realising that later they will want to
15 join these proceedings as a victim. In their statement they will have
16 referred to what they have been through, but as a victim that person will
17 have a right to assistance.

18 The legal representative may well identify that the statement is
19 a statement which could be used in the reputations proceedings.

20 What conduct should the counsel adopt? Should it be, as the
21 Defence says, that he should say nothing, simply observe? In which case
22 I would wonder what assistance has the legal representative provided. Or
23 should he ask to have a copy of at that statement, which could later, at
24 the reparations hearings, serve as a document attesting to the harm
25 suffered by the victim?

1 The other side of the coin could be a victim, for instance, who
2 is represented by the OPCV and has requested assistance from the OPCV.
3 The OPCV may identify in his statement important information, but he may
4 have had the assistance requested denied. What would the situation of
5 that individual be?

6 This is not covered in the texts. There is no provision which
7 prescribes what conduct should be adopted in the presence of a statement,
8 but I would call upon active assistance, and I would refer to a decision
9 of the 18th of January in which it is said that those documents which are
10 relevant for the personal interests of a victim should be available to
11 us. This would include a witness statement. Such a document could prove
12 paramount at reparations hearings. I think that not providing the
13 document to the legal representative or allowing him to use it would be
14 not to allow him to fulfil his role.

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

16 I'm going to jump an issue for a reason that I will explain in a
17 moment and turn on this -- no, in fact there are two. I'm getting ahead
18 of myself.

19 A complaint is made that this document doesn't sufficiently
20 address the need for a post-review security assessment. This is
21 something, Mr. Dubuisson, that the Prosecution argue should be included
22 within this document. Do you have any objections to there being a
23 section that deals with the position for the witness after he or she has
24 concluded giving evidence?

25 MR. VAATAINEN: Your Honour, if I may answer. Well, if I

1 understand this correct will it be your wish that we would add into
2 the -- into our protocol a -- a chapter on the issues that were raised by
3 the Office of the Prosecutor in their filing?

4 PRESIDING JUDGE FULFORD: Yes. It -- it seems that -- well,
5 what's being suggested is there's a gap in that one has got to look at
6 the interests of the witness after they've concluded their evidence,
7 because security problems aren't simply necessarily going to disappear at
8 the moment they leave the witness box, and there needs to be some formal
9 provision for dealing with witnesses once they've finished their evidence
10 to make sure that security is adequately addressed, and we're asking
11 whether you have any objections to having a chapter, it needn't be long,
12 but a chapter that deals with that issue.

13 MR. VAATAINEN: Certainly. That's not a problem. We can easily
14 provide that to your Honours.

15 PRESIDING JUDGE FULFORD: I think that resolves that issue,
16 Mr. Withopf. Good.

17 No one has addressed the recommendations made by the Victims and
18 Witnesses Unit on psychosocial assistance in court. I've taken it from
19 that that there are no submissions to be advanced on the issue, but I
20 just want to check that that is correct. There is a silence, and so we
21 shall move on.

22 Now, the one issue that I have deliberately missed out and which
23 I'll it turn to now is that Ms. Mabelle identified Annex 4.2 of the
24 protocol and the warning that is to be -- or the advice that is to be
25 given to witnesses, and the quotation is set out: "You may have to

1 answer questions about something that happened to you or to someone else.
2 The questions may also be about something you've seen or heard."

3 The complaint that's made is that that doesn't sufficiently warn
4 the witness about giving hearsay evidence, but of course Ms. Mabilles
5 complaint, in a sense, may come in advance of a discussion that there --
6 that needs to take place about hearsay evidence, because of course if
7 hearsay evidence is admissible, it may well be that a witness doesn't
8 have to be warned against giving it. So I think the concern that
9 Ms. Mabilles quite correctly has raised cannot be answered until we have
10 addressed the overarching issue, which conveniently takes me to the next
11 substantial issue, which is here is say and annexes 46 to 52.

12 Mr. Withopf, I would like your assistance on this, because it may
13 have been somewhat overambitious on our part to include this in the
14 agenda without giving the parties and the participants an opportunity of
15 putting in detailed written submissions. It seems to us that the issue
16 of principle in relation to hearsay evidence is one of very great
17 importance indeed, and it is one that isn't necessarily susceptible to an
18 easy resolution. There are at either extreme trenchant positions in
19 relation to hearsay. I suspect, because of the question formulated by
20 Ms. Mabilles, the suggestion from the Defence will be essentially there
21 should be no or very little hearsay. The position of the Prosecution may
22 be that it's all a question of weight rather than admissibility. Well,
23 you can't get much further apart than that.

24 There is, some useful jurisprudence from the ad hoc tribunals on
25 this issue, and there has been some reasonably considerable academic

1 discussion.

2 Now, our view at the moment is that rather than dealing with this
3 all by way of oral submissions, it would be more helpful to everyone
4 involved if we were to have the competing positions set out in writing
5 first of all with supplementary oral submissions.

6 So that's the first point. Before I ask you to take the floor,
7 there's a second point.

8 The specific documents that we have raised for consideration this
9 afternoon are annexes 46 through to 52. One of the witnesses whose name
10 I'm not going to give in relation to those documents has disappeared from
11 the case. That leaves only one witness whose name is known, the witness
12 (expunged), who on my researches, Mr. Withopf, only speaks to two of the
13 documents.

14 MR. WITHOPF: Mr. President, may I please interrupt you at this
15 stage. The Prosecution has a concern if the names of its witnesses are
16 mentioned in public hearings, including the one you just mentioned.

17 PRESIDING JUDGE FULFORD: It's on your list.

18 MR. WITHOPF: On the list known to the Defence Mr. President.

19 PRESIDING JUDGE FULFORD: Sorry?

20 MR. WITHOPF: It's on the list of witnesses whose names are
21 identified to the Defence, and there is, in the Prosecution's view, a
22 huge difference between witnesses being known to the Defence and witness
23 names being made known to the public. We're in a public hearing and it
24 generates a concern.

25 PRESIDING JUDGE FULFORD: All right. All right.

1 There is a witness in relation to whom there are two -- just --
2 I'll just pause a moment.

3 (Trial Chamber and Court Officer confer)

4 PRESIDING JUDGE FULFORD: That has been dealt with.

5 There is a witness who only deals, as I see it, with two of those
6 documents, 46 and 47. Otherwise, there is now no witness in the case who
7 speaks to the rest of the annexes in this bundle.

8 Now, it seems to us that in order for the Defence to advance
9 submissions in relation to the an admissibility of these documents, it is
10 necessary for the Prosecution to explain in detail in writing how
11 admissibility works as regards all of these annexes, what issues they go
12 to, and how, for instance, in the context of the trial as a whole the
13 Defence are going to be able to test these documents and explore the
14 content of them.

15 Now, I'm not going to stop you from going through them this
16 afternoon, but you may prefer, in the first instance, to deal with this
17 in writing.

18 THE PROSECUTOR: Mr. President, your Honours, due to the
19 importance on the one-hand side and do you to the complexity of the
20 issues on the other-hand side, we actually would be prepared to make
21 submissions today. We are prepared to do so, and I would hand over to my
22 colleague Ms. Samson. However, since you offer us the opportunity to
23 provide for our submissions by way of filing, we will certainly use that
24 opportunity. The matters are too complex in both the general nature and
25 in relation to the particular instance here that we should not miss

1 anything in this context.

2 PRESIDING JUDGE FULFORD: Thank you.

3 Ms. Mabilille.

4 MS. MABILILLE (interpretation): Mr. President, I'm somewhat
5 confused, because in our view yesterday -- you issued an order yesterday.
6 The court issued an order, and the Prosecutor disclosed Annexes 46 to 52
7 to us. I have them here before me, and they have no bearing at all -- or
8 no relation at all with what you're saying. So what I would like to know
9 with regard to these annexes, Mr. Prosecutor, this -- these annexes do
10 not fit what the President of the court is saying, so I'm somewhat lost.

