

1 International Criminal Court

2 Trial Chamber I

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

4 Status Conference - Open Session

5 Tuesday, 6 May 2008

6 The hearing starts at 2.05 p.m.

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

9 PRESIDING JUDGE FULFORD: Good afternoon. The Prosecution are
10 represented by Mr. Withopf, Mr. Kaufman, Ian Bulmer and other members of
11 the Prosecution's team. The Defence are represented by Maitre Mabilie,
12 Marc Desalliers, Caroline Buteau, and there are other members of the
13 Defence team present. Paolina Massidda is here in her role certainly for
14 the Office of Public Counsel for Victims is. I don't know whether you
15 have an additional role this afternoon, Ms. Massidda.

16 MS. MASSIDDA: Yes, your Honour. I'm also representing victims
17 A 10506 on behalf of Ms. Carine Bapita. Power of attorney has been filed
18 yesterday in the case record, and I'm also temporary representing Mr. Luc
19 Walley, who has a small transportation problem. He will be arriving in
20 half hour maximum.

21 PRESIDING JUDGE FULFORD: Well, thank you for filling in for the
22 time being, Ms. Massidda, we're very grateful to you.

23 Mr. Withopf, there's a fairly heavy agenda. We don't have a huge
24 amount of time. Of course, if necessary the hearing can be adjourned,
25 although everyone will recognise the benefits that will accrue if we do

1 manage to get through the agenda this afternoon. The first matter
2 obviously is, rather, are the issues relating to exculpatory material,
3 and although Article 67 and Article 54(3)(e) are connected, it may be
4 helpful to separate them out for the purposes of submissions, and if that
5 is convenient, I would recommend that.

6 Mr. Withopf, if we could take Article 67(2) first, and I hope by
7 way of focusing argument if I can just say very, very briefly and then
8 hand the floor over to you that it seems to me that the central issue in
9 relation to Article 67(2) is what is meant by the words "or to mitigate
10 the guilt of the accused." Is that a concept which is limited truly to
11 mitigatory materials, in other words, materials that would come into play
12 post conviction if there were to be one, or do they have a wider meaning
13 and refer to matters which could be relevant to the guilt or innocence of
14 the accused? That's question one.

15 Question two is if the first interpretation is right and they
16 relate -- and those words relate solely to the period post conviction if
17 there is one, what is the obligation on the Prosecution in relation to
18 disclosure? Do all those materials have to be disclosed as soon as is
19 practicable in a real sense prior to the Chamber's verdict, or is it
20 sufficient for those materials to be disclosed post conviction if that is
21 the result?

22 Well, I said they were short questions. I'm not sure whether
23 they are, but bearing those matters in mind on Article 67, I turn the
24 floor over to you, Mr. Withopf.

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

1 I understand that I will have to respond to these questions in the wider
2 context of the two aspects, two questions that have been put to us, and
3 obviously we will do so. I think for the public to understand what we
4 are going to discuss, I will read out the question that has been put to
5 us and it reads as follows: "The interpretation to be given to Article
6 67(2) of the Statute and whether the obligation of the Prosecution at
7 this stage," and I understand, Mr. President, this is directly linked to
8 your questions, "at this stage is to disclose all materials that the
9 Prosecution believes, shows, or tends to show the innocence of the
10 accused, or to mitigate the guilt of the accused or which may affect the
11 credibility of Prosecution's evidence."

12 That's the question that has been put to us. And, Mr. President,
13 your Honours, due to the importance of this matter our submissions today
14 will be a bit lengthier than usual, but we will focus on the true issues.

15 Article 67(2) requires the Prosecution to disclose to the Defence
16 materials in the Prosecution's possession or control that the Prosecution
17 believes, first, show or tend to show the innocence of the accused or,
18 second, to mitigate the guilt of the accused, or, third, which may affect
19 the credibility of Prosecution evidence.

20 Materials falling within either of these categories in our
21 submission are potentially exculpatory, that's foreseen by the law, and
22 as such give rise to the Prosecution's disclosure obligations.

23 Contrary, Mr. President, your Honours, in our submissions we will
24 also partially address the Defence submissions in this context, contrary
25 to the Defence submissions, and I make reference to paragraph 7 of the

1 Defence filing, this disclosure obligation, however, does not require
2 disclosure of all potentially exculpatory materials and certainly not at
3 this stage of the proceedings. Why is this so, Mr. President, your
4 Honours? It is so because in our submission Article 67(2) needs to be
5 read together with other provisions of the Rome Statute, the Rules of
6 Procedure and Evidence, and applicable treaties, and these provisions
7 together create the disclosure regime of the ICC.

8 Amongst these positions very obviously is Article 54, and Article
9 54 creates a duty for the Prosecution to investigate incriminating and
10 exonerating, and I repeat, and exonerating circumstances equally. I make
11 reference to Article 54(1)(a), and Article 54, accordingly invests the
12 Prosecutor with the power to obtain leads materials confidentially.
13 Reference is obviously made to Article 54(3)(e).

14 This material can be, Mr. President, your Honours, can be of
15 incriminatory but it also can be of exculpatory nature. Article 54 does
16 not, does not limit the Prosecution's power to obtain leads materials to
17 incriminatory evidence. Rather, the Article governs the Prosecution's
18 duties and powers with respect to investigation generally and this,
19 Mr. President, your Honours, is a very important point to make at the
20 very outset of our submission.

21 Article 54(3)(e) therefore creates the presumption that leads
22 materials will not be disclosed if they were obtained confidentially and
23 the providers do not consent to disclosure. The existence,
24 Mr. President, your Honours, the existence of this article shows that the
25 drafters of the Statute already envisaged the possibility that leads

1 materials would not be disclosed at all, and in light of the fact that
2 Article 54 is a general provision which does not distinguish between
3 incriminatory and exculpatory evidence or lead materials -- leads
4 materials, its affect is to permit the non-disclosure of leads materials
5 for both categories.

6 There are other provisions in addition to Article 54(3)(e) in the
7 ICC law that also foresee the possibility that materials in the
8 possession or the control of the Office of the Prosecutor not be
9 disclosed. Like in Article 54(3)(e), the consent of the providers is a
10 requisite sine qua non for disclosure, and I very briefly will discuss
11 the respective provisions.

12 There is first Article 93(8)(b) of the Statute which foresees the
13 transmission by States of documents or information to the Prosecution on
14 a confidential basis and for these purposes meaning not for introduction
15 into evidence. But in this context Mr. President, your Honours, even
16 more important is Article 18(3) of the UN Relationship Agreement and the
17 UN Relationship Agreement, Mr. President, your Honours, is applicable law
18 pursuant to Articles 21(1)(b) and Article 2 of the Rome Statute as well
19 as Article 86(7). Article 18(3) of the UN relationship agreement
20 foresees the provision by the United Nations of documents or information
21 or information to the Prosecution on a confidential basis and for leads
22 purposes only.

23 Related to Article 18(3) of the UN agreement is obviously Article
24 10(6) of the memorandum of understanding between the ICC and the UN
25 cooperation between the ICC and MONUC and again this memorandum of our

1 understanding in my submission, Mr. President, your Honours, is
2 applicable law pursuant to Articles 21(1)(b) and (2) of the Statute and
3 again pursuant to Article 87(6).

4 Article 10(6) of the Memorandum of Understanding foresees the
5 provision by MONUC of documents to the Prosecution accordance with
6 Article 18(3) of the UN relationship agreement again on a confidential
7 basis and for leads purposes only.

8 Mr. President, your Honours, I'm now going to address a point
9 which I believe is very important in this context, and what I'm going to
10 address is the following: There are -- there are provisions in the ICC
11 law that also foresee the possibility that the Defence will obtain
12 materials confidentially and as with the case of the Prosecutor, the
13 presumption is that these materials will not be disclosed save with the
14 consent of the providers, and again I will very briefly touch on the
15 provisions concerned.

16 There is first Rule 81 -- 82(5) sorry. 82(5) refers to the
17 possibility that the accused person receives the materials on a
18 confidential basis under the very same conditions as set forth in Article
19 54(3)(e), namely on a confidential basis and for leads purposes only.
20 But more importantly in this context is Article 10(18) of the Memorandum
21 of Understanding. It's more important because Article 10(18) of the
22 Memorandum of Understanding, Mr. President, your Honours, extends the
23 access to documents and information held by MONUC to the Defence and it
24 does so by stating that, and I'm going to quote: "The provisions of this
25 article shall also apply mutatis mutandis with respect to requests

1 submitted by the Registrar for the purpose of facilitating investigations
2 pursuant to an order of a Pre-Trial Chamber or a Trial Chamber."

3 The provisions of this article obviously include Article 10(6) of
4 the memorandum of understanding and Article 10(6) governs the provision
5 of materials pursuant to this article on a confidential basis.

6 Article 10(18) admittedly does not refer to the Defence in
7 explicit or exclusive terms, but the Prosecution wishes to note and the
8 Registrar can be called upon to confirm that the provisions on
9 cooperation with the court in the memorandum of understanding, and I make
10 particular reference to Articles 9(7), 10(18) 11(14), 12(10), 13(4), and
11 15(5) were negotiated in the Memorandum of Understanding in particular
12 with the Defence in mind; that is, with a view to ensure that Defence
13 teams could request an order from Chambers, including the Trial Chamber,
14 for the Registry to seek to obtain materials from the UN on behalf of the
15 Defence teams.

16 THE INTERPRETER: Please slow down for the record.

17 MR. WITHOPF: An order may be sought by the Defence pursuant to
18 5(73)(b) and Rule 116, and this provision thus affords the Defence the
19 possibility to take certain steps and to take such steps independently -
20 and this is very important to note - independently from the Office of the
21 Prosecutor.

22 I come to a conclusion Mr. President, your Honours, the
23 Prosecution's obligation to disclose materials to the Defence is
24 regulated in terms of Article 67(2) in a very precise way and must be
25 read in the context of the other provisions I was just detailing, and in

1 particular, obviously, in the context of the provisions that are found in
2 the Statute itself and this creates a presumption of non-disclosure as a
3 guarantee of confidentiality to information providers.

4 Read together, Mr. President, your Honours, the provisions making
5 up the ICC disclosure regime require the Prosecution to disclose to the
6 Defence all materials in its possession or control which the Prosecution
7 believes show or tends to show the innocence of the accused, mitigate the
8 guilt of the accused, or may affect the credibility of Prosecution
9 evidence so long -- so long as these materials have not been provided
10 confidentially, or if they have been provided confidentially the
11 providers have consented to disclosure.

