

1 International Criminal Court

2 Trial Chamber I

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

4 Status Conference - Open Session

5 Wednesday, 28 May 2008

6 The hearing starts at 10.06 a.m.

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

9 PRESIDING JUDGE FULFORD: Good morning. The Prosecution are
10 today represented by Mr. Withopf and Mr. Sachdeva, accompanied by other
11 members of the Prosecution's team. For the Defence Maitre Mabilille and
12 Mr. Biju-Duval, again with other members of the Defence team. The
13 Registry by Mr. Dubuisson and Ms. Becerra-Suarez and again other members
14 of their team. The Victims Representatives, as usual, Mr. Walley and
15 Ms. Bapita. And the Office of Public Counsel for Victims are represented
16 by Ms. Pellet, and she is accompanied by an associate legal officer.

17 Mr. Withopf, we want to go, as it were, off piste straight away
18 and we need to return briefly to the subject of materials covered by
19 Article 54(3)(e) in this sense. First of all, I need to ask you two
20 questions. The deadline for providing those materials to the Chamber,
21 and that is of course such materials in relation to which you're able to
22 get the consent of the information providers to furnish them to the
23 Chamber, the deadline expires at the beginning of next week. So my first
24 question is going to be how is that process going, and is the Prosecution
25 going to be able to fulfil its obligations within the time frame we set?

1 The second question is whether, as far as your understanding is
2 today, is whether any materials that we are going to receive may include
3 material of an incriminatory nature. So although the focus of this is
4 exculpatory materials, will that body of statements or other documents
5 include evidence that may be incriminatory?

6 Now, can you respond, please, to those two questions.

7 MR. WITHOPF: Thank you very much, Mr. President, your Honours.
8 Indeed I can respond to both questions. The deadline has been rightly
9 mentioned by the Presiding Judge expires on 3rd of June which is Tuesday
10 next week. Obviously immediately after the status conference of 6 of May
11 we got in contact first and foremost with the United Nations but also
12 with the other information providers including NGOs. A letter has been
13 sent or letters have been sent. The first reactions are coming in, and
14 of course in particular in respect of the United Nations we are, in
15 addition to the letter exchanges, in ongoing consultation with them.

16 At this stage I continue to work on the basis that the office of
17 the Prosecutor will be in a position to by Tuesday next week furnish the
18 respective materials provided that the consent will be given to the Trial
19 Chamber.

20 The second question, Mr. President, whether there are documents
21 or materials concerned that in addition to the potentially exculpatory
22 evidence to also include aspects of incriminatory nature, I respond to
23 this question, saying, Mr. President, yes there are rare instances, I am
24 not in a position to give you the exact number now, but there are likely
25 to be rare instances where such information is contained in the materials

1 concerned. If the Chamber has a concern about this matter I would seek
2 the advice of the Chamber on how to deal with it.

3 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf. You
4 can resume your seat.

5 In the light of Mr. Withopf's second answer, the Chamber wishes
6 at the end of today's hearing, really the last item on the agenda, to
7 raise with the Prosecution and the Defence as to whether there are any
8 objections to the Bench looking at this material in its entirety and
9 including what Mr. Withopf has described as the -- the possibly rare
10 instances where the material will include some -- or may include some
11 incriminatory evidence. We believe it's right to give you time to think
12 about this, and if necessary we will allow the Prosecution and Defence a
13 very short period of time to supplement any oral submissions today with
14 written submissions, but there will be a very tight deadline if that's
15 requested. So that's a topic I fear to be added to the agenda as the
16 last item.

17 We turn, therefore, to the agenda as set out in the Scheduling
18 Order. The first paragraph to be dealt with is paragraph 2.

19 Mr. Withopf, I'm going to be it turning to you in the first
20 instance in relation to most if not all of these issues. The first
21 bulleted item is the number of witnesses. Well, I think there's an
22 element of clarity in relation to that now, Mr. Withopf. I think your
23 list now has 31 witnesses together with two experts on age determination
24 so that I think is clear.

25 The issue that arises, however, is the order in which the

1 witnesses are going to be called so that the Defence can be put in a
2 position of being able to prepare, as well as the Chamber, but also so
3 the Victims and Witness Unit can make appropriate preparations for
4 witnesses who are within the protective programme can make appropriate
5 preparations for accommodating them in The Hague.

6 Now, I'm not necessarily asking for you to give detailed chapter
7 and verse in open court, Mr. Withopf, but I think what we are aiming at
8 is hoping to have a piece of paper from you in the very, very near future
9 which sets out the order of witnesses for the purposes that I've just
10 spelt out.

11 Now, can you respond, please, to those observations.

12 MR. WITHOPF: Thank you, Mr. President, your Honours. Your
13 observation, Mr. President, was entirely correct. There are 31 fact
14 witnesses, and there are 3 expert witnesses the Prosecution intends to
15 call, the two expert witnesses on age determination and obviously pending
16 a decision of the Honourable Bench another expert on background and
17 context.

18 The order in which they will be called I can inform you about the
19 general approach the Office of the Prosecutor has taken. We will first
20 call the witness who is the source of the so-called Rwampara video. We
21 will then call the former child soldier witnesses, followed by the UPC
22 and FPLC insider type of witnesses, and the final group will then be the
23 NGO and UN witnesses.

24 I wish to inform the Chamber at this stage, Mr. President, your
25 Honours, that the Prosecution as a professional courtesy already on 9th

1 of May has disclosed the order of the witnesses to the Defence, and since
2 then there is no change. And on the very same day the Office of the
3 Prosecutor has also furnished the Victims and Witnesses Unit with the
4 very same list.

5 I am in a position, Mr. President, your Honours, accommodating
6 your request whether the Office of the Prosecutor or that the Office of
7 the Prosecutor should furnish the Chamber with such a list. I'm in a
8 position to provide the list right now. That list will indicate the
9 order of the witnesses. It will also address the other questions that
10 are asked by the Honourable Bench, namely the preferred language. In
11 very rare instances we indicated an educated guess. In the large
12 majority of the cases we do know which one is the preferred language of
13 the witnesses concerned. And this list will also contain information on
14 the anticipated duration of the Prosecution's questioning, meaning the
15 examination-in-chief.

16 With the leave the Chamber I would like to hand over that list to
17 the Bench, to the Registry, and to the Defence.

18 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Withopf. Do
19 you have copies for us now or not?

20 MR. WITHOPF: Yes. I have copies now.

21 PRESIDING JUDGE FULFORD: Could I ask somebody from the Court
22 Management to distribute those documents, please.

23 MR. WITHOPF: There are three copies for the Bench, one copy for
24 the Defence, and obviously one copy for the Registry for the court file.

25 The list, Mr. President, your Honours, details the order of the

1 fact witnesses, and I wish to add that this is obviously a tentative
2 list. The Office of the Prosecutor, however, will aim to comply with
3 that order, because in our view there is a certain logic behind.

4 I wish to use the opportunity, Mr. President, your Honours, to
5 also indicate as to when the Office of the Prosecutor wants to call the
6 expert witnesses.

7 The two experts, the two French experts, on the age determination
8 we wish to call immediately after the former child soldier witnesses have
9 testified, and the expert on background, Mr. President, your Honours, we
10 wish to call -- or I can provide you with two options and we leave it to
11 the Chamber which is the preferred option.

12 The preferred option of the Office of the Prosecutor would be to
13 call the expert provided that the Chamber decides in favour of the
14 Prosecution's respective application at the very end of the trial in
15 order to clarify whatever issue requires clarification. The second
16 option would be, and we would be prepared, if such, to accommodate such a
17 wish of the Trial Chamber to call the expert immediately after the former
18 child soldier witnesses have testified.

19 I put it to the Chamber, and we would accommodate any wish of the
20 Chamber.

21 PRESIDING JUDGE FULFORD: And therefore not at the beginning,
22 Mr. Withopf, might be said that the background comes before the evidence
23 of the events.

24 MR. WITHOPF: Mr. President, your Honours, the issue has been
25 discussed within the Office of the Prosecutor, and the decision has been

1 taken to put forward these two options to the Honourable Bench. I wish
2 to add that the main focus in the view of the Office of the Prosecutor
3 are the victims. The victims in this case are the former child soldiers,
4 and for that reason the Office of the Prosecutor has taken the decision
5 to indicate to the Chamber that in its view solely after the former child
6 soldiers have testified the expert on background and context should be
7 called.

8 PRESIDING JUDGE FULFORD: We needn't engage in a debate on this
9 now, Mr. Withopf. Thank you very much for indicating the Office of the
10 Prosecutor's preference in this regard, and we will give due
11 consideration to whether or not we agree with -- with that approach, but
12 thank you for indicating it.

13 Now, I think this is probably a useful opportunity to deal with
14 the issue of the background expert. The Office of the Prosecutor put in
15 a filing on the 23rd. Can you just remind me, did you in that filing
16 reveal the identity of the proposed expert.

17 MR. WITHOPF: Yes, Mr. President, we did after we had talked to
18 the expert concerned. His name is contained in the public filing, and
19 his name can be mentioned in a public hearing.

20 PRESIDING JUDGE FULFORD: Right. So there isn't a difficulty
21 with referring to that.

22 MR. WITHOPF: Not at all. And the -- therefore, so it's clear,
23 the position now of the Office of the Prosecutor is that you would wish
24 to call an expert on background.

25 MR. WITHOPF: Indeed so, Mr. President.

1 PRESIDING JUDGE FULFORD: Right. Thank you.

2 Maitre Mabilille, can I ask what the Defence position is on -- on
3 this? You will recall that the Bench expressed an interest in having an
4 expert called on this issue. In the right of that interest and in the
5 light of the Prosecution having identified an individual, do the Defence
6 have a position on this issue?

7 MS. MABILLE (interpretation): Thank you, your Honour. I would
8 make the same observations at the last hearing. We have not arrived at
9 an agreement between ourselves and the Office of the Prosecutor on the
10 name of the expert. The Office of the Prosecutor has stated that it
11 maintains its choice and thus we will hear from the expert called by the
12 Prosecutor, and we will cross-examine the expert in the classic fashion.
13 That is the position of the Defence.

14 PRESIDING JUDGE FULFORD: Thank you, Maitre Mabilille. That makes
15 the position of the Defence very clear.

16 Mr. Withopf, so the Prosecution and the Defence know, the Bench
17 is also giving consideration to having one or two further witnesses
18 called on this issue. Two possible experts in this regard are currently
19 under consideration by the Bench. The first is an expert called Roberto
20 Garreton, and the second further expert called Rene Lemarchand. We will
21 during the course of the day provide the Prosecution and the Defence with
22 details in relation to these witnesses, and before we take a final
23 decision as to whether or not they should be instructed, we would welcome
24 submissions in writing as to whether or not there are reasons to either
25 the Prosecution or the Defence as to why it would be inappropriate for

1 these individuals or either of them to give evidence on the general
2 background issues. So we're going to give you that opportunity.

3 MR. WITHOPF: If I may make one observation now.

4 PRESIDING JUDGE FULFORD: Certainly, Mr. Withopf.

5 MR. WITHOPF: I want to be careful because I'm not entirely sure
6 about the first name, but the Office of the Prosecutor and the Defence
7 met a potential expert with the name Lemarchand some weeks ago. You are
8 aware of this, Mr. President.