11 Were you -- did you make a mistake in the disclosure of the
12 Annexes 46 to 52? I believe -- sorry, I'm told that this is the 6th of
13 March. This -- the annexes include a fairly long redacted document
14 including the names of child soldiers. No names, in any case, but it is
15 a long document. The second document is a report from an NGO.

16 That is what I have as Annexes 46 to 52, and it seems to me that
17 this has no bearing at all on what the President is saying.

18 PRESIDING JUDGE FULFORD: Ms. Mabilille, I'm going to answer that.
19 These are the documents I'm talking about. They are -- they are -- it
20 certainly was the position that they were to be introduced by two
21 witnesses, one of whom is no longer a witness in the case. So there is
22 an issue which generally comes under the umbrella of hearsay as to
23 whether these documents are admissible given that certainly in the main
24 there is no witness who can talk to their contents. They are seemingly
25 someone's records, and the person who compiled the reports -- or the

1 people who compiled the reports are not going to be called, and it seems
2 to us that that is a subject that can conveniently be dealt with as part
3 of an overarching review of the extent to which hearsay evidence should
4 be admitted into this trial.

5 MR. WITHOPF: Mr. President, very briefly. There is a further
6 aspect the Prosecution wants to clarify, and I hand over to Ms. Samson.

7 PRESIDING JUDGE FULFORD: Certainly. Yes, Ms. Samson.

8 MS. SAMSON: Mr. President, I just wanted to clarify in relation
9 to the annexes themselves. There are, as you mentioned, Annexes 46 to 52
10 which the Bench of requested the Prosecution to disclose to -- to
11 re-disclose to the Defence, which we had done. It's not our
12 understanding however, that all seven of those documents are actually
13 affected by the issue. We had made submissions in the disclosure filing.
14 However, I'll reiterate them here for ease of reference.

15 The first three annexes, 46, 47, 48, are notebooks of demobilised
16 child soldiers. They're squarely documents to which we've applied
17 redactions to the names and identifying features of these children, and
18 they fall within the scope of the question that we're being asked to
19 address.

20 Annexes 49 and 50, in our view, do not fit the criteria. Annex
21 49 is a one-page document to which we have sought and have been granted
22 temporary redactions only until next Thursday in relation to one of our
23 trial witnesses.

24 Annex 50 is, as Ms. Mabilie mentioned, an NGO report for which
25 the Prosecution has sought lifting of redactions. It does not deal

1 squarely with names of individual children who we allege had been
2 demobilised from various armed groups.

3 Annexes 51 and 52 again are these logbooks in which certain
4 non-governmental organisations had recorded the entry and exit of
5 demobilised children into their -- into their transit centre, and those
6 two documents for which redactions have been applied would fall within
7 the ambit of the -- of the Bench's order.

8 So I just wanted to clarify can we exclude Annexes 49 and 50 from
9 the filing that we -- we intend to put forward at a date to be determined
10 by your Honour?

11 PRESIDING JUDGE FULFORD: You're quite right, Ms. Samson. I was
12 addressing them in too broad and global a fashion. You have correctly
13 identified two which, strictly speaking, don't come within the category.
14 It's just because we have in the past dealt with these, as it were, one
15 package. I was using that convenient shorthand that you have leave to
16 miss those two documents in your filing.

17 MS. SAMSON: Thank you very much. And not to get into too much
18 of the piece in advance of our actual written submissions, but according
19 to the Prosecution's records, the first three annexes, 46, 47, and 48,
20 have all been addressed by witness who is known as number 31, and you
21 had correctly identified --

22 PRESIDING JUDGE FULFORD: Well, you're going to have to take us
23 to the -- to the relevant sections, because I've managed to track down
24 the references in 46 and 47. I've been unable to find the reference in
25 48. Don't now, Ms. Samson, in your written filing.

1 MS. SAMSON: Thank you.

2 PRESIDING JUDGE FULFORD: We need to know how this works, please.

3 MS. SAMSON: Yes, absolutely. Thank you very much.

4 PRESIDING JUDGE FULFORD: Thank you.

5 Next issue is the Prosecution's application for redactions
6 pursuant to Rule 81(2). This is filing 1165 on the 14th of February,
7 2008.

8 There have been some written submissions on this. I simply
9 wanted to give anyone other than the Prosecution and opportunity to make
10 additional submissions at this stage if they wish.

11 It doesn't seem that anyone is taking the floor. No.

12 MS. MABILLE (interpretation): Mr. President, just a remark, a
13 general remark.

14 As regards 81(2), it seems clear to me that you issued a decision
15 on the 6th of December, 2007. When I read the Prosecution document,
16 which is somewhat elliptical, in our view, we believe we understood that
17 this involved redactions, since you referred to Rule 81(2) or the
18 investigations. However, the decision of the 6th of December, 2007,
19 which you rendered --

20 PRESIDING JUDGE FULFORD: Ms. Mabelle. I'm going to interrupt
21 you --

22 MS. MABILLE (interpretation): It is a decision --

23 PRESIDING JUDGE FULFORD: -- for this reason: You need have no
24 concern about this proposed redaction relating to further investigations.
25 It -- it has -- the proposed redaction has nothing to do, as I understand

1 it, with further investigations.

2 MS. MABILLE (interpretation): If you will, the problem is that
3 with information that the Defence currently has, it cannot say anything.
4 I am always asking -- I'm always asked whether we can release documents.
5 I'm asked whether the redactions are correct, yes or no, whereas I do not
6 have information to make such a decision. So I end up having some
7 difficulty, considerable difficulty, in providing an answer. Filings are
8 made, so how can I on such a matter, when I do not have the document,
9 give an opinion?

10 Mr. President, you're telling me that I'm misinterpreting this
11 that, that this is not in fact ongoing investigations, but I do not see
12 how I can solve the problem or find a solution to the problem.

13 Since I have the floor, I should like to say also that regarding
14 the next document, why do I have a complete list of child soldiers which
15 is redacted? At the current stage of proceedings, why is this document
16 not disclosed to me in whole? It is really to prevent the Defence from
17 doing its work.

18 It is becoming really most difficult, Mr. President, to work in a
19 situation where you never have information that is disclosed from A to Z.

20 Since we're relying on document 46, why is it that Annex 46 has
21 not been disclosed in full?

22 Furthermore, Mr. President, I will conclude with this, my -- in
23 my fit of temper here. I would like to use this opportunity to tell you
24 that the ex parte proceedings that we referred to in our last hearing on
25 the 12th of February, I would like to say that from that date 59

1 proceedings were received, court documents were received, and 11 of those
2 were not notified to the Defence. That is also difficult, Mr. President.

3 I know you said the last time that you understood that this was
4 abnormal, but a month later I would like to say that 11 of these
5 documents were not notified to the Defence.

6 These are my submissions, Mr. President.

7 PRESIDING JUDGE FULFORD: Well, thank you for the observations,
8 Ms. Mabille. You will understand that the Bench has very much in mind
9 the core necessity of you being provided with all of the information to
10 which you're entitled sufficiently in advance of the trial to conduct
11 preparations, and that is why we have at various stages sought to impose
12 deadlines so that there will then be a period after those deadlines for
13 Defence preparation. In a sense, the Bench doesn't need to be told this.

14 As regards the particular document that you've referred to in the
15 annexes under consideration, the reason why this is being discussed in
16 this way, as I think has been identified on a previous occasion, is that
17 if this document is not admissible, then the Prosecution are not entitled
18 to rely on it, and the problem in relation to non-disclosure then
19 disappears, and it seemed to us that it was appropriate to take
20 admissibility first to see whether there is anything within this
21 particular collection of documents that needs to be served on the Defence
22 in full, and it is for that reason that we're dealing with this
23 particular issue in this order.

24 Now, Mr. Withopf, this needs to be resolved relatively quickly.
25 If I were to -- if we were to set a deadline of two weeks for written

1 submissions on this issue is that acceptable?