12 In our submission, Mr. President, your Honours, Article 54(3)(e)
13 and the other relevant provisions in the ICC law have been enshrined in
14 the Statute by its drafters and in the case of the United Nations by the
15 Assembly Of State Parties in recognition of two main principles; namely,
16 first the fact that the Prosecutor's investigation should generally be
17 broad enough to obtain evidence which can be relied upon as alternative
18 to leads materials provided confidentially.

19 And second, Mr. President, your Honours, the need for the Statute
20 to promote international cooperation and judicial assistance, and in view
21 of the Court's inability to compel sources to provide it with the
22 information and documents it relies on it for its investigations and
23 prosecutions.

24 Mr. President, your Honours, this would be our submissions in
25 respect of the first question that has been put to us. If you allow me

1 to continue, I would address the second question.

2 If you allow me, I just want to read an e-mail I have received
3 from the Office of the Prosecutor.

4 I will address the second question and then I will cover aspects
5 of the two questions that have in addition been put to us today. The
6 second question, for the benefit of the public in this context I read it
7 out again. The second question that has been put to us reads as follows:
8 "Consequences of the non-disclosure of potentially exculpatory materials
9 due to limitations to disclosure and post by information providers
10 pursuant to Article 54(3)(e) of the Statute.

11 The starting point, Mr. President, your Honours, of our
12 submission is the fact that the Rome Statute and the Rules of Procedure
13 and Evidence do not identify, they do not identify any consequences of
14 the non-disclosure of potentially exculpatory materials due to
15 limitations to disclosure imposed by information providers pursuant to
16 Article 54(3)(e), and the fact that none of the rules address these
17 consequences was known to the drafters of the Rules of Procedure and
18 Evidence according to the drafting history for preparation commission.

19 Whether for lack of time or due to the strong position of some
20 delegations, and we made some inquiries in that respect, the
21 confidentiality under Article 54(3)(e) was absolute, no specific
22 provision or provisions were added. A number of the negotiating States
23 and a number of the commentators have recognised the need for the Court
24 to fill in this vacuum. In doing so they have called on the court to be
25 mindful that the system it settles on must not, must not compromise

1 confidentiality.

2 In this regard, Mr. President your Honours reference may be made
3 to Rule 84, which states that: "The Trial Chamber shall -- orders for
4 disclosure of documents or information previously disclosed in accordance
5 with Articles 64(3)(c) and 64(6)(d) and 67(2) and subject to 68(5)."

6 In this context, Mr. President, your Honours, it's particularly
7 important that Article 64(3)(c) states that the Trial Chamber shall
8 provide for disclosure of documents or information not previously
9 disclosed and I'm going to quote: "subject to any other relevant
10 provision of the Statute." That's the end of the quote.

11 In our submission, Mr. President, your Honours, this supports the
12 assertion that the Statute recognises the disclosure obligations must be
13 read in conjunction with other provisions and obviously in this context
14 notably in conjunction with Article 54(3)(e).

15 Against this background, Mr. President, your Honours, we submit
16 that where providers do not consent to the disclosure of potentially
17 exculpatory materials a number of solutions may be arrived at and one
18 possibility, in our submission, Mr. President, your Honours, is to draw
19 by analogy from procedures contemplated in other provisions of the
20 Statute, and obviously those dealing with national security come to mind.
21 And in doing so, Mr. President, your Honours, the Prosecution wishes to
22 note certain important caveats with respect to the very distinct objects
23 and purpose of the regime create under Article 72 of the Statute, and in
24 particular, I make reference to paragraph (3) of Article 72, which
25 provides that - and I'm going to quote again: "Nothing in this article

1 shall prejudice the requirements of confidentiality applicable under
2 Article 54 paragraph (3)(e) and (f)." That's the end of the quote.

3 Nonetheless, Mr. President, your Honours, and this is our
4 respectful submission, nonetheless a number of modalities described under
5 Article 72 for resolving issues related to disclosure could be usefully
6 drawn upon.

7 In the first instance in our submission the regime established
8 under Article 72(5) requires the State acting in conjunction with the
9 Prosecution, the Defence, or the Chambers as the case may be to take, and
10 I quote, "all reasonable steps to resolve the matter through cooperative
11 means." The reasonable steps envisaged in the Statute explicitly and
12 prominently include the resort to existing or available alternative
13 evidence, and in this context Mr. President, your Honours, I make
14 obviously reference to our filing of 28 of March, 2008.

15 More concretely, Article 72(5)(b) foresees the court could reach
16 a determination, and I quote, "As to the relevance of the information or
17 evidence sought or a determination as to whether the evidence, though
18 relevant, could be or has been obtained from a source other than the
19 requested State," and Article 72(5)(c) foresees that the information or
20 evidence could be obtained, and I quote: "From a different source or in
21 a different form."

22 Furthermore, Mr. President and your Honours Article 72(5)(e)
23 foresees that agreement may be reached on conditions under which the
24 assistance of a State for the purpose of enabling disclosure could be
25 provided and I quote: "Including, among other things, providing

1 summaries or redactions, limitations on disclosure, use of in camera or
2 ex parte proceedings, or other protective measures permissible under the
3 Statute and the Rules of Procedure and Evidence."

4 In our submission, Mr. President, it is also relevant to examine
5 the standard to be applied by the Chamber in deciding whether to order
6 disclosure pursuant to Article 72(7). The first point we wish to raise
7 in this context is the following: The power to issue an order is limited
8 to cases in which the materials are "relevant and necessary for the
9 establishment of the guilt or innocence of the accused." There is no
10 authority to order the disclosure of materials merely on the basis that
11 they are of mitigating value. And, Mr. President, your Honours, this
12 obviously addresses partially the specific questions that have been put
13 to us. Or that they undermine the credibility of Prosecution evidence.

14 And the second point we wish to make in this context is the
15 following: As an alternative to the issuing of an order, the Chamber is
16 vested with the power to, and I quote again "make such inference in the
17 trial of the accused as to existence or non-existence of a fact as may be
18 appropriate in the circumstances." I refer to Article 72(7)(b)(ii).

19 The regime for ordering disclosure described above is not
20 applicable in our submission in the context of an Article 54(3)(e)
21 agreement; however, the standard to be applied by the Chamber in arriving
22 at its determination how rights of the defendant are to be guaranteed is
23 instructive.

24 I'm going to summarise, Mr. President, your Honours. The
25 Prosecution's position is that the Chamber should consider whether the

1 non-disclosed confidential materials materially impact on the guilt or
2 innocence of the accused person and whether they are available to the
3 accused and his Defence in the form of disclosed alternative evidence.
4 And again here I make reference to the details we have provided in our 28
5 March filing.

6 And I wish to add and I wish to emphasise, Mr. President, your
7 Honours, that in the present instance such alternatives include the
8 statements of witnesses who will appear at trial and the Defence will
9 have the opportunity to cross-examine such witnesses.

10 The Prosecution submits, Mr. President, your Honours, that where
11 the evidence is so critical as to materially impact on the guilt or
12 innocence of the accused the appropriate remedy is for the Chamber to
13 make such inferences in the trial as to the existence or non-existence of
14 facts as may be appropriate in the circumstances, and where the Chamber
15 considers this remedy to be insufficient, the appropriate remedy is the
16 dropping of the relevant charges.

17 PRESIDING JUDGE FULFORD: Mr. Withopf, I've been quiet thus far
18 but I'm going to interrupt you on this point.

19 On a quick reading of Article 72, am I right in making the
20 assumption that where necessary the court will be aware of the content of
21 the -- the evidence? For instance, to be able to draw the kind of
22 inferences that you've just referred to, wouldn't the court need to know
23 what the material was? And what I'm seeking to do is to say there's a
24 difference, isn't there, between the Article 72 regime and the situation
25 that we're confronted with here, because under these agreements we are

1 not allowed to look at the material at all because of the terms of those
2 agreements.

3 MR. WITHOPF: Mr. President, your Honours, I'm very well aware of
4 this difference, and if you allow me to continue, I will address this
5 matter, because the Office of the Prosecutor will offer a potential
6 solution to this dilemma. Thank you very much, Mr. President.

7 In no instance, Mr. President, your Honours, does the Statute
8 foresee that the Chamber would order the disclosure of documents or
9 information that were provided to either the Prosecution or the Defence
10 on a confidential basis pursuant to the conditions set forth in Article
11 54(3)(e).

12 We wish, however, Mr. President, your Honours, we wish, moreover,
13 to recall the distinct position of international organisations and other
14 providers who are not parties to the Rome Statute and are therefore not
15 required to cooperate with the court. In particular in light of the
16 provision of Article 3 of the United Nations relationship agreement
17 ordering the disclosure of materials that were provided by the United
18 Nations confidentially would be also inappropriate.

19 We wish to inform, Mr. President, your Honours, we wish to inform
20 the Chamber that the other providers, in addition to the United Nations,
21 are not States but, rather, individuals or organisations who have
22 legitimate reasons for it's concerns about disclosure. Such individuals
23 or organisations may feel that the fact of the cooperation or interaction
24 with the court may endanger the personal safety of their staff or of
25 other individuals, or moreover, compromise the security and the proper

1 conduct of the operations and activities on the ground. In their case,
2 too, Mr. President, your Honours, the Prosecution submits that it would
3 be inappropriate to order disclosure of materials provided by them
4 confidentially.

5 Mr. President, your Honours, I'm now going to address and to
6 touch upon the potential solution we could offer the Chamber on how to
7 deal with the situation, and this would address the particular concern as
8 has been raised by the Presiding Judge.

9 The existing ICC disclosure regime makes no provision for article
10 54(3)(e) materials to be shown to the Trial Chamber ex parte, and this is
11 different, and I will be very brief in making my reference or making
12 reference to the ICTY, but nevertheless it's notable that at the ICTY a
13 provision is made for the Chamber, but here I haste to add, I really
14 haste to add, "But only to the Trial Chamber" - and this was a quote -
15 "to have access to such materials, no parallel provision exists in the
16 ICC law. When I make reference to the ICTY law, I obviously make
17 reference to Rule 68(4), which briefly has been Rule 68(d), and this
18 provision was introduced only in December 2003, after the ICC Rules of
19 Procedure and Evidence have been adopted. And this, Mr. President, your
20 Honours, is the starting point for our following submission.