9 PRESIDING JUDGE FULFORD: Right. Well, if that's the case and a
10 view has been formed by the Prosecution and the Defence as to the
11 appropriateness of this expert to give evidence, we would ask for that
12 view to be set out shortly in writing so that we can consider it. Given
13 that we will provide detail today, I'm going to set a deadline for this.
14 Would it be convenient by close of play on Monday of next week for you
15 to -- for you and the Defence to furnish us with any thoughts that you
16 have on the subject? Is that suitable?

17 MR. WITHOPF: That's suitable, Mr. President.

18 PRESIDING JUDGE FULFORD: Thank you. Is that convenient,
19 Maitre Mabilille? Good. Thank you very much.

20 Well, Mr. Withopf, that then deals with witnesses and -- and
21 order. I'm working on the basis that the estimate of hours is for the
22 Prosecution's questioning as opposed to all of the questioning by all of
23 the parties; is that right?

24 MR. WITHOPF: That's absolutely correct, Mr. President, and of
25 course this is an educated guess. I wish to mention in this context that

1 the mathematics will provide for about 180 hours of the Prosecution's
2 questioning of the Prosecution's witnesses. This gives an indication as
3 to how long the Prosecution's case may last, but there are very many
4 issues that are beyond the Prosecution's control. For that reason I do
5 not want to provide any anticipated figures.

6 PRESIDING JUDGE FULFORD: And, Mr. Withopf, it is accepted that
7 to an extent there's a real element of an educated guess in relation to
8 length, and we also appreciate that although the - and the Office of the
9 Prosecutor will have done its best in terms of order - you're not
10 entirely in control of events and unforeseen circumstances may arise
11 which necessitate some change in the order. That goes without saying.
12 Now, that deals really, Mr. Withopf, with the length of the evidence to
13 be relied on. You've given your best estimate on that and I won't
14 trouble you with that any further.

15 In terms of the Prosecution's opening address, again,
16 Mr. Withopf, not tying you down to minutes, but can you give some
17 indication as to approximately how long you consider the Prosecution's
18 opening statement will take?

19 MR. WITHOPF: Thank you, Mr. President, your Honours. I can you
20 give -- I can give you such an educated guess again. We anticipate that
21 the opening statement of the Office of the Prosecutor will not last
22 longer than about 90 minutes, one and a half hours.

23 PRESIDING JUDGE FULFORD: Right. On the scale, Mr. Withopf,
24 that's relatively modest, but thank you for that indication.

25 MR. WITHOPF: Can I add one point since the question is also

1 asked in the agenda the content of the opening statement?

2 PRESIDING JUDGE FULFORD: Yes.

3 MR. WITHOPF: We anticipate, Mr. President, your Honours, to
4 outline the main aspects of the case, to highlight the main points, and
5 we also will detail on how the Office of the Prosecutor intends to prove
6 the case against Mr. Thomas Lubanga Dyilo. We also intend to make
7 statements on the gravity of the crime and the fact that such crimes, if
8 proven, require a severe punishment.

9 I submit, Mr. President, your Honours, that this falls widely
10 within the range of the usual what is meant to be covered by an opening
11 statement.

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

13 Languages next. You'll recall that the Bench has expressed on
14 more than one occasion some anxiety that we should not be confronted at
15 the last moment with language difficulties, witnesses being called and
16 finding that it is impossible in fact to interpret what they're saying.
17 Have there been continuous and meaningful discussions between the Office
18 of the Prosecutor and the section of the Registry responsible for this?

19 MR. WITHOPF: There have been such discussions and these
20 discussions continue and the Office of the Prosecutor has obviously also
21 continued and finalised its inquiries with the witnesses concerned, and
22 the list I have provided the Bench with also indicates the preferred
23 languages of the witnesses.

24 The list is almost complete, Mr. President, your Honours. As you
25 can see, there will be 14 witnesses who will prefer to testify in French,

1 12 witnesses - and now this is more important - will prefer to testify in
2 Swahili, and 5 witnesses anticipated to prefer to testify in Lingala.
3 The expert witnesses, all being French nationals, are anticipated to
4 testify in French.

5 PRESIDING JUDGE FULFORD: Now, there's a refinement to the
6 problem, Mr. Withopf, which I'm going to ask you to consider along with
7 the relevant other Prosecutor or Prosecutors in the confirmation of
8 charges hearing which is due to start on the 27th of June. There is --
9 if both cases start on the dates set, there is going to be an overlap.
10 We will have four days of being able to occupy this court alone, and
11 thereafter, possibly for a fortnight, we're going to be sharing the court
12 and the interpreters with the Pre-Trial Chamber.

13 Now, I hope these discussions have already taken place, but if
14 they haven't, we need to ensure, for instance, that the Swahili and
15 Lingali interpreters are going to be able to accommodate the needs of the
16 Pre-Trial Chamber and the Trial Chamber, and if they cannot, we're going
17 to have to make appropriate modifications to the order in which witnesses
18 are called so that we do not place too much of a burden on interpreters
19 who are expected to deal with two cases running concurrently.

20 Now, has this been thought about, Mr. Withopf?

21 MR. WITHOPF: It has been thought about but to a limited extent I
22 am prepared to admit, and I wish to add the following, and this actually
23 highlights what the Presiding Judge has stated: Amongst the first 11
24 witnesses, as can be seen from the list I have provided the Honourable
25 Bench with, all of them will require translation from either Swahili or

1 Lingala into the working languages of the Court. I will certainly take
2 the advice of the Honourable Bench very serious and such a discussion
3 within the Office of the Prosecutor will continue. I'm not in a position
4 to state, and I would not even want to state in public court details that
5 pertain to the other case.

6 PRESIDING JUDGE FULFORD: Now, this needs to be a three-way
7 information, Mr. Withopf. You need to have this conversation with your
8 opposite number, as it were, in the case which is going to be before the
9 Pre-Trial Chamber for confirmation, but you will also need to have this
10 conversation with whoever it is is in charge of Language Services within
11 the court, and with the three of you sitting round a table to do your
12 best to estimate which witnesses will be falling within identified time
13 frames so that you can make an assessment as to whether or not we are
14 going to be asking too much of the interpreters who are going to be of
15 the interpreters who are going to be available to deal with the two
16 cases, and if there is appreciable risk that they are going to be
17 overstretched then you may have to make some fairly radical adjustments
18 to the proposed order in which you're going to be calling your witnesses,
19 because it would be highly regrettable if either the Confirmation of
20 Charges Hearing or this trial were to be significantly delayed because
21 the interpreters were exhausted.

22 MR. WITHOPF: That's noted, Mr. President, and will be taken care
23 of.

24 PRESIDING JUDGE FULFORD: Now, I'm proposing given that
25 protective measures need to be put in place very soon, I'm proposing to

1 set a tight deadline for this conversation to take place. Can you have a
2 short report available to this Chamber and the Pre-Trial Chamber by 4.00
3 on Monday?

4 MR. WITHOPF: I believe we will be in a position to do so.

5 PRESIDING JUDGE FULFORD: Has the Prosecution filed a public
6 redacted version of the summary of presentation of evidence.

7 MR. WITHOPF: Mr. President, we intend to do so in the course of
8 this week. It's worked upon, it's almost completed, and there is a
9 possibility that we will file tomorrow.

10 PRESIDING JUDGE FULFORD: Will that include the annexes or not?

11 MR. WITHOPF: When we filed the initial version of the pre-trial
12 brief on 14th of December last year, Mr. President, your Honours, we did
13 not include the annexes and we have no intention to do so this time.
14 However, as your Honours may have seen already in the context of the
15 initial version, the footnote references other than containing the names
16 of the witnesses were all available in the public version.

17 PRESIDING JUDGE FULFORD: For the moment, Mr. Withopf, we'll
18 leave it there, that there are undoubted problems of providing public
19 versions of the annexes because they would need to be very heavily
20 redacted and so it may actually involve in providing something that may
21 be of no use to the public. But if there are any contrary views to that
22 issue, the Bench should be notified of them before the end of this week.

23 The Pre-Trial Chamber, you will remember this well, Mr. Withopf,
24 amended the charges. At the beginning of the trial, it will be necessary
25 pursuant to Article 68(8)(a) to read the charges to the accused and it

1 would be helpful if a formal document agreed, if possible, between the
2 Prosecution and the Defence, containing the charges could be provided to
3 the court administration and the Bench so that there can be certainty on
4 this issue at the beginning of the trial. It would be most unfortunate
5 if there were to be -- if a document were to be read out to the accused
6 and there then to be disagreement as to whether or not it accurately
7 reflected the charges as confirmed by the Pre-Trial Chamber.

8 Can you engage in that discussion, please, with the Defence?

9 MR. WITHOPF: We will certainly engage in such a discussion in
10 our own interest, Mr. President, your Honours.

11 PRESIDING JUDGE FULFORD: Good. I'm going to ask you please to
12 set out very shortly in writing, and this could be done by e-mail to the
13 legal advisor to the Chamber, by 4.00 p.m. on Monday of next week the
14 results of that discussion, and if possible providing as an annex to that
15 e-mail a document which reflects the charges as confirmed by the
16 Pre-Trial Chamber.

17 MR. WITHOPF: Mr. President, your Honours, can I in this context
18 ask the Honourable Bench to give us one additional day in light of the
19 fact that the Office of the Prosecutor has an event upcoming which
20 requires the attendance of all lawyers of the trial team tomorrow and on
21 Friday. We will not be in a position to convene a meeting with the
22 Defence.

23 PRESIDING JUDGE FULFORD: There's no vast hurry on this,
24 Mr. Withopf, you can have until 4.00 p.m. on Friday of next week.

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

1 PRESIDING JUDGE FULFORD: I want to turn next to the sitting
2 schedule. We've received submissions on this subject. The Chamber at
3 present would be -- is minded to maintain the schedule as proposed by the
4 Bench and communicated to the parties and to the participants; however,
5 we want to stress that this is not an inflexible schedule, and if either
6 the Prosecution or the Defence, indeed the participants, find that the
7 schedule is imposing unreasonable burdens or difficulties we would
8 positively invite representations so that we can consider them. We have
9 in mind the professional obligations of the -- the other professional
10 obligations of some of the lawyers, but we have also got to ensure that
11 this case moves along at an expeditious rate and so we intend to follow
12 that schedule at the outset but it can be modified if representations are
13 made and good cause is demonstrated.

14 Having said that, it looks as though at the outset, or very
15 nearly at the outset, we're going to have to vary the schedule because
16 we're going to be sharing this courtroom with the Pre-Trial Chamber.
17 That means that we will only be able to sit for half a day, and the
18 proposal is there will be two sessions that will occupy our half day. We
19 will provide in due course a detailed explanation as to how that would
20 work, whether it's going to be morning or afternoon, consistently or on a
21 variable basis, and whether it's going to be five days a week or less.
22 But that's just a general indication.

23 The next issue to be raised is that on the 5th of May there was a
24 filing from the Defence which bears the ERN number 1306 requesting
25 disclosure for the purposes of Rule 77. This filing in fact related to a

1 witness who was dealt with in Annex C of the recent substantial decision
2 that was handed down by the Bench, and of course the Defence have not
3 seen the content of Annex C for self-evident reasons.

4 Now, Mr. Withopf, our view is that we have dealt with the Defence
5 application of the 5th of May during the course of our analysis in Annex
6 C, but we would ask you, please, to reflect on this during the course of
7 today's hearing and at the end of the hearing to give us your views as to
8 whether or not we have addressed the points that were made in the 5th of
9 May application.