2 MR. WITHOPF: It is accepted, Mr. President.

3 PRESIDING JUDGE FULFORD: Thank you. Does anybody wish to
4 contest a two-week deadline for submissions on the hearsay in writing?
5 No. We'll say Friday -- Friday, fortnight, 4.00 p.m., please. Thursday,
6 fortnight, 4.00 p.m., because the Friday is Good Friday.

7 MS. MABILLE (interpretation): Mr. President, and what time would
8 we have to respond to the submissions?

9 PRESIDING JUDGE FULFORD: What we're asking is in relation to the
10 general principle for submissions to coincide, it should be perfectly
11 possible for both sides to put in their respective submissions generally
12 on hearsay and admissibility within a fortnight. You, of course, must be
13 entitled to address the Prosecution's specific submissions in relation to
14 these documents. If we were to impose a deadline of seven days after of
15 that to respond to the Prosecution's submissions on these annexes,
16 Ms. Mabilille, would that be acceptable? Good.

17 MS. MABILLE (interpretation): Yes, Mr. President.

18 PRESIDING JUDGE FULFORD: So seven days later.

19 Yes, Mr. Withopf?

20 MR. WITHOPF: Just to be absolutely sure what the deadline is, it
21 appears to us that next week is Good Friday.

22 PRESIDING JUDGE FULFORD: Oh, right. Right. You're absolutely
23 right. So we'll say Friday fortnight.

24 MR. WITHOPF: Thank you, Mr. President.

25 PRESIDING JUDGE FULFORD: Thank you very much.

1 Joint instruction of experts. We can take this shortly.

2 The view of the Bench, Mr. Withopf, is that although it's perhaps
3 regrettable that there haven't been discussions to date between the
4 parties as to joint instruction of experts, that is now so much water
5 under the bridge.

6 We ask both sides to remind themselves of our very clear order in
7 this regard that there should be joint instruction wherever that is
8 possible, so please can that happen.

9 The deadline that we are going to impose is Friday the 23rd of
10 May for service of experts' reports, but the -- I reiterate the parties
11 have an obligation to discuss really in the near future with each other
12 whether it is possible for there to be joint instruction of experts in
13 relevant fields. But the cut-off date for expert evidence is the 23rd of
14 May.

15 The final issue is the proposed mechanisms -- I say the final
16 issue. In fact, it's the penultimate issue, is the proposed mechanisms
17 for exchange of information on persons who have the dual status of
18 victims and witnesses, and there was a joint report that was filed on the
19 18th of February, document 1177.

20 I'm going to take the headlines for each in turn. The respective
21 positions are identified in that joint filing, but of course we'll give
22 permission now for any supplementary submissions to be made raising any
23 new issues.

24 The first relates to witness statements, and on this the
25 Prosecution seek to retain the discretion of not providing the statement

1 of a witness to the representative.

2 Now, to a very large extent we've already covered this ground
3 this morning, and of course the legal representatives of victims and the
4 Office of Public Counsel for Victims have stated their opposition to your
5 submissions, Mr. Withopf. Is there anything you want to add on the
6 point?

7 MR. WITHOPF: Mr. President, your Honours, supplementary
8 submissions will be made by Mr. But.

9 PRESIDING JUDGE FULFORD: Thank you. Anything in addition to the
10 filing, Mr. Bulmer?

11 MR. BULMER: Just a few -- a few points if I may. Thank you very
12 much, Mr. President, your Honours.

13 Ms. Massidda was quite correct when she pointed out the position
14 with respect to the access for victims who have been granted -- for legal
15 representatives for victims who have been granted a right to participate
16 based on your decision of January the 18th. It somewhat ellipses part of
17 the Prosecution's position with respect to this residual discretion, and
18 I acknowledge that. I would just point out respectfully the Prosecution
19 took that position with an application to leave that -- for leave to
20 appeal that issue before the Chamber. Now that that is obviously final
21 law, we followed the decision of the Chamber on that to the extent that
22 that can be compartmentalised into the legal representatives on that
23 issue. So I hope I'm clear about that.

24 On the issue of the residual discretion, the legal
25 representatives obviously complain that it is cast too broad, and I would

1 just point it is not the Prosecution's intention to use this as the rule
2 but rather the exception, and under circumstances that would in
3 appropriate cases justify withholding maybe such circumstances such as
4 provision at the time may just -- may create a risk to a person, either
5 the declarant or another person, or it may result in the disappearance of
6 real evidence the Prosecution is trying to discover. There are a myriad
7 of unimaginable circumstances as well that the Prosecution is attempting
8 to retain a discretion that would not exercise arbitrarily or with
9 caprice but just to safeguard against certain situations. That position,
10 I would add, has been outlined to all the participants in this meeting
11 process, and they're well-aware of that position, but insofar as
12 supplementary positions on that, that concludes my remarks.

13 PRESIDING JUDGE FULFORD: Mr. Bulmer, thank you.

14 Mr. Walley, Ms. Bapita, I think this was largely covered this
15 morning in relation to your respective positions. Is there anything else
16 either of you would wish to add? No. Thank you.

17 Ms. Massidda? No.

18 I think had the Defence really have only focused on the provision
19 of statements that are in your possession to the legal representatives,
20 and I think you -- the Defence position really is that you wish to retain
21 the discretion as to whether or not to do that depending on the
22 circumstances.

23 MR. BIJU-DUVAL (interpretation): (No microphone).

24 PRESIDING JUDGE FULFORD: (No microphone).

25 Second issue, other documents supplied by a witness. The

1 Prosecution do not object to providing this to the representatives of
2 those with dual status. The reservation is in relation to victim
3 applicants, and the Office of Public Counsel for Victims is at odds with
4 the Prosecution in relation to victim applicants.

5 Anything to add, Mr. Bulmer?

6 MR. BULMER: I do not. Thank you.

7 PRESIDING JUDGE FULFORD: Ms. Massidda?

8 MS. MASSIDDA: Your Honour, I would simply like -- I think there
9 is a decision pending on the issue, in any case, to an extent, and in any
10 case, I would like to draw the attention of the Chamber on the transcript
11 of the closed-session hearing, if I recollect, which was held on the 12th
12 of March, 2008, in which the Prosecutor -- in which the Prosecution
13 stated no objection to the --

14 PRESIDING JUDGE FULFORD: Do you mean the 12th of March, 2008?
15 12th of February.

16 MS. MASSIDDA: 12th February of 2008, I think, but I can check
17 the
18 date in two minutes.

19 During the hearing the Prosecution --

20 PRESIDING JUDGE FULFORD: You must be careful, Ms. Massidda. If
21 you're referring to something that took place in a closed-session
22 hearing, you must exercise great caution in revealing what was said
23 during the course of this public session.

24 MS. MASSIDDA: I understand, your Honour, but I was simply
25 referring to the fact that the Prosecution did not object to the Office
of Public Counsel for Victims receiving certain documents if the office

1 was to be recognised as legal representative. There is now a decision by
2 Trial Chamber I, recognise the office as legal representative of victim
3 applicants at least until a decision is taken on their status. This is
4 the additional point that I would like to address with the Chamber.
5 That's it. And I can now confirm the date of the hearing. 12th of
6 February, 2008.

7 PRESIDING JUDGE FULFORD: Thank you very much indeed.

8 Mr. Withopf -- oh, sorry, Mr. Bulmer. I want to make sure
9 there's no misunderstanding about this.

10 Where we're dealing with other documents supplied by a witness,
11 that is comprehensive, is it? Anything that a witness hands over to the
12 Prosecution by way of materials or evidence, you have no objection to
13 copies of those being provided to the representative of participating
14 victims.

15 MR. BULMER: Of participating victims, yes. Victims being --
16 entitled to participant status as opposed to victim applicants, where the
17 Prosecution's discretion is submitted to be a bit different. But to
18 answer your question specifically, that is correct on the basis that from
19 a general principle perspective the evidence coming from the mouth of the
20 victim is the statement. The documentary evidence, if any, produced,
21 they work -- they're cobbled together as one basic similar item. .