21 The Prosecution has inquired with the providers of the
22 undisclosed evidence whether they would be prepared to agree for the
23 Prosecution to show the materials to the Chamber, and we have paid
24 particular attention to this feature. And we wish to inform you that
25 some of the providers have refused for the reasons I was just detailing.

1 However, other providers have expressed concern over the fact that the
2 Prosecution is unable to indicate what might happen with the materials if
3 revealed to the Trial Chamber in this way, but nevertheless if certain
4 guarantees are given, they would be prepared to agree that the
5 Prosecution provides the materials to the Chamber.

6 What these providers may want to get assurances the materials
7 will be shown to the Trial Chamber only, obviously very parallel to Rule
8 68(4) of the ICTY's Rules of Procedure and Evidence, and that consent to
9 disclosure to the Defence will remain the provider's prerogative. That's
10 where we currently are.

11 In addition --

12 PRESIDING JUDGE FULFORD: What provision, Mr. Withopf, is covered
13 by this?

14 MR. WITHOPF: Mr. President, your Honours, if you allow me to
15 make one particular inquiry because this is very important for my answer.

16 (Prosecution counsel confer)

17 MR. WITHOPF: Thank you very much, Mr. President, your Honours.
18 I wanted to make this further inquiries with our expert Ms. Spittler on
19 these matters, and I do not want to be overly optimistic in providing you
20 with figures or percentages. We obviously would need to further inquire
21 with the providers, but I do not want to exclude, and I think this may be
22 the most important the Chamber may be interested to hear, I do not want
23 to exclude the possibility that a high percentage of the materials
24 concerned would fall into that category.

25 We obviously would, if the Chamber would give us some indication

1 whether such a procedure would satisfy its concerns, we would then be in
2 a better position, and that's the point I wish to make, to negotiate with
3 the information providers. We currently are in a situation in our
4 negotiations with the providers where we could not provide for clarity,
5 and the various information providers, be it organisations, be it
6 individuals, they wanted to know, "What can you give us?" And of course
7 we are only able to tell them that the issue is on the agenda of today's
8 hearing and afterwards we may be in a better position to provide you with
9 some clarity. That's basically where we are. Obviously if the Chamber
10 could give some indication where this all goes to, it maybe helpful for
11 our negotiations with the providers.

12 PRESIDING JUDGE FULFORD: Mr. Withopf, you need more than some
13 indication, don't you, for this to have any real purchase. What you want
14 from us, as I understand it, is an indication that having seen it, having
15 looked at it, we would take no steps that would lead to it, as it were,
16 leaving our hands apart from going back to you, without the agreement of
17 the information providers. I mean, that's in essence it, isn't it?

18 MR. WITHOPF: Exactly right, Mr. President. And this,
19 Mr. President, your Honours, would conclude our submission on these two
20 questions, but there still remains -- remain a few words to be said in
21 relation to the very specific question you had asked at the beginning of
22 this hearing.

23 PRESIDING JUDGE FULFORD: Well, before you pass on to those,
24 Mr. Withopf, can I just make sure that housekeeping, as it were, is in
25 order on this.

1 We have been told in the filings late March, early April that
2 there are 181 items in relation to which the providers will not agree to
3 lift the current restrictions. Is that figure still a valid one?

4 MR. WITHOPF: Mr. President, your Honours, this figure remains
5 unchanged.

6 PRESIDING JUDGE FULFORD: Right. To save me going through the
7 list, do I take it that the -- that the last figures set out in your
8 filings are still accurate in relation to the position as regards the
9 exculpatory materials?

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

11 PRESIDING JUDGE FULFORD: Right. Now, you identified,
12 particularly I think it was in the 25th of March filing, six categories
13 which the Prosecution said do not reveal exculpatory materials, although
14 they may have an impact on mitigation. Am I right in understanding that
15 the totality of this material extends beyond those six categories?

16 MR. WITHOPF: I'm not quite sure, Mr. President, your Honours, if
17 I understand the question fully and correctly.

18 PRESIDING JUDGE FULFORD: Well, I didn't quite understand the
19 filing, Mr. Withopf, was the problem.

20 A number of categories were identified, voluntariness, other
21 information about child soldiers, benevolent acts by the accused, et
22 cetera, and what I didn't understand was whether it was being said that
23 all of the material fits into those six categories one way or another or
24 whether some of the material fits into categories above and beyond those
25 six. So what I need to know is whether the six categories effectively

1 gets all of the outstanding exculpatory information or whether there are
2 other categories that haven't specifically been referred to.

3 MR. WITHOPF: Thank you very much, Mr. President, and I believe
4 your question is related to what we considered being category 2.
5 Basically the materials that do have the potential to materially impact
6 on the guilt or innocence of the accused.

7 These categories we have identified in our filing are certainly
8 the main categories, and there is no -- there are no further categories
9 that go beyond this. It may be helpful in this context that we provide
10 you with some figures, and this is quite indicative.

11 If one distinguishes the categories of evidence which do have the
12 potential to materially impact on the guilt or the innocence of the
13 accused, with the material that refers to the categories of evidence or
14 relates to the categories of evidence which do not have the potential to
15 materially impact on the guilt or innocence of the accused, one can
16 easily understand that the majority of the materials concerned of the
17 undisclosed evidence relate to the second category.

18 I will provide you with some figures. There was obviously one
19 category referring to the grounds excluding criminal responsibility, and
20 related to this subcategory there is only one item which currently cannot
21 be disclosed to the Defence because it is 54(3)(e) protected.

22 The second subcategory, efforts to demobilise, there are 14 such
23 items. And when I make reference to items, I talk about documents.
24 Amongst the 212 items concerned in total, there's only one item which is
25 not a document.

1 Related to the subcategory on insufficient command and control,
2 there are 24 such items, and in respect of the role of the Uganda and
3 Rwanda, there are 23. And I wish to add there is an overlap of five
4 documents.

5 If one counts these figures together, it becomes very clear that
6 the majority of the materials concerned fall within the second main
7 category, meaning materials, undisclosed evidence that does not have the
8 potential to materially impact on the guilt of the innocence -- or the
9 innocence of the accused. And I wish to add that the undisclosed
10 evidence falls within either the six categories or -- I just mentioned or
11 the four categories of the second main category.

12 I hope that this gives you an impression about the scope, and I
13 wish to add the limited scope, of the undisclosed evidence that may be
14 problematic for the Defence.

15 PRESIDING JUDGE FULFORD: Well, that provides some assistance,
16 Mr. Withopf. I don't know whether it completely answers the question I
17 asked, but I certainly understand from what you're saying is that
18 generally speaking these items fall within those six categories, but I'm
19 detecting that there are some items that do not necessarily neatly fall
20 with any one of the six, and you can come back on that point in a moment
21 if you wish.

22 Now, the problem with all of this, Mr. Withopf, is of course --
23 and we don't for a minute doubt the good faith of the Prosecution, but we
24 are forced, as it were, to take all of this on the say so of the
25 Prosecutor. We are not ourselves able to exercise any kind of

1 independent judgement as to whether we agree or disagree with what you
2 have concluded is the exculpatory value, or lack of it, of any of this
3 material, and I want to investigate that just for a second.

4 Where is the authority within the Statute to reach agreements
5 with information providers which excludes the Chamber from being able to
6 view the documentation? I entirely accept that 54(3)(e) imposes
7 limitations in relation to disclosure, but is it the Prosecution's
8 suggestion that the Chamber is to be viewed as rather like the other
9 party or the participants, a body to whom disclosure is made in that
10 sense? And what I'm getting at, Mr. Withopf, is does Article 54(3)(e)
11 give you power to reach agreements -- or the court the power to reach
12 agreements with information providers which shuts us out of the picture?

13 MR. WITHOPF: Mr. President, your Honours, of course the
14 Prosecution is the first one to acknowledge that there is a difference
15 between the Defence and the Chamber; however, this is not the determining
16 factor in this context. The determining factor are the concerns of the
17 information providers, and we take these concerns very seriously. But
18 coming back to your question, what's the legal basis for our submission.

19 We submit that Article 54(3)(e) in itself forms the legal basis
20 for not providing these materials to the Chamber. And I make also
21 reference and make, in particular, reference to article 18(3) of the UN
22 relationship agreement where it explicitly says that the materials shall
23 not be disclosed to other organs of the court.

24 PRESIDING JUDGE FULFORD: I have no doubt about that,
25 Mr. Withopf. I'm staying with -- I want the Statute for the moment. So

1 we find it, say the Prosecution, in 54(3)(e).

2 MR. WITHOPF: Yes.

3 PRESIDING JUDGE FULFORD: That gives the statutory basis, and
4 then we go on to look at the particular agreements thereafter.

5 MR. WITHOPF: The statutory basis is in our view is Article
6 54(3)(e), but Article 18(3) of the UN relationship agreement,
7 Mr. President, your Honours, and I make reference to what I said earlier
8 on, is applicable law and it is applicable law why Article 21(1)(b) and
9 Article 2 of the Rome Statute. So in terms of the law that has to be
10 applied, there is no difference, Mr. President, between Article 54(3)(e)
11 and Article 18(3) because this is applicable law.

12 PRESIDING JUDGE FULFORD: Point two then. You've used the
13 expression, I think, "lead evidence" on various occasions today. Is it
14 the Prosecution's contention that these agreements in fact were all
15 limited to lead evidence, what I think on earlier occasions have referred
16 to as springboard material?

17 MR. WITHOPF: Mr. President, your Honours, not at all, and
18 certainly, and this is just an example, but the most important example in
19 relation to the United Nations. On top of the UN relationship agreement
20 and the Memorandum of Understanding there's a letter of 8 November 2005
21 to the United Nations where interpretation is given to the relevant
22 provisions in the agreement and, in particular, in respect of the
23 Memorandum of Understanding, and here it says in relation to Article
24 10(6), that's obviously the pertinent article, and I quote from the
25 letter, and we are prepared to provide the letter to the Chamber, I quote

1 as follows: "It is understood as a general rule the United Nations will
2 endeavour to the extent possible to accede to all requests for consent to
3 view such documents and information in trial. This understanding shall
4 also apply with respect to the information of records referred to in
5 Article 11(7)." That refers to -- the latter sentence refers to
6 interview of members of MONUC.