10 Maitre Mabilille is of course at a significant disadvantage on this
11 issue because she hasn't seen Annex C and so it is going to be impossible
12 for the Defence to say whether we have adequately sufficiently dealt with
13 the matters that they've raised, and we are very much aware of that, but
14 we would this afternoon, Mr. Withopf, ask for your assistance on that
15 issue, and of course we will at that stage give Maitre Mabilille the
16 opportunity to say anything she wishes on the subject, but of course
17 there may be real difficulties in the Defence doing that.

18 Now, we turn next to paragraph 3 of the agenda, and this relates,
19 Mr. Withopf, to your application to rely on the prior recorded statements
20 of two witnesses. This relates to your filing of the 16th of May.

21 Now, there is a difficulty in relation to dealing with all of
22 this in open court, because a part of this issue has been dealt with in
23 confidential Prosecution and Defence-only filings, and so we need to be
24 careful about what is said in open court on these issues.

25 You should know, Mr. Withopf, that the Chamber has questions as

1 to whether or not these two witnesses satisfy the criteria which the
2 Prosecution has identified, and you've identified the criteria in
3 paragraph 4 of filing 1262, and I'll just remind everybody of what that
4 criteria is. Sorry, it's paragraph 18 of 1262.

5 Firstly that prior recorded evidence facilitates the evidence
6 giving process of vulnerable witnesses; secondly, it saves valuable court
7 time; and thirdly, it permits the admission of the exhibits contained in
8 the statement as an integral part of that evidence.

9 Mr. Withopf, as I understand it, although you're not going to be
10 able to deal with this fully in open court, neither of the witnesses come
11 within the definition of vulnerable witnesses. I may be wrong on that
12 and it may be you will have to advance submissions in closed session on
13 that subject.

14 Secondly, although it is suggested that this will save valuable
15 court time, one of the statements is only just over three sides of A4;
16 whereas the other statement is 11 pages of A4. So neither of them are
17 particularly lengthy, so there is a question as to whether dealing with
18 this by way of pre-recorded statements rather than oral evidence is
19 really going to save that much time.

20 Thirdly, as I understand it, this mechanism will not assist in
21 relation to the admission of exhibits, and so, Mr. Withopf, applying the
22 criteria the Prosecution have themselves identified, we don't see that
23 these two witnesses in fact satisfy that criteria on a preliminary view.

24 Now, being careful about what you can say in open court, is there
25 anything that you would wish publicly to say on this issue?

1 MR. WITHOPF: Mr. President, your Honours, thank you very much
2 for the extensive advice that has been provided. My colleague,
3 Mr. Sachdeva, will make our submissions taking into account what has been
4 just said.

5 PRESIDING JUDGE FULFORD: Yes, Mr. Sachdeva.

6 MR. SACHDEVA: Thank you, Mr. President and your Honours.
7 Firstly, I would say that the criteria we have identified is not meant to
8 be exhaustive. Of course there may be other advantages to this process
9 as and if when the Trial Chamber permits the process to continue.

10 Secondly, it's correct that your Honours have identified that the
11 saving the time, albeit minor, but it would be necessarily -- it would be
12 in any event a saving of time, and so if one of the witnesses that you
13 have referred to as having given a statement of 12 or 13 pages, in our
14 submission that would lead to a possible saving of time of two hours, for
15 example, and in our submission the saving of two hours' time in a vast
16 criminal case such as this would inevitably be an advantage to the
17 process.

18 And lastly, the Prosecution still has decisions to make as to
19 whether there are other witnesses we can apply this process to, and that
20 discussion is ongoing and of course much depends on what has been
21 tendered in court beforehand if there has been witnesses where oral
22 evidence has been given and other witnesses may corroborate that
23 evidence, then one would lead to the conclusion that that evidence could
24 be given in written form.

25 PRESIDING JUDGE FULFORD: Very clear, Mr. Sachdeva. Is there

1 anything that you would wish to add to those submissions in closed
2 session or does that really encapsulate the Prosecution's position on
3 this?

4 MR. SACHDEVA: In closed session I submit no more submissions.
5 In our submission it encapsulates.

6 PRESIDING JUDGE FULFORD: Mr. Biju-Duval?

7 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President. On
8 this matter I think we can discuss this publicly without dealing with
9 matters that go to confidentiality or protection. The Defence is opposed
10 to the suggestion of the Office of the Prosecutor for several reasons.
11 All these reasons have already been set out in writing at various points
12 in submissions of which the Chamber is aware. I shall summarise them.

13 The first reason is that this solution cannot rely on any legal
14 basis set out in the Rules of Procedure and Evidence and the Statute.
15 Rule 68(2) which is mentioned by the Prosecutor as a ground for admission
16 without oral testimony of a written statement without questioning by the
17 Prosecutor does not apply because unless I am mistaken, this is what we
18 have understood. We have understood that two witnesses are being
19 referred to here, and there are two written statements related to the
20 witnesses.

21 The Defence received two statements, one of three pages and one
22 of a dozen or so pages which is longer, which means that we are beyond
23 the scope of Rule 68(2), which refers to prior-recorded testimony. Rule
24 68(2) considers exceptionally, and I repeat exceptionally, the admission
25 of statements recorded beforehand as a video, and the Chamber will

1 appreciate the difference, the obvious difference between a written
2 statement which is prepared with the aid of OTP investigators; that is,
3 the OTP investigators prepare a statement received during the
4 investigations. This statement is used -- is prepared with the words of
5 the investigators. So there is a fundamental difference between such a
6 document and an audio or video recording of statements made by the
7 witness at the time when the witness is making them.

8 Rule 68(2) considers the possibility that the Court may view or
9 hear directly the witness himself or herself through the audio or video
10 recording of the testimony. So in this instance this is not the instance
11 we are facing, and because this is not the case, the suggestion of the
12 Office of the Prosecutor cannot be accepted. It cannot be accepted
13 because Rule 68(2) is obviously an exception to the principle that
14 witnesses should appear personally before the Court and that they should
15 be examined by the Prosecution and cross-examined by the Defence. So
16 this is the first argument that would support setting aside such a
17 suggestion.

18 The second issue with regard to the justification advanced by the
19 Office of the Prosecutor, which is based essentially on the idea of
20 saving time, this argument is in fact not able to stand up to scrutiny.
21 On the contrary. Let us take the example of Annex 2. Unless I am
22 mistaken, this is the testimony or the statement which is set out in 11
23 pages, 60-odd paragraphs, some of them quite long, and in this statement
24 this Prosecution witness set out in this statement a number of statements
25 on a large range of events, a wide range of events. It is obvious that

1 if the Prosecutor does not examine this witness in court, that is
2 limiting the examination to what is relevant to the trial, then the
3 Defence will be in a position of being obliged to cross-examine on all
4 the events or all the facts of varying relevance or importance contained
5 in the statement. That is instead of gaining time we're going to lose
6 time, and this is going to happen because the Office of the Prosecutor
7 will have failed to use the opportunity of the hearing to focus, to
8 target the witness to what is relevant to the trial. So we are not going
9 to save time. We are going to lose it. The same applies to the first
10 three-page statement, although less clearly, but it is just as precise.

11 Furthermore, I would like to add, as I have said before, that the
12 principle of personal appearance should be maintained. Most of all, we
13 must maintain the idea that the Prosecutor will examine his witness in
14 court. Why? This is because this is the opportunity during the
15 examination-in-chief of the witness for the Defence to ensure that the
16 rights of the accused are protected, to ensure that this examination
17 follows the rules. It means that the aim is to ensure that the questions
18 put are not guided and that the answers that are given in response to the
19 questions are true. This goes to the fairness of trial. A fair trial is
20 not only dependent on cross-examination, it is not only during the
21 cross-examination that the accused exercises his rights, this also
22 applies during the examination-in-chief.

23 If the examination-in-chief is set aside, then a great many
24 rights of the accused will also be set aside.

25 This is for reasons of principle, and this is why the Defence

1 challenges the Prosecution's suggestion.

2 PRESIDING JUDGE FULFORD: Very clear, very helpful. Thank you,
3 Mr. Biju-Duval.

4 Do you want to come back on this, Mr. Sachdeva?

5 MR. SACHDEVA: May I, Mr. President? Thank you. Just to the
6 first point as to the interpretation of Rule 68(b), I note that Article
7 69 of the Statute permits the introduction of evidence via document form
8 which would mean not obviously videotaped and audiotaped. And secondly,
9 if one goes to the Rule in the French version of the Rules, and again I'm
10 not fluent in French by any means, however, the chapeau talks about
11 enregister sur audio ou video, and then when it speaks to Rule 68(b) it
12 simply mentions the word "enregister," and in our submission if
13 enregister would mean audio and video then the chapeau would be framed in
14 a redundant fashion.

15 And secondly statements in this court are taken pursuant to Rule
16 111 and 112, and in our statement it would be inconceivable that such
17 statement in the feature would be not permitted to be entered into
18 evidence as long as the person who gave the statement is available for
19 cross-examination.

20 The second point with respect to the relevance of the material in
21 our submission with regard to the two witnesses we have determined that
22 all of the material is relevant for your Honours to decide matters
23 pertaining to this case. The Prosecution would not tender or propose to
24 tender material that is irrelevant to the case.

25 Now, if the Defence feels that part of those statements are

1 irrelevant to them and for their cross-examination, then they needn't
2 cross-examine the witness on that part.

3 In any case, in our submission the statements that we have taken
4 are structured in such a fashion whereby there are concrete paragraphs
5 and if the Chamber is minded to ask the Prosecution to lead critical
6 evidence that may be contained in some of the paragraphs, then of course
7 we would oblige the Chamber in doing that. However, in cases which could
8 last -- not just this case but in future cases where you will have 50 to
9 a hundred witnesses, clearly the advantage of leading evidence of a
10 non-critical nature wherein it does not touch upon the acts and conduct
11 of the accused as charged in an indictment is clearly beneficial to such
12 an institution, and therefore in our submission while it's not
13 automatically a bar to -- while the fact that evidence goes to the
14 conduct and acts of the accused is not automatically a bar to its
15 admission, in this situation and our application, we submit that the
16 evidence is of a -- of course it's relevant and important but of a
17 non-critical nature and therefore should be admitted in this fashion.
18 Thank you.

19 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Sachdeva.

20 Mr. Biju-Duval, I think it was a slip of the tongue. You
21 referred on at least one occasion to Rule 68(2). Am I right in thinking
22 that you meant Rule 68(b)? Is that right? I don't mean to be pedantic.
23 It is right. Good. Thank you very much.

24 Well, thank you both for your submissions on that subject. We
25 will deliver a decision on that issue, which is clearly one of general

1 importance to the running of cases before this court.

2 The second item at this paragraph of the agenda, Mr. Withopf,
3 refers to your filing which bears the closing number 1323 where at
4 paragraph 4 of that filing the Prosecution set out as follows: That it's
5 been able to deselect a number of disclosed materials on which it is
6 unlikely to rely during the trial, and you went on to say that the
7 Prosecution has attached an appendix to this information which sets out
8 the materials on which the Prosecution does not at present intend to rely
9 at trial.

10 Mr. Withopf, one doesn't want to be difficult about this, but in
11 terms of the Defence preparing the case for trial, it doesn't necessarily
12 improve their position hugely knowing that evidence is unlikely to be
13 used but may be used because it means that they are left in the position
14 of having to anticipate the possibility that the material may be
15 introduced.