22 PRESIDING JUDGE FULFORD: Thank you.

23 Next issue, number 3, a legal representative, present during the
24 medical examination of a dual-status witness.

25 The Prosecution don't object to this providing the consent of the

1 victim is given, and indeed the Prosecution don't object to the legal
2 representative being given a copy of the examination, again if consent is
3 given.

4 The office of public counsel objects to the notion that consent
5 has to be given, and the Defence have opened to the legal representative
6 being present.

7 Anything else on this, Mr. Bulmer?

8 MR. BULMER: No thank you.

9 PRESIDING JUDGE FULFORD: Ms. Massidda.

10 MS. MASSIDDA: For paragraph 16 of the second joint report, we
are

11 actually working on in order to find a sort of practical solution in
12 order to be able also for the office as if appointed later on in the
13 proceeding to be able to have the consent of the person concerned, but
14 it's still a pending issue, but we think that the issue could be solved
15 internally through discussion with the OPCV and the Registry Victims and
16 Witnesses Unit.

17 PRESIDING JUDGE FULFORD: Can I put a time limit on that, because
18 if we're going to issue a decision on this, it would be useful to have a
19 conclusion before we promulgate a decision.

20 MS. MASSIDDA: 28th of March?

21 PRESIDING JUDGE FULFORD: 28th of March.

22 Anything from the Defence on this point?

23 MR. BIJU-DUVAL (interpretation): Mr. President, perhaps I could
24 offer a clarification. The Defence has no objection as to the legal
25 representative attending the meeting or interview between a

1 representative of the Defence and a witness who is also a victim.
2 However, in the conducting of investigator -- investigations by the
3 Defence, as by the Prosecutor, this could call -- cause a difficulty as
4 regards the organisation of investigations.

5 We would like to avoid a situation whereby a legal representative
6 of a victim who is a potential witness be able to obstruct the interview
7 or be an impediment to an interview taking place until he can be present.
8 One can imagine the difficulties that could occur if the legal
9 representative of a possible witness is based in Mongolia, for instance,
10 and that the Defence is in Ituri for one week of investigations.

11 As you will know, the Defence's investigation budget is
12 particularly limited. What would happen if the legal representative were
13 to say to an investigator or the member of the Defence team that he
14 vetoed an interviewing of his client until he to be present? That would
15 basically mean that the interview could not take place and that the
16 Defence investigation would be impeded.

17 We would like to see this particular difficulty resolved, if
18 possible in a consensual fashion. But it is a general difficulty. That
19 is why in our submissions we said that on the one hand of course we were
20 in agreement with the principle of the presence of the legal
21 representative. That goes without saying. But that in certain cases for
22 certain good reasons, notably in relation to the conduct of
23 investigations, there may be instances where the legal representative
24 will need to accept that an interview takes place when he is not present.

25 The situation is tricky, but perhaps we should continue to

1 reflect on the matter, discuss the matter together. Otherwise, we're
2 likely to have investigations being held up.

3 Thank you, Mr. President.

4 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Biju-Duval.
5 In fact, you jumped one ahead. We were dealing with medical examinations
6 and the legal representatives being present, rather than the next topic,
7 which is legal representatives being present when witnesses with dual
8 status are being interviewed, but no matter. We now have your
9 submissions on that issue, but I'm going to take you back to the medical
10 examination point.

11 Is it really the Defence position, as I think is set out in
12 paragraph 17 of the joint report, that you object to the legal
13 representative of an individual with dual status being present when
14 there's a medical examination?

15 MR. BIJU-DUVAL (interpretation): That's a very brief summary.
16 We did not see any utility at a medical level.

17 Now, moving on to the relationship between the person concerned,
18 the victim witness and his counsel. That is a relationship on which the
19 Defence cannot intervene. If the person concerned wants to have his
20 medical file transferred to his legal representative, the Defence has no
21 comment on that. However, we do not see the utility, usefulness, of a
22 lawyer being present at a medical examination.

23 PRESIDING JUDGE FULFORD: I'm going to ask the question again.
24 I'm sorry, I'm going difficult on this, Mr. Biju-Duval. You may not see
25 the utility, but do you object?

1 MR. BIJU-DUVAL (interpretation): No, we do not make an objection
2 on principle.

3 PRESIDING JUDGE FULFORD: Thank you very much.

4 The next issue -- oh, well, I'm now jumping ahead. Does anybody
5 else want to participate in relation to the interviews?

6 MR. WALLEYN (interpretation): Thank you, Mr. President. As
7 regards the medical examination, I think that by definition if it is a
8 medical examination of a person who is being interviewed, it is something
9 which concerns us and is not related to the harm suffered. Therefore,
10 the legal representative of the victim should be consulted. We will be
11 happy for the legal representative to attend or a doctor who is appointed
12 by him from, for instance.

13 Secondly, sudden the Defence wish to hear as a witness a victim
14 who is already participating in the proceedings, and we know what the
15 general stance is of the Defence vis-a-vis victims participating in
16 proceedings, they refer to accusers, et cetera, et cetera, I would say
17 that by definition there is a certain tension between the position of the
18 Defence and the position of a victim participating in the proceedings, a
19 victim who may also launch a request for reparations.

20 For me, Article 28 of the Code of Ethics covers this matter. It
21 says that a counsel may not directly address the client of another
22 counsel unless he has obtained the consent of that counsel or has acted
23 via him. So the counsel is obliged to go through the legal
24 representative to obtain authorisation for an interview.

25 One might discuss application of that rule, but that is the

1 general rule.

2 Now, if feel that the legal representative is going beyond his
3 mandate or is behaving in an inappropriate fashion, then of course you
4 can always approach the Chamber.

5 PRESIDING JUDGE FULFORD: Thank you very much. Any other
6 submissions on this point? No.

7 Mr. Biju-Duval has set out the Defence position in relation to
8 interviews and the legal representative being present when those with
9 joint status are being interviewed.

10 Anything else on this, Mr. Bulmer?

11 MR. BULMER: Thank you, Mr. President. Just to highlight as well
12 on this issue, the Prosecution has taken a position with respect to
13 reasonable prior notice to be given to the legal representatives prior to
14 the contact with a dual-status individual for evidentiary purpose, and
15 that position is reflected in paragraphs 21 and 22 of the 16th of
16 January -- the original report, if I could use that term to describe it.
17 And I'm afraid I might sound like a parrot on some of these issues, but
18 that, again, seeks to establish general -- reasonable notices of the
19 rule, but there are operational concerns that made occasion to the Office
20 of the Prosecutor that that may not be achievable. That's the only
21 additional point I would make. Thank you.

22 PRESIDING JUDGE FULFORD: Mr. Withopf, the live feed point has
23 now been dealt with, and there's been an appropriate order.

24 The next issue is the provision of information to the legal
25 representative of the family or the legal guardian of minor witnesses

1 enjoying dual status.

2 Although submissions were put in from all involved in this,
3 certainly on my understanding of what was said there didn't appear to be
4 a conflict as such on this issue, but if anybody wishes to develop their
5 positions now, please take the opportunity at this point.

6 Prosecution? No. Defence? No. Good.

7 A possibly more difficult issue is where a victim applicant or a
8 victim has no legal representation and the Victims Participation and
9 Reparations Section need to contact that individual, and the role of the
10 Victims and Witnesses Unit in that process if the individual is in the
11 protection programme.

12 Somewhat complicated positions were set out in the -- in the
13 document. Does anybody wish to take the position set out there any
14 further? And I think in particular do the Victims and Witnesses Unit
15 wish to participate on this issue?

16 Yes, Mr. Dubuisson. Do you want to floor first then.

17 MR. DUBUISSON (interpretation): Mr. President, with much regret
18 I need to inform you that the problem lies with me. It's a problem --
19 internal problem in the Registry.

20 The problem is one which should prove quite rare. The situation
21 would be where VPRS receives a document which is not complete, and for
22 one reason or another they cannot recontact the person to obtain
23 additional information.

24 As you know, we also work through intermediaries, and it could
25 happen that we fail to find the person who assisted in the completion of

1 the form and we have to find another way.