7 And this, Mr. President, your Honours, answers the question you
8 have put to me. Of course there was never ever any intention on the side
9 of the Prosecutor, and it was also understood as such by the United
10 Nations, that these materials were received only for lead purposes. The
11 point was to obtain these materials as quickly as possible for the sake
12 of the ongoing investigation and then to allow the Office of the
13 Prosecutor to identify the materials it wishes to use as evidence and
14 then seek permission. But before I forget it, Mr. President, your
15 Honours, I wish to hand over copies of the letters to the Bench and
16 obviously also to the Registry and to the Defence.

17 PRESIDING JUDGE FULFORD: But isn't that inconsistent with
18 Article 54(3)(e), Mr. Withopf? Article 54(3)(e) referring to agreements
19 that are made solely for the purpose of generating new evidence. Now,
20 doesn't that indicate that these agreements should be limited to material
21 that it is known will not be used at trial but will lead on to other
22 material that can be used at trial? And as I've understood it, what
23 you've just said is that these agreements in fact had wider ambit and
24 included material that it was understood would or it was hoped would be
25 used during the trial?

1 MR. WITHOPF: I think the first point I wish to make is reference
2 to Rule 82. Rule 82 clearly indicates that materials that have primarily
3 been obtained for leads purposes only can only later on be introduced
4 into evidence provided that the provider has given its consent.

5 And I also wish to reiterate what I said earlier on today, that
6 Article 54(3)(e) governs the use and the not the nature of the documents
7 obtained, and there's a difference in our view, Mr. President, your
8 Honours.

9 PRESIDING JUDGE FULFORD: I have deflected you, Mr. Withopf. I
10 think you wanted to conclude with some remarks specifically addressing
11 the points I raised at the beginning.

12 MR. WITHOPF: The remarks you made, Mr. President, your Honours,
13 or the questions you put to us were related to the following -- if I
14 recall correctly, whether mitigating factors and materials of undisclosed
15 evidence relating or potentially relating to mitigating factors should be
16 disclosed now or during trial or only after or once and in the event
17 there would be a sentencing hearing. That's how I understood the
18 question, Mr. President, your Honours.

19 And of course I recall the submissions we made earlier on in this
20 context where we have submitted that the Office of the Prosecutor is of
21 the view that aspects relating to mitigating factors can already be
22 discussed at the trial prior to the sentencing hearing, and this of
23 course would lead to the conclusion, to be consistent with our prior
24 submission, that such materials would need to be included already during
25 or prior to the sentencing hearing.

1 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf,
2 anything else?

3 MR. WITHOPF: If you wish so, Mr. President, your Honours, I can
4 also address some of the aspects the Defence has raised in their response
5 to our 28 March filing.

6 PRESIDING JUDGE FULFORD: Why don't you wait until Maitre Mabilille
7 has made her submissions generally and then come back, as it were, in one
8 piece. Thank you very much.

9 Maitre Mabilille.

10 MS. MABILLE (interpretation): On this passionate subject my
11 colleague, Mr. Marc Desalliers, will be making our submissions,
12 Mr. President.

13 MR. DESALLIERS (interpretation): First of all, Mr. President, I
14 shall return to the first issue which you raised, that is, regarding or
15 to mitigate the guilt of the accused. What this refers to is this: The
16 Defence position is that this is material that could be mitigating or
17 have a mitigating circumstances. So these mitigating circumstances are
18 different from the evidence that tends to or exonerates the accused
19 closely, but we think that this is material for which we think that at
20 the current stage it might contain exonerating evidence.

21 I shall now refer to Article 67(2), and this does not create a
22 hierarchy with regard to disclosures. All evidence or materials which
23 falls within the ambit of 67(2) should be disclosed by the Prosecutor as
24 soon as possible. So as soon as it is materially possible for the
25 Prosecutor to do so. So the Defence falls in or agrees with the position

1 taken by the Prosecutor towards the end; that is, to say that the Defence
2 must be privy to these before trial and the disclosure should not only
3 intervene when sentencing comes up. All these materials, all disclosed
4 materials that tend to mitigate the guilt or affect credibility, should
5 be disclosed by the Prosecutor as soon as possible. There is no
6 hierarchy as to how they should be disclosed.

7 Furthermore, it could be fairly objective and it could change
8 depending on whether they're being examined by the Prosecution or by the
9 Defence. I'm referring to a case where a document or a piece of evidence
10 may mitigate, to use the English expression, and which may change
11 depending on the context or the data.

12 So in the current context we -- at the pre-trial stage we have no
13 evidence that has been tendered and we do not know how those proceedings
14 will be conducted at trial. So if evidence is presented as tending to
15 serve to mitigate, after a week of trial, after a month of trial, it may
16 tend, on the contrary, to be viewed as tending to exonerate or
17 exonerating the accused. So it should be important for the Defence to
18 have a copy of such materials as soon as possible.

19 Article 67 does not only place an obligation on the Prosecution,
20 it is a right of an accused person. That is in fact the title of Article
21 67, which states clearly that this obligation, the disclosure obligation
22 of Prosecution materials, is a fundamental right provided for in the
23 Statute for the accused.

24 I shall now turn to what might be -- that I'll refer to as Rule
25 54(3)(e). I do not intend to repeat all the arguments that we have made

1 in our submissions, but I shall summarise them in a few points.

2 Article 54(3)(e) allows the Prosecutor to have confidentiality
3 agreements if the Defence so agrees. However, such agreements with
4 sources are subject to limitations. They are not untrammelled. Article
5 54(3)(e) states these limits clearly. The limits should be limited to
6 what is necessary for the purposes of obtaining evidence.

7 If the Prosecution's submissions are taken into account and taken
8 to the extreme conclusion, we could have a confidentiality agreement.
9 This is a hypothesis. I'm not saying that this is what actually
10 happened. So there could well be a confidentiality agreement with a
11 source as follows: The Prosecutor undertakes not to disclose any
12 evidence, any exonerating evidence, either to the Chamber or to the
13 Defence. That is my hypothesis. It is somewhat absurd, I must admit,
14 but it illustrates that Article 54(3)(e) is not without its limitations.
15 There are very clear boundaries which must be respected.

16 These boundaries also concern the fact that the Prosecutor cannot
17 promise in advance not to disclose exonerating evidence. For example, I
18 shall refer to jurisprudence from the International Criminal Tribunal for
19 the Former Yugoslavia in the case of Tadic, IT-99-36-T of the 23rd of
20 May, 2002. And more precisely, I shall refer -- if you'll give me a
21 moment. I beg your pardon. I have too many papers. You'll forgive me
22 confusion.

23 There is a quote that I would like to bring to the attention of
24 the Chamber. I am referring to paragraph 19 of the Tadic document, (In
25 English) "Restricting the rights of the accused which are strictly

1 necessary ought to be adopted. Thus, for example, the public interest
2 immediately discussed above is excluded where its application would deny
3 the accused the opportunity to establish his or her innocence. This is
4 paramount importance because it must be emphasised that the exception to
5 disclosed found in paragraph 70(b)(2)(e)," (interpretation) which is the
6 equivalent of Article 54(3)(e), (In English) "Information provided on a
7 confidential basis which has been used solely," (interpretation) this is
8 emphasised in the text, (In English) "new evidence and in any event does
9 not, (interpretation) more emphasis, (In English) "relieve the
10 Prosecution of the obligation pursuant to 68 to disclose to the Defence
11 the existence of material known to the Prosecutor which in any way
12 tends -- tends to suggest the innocent -- innocence or mitigate the guilt
13 of the accused or may affect the credibility of the Prosecution's
14 evidence."

15 (Interpretation) So we are facing the same situation. The
16 Prosecution may have confidentiality obligations but it does not in any
17 way divest him of the responsibility to disclose all the exonerating
18 evidence that he may come across. The fact that there is a limit means
19 necessarily that they are control measures, and the only the way of
20 enabling such control to be conducted is first and foremost to provide
21 the Chamber with this confidentiality agreement in the first instance and
22 then provided with the evidence that was collected under the cover of
23 what is described as a confidentiality obligation.

24 I am referring to the wording of Article 67(2), "In case of doubt
25 regarding the application of this paragraph, the court shall decide." It

1 doesn't mean that in case of doubt the Prosecutor decides. In the
2 current situation this is what is going on. You have the Prosecutor who
3 gives you a series of materials and he says, "potentially exculpatory" or
4 "Potentially mitigating the responsibility of the accused. It's
5 potentially affecting the credibility, but trust me, I'll look at it
6 closely, but I don't think we need to worry about this."

7 That is not the role of the Prosecutor. It is the role of the
8 Chamber, and the Chamber may only usefully perform this role if it is
9 privy to the contents of the materials. And not only the materials.
10 Let's -- I'm referring to the confidentiality itself.

11 Earlier on the Prosecutor was heard to say two things that struck
12 me particularly. I might say they alarmed me somewhat. I think it is
13 the first time we are hearing the reason why these confidentiality
14 agreements were reached. They were reached for the purpose of protection
15 of the source, but that is not the only thing. The Statute has very
16 specific remedies provided for if there is reason to believe, and in any
17 case there is no such reason to believe that, but if such a reason were
18 to exist, there would be more appropriate remedies apart from hiding
19 exonerating evidence and making sure that it was not -- never available
20 to the accused.

21 Something else I would like to raise. As you emphasised,
22 54(3)(e) is limited in its scope; that is, it is useful for obtaining
23 evidence. But in the current case, in the Prosecution's submissions, it
24 made his job easy perhaps. Perhaps it made it easier for him to obtain
25 the evidence more easily, more quickly, but it does not justify covering

1 all these materials with the umbrella of confidentiality. That is not
2 what is provided for in 54(3)(e).

3 Furthermore, I would just like to return to a few matters that we
4 have seen in the course of the proceedings. I'm referring to the
5 Chamber's decision of the 9th of November last in which the Chamber
6 recalled in paragraph 6 of the decision of the 9th of November that 50
7 per cent of the documents pertaining to the DRC were obtained under the
8 54(3)(e) confidentiality obligations. That is 50 per cent.

9 Now, with reference to the process, an isolated process to obtain
10 a specific piece of material, it would be the exception, but it seems to
11 be systematic if 50 per cent of the evidence were obtained in that
12 manner.