16 Now, am I right in summarising the true position as follows that
17 from your vantage point at the moment, looking at the case shortly before
18 it's to begin, the Prosecution is not intending to lead this evidence?
19 However, one can never say things with absolute finality, and of course
20 you wish for the door to be left open so that if something unexpected
21 arises which renders this material relevant, it may be in those
22 circumstances the Prosecution will be making an application to be allowed
23 to rely on this material.

24 Now, is that what the true position is, Mr. Withopf?

25 THE PROSECUTOR: Mr. President, your Honours, Mr. President, you

1 make my life easy in this instance. Indeed that's the position of the
2 Office of the Prosecutor. We do not want to close the door to rely
3 whenever need arises on these materials and of course as we indicated in
4 our filing we would give advance notice to both the Bench and, of course,
5 also to the Defence.

6 PRESIDING JUDGE FULFORD: So thank you. We'll proceed then on
7 the basis that the matters identified in the appendix to filing 1323 are
8 not going to be introduced by the Prosecution during the trial, but as
9 with any material, of course it is open to the Prosecution to make an
10 application, if circumstances change, to be allowed to introduce further
11 material to meet unforeseen circumstances.

12 Now, do you want a moment?

13 MR. WITHOPF: If you allow me, Mr. President, to very carefully
14 read the transcript since I want to be absolutely sure that our position
15 is correctly reflected in the transcript.

16 Mr. President, your Honours, this is not exactly our position.
17 Our position is that there is a list of evidence. This list of evidence,
18 Mr. President, your Honours, is currently comprised of 1 .127 items, and
19 that's the list detailing the documents and the video materials, and it
20 does not include the list of witnesses. And all these items have been
21 disclosed to the Defence over the last two years as incriminatory
22 evidence.

23 In order to focus or to enable the Defence to properly and better
24 prepare the Office of the Prosecutor triggered by a decision of the
25 Honourable Bench, has indicated in the filing we are currently dealing

1 with that there are 214 items it at this stage doesn't believe it will
2 rely on during the trial, but as has been rightly mentioned, things may
3 change and they may in particular change once the Defence by the
4 beginning of next week has filed it's defence lines.

5 Our position is the following: There is a list of evidence, and
6 this list of evidence contains also these 214 items, but we will only
7 rely on them once we have given advance notice to both the Bench and the
8 Defence, but what we -- what's not our position, Mr. President, your
9 Honours, that this would require a specific application. Our position
10 would be advance notice and this should be sufficient.

11 (Trial Chamber confers)

12 PRESIDING JUDGE FULFORD: Mr. Withopf, I'm afraid that the time
13 has come when there's got to be certainty in relation to the materials
14 the Prosecution is going to present. We are grateful to you for having
15 set out in that filing that there is an area of evidence which looks as
16 though it's likely to fall off the map. However, the way that I
17 described it at page 22, line 17, is the approach that we're going to
18 adopt. This material is not to be relied on unless the Prosecution make
19 an application for permission to be allowed to rely on it.

20 Now, all sorts of unforeseen circumstances may justify that
21 course and including matters revealed for the first time by the Defence,
22 and so the door is not closed, Mr. Withopf, in that sense. You can --
23 you can return to us if something has changed the position, but for the
24 moment the Defence are entitled to assume this material is not going to
25 feature.

1 Now, Maitre Mabilie, I have not invited you to participate
2 because I've assumed that the position that I've just summarised would
3 coincide with the Defence position, but of course if there's anything you
4 would wish to add, please do so.

5 MS. MABILLE (interpretation): No, I have nothing to add, and I
6 agree with the Chamber's position. Thank you, President.

7 PRESIDING JUDGE FULFORD: Thank you very much.

8 We turn now to paragraph 4 of the agenda, which deals with,
9 amongst other things, the audio-video materials. Part of the reason for
10 including this was to provide the Registry with an opportunity of
11 addressing us in relation to any technical problems that may stem from
12 the Prosecution's suggestions, but it is also to give the Defence an
13 opportunity to advance any oral submissions that they wish in relation to
14 the Prosecution's proposals as is set out in filing 1260.

15 Mr. Dubuisson, I'm going to turn to you first. Is there anything
16 that the Registry would wish to say about the Prosecution's proposals,
17 and I would anticipate this particularly relates to the suggestion that
18 some videos should be shown in slow motion and on some occasions there
19 should be the simultaneous broadcast of video materials.

20 MR. DUBUISSON (interpretation): Thank you very much, President.
21 I'll hand the floor to Charlotte Dahuron.

22 Ms. Dahuron (interpretation): Thank you, President. The main
23 points are first simultaneous viewing of two videos in consultation with
24 the OTP we have come to a solution which consists of the OTP in preparing
25 two separate videos and a third one in a separate format that combines

1 the other two videos and in which the OTP will have selected the relevant
2 parts, and so this would be a third video based on the two original ones.
3 What is important in this case ask to identify if necessary whether or
4 not the audio recordings should be used and to which video they relate.

5 The second point was the possibility of showing a slow motion
6 video and rewinding. The current situation in the court is that the
7 material isn't adapted for this, and in consulting with the information
8 and telecommunications section of the Registry, they have announced that
9 they will be able to provide us appropriate equipment in two weeks. So
10 before the beginning of the trial.

11 Either way, the videos will be presented from the court
12 manager -- by the court manager, and we will have a presentation by the
13 participation -- the participants who wish to do so the week of -- the
14 2nd of June and for those who wish to hear this on the final modalities
15 of the procedure.

16 PRESIDING JUDGE FULFORD: Defence have thus far been included in
17 these discussions because there may be some objection to the final
18 proposed format of these materials.

19 Yes, Mr. Dubuisson.

20 MR. DUBUISSON (interpretation): Indeed, President. At this
21 stage of the procedure we haven't included the Defence in our discussion.
22 The problem, we believe, is a technical one which had to be resolved on a
23 technical level. The Defence may raise other issues concerning specific
24 points. For instance, we have two pieces of evidence, two documents, and
25 if we create a third document this could be considered as a third piece

1 of evidence. The Chamber will have to decide this.

2 The subtitles that could be used will be subtitles in one or
3 maybe two working languages, and our interpreters will not be able to
4 interpret two subtitles at the same time, for instance for the language
5 that one of the witnesses is using. So this is another problem that
6 might arise.

7 And the third problem could be related to the forwarding and
8 rewinding, because the person rewinding and forwarding should be the
9 court manager because they -- because it shouldn't be one of the parties
10 who does so, because that could modify the presentation. I believe that
11 we should discuss this here in the -- in the court setting rather than
12 outside the courtroom.

13 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
14 the submissions that we've heard thus far it would be appropriate for the
15 Defence to be shown in the near future what it is that is proposed for
16 presentation in court during the trial so that if there are objections to
17 the way that this has been prepared from a technical point of view there
18 can be a full opportunity for the Bench to be addressed on those points
19 and for an alternative solution to be found if necessary. And so,
20 Mr. Dubuisson, without setting a time frame to this, can we leave it to
21 you, please, to make sure that the Defence are appropriately but fully
22 involved in this process.

23 MR. DUBUISSON (interpretation): Yes, we will do so.

24 PRESIDING JUDGE FULFORD: Mr. Withopf, there aren't any
25 difficulties with that, are there?

1 MR. WITHOPF: Not at all, Mr. President.

2 PRESIDING JUDGE FULFORD: Thank you very much indeed.

3 Maitre Mabilie, we of course -- have of course considered the
4 Defence filing of the 4th of April often these issues, but we would now
5 wish to give you the opportunity of further developing, if you wish, any
6 of the matters that you set out in that filing in relation to the
7 Prosecution's proposals as regards audio-visual material.

8 MS. MABILLE (interpretation): Well, actually, President, I will
9 just refer to the submission of the 18th of April, 2008, and I do not
10 have any points to add to that submission.

11 PRESIDING JUDGE FULFORD: I expected that might have been the
12 position, Maitre Mabilie. Thank you very much indeed.

13 Now, the next issue arising out of paragraph 4, which may in fact
14 need no substantive canvassing now, is to whether or not there is
15 anything more that needs to be said to the Chamber about the approach
16 that should be taken by the Defence when they conduct their final
17 questioning of a witness under Rule 140(2)(d).

18 As I understand it, there is if not complete a very high measure
19 of agreement between the Prosecution and the Defence on this issue.

20 First of all, Mr. Withopf, am I right in that? Has agreement
21 broken out on this subject?

22 MR. WITHOPF: There is a high overlap, obviously, of views, but
23 this issue has never been the issue of discussion -- explicit discussion
24 with the Defence.

25 PRESIDING JUDGE FULFORD. Your position is clear. Is there

1 anything else you'd wish to say on this?

2 MR. WITHOPF: No, Mr. President. Our position has been outlined
3 in our respective filing.

4 PRESIDING JUDGE FULFORD: Yes. Thank you. Maitre Mabilille,
5 anything on this?

6 MS. MABILLE (interpretation): I would also like to refer to our
7 submissions on this point, President.

8 PRESIDING JUDGE FULFORD: We turn then to paragraph 5 of the
9 agenda. Now, Mr. Withopf, on paragraph 5 there is in a sense a clear
10 difficulty for the Defence on this issue because there has been a
11 confidential filing, 1309, and a Prosecution and Defence only filing,
12 1324. You are applying for the opportunity to furnish materials in
13 redacted form, and it may be we'll have to hear you ex parte on this
14 issue. Is there anything else that the Prosecution would wish to say in
15 public in relation to this filing?

16 MR. WITHOPF: Mr. President, your Honours, not in public, and I
17 would also suggest, since my colleague Ms. Samson is dealing with this
18 matter, that we postpone this matter, if at all it needs to be further
19 addressed, to the afternoon session.

20 PRESIDING JUDGE FULFORD: All right. It may not be the afternoon
21 session, Mr. Withopf, it may be the 12.00, session, so I hope Ms. Samson
22 is somewhere in the building.

23 MR. WITHOPF: Indeed she is in the building.

24 PRESIDING JUDGE FULFORD: Right. She'll have an opportunity of
25 reading the transcript.

1 Maitre Mabilie, fully appreciating the difficulties that you
2 labour under because you haven't seen the core materials, is there
3 anything that you would wish to say orally on the Prosecution's
4 application in this regard?

5 MS. MABILLE (interpretation): Well, I would like to mention to
6 the Chamber that we're exasperated having documents which we are unable
7 to have an opinion about. So I do not have an opinion and I think it's
8 quite sensitive for us to be asked to give an opinion about documents
9 which are practically illegible, and so we repeat that we need
10 exculpatory evidence in unredacted form. That's the only thing I can say
11 just now.

12 PRESIDING JUDGE FULFORD: 12.00 then, please, for Ms. Samson,
13 Mr. Withopf.

14 Paragraph 6, I think we're really in exactly the same territory,
15 and I would anticipate that the position of the Defence is the same.
16 Yes. And Maitre Mabilie confirms that it is.

17 So -- yes, certainly, Maitre Mabilie.

18 MS. MABILLE (interpretation): Mr. Jean-Marie Biju-Duval would
19 like to say something about this request.

20 MR. BIJU-DUVAL (interpretation): Yes. Concerning point 6 -- and
21 perhaps I should speak after the Prosecutor has first spoken about the
22 issue. I don't want to reverse the order of things. Would you like --
23 shall I make some observations?