2 For us the principle is that the report is confidential in the
3 framework of protection. However, if VPRS has done all that it can to
4 try and recontact the person through the intermediary but fails to do so,
5 we believe that there are two conditions which we must respect in
6 providing the services which we do to the parties.

7 First of all, it is important that on the form, and this is a
8 fact of the matter, it must be stated on the form that the person does
9 not wish his identity to be revealed to the Prosecution or the Defence.
10 In that case, then, we could indeed play a role. What is more, when we
11 provide the information to the VPRS, VPRS must undertake not to reveal to
12 that person that -- to the legal representative that they play a role in
13 the proceedings on one side or on the other. Based on that condition --
14 or subject to that condition, we could move from our usual position of
15 reserve to provide information.

16 It strikes us that it is not necessary that there be a document
17 where it is said that contact with the Prosecution or the Defence is not
18 desired. It is possible that that does not figure on a document because
19 it has been omitted or the utility was not seen at the time, in which
20 case we believe it would be not up to us to make a determination but,
21 rather, up to the Chamber to make a ruling.

22 The problem is quite simple, but I suspect that it will only
23 arise very early. But as we were asked to produce a document that was
24 quite complete and this detail, this hypothesis was also included, at
25 that time that we wrote the document we didn't have the solution, but I

1 think that one can certainly be found should the instance ever arise.

2 PRESIDING JUDGE FULFORD: Thank you, Mr. Dubuisson.

3 Any submissions from anyone else on this topic?

4 The last two issues under this heading, informing the legal
5 representative of the prosecution or the -- sorry. Informing the legal
6 representative of an intention to make a referral for protection, and the
7 last issue, providing the provision of information by the Victims and
8 Witnesses Unit to the legal representatives or the -- of the family or
9 the guardian of minor witnesses in the programme, in relation to both of
10 those points there seem to be no substantive observations that were made
11 in the joint document, but now is the moment if anyone has any additional
12 points they wish to make. Is answer is no.

13 Thank you all very much for your help in relation to compiling
14 that document. Where there are areas of disagreement the Chamber will
15 address them and provide, as it were, a definitive version, but that was
16 an extremely helpful exercise for which we're grateful.

17 Mr. Withopf, the final matter that I want to raise with the
18 Prosecution is this: If it's unfair or impractical for you to deal with
19 it now, you only have to say and we can put it over till tomorrow, but
20 let's see how we do.

21 In -- and can I stress that this is in a confidential provision
22 of information in relation to witnesses made on the 4th of March,
23 disclosed to the Defence. I don't give their names, but is a list which
24 includes 26 witnesses, the identities of whom have been revealed. There
25 are then eight witnesses who come after the 26 whose names have not been

1 revealed.

2 In relation to those witnesses, Mr. Withopf, first of all is it
3 anticipated that protective measures will be sought and, if so, have
4 referrals been made to the Victims and Witnesses Unit in relation to any
5 of those witnesses and, if so, how many?

6 MR. WITHOPF: Mr. President, your Honours, we can answer these
7 questions. I hand over to my colleague Ms. Samson.

8 PRESIDING JUDGE FULFORD: Yes, Ms. Samson.

9 MS. SAMSON: Your Honours, I can advise at the moment that of the
10 eight witnesses to which you are referring, referrals have been made for
11 five. They happen to be the first five, numbers 27 through to 31.

12 PRESIDING JUDGE FULFORD: Each of the referrals, please?

13 MS. SAMSON: I apologise. I don't have is that information at
14 hand. It's certainly information that we provided during the 12th
15 February and 13th February hearings.

16 PRESIDING JUDGE FULFORD: Right. So that's -- that's all --
17 these witnesses have all been covered during the confidential hearing on
18 the 12th and 13th of February.

19 MS. SAMSON: That's correct. I simply add that for the last
20 three that appear on this list, which are 32, 33, 34, that referrals have
21 not yet been made. Numbers 33 and 34 are at issue and will be discussed,
22 I expect, during a hearing tomorrow, and number 32 has -- had also been
23 addressed during those hearings. A referral has not yet been made for
24 him either.

25 PRESIDING JUDGE FULFORD: Ms. Samson, I anticipate that the

1 Prosecution's position will be that full disclosure of materials is
2 dependent on the implementation of protective measures.

3 MS. SAMSON: Yes, that's correct, your Honour. I add, however,
4 if I may, that to the extent that we can discuss this now, orders have
5 been made with respect to a certain number of these witnesses, in fact
6 the first five. Disclosure of their materials will take place next
7 Thursday, March 20.

8 PRESIDING JUDGE FULFORD: Good.

9 MS. SAMSON: And we've anticipated as between the VWU and the
10 Prosecution that protection will be afforded to them.

11 I may -- I need to add one more piece of information to this
12 puzzle which is very recent and affects one of the five witnesses that
13 I'm -- that are intended for disclosure next week, and that's on the
14 list, the trial witness list, that's number 28. He's Witness 156. He is
15 going to be removed from the Prosecution trial witness list.

16 PRESIDING JUDGE FULFORD: Mr. Withopf, I needn't have felt quite
17 as depressed as I had done earlier this morning. It's clear that
18 certainly in relation to most if not all of these witnesses the position
19 is in hand. And when I say that, that's by reference to a trial date of
20 the 23rd of June.

21 That, I think, brings to a conclusion all or nearly all of the
22 matters that are to be raised by the Bench. I ask the legal advisor to
23 let me know if I've missed anything, but before we rise today is there
24 anything in public session which any of the parties or the participants
25 wish to raise?

1 Yes, Mr. Withopf.

2 MR. WITHOPF: I believe still open to be discussed is agenda item
3 1.8, the use of the parties and participants and further subjects which
4 may need to be determined prior to the commencement of trial, and the
5 Prosecution actually has a strong interest to raise a few points in this
6 context.

7 PRESIDING JUDGE FULFORD: Do you want to it raise those in open
8 court or to communicate it to the Chamber? We're entirely in your hands,
9 Mr. Withopf. If it can be done shortly now, do set out your shopping
10 list.

11 MR. WITHOPF: It can be done shortly now. It may take me five
12 minutes.

13 PRESIDING JUDGE FULFORD: Good. Well, do so then, please. Thank
14 you.

15 MR. WITHOPF: I'm very grateful to this opportunity,
16 Mr. President, your Honours.

17 The first point I wish to make in this context is more a signed
18 reminder than setting out a new issue. It relates to the e-court
19 protocol. We believe, the Prosecution believes, that the e-court
20 protocol needs to be finalised as soon as possible in order to provide
21 for the parties and also to the participants the early opportunity and
22 the necessary time to enter the data as requested, and I draw the
23 attention of your Honours to and pending application of the Office of the
24 Prosecutor on metadata in respect of the source of materials.

25 I'm raising this -- it may sound like a minor issue, but for our

1 daily work it's actually quite important matter to be decided upon.

2 PRESIDING JUDGE FULFORD: I'm sorry to interrupt, Mr. Withopf.

3 Is this something that is resolved -- there is in fact, a decision of the
4 Chamber which we were proposing to file within the next 24 hours in
5 relation to metadata issues. Is it that you have you've got further
6 submissions to make or that you just need us to deliver a decision?

7 MR. WITHOPF: I principally just need you, Mr. President, your
8 Honours, is to deliver a decision.

9 PRESIDING JUDGE FULFORD: I can undertake that you'll have our
10 decision -- I'm just going to lean forward a minute. It will be filed
11 tomorrow.

12 MR. WITHOPF: That I'm very happy to hear, because as I said, it
13 has a serious impact on our daily work.

14 PRESIDING JUDGE FULFORD: Yes. Right. That will be dealt with.

15 MR. WITHOPF: Thank you very much, Mr. President, your Honours.

16 The further subjects, and now I'm coming to the heart of the
17 questions that have been put to us, further subjects that may require to
18 be determined prior to the commencement of trial.

19 We have identified a number of matters. Some of them are of
20 higher importance. Some of them are less importance. Nevertheless, we
21 all consider them being of such practical nature they need to be
22 addressed.