13 Still in this decision of the 9th of November, 2007, the Chamber,
14 in paragraph 7, raised a matter which the Defence did not observe, but it
15 only observed this when it read the Chamber's decision, that the
16 Prosecutor had stated that he was aware that the evidence or the
17 materials collected would very probably, to use the words of the
18 translation, "used as evidence." So once more this is proof that we have
19 gone beyond what is provided for in Article 54(3)(e).

20 So where do we go from here? An order was issued by the Chamber
21 on the 3rd of April which ordered the Prosecutor to disclose to the
22 Chamber the confidentiality agreements and the material referred to or
23 collected within the scope of such agreements. The Prosecutor says to
24 the Chamber, "Unfortunately, I cannot disclose such materials to you.
25 I'm sorry." But, Mr. President, what do you do in such a situation?

1 If an order is not enough for the Chamber to obtain a copy of
2 these documents, then the Chamber is not able to assess the actual
3 exculpatory weight, and the description of this -- these materials which
4 appears in the last of the Prosecution's filings in the opinion are
5 obviously of capital importance for the Defence of the accused. They are
6 capital to the determination of his guilt or otherwise.

7 It is obvious, therefore, that the Defence cannot agree to be
8 placed in a position where it is told confidentiality agreements have
9 been concluded and, unfortunately, you do not have access to all the
10 exculpatory materials. I think this is a point that needs to be raised.
11 The documents that have been disclosed so far as incriminating evidence,
12 there were 1.745 documents disclosed to the Defence; potentially
13 exculpatory, or those referred to as pexo, 409 documents; Rule 67, 344
14 documents were disclosed to the Defence. So potentially exculpatory,
15 taking into account the fact that about 400 documents were disclosed as
16 exculpatory materials, and of that we have 200 documents or thereabouts
17 that the Prosecutor claims not to be able to disclose because they are
18 the subject of confidentiality obligations, we might say then that
19 one-third of the materials have not been placed at the disposal of the
20 Defence. They are somewhere on the 10th or 11th floor, but we cannot get
21 copies of them. These are fairly disturbing figures.

22 So considering that an order by the Chamber to obtain the
23 confidentiality agreements and the materials themselves are not
24 sufficient to secure disclosure, Mr. President, your Honours, there's
25 only one other possibility, that is the draw of the charges. And this is

1 a possibility considered by the Chamber as from the 9th of November.

2 On the 9th of November, the Chamber told the Prosecutor through
3 its decision that he had until the 14th of December to disclose all the
4 evidence, that is incriminating and exculpatory evidence. The disclosure
5 date was postponed because some witnesses had not been protected, and the
6 decision of December which postponed the disclosure dates stated clearly
7 that the other obligations of the Prosecutor would be maintained.

8 In spite of all that we waited until the 28th of March, 2008, to
9 be told, "This is what is potentially exculpatory. I'll give you -- I'll
10 give you a copy, and I'm telling -- I'm asking for permission not to
11 disclose these materials."

12 Mr. President, your Honours, there is only one remedy for this
13 situation. A clear message must be sent. You must tell the Prosecutor
14 this is not how it works. We are relying entirely on the decision of the
15 9th of November, 2007, for remedies for this situation.

16 I would like to conclude by saying that this is a new
17 institution. This is the first trial before this new institution. I
18 think that particular attention should be paid to this issue.

19 The Defence is fairly alarmed by the fact that the Prosecutor is
20 saying to us, "I promised not to disclose the evidence that I was
21 provided with, either incriminating or exculpatory, and you the Chamber
22 must go along with this." This is not acceptable. This is not the kind
23 of procedure that will help the institution in future, and this is
24 certainly the kind of procedure that will always infringe the fundamental
25 rights of the accused.

1 Thank you.

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

3 Mr. Withopf, do you want to make your submissions before we have
4 a break.

5 MR. WITHOPF: I want to make a number of observations. I promise
6 you I will be brief and really focus on very few issues only.

7 My learned friend has put in hypothesis of disclosure agreements
8 to the Chamber, and I wish to emphasise that such hypothesis is lacking
9 any factual basis. The agreements are based on Article 54(3)(e) and
10 solely on Article 54(3)(e), and there is no such an agreement that says
11 that evidence will not be disclosed. And of course Article 54(3)(e)
12 makes particular reference to the permission of the information providers
13 to disclose such materials.

14 My friend has also made reference to the Tadic decision,
15 paragraph 19. On principle in general we would agree, but there is a
16 difference. We were able to provide the Chamber with alternative
17 evidence, and this makes the reference to the Tadic decision sort of
18 redundant.

19 The question has been raised by the Defence but also by the
20 Honourable Bench, Mr. President, your Honours, why there should be trust
21 in the Office of the Prosecutor, be it in its determination on the
22 exonerating nature and on the question whether the -- whether the
23 material materially impacts on the guilt or innocence of the accused or
24 on the assessment of the alternative evidence. And there's an answer in
25 the law, because Article 67(2) itself makes reference to the belief of

1 the Prosecutor, and this shows that the legislator built in some trust to
2 the Office of the Prosecutor.

3 Mr. President, your Honours, that's basically where I will stop.
4 I do not want to exceed my time too much.

5 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf.

6 We'll have a break now and then see whether either Ms. Massidda
or

7 Mr. Walleyne wish to join in, and then turn to the other issues on our
8 agenda.

9 We'll sit again at five to 4.00. Thank you very much.

10 Recess taken at 3.24 p.m.

11 On resuming at 3.59 p.m.

12 COURT USHER: All rise. Please be seated.

13 PRESIDING JUDGE FULFORD: Mr. Walleyne.

14 MR. WALLEYNE: Thank you, Mr. President. I just want to present
15 my excuses for not being here at time, but it was really out of my will.
16 Thanks.

17 PRESIDING JUDGE FULFORD: Do you want to make any submissions in
18 relation to these issues?

19 MR. WALLEYNE: To this particular issue I don't have observations
20 to make. Thank you.

21 PRESIDING JUDGE FULFORD: Thank you very much.

22 Ms. Massidda.

23 MS. MASSIDDA: I have no submissions, your Honours.

24 PRESIDING JUDGE FULFORD: Thank you very much.

25 Mr. Withopf.

1 MR. WITHOPF: Mr. President, your Honours, I only want to use
2 this opportunity because we have it with us to hand over the relationship
3 agreements between the court and the United Nations, the one which is
4 actually signed by the President of the court and the Secretary-General
5 of the United Nations, which is a different copy compared to the one we
6 have provided earlier on as an annex to our filing.

7 And using this opportunity, Mr. President, your Honours, I wish
8 to emphasise that this is not solely as one would or could get the
9 impression reading the Defence submissions an agreement between the
10 Office of the Prosecutor and the United Nations, it's an agreement
11 between the court, the ICC, and the United Nations, and as such, as I
12 have emphasised earlier on, binding the court as applicable law.

13 And my last remark in this context and then I'm going to stop,
14 and solely for the purpose to avoid any misunderstanding and for the
15 record, whenever the Office of the Prosecutor enters into 54(3)(e)
16 agreements, the aim obviously of such agreements is to obtain only lead
17 information.

18 I leave it as such, Mr. President, your Honours, but I would like
19 to hand over the agreements, copies of the agreement.

20 PRESIDING JUDGE FULFORD: Mr. Withopf, you have made a suggestion
21 which the Bench is going to respond to; namely, you asked us to consider
22 whether we would be prepared to indicate that if the material were
23 provided to us, we would restrict ourselves in terms of onward disclosure
24 by giving the undertaking that that would not happen unless the
25 information provider via the Office of the Prosecutor had indicated the

1 particular material could be disclosed onwards.

2 Now, we're prepared to do that, Mr. Withopf, but the limits of
3 this need to be very clearly understood. We will be receiving this
4 information subject to that very important restriction, and if having
5 read that material we consider that one or more of the items should be
6 disclosed to the Defence because of Article 67(2) considerations, and if
7 it is impossible to disclose it to the Defence and there is no adequate
8 remedy following from the impossibility of disclosure, well, as I've
9 indicated before, Mr. Withopf, there may be consequences to one or more
10 of the charges depending on a number of factors.

11 The other thing that needs to be borne in mind is that you have
12 said at best that this is going to relate to a high percentage of the
13 material that comes within this category, and that still leaves us in the
14 position in which we are now in relation to that material, and so
15 although this suggestion certainly enables us to take matters forwards to
16 a significant extent, there are still problems that cannot be forgotten
17 and which we're going to have to address.

18 Now, I need your help with timetable, Mr. Withopf. How long is
19 all of this going to take, because you've now got to go back to the
20 information providers, you've got to get their consent, you've then got
21 to put the materials together in an appropriate form, and you've got to
22 get them to us. How long realistically do you need for that?

23 MR. WITHOPF: Mr. President, please allow me to consult with our
24 colleague.

25 (Prosecution counsel confer)

1 MR. WITHOPF: Mr. President, your Honours, this is obviously a
2 process, and we need to not only consult with the information providers
3 concerned, but we also need to provide the materials, and we envisage -
4 and this is a rough guess, an estimated guess though - that this will
5 last for about three to four weeks. Three weeks may be optimistic. Four
6 weeks is probably more realistic.

7 PRESIDING JUDGE FULFORD: This all takes us perilously close to
8 the start date, does it not, Mr. Withopf? We're now I think the 6th of
9 May, is it? Four weeks, beginning of June, trial date end of June.

10 MR. WITHOPF: It certainly does, Mr. President, but I do not want
11 to be overly optimistic and later on tell you that it was not possible in
12 the time that was given to us.

13 PRESIDING JUDGE FULFORD: It has to be observed that we visited
14 this area back in the autumn of last year, the problem of these
15 agreements was ventilated then with the Prosecution saying that you were
16 going to go back to the information providers to seek appropriate
17 releases.

18 Well, four weeks let it be, Mr. Withopf, but it causes concerns
19 in relation to the knock-on effect should there be a body of material
20 that we then decide needs to be disclosed to the Defence, because I
21 anticipate that will then mean you'll have to go back to the information
22 providers to make yet another request, but we'll take it in stages. Four
23 weeks then from today. Thank you very much.

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

25 PRESIDING JUDGE FULFORD: Right. Mr. Walley, we have on the

1 agenda a request that you've made for clarification of the 18th of
2 January decision on victims' participation. I think that this has not
3 produced any response from the Prosecution or the Defence, as I
4 understand it.