24 PRESIDING JUDGE FULFORD: (Previous translation continues)...
25 thank you. Is Ms. Samson going to wish to advance in public submissions

1 on these issues, Mr. Withopf, or are they going to be only ex parte
2 submissions?

3 MR. WITHOPF: Based on our pre-discussion of this matter there is
4 almost everything that can be said in public.

5 PRESIDING JUDGE FULFORD: Good. We shall return to this subject
6 at 12.00 then, because we shall need Ms. Samson.

7 In a moment we'll rise because we must give the interpreters half
8 an hour's break. So that everybody knows what's left of the agenda,
9 Article 76, insofar as there are any submissions to be made on -- on that
10 subject, there was a Defence e-mail sent yesterday which revealed that
11 the issue of disclosure arises, and we will of course give Maitre Mabilie
12 a full opportunity to address the Bench on that subject, and then there
13 is Mr. Walley's communication which we will deal with after the break,
14 and then finally we will return to the subject that I raised at the
15 outset, 54(3)(e). So unless there is, as it were, any other business,
16 any other matters that the parties or the participants wish to raise, we
17 shall address those issues when we sit again at 12.00.

18 Thank you all very much. We'll take a break now for 35 minutes
19 and sit again at 12.00. Thank you.

20 Recess taken at 11.24 a.m.

21 On resuming at 12.03 p.m.

22 COURT USHER: All rise. Please be seated.

23 PRESIDING JUDGE FULFORD: Yes, Ms. Samson.

24 MS. SAMSON: Good morning, your Honours.

25 PRESIDING JUDGE FULFORD: We understand from Mr. Withopf that

1 you're fielding paragraphs, I think it's 5 and 6 on today's agenda, and
2 I'm afraid you've got the first billing for this particular part of the
3 hearing. It's really whether there's anything in addition to the
4 Prosecution's written submissions that you wish to say in public.

5 MS. SAMSON: Thank you, your Honour. At this time there is
6 nothing further for the Prosecution to make submissions on in the public
7 hearing. Should the Chamber have any particular questions that may
8 require a closed-session hearing, then certainly we'd be available to
9 answer those types of questions on the specific redactions.

10 PRESIDING JUDGE FULFORD: Ms. Samson, we've worked on the basis
11 that the filing -- the ex parte filing has been full and that you have,
12 as it were, within your judgement provided us with everything that we
13 need to know in order to make a decision on the particular requests that
14 have been made. In those circumstances, the Bench is not going to
15 request an ex parte session. We trust you to have revealed everything
16 that needs to have been revealed and we don't have any additional
17 questions. So does that mean that in fact as far as you're concerned
18 there doesn't need to be an ex parte hearing on the issue?

19 MS. SAMSON: Yes, that's correct.

20 PRESIDING JUDGE FULFORD: Good. And you've nothing to add?

21 MS. SAMSON: No, nothing to add.

22 PRESIDING JUDGE FULFORD: Thank you, Ms. Samson.

23 Mr. Biju-Duval? Paragraph 6. Ms. Samson's not going to develop
24 any more oral arguments, so it's really based on what has been set out in
25 the public version of the filings.

1 MR. BIJU-DUVAL (interpretation): Yes, your Honour. Some brief
2 comments on this application. As you said yourself, we are addressing
3 the matter in very difficult circumstances, because this application was
4 filed in the wake of ex parte proceedings in which the Defence did not
5 participate, the application itself is ex parte, and a large part of it
6 has been redacted so it's largely incomprehensible to the Defence.
7 However, we can nonetheless make two comments.

8 Firstly, we note that this application for non-disclosure of
9 exculpatory evidence to the Defence is based on Rule 82. That is to say
10 is based on the need for confidentiality in relation to ongoing
11 investigations, ongoing investigations of which we know nothing.

12 In this connection, the Defence would like to remind the Chamber
13 that in an oral decision made on the 18th of January, 2008, the Chamber
14 recalled that the Prosecutor would not be allowed to "detail information
15 which could potentially assist the accused on the basis that that
16 evidence was related to ongoing investigations." Thus even though we
17 cannot understand the detail of this application, we see that it is based
18 on ongoing investigations, although the Chamber has already ruled that
19 that basis, that ground, could not be used to keep from the Defence
20 potentially exculpatory information.

21 My second comment: The Office of the Prosecutor proposes to make
22 ad hoc factual admissions in order to avoid having to disclose
23 potentially exculpatory information concerned. We would just like to
24 make one observation and draw the attention of the Chamber to one point
25 which is linked to paragraphs 8 and 9 of the Prosecutor's application and

1 which illustrate eloquently the fact that an admission by the Prosecutor
2 cannot, cannot, usefully replace the document itself or the statement of
3 the witness. The Prosecutor demonstrates it himself in his application
4 by giving an example. He refers to a piece of information according to
5 which, and now I refer to the -- the filing, that Lubanga had not
6 participated and had no reason to be implicated in military operations on
7 the basis of the allegation.

8 That is the information provided. The Prosecutor wants to make
9 an admission which would allow him not to provide the document in extenso
10 to the Defence or the statement in extenso, and what is the admission
11 that the Prosecutor offers? The admission is as follows: That Thomas
12 Lubanga Dyilo played a political role in the UPC and did not fight on the
13 front lines. This is a very clear example of distortion between the
14 document contained in the document which is not to be disclosed in its
15 entirety and the admission made by the Office of the Prosecutor. Not
16 fighting on the front lines is obviously not the same thing as not being
17 involved, implicated, in military operations. It's not the same thing.

18 This is an example of an admission offered by the Prosecutor
19 which cannot substitute non-disclosure of potentially exculpatory
20 information. So this is an example which I believe should lead the
21 Chamber to rule that this solution should not be retained.

22 PRESIDING JUDGE FULFORD: Mr. Withopf, do either you or
23 Ms. Samson wish to come back on that point?

24 MR. WITHOPF: Mr. President, thank you for giving us an
25 opportunity to confer. We will not make submissions on this matter.

1 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, Maitre Mabilie, this
2 may be an appropriate opportunity for the Defence now to set out orally
3 the submissions that were raised by way of indication for our
4 consideration in the e-mail of yesterday, namely as I understand it the
5 difficulties that it's said currently exist in relation to disclosure.
6 So we give the floor to you.

7 MS. MABILLE (interpretation): Thank you, President. Thank you,
8 your Honours. Yes, indeed. I must make it plain to you that the Defence
9 is somewhat preoccupied regarding this issue of disclosure. I would like
10 to return to the principles set by your Chamber on the matter of
11 disclosure. The principle which strikes me as being essential is that
12 the deadline for the Prosecutor is the 28th of March. We have talked
13 about it at length on a number of occasions. That was the date. Beyond
14 that date the Prosecutor was not to disclose information, evidence,
15 unless expressly authorised to do so by the Chamber.

16 Now, first of all I would like to address the issue of
17 incriminatory material. Since the 28th of March we have received a
18 certain amount of incriminatory material. A week ago we received a new
19 disclosure with incriminating material. We informed the Prosecutor that
20 we could not accept the disclosure of that incriminatory material. At
21 that time the Prosecutor said to us -- said that he would disclose us --
22 disclose it to us under Rule 77. However, in the wake of this what did
23 we discover? We discovered that the Prosecutor was providing to us a
24 document required by the Chamber and that was the summary of the charges,
25 the charging document, and in that summary of the charges the Prosecutor

1 specifies the incriminatory material on which he would rely, and what do
2 we find there? Material disclosed to us under Rule 77 as incriminating
3 material.

4 This presents a problem, a real problem. How am I and how is the
5 Defence team to interpret your decision of the 28th of March? We
6 interpret it, and I will move to English, late is too late. That is to
7 say that all documents produced after the 28th of March are too late
8 unless the Chamber authorises the Prosecutor to disclose them and that
9 that material cannot be used at trial. That is how we understand that
10 decision. Such material cannot be used at trial.

11 Now, when material is disclosed to us under Rule 77 and then we
12 find that material referred to under the incriminating evidence on which
13 the Prosecutor intends to rely, the Defence shall return to you
14 systematically in connection with each of these items or each of these
15 pieces of material to state that the Prosecutor cannot use that material
16 unless it is authorised by the Chamber, because this is how we interpret
17 the situation.

18 These are my first comments on the incriminatory evidence.

19 Turning now to exculpatory evidence, here, too, the Defence is
20 particularly uneasy. We have received two waves of disclosure, one on
21 the 6th of May and one about one week later. I'm just looking for the
22 date. These two sets of disclosure in total constituted 3.000 pages
23 disclosed between the 6th of May and the 16th of May approximately.

24 Obviously we must process this exculpatory material. A large
25 proportion of these documents are redacted, still redacted, and as you

1 know that renders our task all the more difficult.

2 The Defence has difficulty understanding, and here I weigh my
3 words, the Defence has difficulty understanding how these documents which
4 are in part transcripts of statements given by witnesses and who have
5 been questioned by the Prosecutor in 2006 and in 2005 and in 2007 are
6 being disclosed to us today. The texts say "as early as possible." Is
7 it acceptable or can one consider that these documents are being provided
8 to us as early as practicable when some of this information has been in
9 the possession of the Prosecutor for over two years. I do understand
10 that the Prosecutor is continuing to investigate and that the Defence
11 cannot complain of receiving an exculpatory information that has come
12 into the possession of the Prosecutor only in recent days in Bunia. This
13 we could understand. What we have difficulty understanding is that this
14 exculpatory material is being disclosed to us now, although it has been
15 in the possession of the Office of the Prosecutor for practically two
16 years.

17 Clearly this raises another issue for us, and that is,
18 Mr. Prosecutor, how much exculpatory material do you have in boxes which
19 you are going to provide to us little by little, and what position is the
20 Defence being put in? The Defence is being put in the following
21 position: I would say that there is a -- we have here a paradoxical
22 injunction. The first injunction or request of the Chamber is that we
23 reveal our lines of defence and at the same time the Office of the
24 Prosecutor is saying, "Oh, I still have exculpatory material, but just
25 wait. Bide your time. You will receive it at a point in time which we

1 deem appropriate."

2 So what position is the Defence in today? We are concerned about
3 the conduct of a fair trial. These are very serious matters. I would
4 add that at our last hearing we discussed various exculpatory -- or items
5 of exculpatory material, and these were not minor pieces of information.
6 These were very substantial matters relating to the innocence or lack of
7 guilt of our client. The Prosecutor said that he needed to obtain
8 authorisation from the source to provide that information to us.

9 Now, I know that the Chamber took a decision on this matter in
10 that the Prosecutor would have four weeks to submit that material to the
11 Chamber. However, in the interests of a fair trial, starting off on a
12 footing where there is exculpatory material which is available to the
13 Office of the Prosecutor which has not been revealed to the Defence is
14 not right. The Office of the Prosecutor is obliged to investigate
15 exculpatory and incriminatory circumstances equally and to divulge the
16 exculpatory and potentially exculpatory material to the Defence so that
17 it can properly defend its client Mr. Thomas Lubanga. What is the point
18 of a Defence revealing its lines of defence while on the other side of
19 the courtroom the Prosecutor says, "Well, I haven't even provided you
20 with all of the exculpatory material available"? This places the Defence
21 in a very, very sensitive situation. It is a matter of our very
22 professionalism. We are obliged to have that material to do our work.