23 There are a number of issues in Regulation 55, and these issues,
24 in addition to the ones that have been dealt with by the Honourable
25 Bench, there are a few ones that have not been dealt with, and there's no

1 indication at this stage whether the Bench actually is prepared, and it
2 obviously does not have to deal with some of these matters. I
3 specifically make reference to the issue about the length of the
4 questioning of witnesses, the length of content of legal argument, or the
5 presentation in evidence in summary form. Again, these are issues
6 whenever the Chamber wishes to decide on them they will of great
7 significance in respect of our daily work.

8 In this context, the Office of the Prosecutor would also like to
9 be informed where possible as to whether the Chamber intends to hold what
10 is known as a Pre-Trial Conference at the ad hoc tribunals. I make
11 reference to Rule 73 bis of the ICTY's Rules of Procedure and Evidence,
12 and I make, in particular, reference to that rule, because this rule
13 deals with the determination of the Chamber of the number of witnesses
14 the Prosecution will call, and it also covers aspects on the time
15 available to the Prosecution for the presence of evidence. Again, very
16 live issues, and we would appreciate to get to know as soon as possible.

17 PRESIDING JUDGE FULFORD: Mr. Withopf, if I can deal with those
18 first of all.

19 Thus far it has been wholly unnecessary to impose time limits. I
20 think I can say on behalf of all three of us that we have been impressed
21 and grateful by the way in which all counsel have been focused and
22 succinct in the presentation of arguments to date, and I suspect that the
23 Bench would be adverse to imposing time limits when certainly on present
24 evidence they don't seem to be necessary. Indeed, it can have the
25 opposite effect. If you set a time limit, counsel tend to expand their

1 arguments so that they take up all the time that's been made available.
2 So it can act in a contrary fashion.

3 Now, if you're saying it's absolutely necessary for us to address
4 this in advance then we'll do so, but there had been an element of
5 intention behind not -- behind the Bench not raising this as an issue
6 really before it emerges as something which requires intervention.

7 So do I take it from your physical reaction to this, Mr. Withopf,
8 that you're not positively encouraging us to impose time limits?

9 MR. WITHOPF: I'm very happy to say, Mr. President, that I was
10 hoping to trigger exactly the reaction you have provided us with. Thank
11 you very much.

12 PRESIDING JUDGE FULFORD: In relation to a Pre-Trial Conference,
13 I mean, absolutely. I think on earlier occasions we've indicated that it
14 may well be important at an appropriate date before the commencement of
15 the trial to have a hearing in court where we can look very carefully at
16 the mechanics as to what is going to happen during the trial to make sure
17 that everything is in place, and in the parties and the participants
18 encourage that, we will certainly identify a date for that hearing.

19 Anything else, Mr. Withopf?

20 MR. WITHOPF: A few further matters. One of them deals with the
21 use of visual aids, which relates -- obviously evident from your physical
22 reaction, Mr. President, I understand that the Chamber considers this
23 also being an important issue.

24 The Office of the Prosecutor intends to use a number of visual
25 aids for the purpose of the upcoming trial, and in this context I believe

1 submissions of the parties and participants in respect of the definition
2 of visual aids may be helpful for the Trial Chamber to determine on this
3 matter. I raise just as a -- by way of example the question what
4 materials can actually be used to put together visual aids. Does it need
5 to come from the body of evidence that's being provided to the Honourable
6 Bench, that's being disclosed to the Defence, or can it be any other
7 information? I just put this question to you to illustrate the
8 importance of this issue.

9 And of course it also is a question that is disclosure related.
10 Do visual aids need to be provided to, and I deliberately avoid the term
11 "disclosed" to the Defence, and, if so, as to when.

12 PRESIDING JUDGE FULFORD: Mr. Withopf, please forgive me
13 interrupting again.

14 From a practical point of view, wouldn't it be best if there have
15 been discussions between the Prosecution and the Defence and the
16 participants on this sufficiently in advance of the trial to make sure
17 that there are no difficulties with the modes of presentation that you
18 have in mind, because it may be there will be no disagreement and there
19 will be no need for a ruling from the Chamber? So could we encourage
20 cross-party talks, as it were, on this point?

21 MR. WITHOPF: We will certainly follow that suggestion.

22 PRESIDING JUDGE FULFORD: Can you make sure that you've spoke be
23 to Ms. Mabile, Mr. Walley, Ms. Bapita, et cetera, so that they know
24 well in advance what you have in mind so that objections can be raised
25 sufficiently in advance for this to be resolved.

1 Speaking for myself, Mr. Withopf, I would strongly encourage the
2 use of visual aids. If there are things that are fair that can give the
3 Bench a better understanding of the facts in the case, that is to be
4 encourage. Of course I underline the word -- the words "so long as it's
5 fair." But so long as it's fair, then all of the new technologies should
6 be used where possible.

7 MR. WITHOPF: Thank you, Mr. President. A further point I wish
8 to raise in this context is the interpretation of Rule 68, prior recorded
9 testimony.

10 I put to you, Mr. President, your Honours, and this is just the
11 question: Is the Trial Chamber considering the use of written statements
12 similar to the provision of Rule 92 bis in the ICTY's Rules of Procedure
13 and Evidence?

14 At this stage it doesn't appear to us that the law -- the ICC's
15 law is supporting such an idea. Nevertheless, it's worth raising this
16 point.

17 And a second issue in the same context, and it's a similar
18 question, and I think this one is even more relevant and may become
19 easier practical issue, would the Trial Chamber be prepared to allow the
20 parties to make their witnesses confirm their written statements without
21 further examination-in-chief by the submitting party, obviously under the
22 precondition that the other party's given the opportunity to
23 cross-examine the witness? This has a number of advantages, and not the
24 least one, obviously, shortening the trial proceedings.

25 Again, I just raise this, I flag this, but for the Office of the

1 Prosecutor this is a live issue.

2 PRESIDING JUDGE FULFORD: That's likely to be -- that is likely
3 to be very contentious, I think, Mr. Withopf. I -- this would need a
4 positive Prosecution application to proceed in that way in relation to
5 specified witnesses so that the issue can be dealt with in principle, but
6 in principle by reference to a particular application for particular
7 witnesses. So you're going to have to take the initiative on this.

8 If that's a course of action you wish to be followed, could you
9 please put in a filing so the Defence can deal with it. Thank you very
10 much.

11 MR. WITHOPF: That's understood, Mr. President.

12 A further point, and this is the second last one, for your
13 information, a further point relates to the use of video materials, and I
14 give you a number of examples.

15 The first one pertains to the question whether or not transcripts
16 of the audio -- of the audio on video footage need to be provided in one
17 of the working languages of the court or in a language the accused
18 understands.

19 The second point in this context, just to illustrate what
20 questions come with the use of video materials, is the following:
21 Whether the full transcript of a video needs to be provided if the
22 Prosecution realise on a portion only. The same question obviously,
23 Mr. President, your Honours, arises in the context of video materials
24 containing potentially exculpatory information.

25 The third point in this context is the question whether

1 transcripts of video materials need to be provided for materials that
2 fall within the ambit of Rule 77.

3 And finally, and this is a very important technical aspect, we
4 would enjoy and would be happy to get clarification as to who will
5 operate the video materials in court. This is obviously a question
6 that's also put to the Registry. And if it is the Registry, the question
7 arises whether the Registry can confirm that it can operate excerpts of
8 video materials.

9 These are very practical questions.

10 PRESIDING JUDGE FULFORD: I think it's going to need a filing,
11 Mr. Withopf, I'm afraid. It certainly isn't susceptible to a quick
12 reaction from the Bench now, and I imagine the Defence would wish to
13 reflect and consider this carefully.

14 Two weeks for submissions?

15 MR. WITHOPF: Mr. President, we already have quite a number of
16 filings to be made two weeks from now. Can I ask you for three weeks
17 from now?