5 We're in, I think, the slightly difficult position that the 18th
6 of January decision is subject to an appeal, and there is as yet
7 unresolved.

8 MR. WALLEYN: Thank you, Mr. President. It is true that there is
9 an appeal, but I think that this appeal doesn't concern the precise issue
10 that we raised.

11 PRESIDING JUDGE FULFORD: Do you want to add to your written
12 submissions on -- on this point?

13 MR. WALLEYN: I think, Mr. President, that our submissions are
14 clear indeed. I would like to have an explanation from the Prosecutor,
15 because I don't really understand the position of the Prosecutor. But if
16 their interpretation is right, then I have another problem because if --
17 (interpretation) I will change to French, if I might.

18 If I follow the thinking of the Office of the Prosecutor, this
19 would mean that in the case of each document which we wish to obtain, we
20 would have to provide a specific authorisation to the Chamber, or request
21 a specific authorisation from the Chamber. This means that we will find
22 ourselves in a vicious circle in that in order to obtain the document we
23 would have to request authorisation for the attention of a specific
24 document. So we would know that that document exists, and only that --
25 that can only happen if we have access to the record.

1 I think that the only way to resolve of the problem is if the
2 Office of the Prosecutor shows the same goodwill as we expect in the case
3 of disclosure to the Defence. The Defence does not have to identify the
4 specific document which it wishes to have disclosed to it, no. Rather,
5 it's up to the Office of the Prosecutor to identify those documents which
6 are material to the Defence. And if I understand your decision as being
7 that it is indeed the Office of the Prosecutor -- Prosecution, which must
8 identify evidence or items which are of direct concern to us.

9 The request which we filed at the beginning of March, I believe,
10 was sufficiently specific. We asked which type of document was directly
11 relevant to our victims, documents relating to specific persons and
12 specific places. I cannot be clearer in my requests.

13 If the Office of the Prosecutor maintains its position, then I
14 would ask the Chamber to please intervene, because there is now a period
15 of six weeks before the opening of the trial subject to any decision
16 which might be taken in that connection. We, too, must prepare for
17 trial. It is not only after the beginning of trial that we need
18 documents, not at all. We need access to documents to prepare our
19 participation. So in terms of the timing, it has become rather tight, I
20 would say, too tight for us to wait much longer.

21 PRESIDING JUDGE FULFORD: (Microphone not activated)

22 MS. MASSIDDA: Thank you, your Honours, I agree with the
23 submissions of Mr. Walley. I wanted simply to point out that the
24 decision of the Trial Chamber of request for leave to appeal dated 6
25 March 2007 -- sorry, 2008, did not grant to the Prosecution and the

1 Defence leave on that particular issue. I wanted also to point out that
2 in our reading of the decision, paragraphs 103, 104, and 111 regulates
3 two different questions. The question regulated in paragraphs 103 and
4 104 of the decision of 18 January, 2008, on victims' participation,
5 regulates modalities of participation of victim in relation to any
6 identified stage of the proceedings and establishes that if a victim
7 wants to participant in a specific stage, that victim has to set out in
8 writing the reasons why and the way in which the personal interests are
9 affected.

10 Now, paragraph 111 of the same decision deals with inspection,
11 and in particular with the material in possession of the Prosecution, and
12 paragraph 111 provides that the Office of the Prosecutor shall provide to
13 the legal representative any material in its possession which may have an
14 impact on the personal interest of the victim concerned provided that
15 such victim can show which is the interest in having that material.

16 This is what it was done by Mr. Walley in a quite, I would say,
17 detailed manner, because the letter detailed why the interests were
18 affected and which material could have an impact on such interest, and
19 falls within the provision of paragraph 111 of the decision of 18th of
20 January, 2008. Thank you.

21 PRESIDING JUDGE FULFORD: What do the Prosecution say about this,
22 Mr. Withopf?

23 MR. WITHOPF: A few points we wish to make and I do want to limit
24 repetition of what has been said earlier on. The Presiding Judge has
25 already, in our view rightly, emphasised that the issue is on appeal.

1 And of course it is not the access of the material that is on appeal but
2 the modalities of victim participation. That is an issue that's
3 currently considered by the Appeals Chamber. And the respective
4 paragraphs in the 18 January decision, 103 and 104, form part of the
5 modalities of victim participation.

6 On principle we would like to provide the legal representatives,
7 Mr. Walleyne and also the other legal representatives for the victims
8 access to the materials, but in our interpretation of that decision and I
9 make reference again to paragraph 111, our hands are bound, and we in our
10 view cannot provide for access.

11 In addition to what has been said earlier on, and we in our view
12 cannot provide for access. I want to make reference to paragraph 138 of
13 the decision which in -- details the order of the Trial Chamber. In our
14 interpretation, the other clearly provides for an order on how to
15 proceed, and I make specific refer to subparagraphs (e) and (f) of
16 paragraph 138. It appears to be clear in our interpretation of the
17 decision that first comes the application to the Trial Chamber and only
18 afterwards access can be provide. That's how we read the decision.

19 If the Chamber wishes to clarify it then of course -- wishes to
20 clarify it in the sense of the submission of Mr. Walleyne, then of course
21 we would be prepared to provide for access.

22 PRESIDING JUDGE FULFORD: Yes, Ms. Massidda.

23 MS. MASSIDDA: I'm sorry, your Honour, but if I may. In respect
24 to the final part of the decision I'm referring to page 48 of the
25 decision of 18 January 2008, letter (f). "The Prosecution shall provide

1 to participating victims upon a specific request subject to a
2 demonstration of relevance to their personal interest material in its
3 possession and public evidence list in annexes 1 and 2 to the
4 Prosecution's summary of presentation of evidence." I want simply to
5 point out that at this point in time we have not received any material in
6 the possession of the Prosecution. We have not received any public
7 evidence list in annexes 1 and 2 to the Prosecution's summary of
8 presentation of evidence. We have only received the summary of
9 presentation of evidence, redacted.

10 MR. WITHOPF: If I may, paragraph 111 of that decision, the very
11 last part, makes reference to the annexes that have been just addressed
12 by my colleague, and again the decision clearly says "subject to a
13 demonstration of relevance to the personal interest as stated above."
14 This is exactly the same situation as in respect to any other materials,
15 and precondition is the procedure as detailed, in our view, in paragraph
16 102-103, and 104.

17 PRESIDING JUDGE FULFORD: Thank you very much.

18 Well, we will undertake the interesting exercise of interpreting
19 our own decision, and in due course we will let you know what our
20 interpretation is.

21 Mr. Walley, we shall try and do this reasonably speedily because
22 you need an answer for this clearly for the reasons you've set out.

23 I turn next to the issue of agreement of facts. As I understand
24 it, the Prosecution have sent a suggested list of facts or areas which
25 could be agreed to the Defence.

1 Is that right, Mr. Withopf? Has such a document been sent?

2 MR. WITHOPF: That's correct, Mr. President. On the 23rd. I
3 just double-check. On the 23rd of April we submitted about 60 facts to
4 the Defence, suggestions for agreements, and in doing so we followed an
5 earlier suggestion of the Trial Chamber trying to avoid negotiations. So
6 far we haven't received any response.

7 PRESIDING JUDGE FULFORD: Maitre Mabilille, I'm not at all going to
8 put you on the spot, but just to make sure you've received that list and
9 to ask whether it's under consideration.

10 MS. MABILILLE (interpretation): Mr. President, if I could just
11 take a -- a step back regarding the victims and the position of victims.
12 I just wanted to tell you that the Defence shares the view of the
13 Prosecutor for once, and clearly there -- the matter of the personal
14 relevance is under appeal, and of course unfortunately we all to await
15 impatiently the judgement of the Appeals Chamber.

16 Mr. President, on the second matter we have submitted a short
17 filing stating that we have received the list of proposed agreed facts.
18 We have received the list from the Prosecutor, but we still have a
19 difficulty, and in jest I might say the confidentiality of the sources
20 does not apply to the Defence, because up until now it has been
21 impossible for us to discuss anything with the Prosecutor because he
22 considers any of our discussions not to be confidential.

23 As long as that persists, Mr. President, I unfortunately have to
24 tell you that we cannot work together.

25 There are two possible solutions. The Prosecutor proposes a

1 number of facts. If we agree on those facts, then we can all stop work
2 immediately because then the issue will have been resolved and the guilt
3 of Mr. Lubanga will have been totally established, or we will be obliged
4 to take each fact proposed by the Prosecutor and discuss the way in which
5 the Prosecutor has formulated them or not formulated them. The matter as
6 to whether there is agreement, yes or no, on the various points is
7 something that you might wish to have, but at this point in time our
8 answer has to be no, because we will have to discuss these matters with
9 you until we arrive at an agreement. That agreement will be submitted to
10 the Chamber.

11 The Prosecutor tells us that the Chamber can tell us to lift the
12 confidentiality. We cannot work in this way, Mr. President, and that is
13 why I have to report to you that we had one meeting, and at that meeting
14 we reformulated a number of things. The Prosecutor then said to us that
15 those discussions would not be confidential, that the e-mails which we
16 exchanged would not be confidential, and that they could be revealed,
17 confidentiality could be lifted at any point in time, and that is why the
18 discussions have not progressed. At this time it is not possible for us
19 to move forward.

20 PRESIDING JUDGE FULFORD: Yes.

21 MR. WITHOPF: Mr. President, your Honours, I think the time has
22 come to provide you with a full picture of what has happened in the
23 context of these discussions, and I'm not going to breach any of the
24 confidentiality agreements with the Defence.

25 The first point I wish to make prior to going into some more

1 detail what has happened in the past was the following: There are
2 discussions, this is correct, what my learned friend says between the
3 Office of the Prosecutor and the Defence on principled issues of
4 confidentiality, but these ones don't play a role in this context. In
5 this particular context the Defence has taken the view that anything and
6 everything that's being discussed is confidential, and the Office of the
7 Prosecutor was prepared to accept a certain level of confidentiality but
8 not to accept full confidentiality. And I make reference to our filing
9 of 25th of April, 2008, where we detailed what we consider -- what we
10 consider being bound or to what level we consider the Office of the
11 Prosecutor being bound. So there's a huge difference between no
12 confidentiality at all and absolute confidentiality, and we have taken
13 the middle ground. I make referenced to the paragraph 4 of the filing I
14 was just mentioning, but this just as an introductory remark.