23 So what consequences can be drawn from what I'm saying? A little
24 earlier, and I will return to the question that you put to me,
25 Mr. President, at the outset, you asked whether the material that will be

1 provided to the Chamber by the Prosecutor would contain exculpatory
2 material and whether there would also be incriminating material and
3 whether the Chamber should view that incriminatory material. My answer
4 to you would be no based on the situation which we find ourselves. No,
5 the Chamber need not view this incriminating evidence because today it is
6 too late. The Prosecutor cannot use that material in the trial. That is
7 our position. Otherwise, there is no end in sight. And also the concept
8 of a fair trial which is at the heart of this -- these issues, this
9 problem complex, is at play.

10 My question is: Mr. Prosecutor, when will we have all of the
11 exculpatory material in its entirety? When? At what date? This is an
12 essential issue.

13 We need to know whether we will be -- we will have to keep
14 adjusting our approach as and when material is revealed to us. I'm not
15 even talking about -- I am not talking about exculpatory material that
16 the Prosecutor may, may obtain at this time. No, I am talking about
17 material that is in his possession in his offices.

18 You yourself indicated a sanction in your decision. You said if
19 that material was not disclosed the Prosecutor would be obliged to
20 abandon charges. We cannot continue in a process which is never ending
21 and where the rights of our client are not being respected as they
22 should.

23 These are the observations which I wanted to make, and I make
24 them with gravitas because we are speak of the very interests of the
25 Defence.

1 PRESIDING JUDGE FULFORD: Maitre Mabilie, thank you very much.
2 There are two points that I want to raise straight away by way of
3 questions and one observation. The first point is, and this really picks
4 up on the submissions you made right at the end. The Chamber's concern
5 over -- or not concern but the question that we raise over viewing
6 incriminatory materials at this stage in the Article 54(3)(e) category is
7 not that we are in any sense contemplating the possibility of further
8 incriminatory materials being introduced into the trial. I think unless
9 something exceptional happens it's far too late for that.

10 The issue really is aimed at a different question: Whether
11 anyone has any objection when we are assessing the exculpatory value of
12 the materials which is in this category, when we're undertaking that
13 exercise, if we read the materials as a whole, which may, by the way,
14 include some sections which could be said to be incriminatory rather than
15 exculpatory.

16 So this isn't about us permitting the Prosecution to introduce
17 further elements of their case, it is simply us reading materials that in
18 the end may never be handed over to the Defence because we've decided
19 there's no exculpatory value and, by the way, because the information
20 providers have failed to give their consent. So it's really whether
21 you -- whether anyone has any concerns on that issue. That's the first
22 question. I would ask you to come back on that.

23 The second is on the Rule 77 point and what you've identified as
24 being some further incriminatory materials that you believe have been
25 revealed in this process, you said that you would systematically return

1 to us on that point, would it be reasonable for us to ask you to provide
2 us with a document identifying -- you needn't go into great detail,
3 simply identifying either the items of evidence or the areas of evidence
4 so that we in turn can make our own assessment of this, because you'll
5 understand that the disclosure process between the Prosecution and the
6 Defence isn't one to which we're usually a party, so we're not -- we
7 don't have the detail of the matters that will have caused you concern.
8 So I'm really asking whether -- whether you can provide us with that,
9 with a document in a reasonable period of time.

10 The third matter, which is really just to make an observation,
11 Maitre Mabilille, we cannot stress too strongly the concerns that we hope
12 that we've set out in writing in various decisions that have been handed
13 down that we have as regards the need for the Defence to be provided with
14 exculpatory material, and the submissions that you've made today on that
15 point will be very carefully borne in mind by us, but could you come
16 back, please, now, on the two questions that I've just raised.

17 MS. MABILLE (interpretation): Mr. President, regarding the
18 filing concerning documents that were disclosed to the Defence under
19 Rule 77 and which are in fact in the Prosecution document, it's very
20 simple. We can make the filing without any difficulty.

21 Regarding the second point, that is whether the Chamber can see
22 incriminating evidence, perhaps I didn't understand you clearly, but I
23 have a bit of trouble with this. Why would the Chamber consider
24 incriminating evidence or materials, because in any case, as I understood
25 it from what you said, we agree that the Prosecutor on no account can the

1 Prosecutor use these documents during the trial.

2 PRESIDING JUDGE FULFORD: I'll have one last go at this
3 Maitre Mabilille. It's probably a problem of interpretation. The -- one
4 last go. We have got to undertake a task of seeing whether within the
5 documents that are covered by the 54(3)(e) agreements there is material
6 which has an exculpatory value which need to be disclosed to the accused.
7 So that's the undertaking. That's the task we've got to perform.

8 In order to assess the -- the overall value of that material, it
9 could be said that it's better to read the materials in their -- in their
10 entirety so that you see the complete picture, and so that would involve
11 focusing on the exculpatory material but also along the way looking at
12 the incriminatory parts. Not with a view to including it in the trial
13 evidence, but simply so we have the full picture. And as I've said
14 earlier, this may involve in fact us reading statements that you never
15 see.

16 Now, it's really a question whether there's a difficulty of that.

17 MS. MABILILLE (interpretation): Forgive me, Mr. President. I
18 didn't understand you clearly. There's no concern in that regard for us.
19 It's all right. It can be done in this way.

20 (Trial Chamber confers)

21 PRESIDING JUDGE FULFORD: Right. Mr. Withopf, I'm not sure on
22 the extent to which you need to come back on these points. That's a
23 Rule 77 complaint. Maitre Mabilille has said that she will identify the
24 documents that she says infringes our orders on disclosure, and I'm going
25 to ask for that document to be disclosed in seven days, and it may be at

1 that point you'll want to return.

2 Is there anything you want to say on that issue now?

3 MR. WITHOPF: There are a few points, Mr. President, your
4 Honours, I want to clarify, not that the wrong picture has been drawn.

5 In respect of the disclosure of incriminatory materials, the
6 Chamber at any given point in time has always been appraised about the
7 situation, and as your Honour the Presiding Judge is aware of, there are
8 a number of applications pending to seek authorisation to add
9 incriminatory evidence to the Prosecution's list of evidence.

10 The Rule 77 disclosure my learned friend from the Defence is
11 making reference to took place on the 16th of May, and these materials
12 concern exactly the very same materials for which such applications are
13 pending. The Office of the Prosecutor has very deliberately taken the
14 approach that the Defence, in order to prepare properly, should be given
15 an opportunity to have access to these materials at the earliest stage
16 possible, and for that reason we have offered to the Defence to provide
17 these materials under the heading of Rule 77 at this stage pending a
18 decision of the Trial Chamber on the application to authorise to add
19 these materials to the materials to be relied on at trial.

20 I think this is a very important distinction to be made, and the
21 Chamber, as I said, at any given point in time is informed about what's
22 going on, if I may phrase it that way, on the disclosure front line.

23 The Defence has raised a point that these materials are despite
24 the fact that the decision of the Trial Chamber is pending allegedly
25 included in to the annex to the Prosecution's summary of evidence. At

1 this stage I'm not in a position to verify this, but I would invite my
2 learned friends from the Defence to identify the documents concerned by
3 their evidence registration numbers so that the Office of the Prosecutor
4 would be in a position to further inquire into this matter.

5 That's what I want to say, Mr. President, your Honours, in
6 respect to the Rule 77 disclosure.

7 PRESIDING JUDGE FULFORD: Can we then be clear about this,
8 Mr. Withopf? Whatever has been revealed during the Rule 77 process, the
9 Prosecution accept that if they are to add to the list of evidence there
10 has to be an application made to the Chamber for permission.

11 MR. WITHOPF: Absolutely right. In respect of all these
12 materials such applications are actually pending.

13 PRESIDING JUDGE FULFORD: Right. And what you're doing is -- and
14 the Defence are entitled to either accept the offer or refuse it, you're
15 giving them an opportunity now of looking at the materials which are the
16 subject of those applications.

17 MR. WITHOPF: That's entirely correct, and this process has been
18 explained both in the cover letters to the disclosure and during the
19 disclosure meetings.

20 PRESIDING JUDGE FULFORD: All right. All right. Fine. Thank
21 you.

22 Now, on the other points?

23 MR. WITHOPF: On 54(3)(e), Mr. President, your Honours, I used
24 the break to provide -- or to inquire as to how many such materials
25 within the 210 or 212 documents do potentially contain incriminatory

1 evidence, and what I can say at this stage, we are talking about 35 to 40
2 documents concerned, which is a percentage of roughly 15 to 20 per cent.
3 Not an unimportant percentage.

4 To answer your question, there's no concern from the Office of
5 the Prosecutor's side. The Bench is comprised of professional Judges and
6 professional Judges can easily distinguish between materials they can use
7 later on for the determination of guilt or innocence or they cannot use.

8 If you allow me to address one point that has been made by the
9 Defence in respect of the disclosure of potentially exculpatory evidence.
10 The Office of the Prosecutor has always taken a very liberal approach in
11 interpreting Article 67(2) meaning when there was doubt such materials
12 have been provided to the Defence under the heading of Article 67(2),
13 potentially exculpatory materials.

14 What has been disclosed and what my learned friend from the
15 Defence has specifically referred to between the 6th of May and the 16th
16 of May is material that follows the 24th April decision of the Honourable
17 Bench. So this is basically in compliance with a court order.

18 What I wish to emphasise at this stage, however, Mr. President,
19 your Honours, is the following: It's not for the first time that the
20 Defence has had access to the potentially exculpatory portions of the --
21 of the materials concerned. Excerpts, as your Honour -- as your Honours
22 are very well aware of, excerpts of these documents have been provided to
23 the Defence on a rolling basis months ago, though the potentially
24 exculpatory details were known to the Defence earlier on. However, what
25 was not known to the Defence are the identities of the witnesses who

1 provided such potentially exculpatory information.

2 Finally my learned friend from the Defence has raised the
3 question as to when the disclosure of potentially exculpatory evidence
4 will be completed. First of all, I want to say that the obligation is an
5 ongoing obligation, and I wish to inform the Chamber that there are a
6 number of document collections within the Office of the Prosecutor, the
7 DRC collection, the Uganda collection, the Central African Republic
8 collection, obviously the Darfur collection, mirroring the
9 investigations, mirroring the areas or situations in which the Office of
10 the Prosecutor is investigating. Of course the review of the DRC
11 collection has been completed months ago and the materials concerned have
12 been disclosed to the Defence save the Article 54(3)(e) protected
13 documents.

14 Investigation into the DRC situation continues, and of course
15 materials come in. Such materials will be reviewed and are reviewed
16 contemporaneously and are disclosed in the event they meet the criteria
17 of Article 67(2).

18 The other document collections are also reviewed. The Uganda
19 collection has been fully reviewed and respective materials have been
20 disclosed to the Defence, and the Office of the Prosecutor has an
21 internal deadline to complete the review of the Central African Republic
22 collection and the Darfur document collection at the very least ten days
23 prior to the start of the trial to ensure that in the unlikely event that
24 there are materials that are of potentially exculpatory nature can be
25 disclosed to the Defence prior to the start of the trial.

1 PRESIDING JUDGE FULFORD: Well, Mr. Withopf, of course we
2 understand that. You will realise that if exculpatory material, even
3 through no fault of the Prosecution, is served very late, at the very
4 least we're going to have to ensure that the Defence have had a
5 sufficient opportunity to research it and deal with it. Now, how that is
6 done we'll have to wait to see, but I'm sure you would not stand in the
7 way of a proposition that the Defence must be given a proper opportunity
8 to deal with those materials.