18 PRESIDING JUDGE FULFORD: Three weeks from now. So we'll say
19 Friday, three weeks' time.

20 And a response two weeks thereafter, Ms. Mabilie?

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

22 PRESIDING JUDGE FULFORD: Anything else on your list,
23 Mr. Withopf?

24 MR. WITHOPF: The very last point, and it will be a very short
25 point. There are a number of questions surrounding the provision of Rule

1 102(D), namely in respect of the implementation into practice of the
2 provision that the Defence shall always be the last one and have the
3 right to be the last to examine witnesses. This is a question where if
4 one applies the content of examination-in-chief, cross-examination, and
5 re-examination, in practice will actually result in some confusion, very
6 frankly, and the Office of the Prosecutor would like to get, where
7 possible, information from the Trial Chamber what their views on this
8 matter are.

9 PRESIDING JUDGE FULFORD: 4.00 p.m., three weeks' time.

10 MR. WITHOPF: Understood, and we will file some -- (overlapping
11 speakers).

12 PRESIDING JUDGE FULFORD: Defence a fortnight afterwards, please.
13 Thank you very much.

14 MR. WITHOPF: This basically concludes our submissions on this
15 matter. I now have a question. There's still the issue of the pending
16 application in respect of previously Article 54(3)(e) documents, and my
17 question is just the following: Whether the Chamber expects submissions
18 to be made either today or tomorrow. We can do it any time.

19 PRESIDING JUDGE FULFORD: Would it be convenient to deal with
20 this tomorrow, Mr. Withopf? They need to be dealt with, and there's
21 going to be a closed session tomorrow anyway. So we could deal with them
22 conveniently at that time if that's acceptable to you.

23 MR. WITHOPF: It is acceptable for us. I wish to add that we do
24 not necessarily see the need to address these matters in closed session.
25 We can address --

1 PRESIDING JUDGE FULFORD: Simply deal with them on the papers.

2 MR. WITHOPF: With them simply in addressing the Defence concerns
3 that have been raised in their respective filings, and the submission
4 would be short.

5 PRESIDING JUDGE FULFORD: How long will that take?

6 MR. WITHOPF: Not more than ten minutes.

7 PRESIDING JUDGE FULFORD: Just give me a moment.

8 Do so, Mr. Withopf.

9 MR. WITHOPF: In that respect, Mr. President, your Honours, my
10 colleague Ms. Solano will make our submissions.

11 MS. SOLANO: Your Honours, I will be referring to four points
12 that have been raised by the Defence in the responses to both our
13 applications to have admitted as incriminating evidence documents which
14 were formally under 54(3)(e) -- Article 54(3)(e) restrictions.

15 The first one of those is a complaint by the Defence that the
16 Prosecution has failed to apply for an extension of the time limits for
17 disclosure with respect to these documents, and in this regard the
18 Prosecution simply would like to refer the Defence to the Chamber's oral
19 decision of 13 December 2008 in which, in the Prosecution's reading, the
20 Chamber determined, actually instructed, the Prosecution to bring
21 applications to rely on these materials as incriminating evidence and
22 disclose them to Defence rather than to request extensions of time
23 limits.

24 The second point, your Honours, concerns the complaint by the
25 Defence that the Prosecution has not provided the dates on which the

1 documents which are subject to these two applications were collected by
2 the Prosecution.

3 In this regard, your Honours, we would like to state that in the
4 Prosecution's view, the date on which these documents were collected is
5 not relevant for the purposes of these applications the Prosecution
6 submits that in deciding whether these applications should prosper or
7 not, what the Trial Chamber should determine is whether the Prosecution
8 has enabled disclosure of these materials to the Defence with sufficient
9 time prior to the trial in order to allow the Defence to prepare
10 adequately pursuant to Article 64(3)(c).

11 At this stage, your Honours, given the envisioned trial date of
12 late June, the Prosecution submits that the Defence would have sufficient
13 time to prepare adequately where these 17 documents are concerned, and I
14 should finish the second point by emphasising that of these 17 documents
15 which run to a total of 76 pages, 12 have already been disclosed to the
16 Defence for their potentially exculpatory or Rule 77 content, and this
17 really reduces, if I may be allowed to use that word, the amount of the
18 new materials that the Prosecution would seek to rely on as incriminating
19 evidence to about five documents and 20 pages.

20 The third point, your Honours, we wanted to raise is in fact a
21 clarification. The Defence has raised in their responses that the
22 documents that they have had access to contain redactions, and the
23 Defence were concerned that the Prosecution had failed to flag the fact
24 that these documents are redacted.

25 In this regard the Prosecution would like to explain to the

1 Chamber and the Defence that these redactions were made by the providers
2 of the documents themselves, and this is the reason why the Prosecution
3 does not declare them when -- when disclosing them or when making --
4 filing them as annexes to its applications to the Chamber.

5 By and large, your Honours, these documents, to the extent that
6 they contain potentially exculpatory or Rule 77 information are not
7 affected by the redactions imposed by the providers of the documents. To
8 be more precise, there are, in the Prosecution's analysis, 12 out of the
9 17 documents that contain either potentially exculpatory information or
10 Rule 77 information or both. Nine of these documents -- for nine of
11 these documents these portions have not been redacted by the provider.
12 In the case of three documents, in the Prosecution's assessment the
13 provider has made redactions that do affect the potentially exculpatory
14 or Rule 77 content of the documents, and the Prosecution is preparing to
15 go back to the provider and request that more discreet redactions be made
16 so that the Defence can have access to this information.

17 The final point, your Honours, raised by the Defence in the
18 responses is the question of whether the Prosecution should be allowed to
19 even apply to introduce as evidence materials which it obtained under
20 Article 54(3)(e) of the Statute.

21 In this regard, your Honours, we would encourage the Bench to
22 read Article 54(3)(e) together with Rule 82 of the Rules of Procedure and
23 Evidence, which if read together, in our view, do create the possibility
24 that the OTP -- that the Prosecution would seek to rely on materials that
25 were originally obtained under Article 54(3)(e).

1 That would be all, your Honours.

2 PRESIDING JUDGE FULFORD: Any response to this, Ms. Mabilles?

3 MS. MABILLE (interpretation): No, Mr. President. I must say
4 that I have some difficulty following or finding the document, so I do
5 not have any observations to make.

6 PRESIDING JUDGE FULFORD: I don't want to be unfair on you,
7 Ms. Mabilles. Do you want to have time to put in a response in writing if
8 you found difficulties finding the document today? We'll certainly give
9 you --

10 MS. MABILLE (interpretation): Mr. President, it seems to me that
11 we have provided a response, and we did so on the 10th of March, 2008,
12 and so we limit ourselves to these observations, Mr. President.

13 PRESIDING JUDGE FULFORD: Well, thank you very much, Ms. Mabilles.
14 Anything else from anyone else? No.

15 Ms. Mabilles.

16 MS. MABILLE (interpretation): Mr. President, I am somewhat
17 worried as to the time, but we have a serious concern to raise pursuant
18 to what the Chamber requested of us. We approached the Office of the
19 Prosecutor with regard to the agreed facts, and we have to approach the
20 Prosecutor -- we have to approach the Prosecutor again today regarding
21 the experts.

22 We cannot make any progress now for the -- for this reason: The
23 Office of the Prosecutor and the Defence have not come to an agreement as
24 to the confidentiality of the discussions. The Defence position is that
25 all discussions that we have on agreed facts are confidential and shall

1 remain so until we have come to an agreement. The only thing that we
2 will disclose or transmit to the Chamber is the agreement itself. That
3 is our position. Accordingly, anything outside such agreement shall
4 remain confidential.

5 The Office of the Prosecutor is not in agreement with our
6 position. The Office of the Prosecutor considers that our discussions
7 may well be confidential, but under the issue is a certain number of
8 restrictions particularly that since we're not in agreement on one point,
9 we should submit the point to the Chamber for determination.

10 I shall not go into further detail on this point. The Defence
11 thinks that it is clear that -- I'm sorry. I forgot to raise another
12 argument that the Prosecutor raised with us.