15 The negotiations, if I may call them as such, between the Office
16 of the Prosecutor and the Defence, to date have been a fairly frustrating
17 exercise for the Office of the Prosecutor. We started the process on
18 30th of November of last year by sending a letter to the Defence
19 outlining as to how the Prosecution would envisage the process on
20 agreements on facts. Meetings followed. A limited number of meetings
21 followed, and the problematic areas identified by the Defence or the
22 problematic area was the impact on possible further charges the Office of
23 the Prosecutor may or may not bring against Mr. Thomas Lubanga. This was
24 the first point that has been made by the Defence, and the Presiding
25 Judge and your Honours may recall that the issue has been raised earlier

1 on. A suggestion has been made by the Honourable Bench on how to address
2 this, and the Office of the Prosecutor has followed that suggestion, and
3 it has undertaken in a letter to the Defence that it would not use in any
4 way any possible agreement on facts in any possible later proceedings
5 against Mr. Thomas Lubanga. So at this point in time we thought the
6 concern of the Defence is accommodated.

7 This has all been discussed on the 10th of January in the context
8 of a Status Conference that took place at that point in time. On 20th of
9 February, the Trial Chamber rendered its decision on agreements, and
10 since then the negotiations are hampered by the interpretation that's
11 given by the Defence on the confidentiality level.

12 On 12th of March at the Status Conference, the Defence
13 volunteered to address this issue with the Trial Chamber, and the Trial
14 Chamber made again a suggestion of how to proceed, namely instead of
15 having negotiations to just exchange e-mails, and that's exactly what we
16 have done after already at the -- on the 12th of March. We have
17 indicated that we would -- think such a suggestion is a very meaningful
18 one. And we followed that suggestion, and we provided the Defence, as I
19 outlined earlier on, on the 23rd of April about 60 facts, and we were
20 very selective because we do not want to even suggest facts to the
21 Defence where we are sort of sure that the Defence may not be prepared to
22 accept. We solely submitted facts to the Defence where we thought the
23 Defence and Mr. Thomas Lubanga may be prepared to accept. And again we
24 don't get any reaction. We are permanently confronted with this issue of
25 confidentiality. That's where we are. And I think one can easily

1 conclude that the Office of the Prosecutor has tried to accommodate the
2 concerns of the Defence to the highest extent possible, and one can also
3 and more easily conclude that we followed both suggestions of the Trial
4 Chamber to further the process. So I have a difficulty to understand why
5 the Defence is, and I really deliberately say this, is creating problems
6 which in our view are not problems.

7 Thank you, Mr. President.

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

9 Do you want to respond to that, Maitre Mabilille?

10 MS. MABILLE (interpretation): We're not going to argue about
11 this with the Prosecutor, because we seem to tend to argue about this,
12 but I have the document they sent to us on the 23rd of April with the new
13 matters you submit to us, and this morning I received an e-mail that
14 proves that the Office of the Prosecutor works very early, from 6.45 in
15 the morning. So there are two, this morning 6.45, and the 23rd of April.

16 So what I'm saying to the Chamber is this: That on the 23rd of
17 April, the Prosecutor gave me a list of materials. If I said that I was
18 in agreement with these materials by saying yes or no, then there is no
19 point of holding the trial any more. So obviously I was not expected to
20 say yes or no to that.

21 I think that negotiation on agreed facts requires reformulation
22 of some materials. If it is a purely academic exercise, I shall attend
23 to it academically. I shall answer yes or no to the Prosecution's
24 proposals on the 23rd of April. Otherwise, I restate the Defence's
25 position: We need to conduct discussions. The results of these

1 discussions, which would lead to an agreement, would be submitted to the
2 Bench of course, but anything prior to the discussion and on any matters
3 which are still in dispute should remain confidential.

4 I think it is a reasonable position to take, and as the
5 Prosecutor is refusing this discussion and saying nothing is
6 confidential, it means that the whole exercise -- academic, and of course
7 the Defence will comply with the exercise as it is, but the result will
8 not be at all what we're seeking, which is to define a certain number of
9 elements for which the Prosecutor will not be obliged to provide proof
10 because they would be not in dispute from the Defence's standpoint.

11 So, your Honours, I have done what I could. The Defence team has
12 done what is good. We shall respond to the agreed facts as the
13 Prosecutor has sent them to us, but I say that this is a futile exercise
14 which has no meaning within the context of the work that we're trying to
15 do to advance our case.

16 PRESIDING JUDGE FULFORD: Thank you. Mr. Withopf, I want to try
17 to break through this if I can. There appears to be the possibility of
18 there being sufficient agreement in relation to confidentiality from what
19 you've said that the -- the Prosecution have tried to steer a middle
20 course, as it were, between complete confidentiality and a complete lack
21 of it. Could I ask that you set out shortly in a -- just a paragraph or
22 two for consideration by the Chamber and by the Defence as to precisely
23 what areas -- what the areas are that the Prosecution accept should be
24 covered by confidentiality in relation to these discussions so as to
25 enable the discussions on the proposed admissions to go forward. So I

1 would ask that, please, to take place subject to any observations on
2 that.

3 Secondly, it seems to me that the list that you've sent through,
4 although of course they could be dealt with by a yes or no answer could
5 also be dealt with, where it's appropriate, by a suggested alternative
6 formulation. So if there is something in the drafting or the scope of
7 the proposed admission which is objectionable, then a counter-proposal
8 could be made which may realistically produce agreement between the
9 Prosecution and the Defence.

10 And so I make one request of you, Mr. Withopf. I make another
11 request of the Defence that they don't deal with this simply as a yes or
12 no exercise, but they look at the list that's been sent through to see
13 whether with appropriate modifications acceptable admissions could be
14 made.

15 Now, you're on your feet, Mr. Withopf, so I think there's
16 something you want to say on this point.

17 MR. WITHOPF: What I want to say, Mr. President, your Honours, is
18 that we accommodated both suggestions, actually. In our 25 March filing
19 I make reference to paragraph 4, and I'm going to read it out now, we in
20 very detail -- detailed the level of confidentiality we were felt bound
21 by - and the Defence also has as an annex to their filing - annexed the
22 e-mail exchange. I read out the following: "The Prosecution considers
23 itself bound by a confidentiality agreement --

24 THE INTERPRETER: Please slow down for the record.

25 MR. WITHOPF: Thank you very much. I will do so, and I start

1 afresh.

2 "The Prosecution considers itself bound by a confidentiality
3 agreement concerning the discussions on agreed facts so long as there is
4 no inquiry of the Trial Chamber into the related negotiations, including
5 both the process and the substance. In respect of the latter aspect, the
6 Prosecution considers itself in particular free to address before the
7 Trial Chamber any disputes on agreements."

8 That's our interpretation in respect of the confidentiality in
9 the context of these negotiations.

10 That's the first point, Mr. President, and the second point I
11 wish to make, and again it accommodates the suggestion that has been made
12 by the Bench, is the following. Without going into any details because
13 we consider this be falling in our confidentiality agreement, without
14 going into any details on the agreed facts, there is a column which reads
15 as follows -- they are the facts on the left-hand side and on the
16 right-hand side there is a column and it says "Agreement by Thomas
17 Lubanga Dyilo/Proposal by Defence." We tried to exactly accommodate that
18 concern. At this stage, Mr. President, your Honours, I cannot imagine
19 anything we can do to further that process. The ball is in the court of
20 the Defence.

21 PRESIDING JUDGE FULFORD: Mr. Withopf, if the Bench were to
22 indicate that it would not make any inquiry into the negotiations, that
23 would provide Ms. Mabilile with the level of confidentiality that she
24 requires, wouldn't it, because you've said that the discussions will be
25 covered by confidentiality unless the Chamber makes an inquiry as to what

1 occurred during the negotiations. If we were to indicate that we will
2 not make any such inquiry, that would provide the Defence with the level
3 of confidentiality that they seek, wouldn't it?

4 MR. WITHOPF: It certainly would further the process, and it
5 would address one of the two aspects but not the second aspect, because
6 we consider us free to address before the Chamber any disputes on
7 agreements. That's the second point.

8 PRESIDING JUDGE FULFORD: Sorry. I was -- I was assuming that
9 that was linked to the Chamber's inquiry. Yes. Well, I can see that
10 Ms. Mabilille is not going to accept that.

11 All right. Well, I think there's probably nothing else to be
12 said on this. We'll reflect and see whether there's anything further we
13 can suggest. Thank you very much.

14 The final issue is that the Defence asked for the subject of the
15 joint instruction of experts to be put on the agenda.

16 Maitre Mabilille, is there anything you want to say in particular
17 about this issue?

18 MS. MABILLE (interpretation): Two points, Mr. President, your
19 Honours. We wish to inform the Chamber of the difficulties we have
20 encountered. They are of two types. The first difficulty is that the
21 Office of the Prosecutor proposed two meetings with two experts for us,
22 and these two experts, it seems to us, I don't know exactly what term I
23 might use, but I would say they were competent with regards to the
24 Ituri -- or with regard to the Ituri situation. This is a problem.

25 I think that with regard to the second expert, the Office of the

1 Prosecutor is less clear or perhaps not as affirmative as we would be.
2 However, we consider that we're not inclined to accept either the first
3 or the second expert because of the competence, their competence. That
4 is my first point that I wish to raise.

5 The second point that the Defence wishes to raise, although we do
6 not feel that the Chamber can solve the problem, we have no budget to
7 remunerate the experts. The Prosecutor said that if we contracted the
8 service of an expert then the Defence should participate or take part in
9 paying this expert, which seems to me to be fair. We approached the
10 Defence service, which informed us that there was no budget in the
11 Defence for the Defence to contract the service of an expert. We are
12 trying to solve the problem, but I must say that we of the Defence find
13 this quite irritating because we have the investigations budget which is
14 so small that we have a lot of trouble carrying out our work, and then
15 now we have -- we've just been told that there is no budget for experts,
16 for the instruction of experts. It makes life difficult for us.

17 We can seek relief, but while we're doing such -- seeking such
18 relief we're not studying the case file, and we're not dealing with
19 substantive matters in these proceedings. So we wished to inform the
20 Chamber of the proceedings -- of the difficulties, I beg your pardon,
21 that we're currently facing.