9 MR. WITHOPF: Not at all, Mr. President, your Honours. We make
10 extra efforts to satisfy this right of the Defence.

11 PRESIDING JUDGE FULFORD: Anything else?

12 MR. WITHOPF: Not at this stage, Mr. President.

13 PRESIDING JUDGE FULFORD: Thank you.

14 Maitre Mabilille, do you wish to come back at all on any of these
15 issues?

16 MS. MABILLE (interpretation): No, I do not wish to come back,
17 Mr. President, but I cannot let the Prosecutor say that out of the 3.000
18 pages disclosed to us there are exactly -- that it is exactly one week
19 and 15 days ago, these materials were known to the Defence. When you
20 give us a summary of ten lines without telling us the provenance or the
21 origins and then you talk about 500-page testimony, I'm sorry, the
22 Defence wishes to work properly, and if the Defence wishes to do so it
23 must read the testimony in full.

24 Without offending you, Mr. Prosecutor, what Mr. Jean-Marie
25 Biju-Duval told us, that is, that you are asking us for admissions, when

1 we look at what we have there are various significant inconsistencies.
2 The witness summaries given to us, if we work on them we would not be
3 doing our work properly.

4 Not to argue too much, I will end with this: Regarding,
5 Mr. Prosecutor, I may be wrong, for all the transcripts of interviews we
6 have received we have three that we have knowledge of, but there are
7 actually 17. This is new to the Defence.

8 PRESIDING JUDGE FULFORD: Mr. Withopf, this really serves to
9 underline something that we've indicated on an earlier occasion, that the
10 Prosecution, but more particularly the Bench, has an obligation to ensure
11 that any admissions that are made in relation to exculpatory material do
12 truly cover the exculpatory value of the underlying statement or
13 documents, and once the process is complete of furnishing proposed
14 admissions to the Defence we will need to conduct the exercise of
15 comparing the admissions with the core material, and I will ask you
16 please to reflect on how we can best be furnished with the underlying
17 documentation so that we can identify the admissions and relate the
18 admissions to the relevant parts of the statements or documents.

19 So could you over a break, the very short break we're going to
20 have, could you discuss that with your team so that we can ensure that
21 the admissions are wholly adequate for their purpose. Thank you very
22 much.

23 MR. WITHOPF: Indeed we will do so.

24 PRESIDING JUDGE FULFORD: Thank you. There is something that the
25 Judges need to discuss very briefly. We're going to rise for a moment

1 only. I'm going to ask the parties and the participants not to
2 disappear, because we will be back on the Bench very quickly, but it's
3 something that should be done other than in a whispered conversation on
4 the Bench. So we will be two or three minutes.

5 Recess taken at 12.44 p.m.

6 On resuming at 12.49 p.m.

7 COURT USHER: All rise. Please be seated.

8 PRESIDING JUDGE FULFORD: Mr. Walley, Ms. Bapita, we are very
9 much conscious that you have attended today's hearing, and we've really
10 not included either of you at all.

11 First of all, can I thank you on behalf of all of the Judges for
12 your attendance here today, and in a sense give an explanation or at
13 least a partial one. There is, as you will be aware, consideration
14 currently going on as regards the -- what I'm going to describe as the
15 core group of victim applicants, and by that I mean the -- the group that
16 is not subject to appeal to the Appeals Chamber.

17 Once the responses of the parties have been received at the
18 beginning of June to those applications and once the Chamber has made a
19 decision on those victim applicants, we will then be in a position to
20 make decisions as regards the detail of victim participation,
21 particularly at the beginning of the trial, and there will be obvious
22 focus on the opening stage and the statements to be made, if any, by
23 victims at the commencement of the case.

24 It seems to us that it would be appropriate to address those
25 issues globally once a determination has been made in relation to the

1 applications for the core group of victims rather than determining the
2 position of the victims who the two of you represent at this stage, only
3 then having possibly to review any decision that we make in as regards
4 those victims once we've looked at the overall picture. So I'm afraid
5 that some of the issues that most particularly concern you will need to
6 wait for a little while so that we can have a better view of the overall
7 picture as regards victim participation. So that is why we have delayed
8 addressing some of the points which are undoubtedly of concern to the two
9 of you, and we would wish that we could have dealt with them sooner, but
10 we've been unable to do so.

11 Mr. Walley, you have made a request, appropriately via e-mail,
12 which touches upon the interpretation of the Appeals Chamber decision in
13 relation to suspensive effect. It may be we're being oversensitive on
14 the issue, but rather than engaging certainly at this stage in open court
15 in a minute discussion of what the Appeals Chamber decision means, we
16 feel that it would be more appropriate, possibly more seemly, if in the
17 first instance any submissions in this regard could be communicated to
18 the Chamber in writing, and if we feel it's necessary to develop those
19 submissions by an oral hearing, we will, of course, give proper
20 consideration to that possibility.

21 I'm afraid we're going to impose a short deadline for written
22 submissions. I'm afraid it's going -- we would like it to be very short
23 indeed because these are matters which we need to progress. Would 48
24 hours be unreasonable, Mr. Walley?

25 MR. WALLEY (interpretation): Yes, Mr. President. Thank you for

1 your words. We are very frustrated, however, that 48-hour time limits
2 are being imposed on us, whereas these are requests or applications that
3 we made two years ago and in relation to which no decision has been made
4 officially because we're still not aware whether on the 23rd of June we
5 or our clients will be authorised to be -- to participate in the
6 proceedings.

7 Yes, I might make an effort to make a submission within 48 hours
8 because I know what I have to say. However, we still consider that the
9 principles of fair trial apply to all participants and that there are
10 some rights which are enshrined in the Statute and the other instruments
11 of the court for the benefit of the victims.

12 For the time being we are completely in the dark we feel, because
13 after two years of close collaboration or close cooperation for the
14 preparation of this trial, three weeks from the commencement of trial,
15 not only are we unaware of whether or not we will be able to participate
16 and with whom, we do not even know whether we shall have access to the
17 documents that you mentioned in relation to which you said in your 18
18 January decision that we could have access. So we --

19 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
20 for you moment, Mr. Walley, and I apologise to the interpreters for
21 doing so.

22 There are two separate issues here. You already have made a
23 filing in which you have made a request for clarification of the
24 majority decision in relation to victims participation. Now, that is in
25 any event under consideration by the Bench, and I hope -- well, let me

1 start that sentence again. There is a possibility that you will have an
2 answer to the clarification that you've sought in the near future.

3 The more limited point that I'm addressing now is rather than
4 develop the matters that you raise by way of e-mail in the last day or
5 two which really touches on the interpretation of the Appeals Chamber's
6 decision on suspensive effect, rather than us engaging in an analysis of
7 the Appeals Chamber decision in open court, I'm simply asking you to put
8 your thoughts on the issue, if you wish to, in writing in 48 hours. So
9 this isn't really asking you to deal within a short matter of time with
10 something that's been lingering for two years. This is actually asking
11 you to address a new issue that's arisen. It's a limited and confined
12 issue over a short period of time. So although you may feel frustration
13 at a number of elements, I think it may be slightly unfair to be linking
14 those with the request that I'm making of you at this point in time.

15 MR. WALLEYN (interpretation): I agree with you, Mr. President,
16 but when I mentioned the two-year delay, it is because we are three weeks
17 from the commencement of trial and there's still no official decision on
18 our application for participation in the trial, and I think that the
19 victims who may be authorised to participate in the trial should also
20 have the opportunity to prepare for the trial.

21 Furthermore, I consider that it's a little unfair to ask that all
22 preparation, all necessary preparation, be made for something that may
23 not occur. So in our view, it's a question of how to organise our time,
24 our practices, our teams, because as you yourself said, there is the
25 possibility that depending on the number of victims who will be

1 authorised to participate, even if this is a core group it is possible
2 that there will be a need or a request on the part of the Chamber for
3 reconsideration of the composition of the teams or to merge some teams.
4 All of these are issues that require time and negotiation between
5 counsel. They require contact with clients and intermediaries as well.

6 As we say, time is running. Time is passing, and these things
7 are becoming increasingly difficult to carry out in three weeks. That is
8 what I wanted to say.

9 PRESIDING JUDGE FULFORD: Mr. Walley, we are keenly aware of
10 those difficulties, and once the position is clear we will, I assure you,
11 reflect on what is fair to those victims who will be participating in
12 this trial, and if there is a need for time to be given based on
13 applications, those applications will be scrutinised very carefully and
14 where it is just and reasonable time will be given.

15 I make this observation because it maybe useful for you and
16 others to consider, there maybe, and I simply pose this as a question,
17 two stages. The involvement at the beginning by way of a general opening
18 statement in the which the views and concerns of particular victims are
19 expressed. That is one part of the process, and that may require a
20 different kind of preparation than a detailed review of the entirety of
21 the available evidence in the case.

22 There is then the further participation which is now dependent on
23 the decision from the Appeals Chamber, namely, the extent to which
24 participating victims can engage in what I'm generically going to
25 describe as the core issues that divide the Prosecution and the Defence.

1 Now, on that there is nothing to be done but to await the outcome of the
2 Appeals Chamber decision, but we may be able to progress the first area
3 without awaiting the decision of the Appeals Chamber, and it may not be
4 necessary for the same detail of preparation to be undertaken by victims
5 in order for the opening statements to be made.

6 Now, I'm not inviting a response on this. In fact, I would
7 encourage you not to respond. It's just a thought that may be useful
8 when it comes to formulating any submissions that are made later in terms
9 of the amount of time that's needed by victims, which we're keenly aware,
10 before they can properly participate in these proceedings.

11 All right. Thank you very much indeed.

12 MR. WALLEYN (interpretation): Thank you.

13 PRESIDING JUDGE FULFORD: Mr. Withopf, there is one final issue
14 that the Bench wishes to raise with the Prosecution.

15 Under Rule 87, we -- there is the opportunity for the Chamber to
16 grant protective measures in court. There is a process that needs to be
17 undertaken in this regard. There needs to be an application, the Defence
18 need to have an opportunity to respond to it, and the participants, and
19 the Chamber needs to have sufficient time in which to consider the
20 various representations and to unburden itself of a reasoned decision.

21 Now, we are close to the beginning of the trial, and if there are
22 applications to be made under Rule 87, the Prosecution had better put
23 them in speedily.

24 MR. WITHOPF: Thank you very much, Mr. President, your Honours,
25 that you come back to this issue which is actually on the agenda for

1 today.

2 On this we are in close contact for the obvious reason with the
3 Victims and Witness Unit and there will be a distinction between the
4 witnesses who are in the court's protection programmes, meaning the
5 Victims and Witnesses Unit's protection programme, and the witnesses who
6 are not in such a programme.

7 With respect to the first category of witnesses, Mr. President,
8 your Honours, we follow the advice that has been provided by the Victims
9 and Witnesses Unit, obviously being the unit best placed and having the
10 closest contact to the witnesses concerned, and in line with such an
11 advice we will file applications in the near future that will contain the
12 following, and the applications will be en bloc applications. Face and
13 voice distortion and the assignment of pseudonyms to these witnesses.
14 And I wish to add, Mr. President, your Honours, that the witnesses the
15 Office of the Prosecutor intends to call first are all in the court's
16 protection programme.