13 The Prosecutor said that the Chamber may itself ask us to lift
14 the seal of confidentiality on our discussions, and then the Prosecutor
15 would be able to provide the information you have asked us to leave the
16 confidentiality from. Those are the Prosecution arguments.

17 Therefore, your Honour, we have decided not to talk further with
18 the Office of the Prosecutor, because it gives us no margin for security
19 within these discussions. I am saying this because I consider that in
20 regard to the experts, I have the same concerns more or less. All our
21 discussions must remain confidential until both parties come to an
22 agreement on a point, at which point we shall then submit it to the
23 Chamber.

24 If the confidential is lifted from all our discussions, in that
25 case I would like to inform the Chamber that my team has decided that we

1 will stop talking with the Prosecutor.

2 I did not wish you to be surprised that we have not succeeded in
3 coming to an agreement.

4 PRESIDING JUDGE FULFORD: Ms. Mabilie, I'm very glad that you
5 have you've raised this for the Chamber, and entirely right that you
6 should do so.

7 Mr. Withopf, in reality, is this ever an occasion in relation to
8 these conversations, in a sense robing room talk, would ever or should
9 ever find their way back to the Chamber? If -- we're talking about
10 agreed facts, not facts which the Chamber is forcing the parties to
11 agree, but facts which the parties are able to agree. If agreement can
12 be reached, and of course we would encourage this, if agreement can be
13 reached then agreement is reached and the trial goes on, so long as the
14 Chamber agrees with the approach, on the basis of those agreed facts. If
15 the facts can't be agreed, the Chamber can't force the parties to do so.

16 So do you envisage, in fact, a situation where you would ever
17 have to bring to us the content of what passed between you and
18 Ms. Mabilie in those discussions?

19 MR. WITHOPF: Mr. President, your Honours, I have been in such a
20 situation. I have been in such a situation. Obviously not before the
21 ICC, and that's the reason why the Office of the Prosecutor -- that's not
22 the sole reason, but it's one of the reasons why the Office of the
23 Prosecutor has taken the approach it has taken after very careful
24 consideration. Of course the Office of the Prosecutor is very much in
25 favour of continuing the discussion on agreed facts for the very many

1 obvious reasons. However, full confidentiality the Office of the
2 Prosecutor finds extremely problematic for a variety of reasons.

3 It's not the experience lawyers within the Office of the
4 Prosecutor have made in the past before international tribunals in their
5 respective home country jurisdictions that any Defence has gone so far as
6 to make the Office of the Prosecutor actually sign, sign a formal
7 agreement that any discussions and any details of these discussions
8 remain confidential. This was a completely new approach to all lawyers
9 within the Office of the Prosecutor, to most of them.

10 The second point: Even if there is agreement on facts, later on
11 in trial the issue may again come up, and there may be different
12 interpretations on the agreement and on the scope of the agreement. And
13 this is again something where the Office of the Prosecutor is very
14 concerned to enter into an agreement, into such a strong agreement with
15 the Defence that everything is confidential.

16 Of course we consider when we meet Ms. Mabilie and the co-counsel
17 and other Defence lawyers on the Defence team in our meeting rooms or in
18 their meeting rooms, we have no intention to deliberately disclose this
19 information to the Trial Chamber, but in no such occasion we can exclude
20 that there may come a time and there may be a reason that the Office of
21 the Prosecutor considers it's necessary in the interests of justice to
22 disclose such information to the Bench.

23 So the Office of the Prosecutor, to keep it short, has taken a
24 very principled approach after careful consideration to not enter into
25 such an agreement. And if I may clarify a last point that it may be a

1 misunderstanding on the side of my learned friends from the Defence. It
2 was never the intention of the Office of the Prosecutor to provide the
3 facts that are not agreed upon for determination to the Trial Chamber.
4 It obviously doesn't fall within the range of functions of the Trial
5 Chamber.

6 This is the Prosecution's submission on this matter.

7 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, thank you for that.

8 It seems to me we can't force the parties to agree facts and,
9 similarly, we can't force the parties to enter into confidential
10 agreements in relation to the discussions that they have with one
11 another.

12 It may be that there are other ways of dealing with this.
13 Proposals as to agreed facts can be made and responded to without
14 meetings and discussions between the parties. You can draft a list of
15 proposals in the areas which you believe are susceptible to agreement to
16 be sent to Ms. Mabilille for her consideration and for any agreement or
17 suggested amendments to that list. So the fact that you may not be able
18 to sit down in a room together to have detailed discussions about it I
19 hope will not prevent sensible suggestions being made as to agreements
20 and sensible responses being received to those suggestions, and so I
21 would encourage the parties to find other ways of dealing with this which
22 will stop witnesses being brought unnecessarily to The Hague to give
23 evidence and this then turns out that their evidence is not in dispute.

24 MR. WITHOPF: This is another point, Mr. President, your Honours,
25 that actually was subject -- subject matter of the discussions between

1 the Office of the Prosecutor and Ms. Mabilille.

2 The Defence so far in this respect has taken the approach that
3 without the full disclosure of all materials, and even at a stage, and I
4 stand corrected if I'm misrepresenting what -- misrepresenting the
5 Defence point of view, even afterwards the Defence would not be in a
6 position to agree on the content of future testimony.

7 This is one further point, and since my colleague has chosen to
8 provide the Trial Chamber with information on this subject matter, and
9 rightly so, I wish to add a further element to this whole suggestion.

10 As you may recall, Mr. President, your Honours, the big issue
11 came up -- or it was made a big issue by my learned friend from the
12 Defence that there are further investigations against Mr. Thomas Lubanga
13 and that this matter hampers the discussions on agreed facts.

14 For the full information of the Trial Chamber, the Office of the
15 Prosecutor has undertaken, has undertaken to agree that agreed facts in
16 the present proceedings would never be used in any other potential future
17 proceedings following the suggestion of the Trial Chamber. The Office of
18 the Prosecutor has accordingly informed my learned friends from the
19 Defence about this undertaking, and despite this undertaking my learned
20 friend from the Defence continues to have a -- or appears to continue to
21 have a serious problem with this issue. All discussions on agreed facts
22 are sort of hampered by a whole series of considerations raised by my
23 learned friend from the Defence.

24 PRESIDING JUDGE FULFORD: Thank you, Mr. Withopf. I'm going to
25 propose this way of proceeding on this, that we with await the complete

1 disclosure of the Prosecution case, and you are very shortly indeed going
2 to receive some final immovable dates in relation to this. Once full
3 disclosure has taken place, at a Status Conference sufficiently in
4 advance of the trial we will return to this issue to see whether progress
5 can -- can be made to ensure that witnesses are not needlessly brought to
6 this court from Africa. But in the meantime, we encourage the parties to
7 communicate to each other, I'm not necessarily going to use the word
8 "discussion," but to communicate with each other to try to resolve these
9 two outstanding issues of the joint instruction of experts and the
10 agreement of facts, because otherwise time and resources are going to be
11 wholly unnecessarily expended.

12 MR. WITHOPF: That's well understood, Mr. President, and with the
13 limits I have described, we'll certainly give it an extra effort.

14 Before I conclude there's one other aspect completely unrelated
15 to this matter my colleague Mr. Bulmer wants to very briefly address.

16 PRESIDING JUDGE FULFORD: Yes. I'm really not sure how much
17 further we can take it this afternoon. I think it's now becoming very
18 unfair on the interpreters. And there were some other issues, I think,
19 from the other side of the court.

20 I'm very sorry about this. We're going to have to break off now.
21 It is -- it is simply intolerable for the interpreters who have had to
22 work very hard, and we will have to have a short open hearing at 10.00
23 tomorrow morning, I'm afraid.

24 And so the Defence know, there is to be an ex parte hearing
25 tomorrow in relation to protective measures. Because this is a public

1 session, I cannot say anything more about it than I just have, but if
2 there is discussions between the Defence and the Prosecution, some detail
3 in relation to that hearing can be provided to Ms. Mabilie.

4 Good. We'll adjourn now and sit again at 10.00 tomorrow morning.

5 Thank you very much.

6 The hearing ends at 4.30 p.m.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25