22 I also add that the Defence is not inactive. We ourselves have
23 tried to contact two experts just to make proposals also. For the time
24 being things are not as easy as they might be because the most skilled
25 people with regard to Ituri do not wish to come and give testimony before

1 this court because they feel that it might negatively affect their
2 subsequent work on the ground. So we are facing a somewhat difficult
3 situation in terms of looking for experts.

4 This is what the Defence wished to tell the Chamber about this
5 problem.

6 MR. WITHOPF: Thank you, Mr. President, your Honours. There is
7 actually a point I very much agree with my learned friend from the
8 Defence because we are facing the very same problem. We met an expert
9 already in summer of last year prior to the Chamber's 10 December
10 decision, and this expert appeared to be the most suitable one, and
11 exactly what has been described by my learned friend happened. The
12 expert made it absolutely clear that he's not going to appear before the
13 Chamber no matter if he would appear as a party expert, no matter whether
14 he would be jointly instructed by the Office of the Prosecutor and the
15 Defence, or also including irrespective of whether the Trial Chamber
16 would instruct him. He made it clear exactly that reason that any
17 appearance before this court would hamper his future work in the area.

18 Nevertheless, we came up with two further potential experts, and
19 the expert have been met jointly with the Defence, the first one on 27th
20 March, and the second one on 24th of April, and both experts were
21 suggested by the Office of the Prosecutor.

22 The first person we met we did not find suitable, but the second
23 person we met we actually do find suitable as an expert on background and
24 context.

25 We wish, however, in light of the current situation to inform the

1 Trial Chamber about the following: The Prosecution would instruct that
2 expert on background and context solely if there would be a joint
3 instruction with the Defence. To phrase it the other way around, we
4 would not instruct the expert or the potential expert as a party expert.
5 However, if the Chamber wishes to consider -- to instruct the expert as a
6 court expert, we obviously would be very much prepared to provide the
7 name of the person to the Trial Chamber. We would do so in writing
8 because we have no explicit consent of the person concerned to provide
9 the name in a public court session.

10 PRESIDING JUDGE FULFORD: Mr. Withopf, is this individual the
11 first or the second individual that Ms. Mabilille referred to? She
12 appeared to be rather keener on the first expert than the second.

13 MR. WITHOPF: I'm not quite sure whether Maitre Mabilille talked
14 about two additional experts. From what I understood following the brief
15 exchange of views after the meeting with the two experts, the Defence has
16 indicated, but I stand corrected if I'm wrong, that none of the two is
17 found suitable by the Defence.

18 PRESIDING JUDGE FULFORD: All right. It is -- it is likely that
19 it is going to be of assistance to the Chamber to have somebody to speak
20 on context and background I would have thought, and are you saying,
21 Mr. Withopf, that there is really as far as the Prosecution are
22 concerned, that there's now only one realistic contender for that role?

23 MR. WITHOPF: That's unfortunately correct. There are two
24 reasons. The first reason is really it's not that easy to find a person
25 suitable to provide expert opinion, and the second reason, and that's the

1 worrisome aspect of it, at least the person we thought would be the most
2 suitable expert clearly indicated he is not prepared to appear before the
3 Chamber for the reasons outlined.

4 PRESIDING JUDGE FULFORD: Right. Thank you very much indeed.
5 Thank you.

6 Maitre Mabilille, could I ask, are you in fact saying -- saying no
7 to one or both of the proposed experts?

8 MS. MABILLE (interpretation): No. Our position is to say no to
9 both proposed experts. We are in complete agreement with the Chamber
10 moreover with regard to the fact that we need somebody to come and
11 provide the Chamber, the parties, and the participants the background as
12 to what happened in Congo at that time, particularly in Ituri. So the
13 Defence agrees completely that there is a need for this. The problem is
14 when we meet these experts, first question we put to them is, "What are
15 your skills? What qualifications do you have with regard to talking
16 about Ituri? What is the history? What is the work that you've done?"
17 We try to talk -- we spent two hours with these experts, and after that I
18 said to myself, I could say to the -- Mr. Withopf thought the second
19 expert would be all right, but I'm not trying to be disagreeable with the
20 Prosecutor.

21 Perhaps the Office of the Prosecutor is working behind time.
22 It's -- things are getting somewhat late and somebody is being taken to
23 propose to the Chamber just so we can tell the Chamber that there is
24 someone on the list.

25 I am not in agreement. What we are trying to do is find actively

1 someone who can fulfil the role that we all hope that he can play; that
2 is, somebody who can talk about the situation in Congo in general and
3 then Ituri in particular and what happened there, but to ask someone who
4 has practically never been to Ituri to come and tell us a great deal
5 about Ituri seems rather difficult to me.

6 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, I think six weeks
7 before the beginning of the trial to ask the Chamber to embark -- to
8 embark on the process of finding an appropriate expert is really
9 expecting too much. At an earlier stage it may have been a possibility
10 that the Chamber of its own accord could have set about obtaining
11 evidence of this kind that would be acceptable not only to the Bench but
12 also to the parties, but it is too late now.

13 I think the limit of what we can do is to encourage the
14 Prosecution and the Defence to try to find an expert who is acceptable to
15 both sides, and if that fails, Mr. Withopf, I think the Prosecution need
16 to reflect on the decision that you indicated a little earlier that you
17 will only call a witness in these circumstances if it's a joint witness.
18 I think that decision is one that needs to be thought about very
19 carefully, because so long as there is somebody who is suitably and
20 appropriately qualified, this evidence is likely to be of assistance to
21 the Chamber, but it would clearly be best if there was a joint
22 instruction to that expert and if the expert was seen by both sides as
23 being acceptable.

24 Right. That, I think, concludes the matters on the agenda save
25 that Mr. Walleyne has something to say. Yes.

1 MR. WALLEYN (interpretation): Thank you, Mr. President,
2 Mr. President, your Honours. With regard to this issue of experts, I
3 just wish to say that this is not completely without consequence to us as
4 victims. We're not talking about precise matters, but we're referring to
5 the context. This is also our context.

6 If these are actual specialists of Ituri, then these are also
7 people who can say something with regard to the consequences of the
8 enlistment of children and young people in the area, and so I am sorry to
9 say -- I must say that the victims are increasingly frustrated, and they
10 get the -- they have the impression that they have been ostracised in
11 some way from -- if they consider the position of the Office of the
12 Prosecutor.

13 Victims might have suggestions about experts. If -- if the
14 questions were put to us, we might have responded. If meetings are held
15 covering hours about an expert with the Defence, why exclude the other
16 participants?

17 Perhaps we are on the eve of a new process, and it is not always
18 quite clear what victims the role (as interpreted) will play. However, I
19 always think of your decision of the 18th of January. It is true that it
20 deals with evidence rather than access to case -- record of the case.
21 There is an appeal, but the appeal is yet to be of suspensive effect.

22 However, I consider that as set out in paragraphs 108 and 109,
23 victims also have a role to contribute or a contribution to make to the
24 evidence be submitted, and I think that it is not necessary for an expert
25 to meet the agreement of the Prosecution and the Defence in order to

1 appear before the court. It is entirely possible for an expert to come
2 and inform the court even if the Defence considers that this is a bad
3 expert, then submission will be made in that regard. But I'm sorry, as I
4 say again, that our opinion was not sought on this matter.

5 MS. MASSIDDA (interpretation): Mr. President -- Mr. President, I
6 just wished to add that there has already been a decision by the Chamber
7 regarding the experts. This is the decision of the 10th of December,
8 2007, and I just want to recall paragraphs 18 and 19 of the decision.
9 (In English) "Participant has been given leave to participate in the
10 trial. As regards the particular issue area of evidence, which is to be
11 the subject of expert evidence, the parties whenever appropriate should
12 notify the participant and thereby provide him with the opportunity of
13 contributing to the joint instructions or filing separate instructions."

14 Now, we understand that maybe we need a further interpretation of
15 particular issue or area, but still this is a decision of Trial Chamber
16 I, and this instruction is also reiterated in paragraph 19 of the
17 decision. Thank you.

18 PRESIDING JUDGE FULFORD: Thank you very much. Well,
19 Mr. Walley, if you have or any other representative of victims has a
20 suggestion in relation to an appropriate expert in this or any other
21 area, I think we would encourage you to pass those suggestions on to the
22 Prosecution and the Defence, and we would hope that if there is to be
23 joint instruction of an expert that there will be a sensible degree of
24 consultation so as to make sure that particularly where experts are
25 actually participating in these -- where victims are participating in

1 these proceedings at the moment, that they're able to make a sensible
2 contribution to process of instructing joint experts.

3 Finally, you are absolutely right. It's not a precondition of
4 calling an expert that it's a joint expert. An expert can be called by
5 one side or the other, and it was that that I had in mind when I said to
6 Mr. Withopf a few moments ago that I think he ought to seriously reflect
7 on his decision that he's only going to call an expert or only going to
8 produce an expert in this area if it's a joint expert. I'm not sure
9 whether that's the right approach.

10 Good. Thank you all then very much indeed. That then brings
11 this Status Conference to a conclusion. There is to be a further Status
12 Conference on the 27th and 28th of May.

13 The Defence and the participants should know that tomorrow there
14 will be issued a public redacted version of the Chamber's decision on
15 disclosure issues, responsibilities for protective measures, and other
16 procedural matters, and there's in fact going to be an ex parte hearing
17 in a moment to discuss precisely what redactions need to be made to that
18 decision.

19 Finally, in public, Mr. Withopf, there has been an application by
20 the Prosecution for a preliminary ruling on the admission of prior
21 recorded statements. Could you please file a written application really
22 linking your general observations to specific witnesses so that we can
23 understand precisely how you're saying Rule 68 ought to operate in the
24 context of the requirements of or the circumstances of particular
25 witnesses.

1 I said finally. In fact, there's one last matter. The review of
2 the accused's detention needs to have been made by the 31st of May, and
3 we request the Prosecution and the Defence to put in any written
4 submissions on this subject that they wish by 4.00 p.m. on the 19th of
5 May. And I should impose a deadline for the submission -- for the
6 written filing on Rule 68. Would ten days be sufficient, Mr. Withopf?
7 Yes.

8 MR. WITHOPF: Indeed, yes.

9 PRESIDING JUDGE FULFORD: Ten days it will be then.

10 Thank you very much. We'll sit again ex parte Prosecution and
11 Registry only at half past 5.00.

12 The hearing ends at 4.58 p.m.

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