17 There's a second category of witnesses, Mr. President, your
18 Honours, who are not in the court's protection programme. Of course we
19 are also in a position to prior to the commencement of trial file
20 applications and it can be anticipated that for a comparatively high
21 number of such witnesses applications will be filed. In this respect,
22 however, I wish to emphasise that the Office of the Prosecutor, in the
23 interest of the witnesses concerned and in the interest of their security
24 situation, finds it appropriate -- both appropriate and necessary to be
25 given the opportunity to talk to the witnesses concerned once they

1 arrived here in The Hague where applicable for testimony.

2 I'm very much aware, Mr. President, your Honours, that there is
3 the decision of the Trial Chamber on witness familiarisation, and the
4 sole aspect we would like to discuss with the witnesses concerned is
5 security related, and if there is a concern either on the side of the
6 Bench or the Defence, we would certainly also be prepared to tape these
7 conversations to ensure that we are not in conflict with the decision on
8 witness familiarisation.

9 Why do I make that distinction? I make it along the lines that
10 security and the situation of the security of witnesses changes over
11 time, and what three weeks prior to the trial may be a comparatively safe
12 situation may change very quickly three days prior to the trial, and
13 nobody at this stage can anticipate, can reasonably anticipate how the
14 commencement of the trial and the testimony of the first witnesses to
15 come will impact on the security situations of other witnesses. For that
16 reason, I request the Trial Chamber to give leave to the Office of the
17 Prosecutor to talk to the witnesses once they arrived in The Hague,
18 limited to their security situation, and to file respective applications
19 or amendments to applications where necessary two to three days prior to
20 their actual appearance in court.

21 PRESIDING JUDGE FULFORD: Thank you.

22 Maitre Mabilille, this, I anticipate, will have come as a complete
23 surprise to the Defence, and if that's right I think you should have the
24 opportunity of either reacting immediately now or if you would prefer
25 putting in written submissions in due course having had an opportunity of

1 considering precisely what the Bench said I think now in two decision on
2 witness familiarisation.

3 MS. MABILLE (interpretation): President, if you may, I would
4 like to respond orally. My team has been complaining of being
5 overworked, so I would like to avoid tasking them with an extra filing.

6 I don't understand the Prosecutor's position. We've already
7 spoken about this. Several decisions were issued and I believe that it
8 said the office next door that's responsible for all these measures, and
9 I think at one point in time everybody will have to do what they have to
10 do and the Section for Victims and Witnesses is the one that has to take
11 care of the protection of victims and witnesses.

12 That is my comment. I have no further observations to make.

13 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
14 encapsulates the question in my mind, Mr. Withopf. Given the
15 responsibilities of the Victims and Witnesses Unit, why does this need
16 the intervention of the Prosecution rather than sensible questions being
17 put by a representative of the Victims and Witnesses Unit to the
18 witnesses as and when they arrive to ascertain what their security
19 concerns may be and to respond to any questions that they may have?

20 MR. WITHOPF: There are two answers to your question,
21 Mr. President, your Honours. The first answer is that Rule 87 sets out
22 that it's either the Prosecutor or the Defence or the witness, him or
23 herself, can file respective applications. So it's not the Victims and
24 Witnesses Unit. And of course the Office of the Prosecutor is open to
25 each and every practical solution to these matters, and without wanting

1 to go in any further detail, there's a history of divergent views of the
2 Office of the Prosecutor and the Victims and Witnesses Unit on security
3 concerns of witnesses, and for that reason, Mr. President, I maintain my
4 request that the Chamber allows us to contact the witnesses for that sole
5 reason.

6 PRESIDING JUDGE FULFORD: I think this is going to need careful
7 consideration by the Bench, Mr. Withopf. We will -- we will reflect on
8 what the best course of action is, but does that fully set out your
9 concerns and the points that you would wish to raise on the issue?

10 MR. WITHOPF: Indeed so, Mr. President.

11 PRESIDING JUDGE FULFORD: Good. I used the expression finally a
12 few minutes ago. I was in error. There is one matter that's put on the
13 agenda. It may be there is in fact nothing by way of oral submissions
14 that the parties wish to raise on it. It's Article 76 of the Statute.
15 Written submissions have already been filed on this. I'll come to you in
16 a moment, Ms. Pellet. Written submissions already have been filed on
17 this and it's really whether anybody wishes to add anything orally on the
18 subject of whether, should we ever reach the sentencing stage, whether
19 that should be a separate part, a separate procedure following the trial
20 or whether everything in relation to sentence should be dealt with in the
21 course of the trial so that the Chamber can deal with both guilt or
22 innocence, and if there's a conviction, sentence all in one decision.

23 Now, is there anything you wish to add to your written
24 submissions on that, Mr. Withopf?

25 MR. WITHOPF: Mr. President, your Honours, there is only very

1 little I wish to add but I want to use the opportunity to indicate that
2 my learned colleague, Mr. Sachdeva, will make further submissions on
3 Article -- for Article 40 of the Rules. This will not take longer than
4 two minutes and my submissions will certainly also not take longer than
5 two minutes on Article 76.

6 What I want to add to our written submissions is really the sole
7 observation and I wish to draw the attention of the Trial Chamber to the
8 following, namely to Rule 45 -- 145, and Rule 145 sets out as aggravating
9 factors in particular the harm caused to victims in the commission of a
10 crime where the victim is particularly defenceless, and I make this
11 observation against the background that one of the main considerations
12 the Office of the Prosecutor has put forward that there is an interest to
13 avoid recalling the very same witnesses for the purpose of a sentencing
14 hearing. That's all, Mr. President, your Honours, I want to outline at
15 this occasion.

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

17 Maitre Mabilille, do you have any submissions on this?

18 MS. MABILLE (interpretation): We would like to refer to our
19 written submissions.

20 PRESIDING JUDGE FULFORD: I thought that would be the position.

21 Now, Mr. Sachdeva.

22 MR. SACHDEVA: Thank you, Mr. President. Just very briefly.

23 Regarding Rule 140, of course there is agreement that the Defence should
24 be the last to examine a witness. I would just underscore that the
25 Prosecution reserves its right to be able to re-examine after the Defence

1 has cross-examined, and of course then the Defence can be the final --
2 can ask questions of that witness, but those questions should be
3 restricted to matters that have arisen through our re-examination, and
4 that's of course should the Trial Chamber decide that re-examination is
5 permissible. The Defence's position is that it's not permissible and our
6 position is that this would lead to the situation where the Defence calls
7 its witnesses, we then cross-examine the witnesses, and the Defence would
8 have the right to re-examine and those rights would not be accorded to
9 the Prosecution. And so there is agreement the Defence should be last,
10 but there is these distinctions that I would like to underscore. Thank
11 you.

12 PRESIDING JUDGE FULFORD: Thank you. We will in due course
13 deliver a short decision on the number of times that the parties are
14 going to be allowed to ask questions. We could end up with there being
15 multiple occasions where there is an opportunity to ask questions, and we
16 will also address specifically the issue what can be dealt with during
17 the final questioning by the Defence, but thank you for that.

18 Now, Ms. Pellet, I think you had something you wished to raise.

19 MS. PELLET (interpretation): Thank you, President. I'm sorry to
20 come back to the point raised with the Prosecution about protective
21 measures, but Prosecution raises special protective measures under Rule
22 88. He mentioned that -- he was going to -- (In English) pseudonyms.
23 (Interpretation) I would just like to recall that some of the
24 Prosecutor's witnesses may also be victims and that if the Prosecutor
25 made more extensive requests for victims which are also witnesses, then

1 they would have to consult the Prosecution to be informed and also to
2 avoid multiplication of requests for protection measures or special
3 measures before the Chamber concerning the same persons, concerning their
4 stature as a victim but also as a witness.

5 This issue has not been settled on the -- during the discussion
6 on double status. The Chamber had requested discussions on this, but we
7 are the -- or, rather, the legal representatives of victims who will
8 represent people with dual status should be duly informed and vice versa.
9 The Prosecutor also, if they have different information from their
10 client.

11 PRESIDING JUDGE FULFORD: (Previous translation continues) ... it
12 reveals that in the decision that we need to unburden ourselves of in the
13 near future this is a discrete issue as regards dual status individuals
14 that needs to be addressed, and what comes to is you're submitting there
15 should be sensible communication between the representatives of those
16 with dual status and the Prosecution when consideration is given to
17 protective measures.

18 MS. PELLET (interpretation): I insist. I don't want it to only
19 be in one direction. Legal representatives should have the same
20 obligation and this to avoid a duplication of requests, but I believe
21 that the dual status of victims and witnesses must be dealt with.

22 PRESIDING JUDGE FULFORD: Certainly. I imagine you don't object
23 to that, do you, Mr. Withopf? No.

24 Now, is there anything else that anyone wishes to raise? I'll
25 take Mr. Walley first.

1 MR. WALLEYN (interpretation): President, if you may, I would
2 like to come back to this issue of submissions. You have given us 48
3 hours. However, logically the Defence and Prosecution will also be given
4 an opportunity to respond to the observations made, so I believe it is an
5 urgent matter and there should also be a deadline set for the other
6 submissions.

7 PRESIDING JUDGE FULFORD: I forgot a deadline, Mr. Walley. n.
8 Thank you for reminding me. Absolutely right. Given this is a very
9 confined issue, and I'm sorry that the parties on both sides are
10 overworked at the moment, but I'm going to ask for short submissions, 48
11 hours after delivery of Mr. Walley. n. and Ms. Bapita's submissions. This
12 needn't be extensive. It's a very discrete point. But thank you for
13 raising that, Mr. Walley. n.

14 Mr. Withopf.

15 MR. WITHOPF: Very briefly, Mr. President and your Honours. You
16 asked us to come back to the filing of 5th of May, 2008, with the number
17 1306, I believe, and whether this issue has been dealt with. In the view
18 of the Prosecution, the issue has been dealt with by disclosure of the
19 respective materials on the 16th of May to the Defence. There are very
20 discrete redactions to the materials, respective applications pending
21 before the Trial Chamber. In essence, however, this is more a question
22 that the Defence should be prepared to answer whether they are satisfied
23 with the materials.

24 PRESIDING JUDGE FULFORD: Well, I think the problem with that,
25 Mr. Withopf, is that given there have been redactions, the Defence are

1 unable to say whether or not there has been complete and proper
2 disclosure in accordance with the requests that they've made.
3 Inevitably, the Defence as I've said earlier labour under a real problem
4 in this regard and so it's up to the Bench to ensure that everything has
5 been done which should have been done, but we will bear in mind that the
6 Prosecution's view is that the issue has been properly addressed. We
7 will reconsider Ms. Mabilille's written filing on this issue and any
8 silence from the Bench on this issue will simply reflect that our view
9 has been endorsed, that this has been in fact properly addressed.

10 MR. WITHOPF: Thank you, Mr. President. And otherwise I make
11 written response to our response to the Defence request.

12 PRESIDING JUDGE FULFORD: Anything else from the Defence today?
13 No.

14 Good. Thank you very much all indeed. The trial date therefore
15 of the 23rd of June remains. There will undoubtedly be a need for
16 further hearings. It would be foolish to suggest otherwise, and we will
17 give those as early a listing date as possible, but that completes this
18 Status Conference. Thank you very much.

19 The hearing ends at 1.21

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