

1 International Criminal Court

2 Trial Chamber I

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

4 Status Conference - Open Session

5 Monday, 12 January 2009

6 The hearing starts at 4.36 p.m.

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

9 PRESIDING JUDGE FULFORD: I was about to say good afternoon. I
10 think in fact I ought to say good evening.

11 Can I thank you all for your tolerance and forbearance in
12 attending a hearing at nearly quarter to 5.00 on a Monday. I imagine you
13 are all aware of the reasons why this has had to be. We only have one
14 courtroom available at the moment, and the confirmation proceedings
15 against Mr. Bemba has been taking place, and there has simply been no
16 choice, but you have our thanks.

17 The Prosecution today are represented by Ms. Bensouda,
18 Mr. Sachdeva, Ms. Samson, and other members of the Prosecution's team.
19 The Defence by Maitre Mabilille, and Mr. Biju-Duval, also accompanied by
20 other members of their team. The Office of Public Counsel for Victims by
21 Ms. Massidda and another of her colleagues. The various participating
22 victims are represented by some of the lawyers now acting for them but by
23 no means all. In fact, only Mr. Walley and Ms. Bapita are in court.

24 We're not going to investigate exactly what the position is in
25 terms of representation this afternoon, Mr. Walley and Ms. Bapita, but

1 given that we now know that there is no conflict of interest that has
2 emerged between any of the victims who are participating, for the
3 purposes of this afternoon can we please ask you both, as it were, to
4 adopt a watching brief, assisted by Ms. Massidda, to make sure that all
5 of the central points are made on behalf of all participating victims.
6 Thank you very much indeed.

7 The agenda -- Ms. Bapita.

8 MS. BAPITA (interpretation): I'm sorry, but I have two proxies,
9 one from Mr. Keta, Joseph Keta, and another from Mr. Paul Kadugibasu
10 [phoen] who have given me their proxy to speak on their behalf. Thank
11 you.

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

13 The agenda has been circulated in advance, and unless there are
14 strong reasons for not doing so, we intend to follow the order as set
15 out, really for everyone's convenience.

16 So item 1, trial arrangements, including, and we take protective
17 measures for trial witnesses first. This principally relates to a filing
18 of the Office of the Prosecutor, number 1591, which was filed
19 confidentially, but Ms. Bensouda has very kindly indicated a little
20 earlier today that there is no difficulty in this filing being referred
21 to in open court in the presence of the public so long as we do not
22 investigate paragraph 8 of that filing, which is a very short paragraph,
23 and having read it, it seems to me highly unlikely that anyone needs to
24 make reference to it.

25 If I'm wrong in relation to that, could somebody at some

1 appropriate stage correct me.

2 In essence, this relates to the proposal that there should be
3 three forms of protective measures, image distortion, voice distortion,
4 and the assignment of a pseudonym for some 20 witnesses, two of whom are
5 of particular relevance to Mr. Walley.

6 The Victims and Witnesses Unit has indicated it's support for the
7 submissions insofar as they concern dual status, witness and victims, and
8 the question, therefore, is whether anyone else has any submissions on
9 this filing. And I look first towards Maitre Mabilille and Mr. Bijou-Duval.

10 Yes.

11 MR. BIJU-DUVAL (interpretation): President, if you may, we have
12 some objections to this application by the Office of the Prosecution. It
13 should be read together with the memorandum that was sent out by the
14 Victims and Witnesses Protection Unit and which makes a number of
15 recommendations.

16 If you look at the application and the recommendations together,
17 one can only conclude that if the Chamber accepts this it would lead to a
18 closed hearing or a form of closed hearing for the whole of the trial.
19 All of the applications aim at disclosing the identity of the witnesses,
20 but this is an exception under the Statute and the Rules and it should
21 remain so. I hope the Chamber will understand that this is -- or this
22 relates to the critical mass, please allow me to use a scientific term
23 although I'm not a scientist, because if Witness 32 wants to keep their
24 identity anonymous, that is possible; but if 20 witnesses wish to do so,
25 two-thirds of the witnesses want -- two-thirds of the witnesses which are

1 to appear before the Court are authorised to keep -- to stay anonymous,
2 the trial is no longer a fair trial. Why? Well, because this affects
3 the publicity of the debates to the extent that the proceedings or the
4 trial is no longer fair. Why? Not only because one no longer knows
5 who's talking, and it's important, and this is to ensure the authenticity
6 of the testimony, but also because, and the Chamber knows this, that
7 disclosure of the identity or non-disclosure of identity means or
8 presents a prejudice to the ability to ask questions to the witnesses,
9 and this is actually in the memorandum of the Victims and Witnesses Unit.

10 If the Prosecution witnesses remain anonymous, nobody, and
11 especially the Defence, will not be able to ask questions which directly
12 or indirectly may reveal the identity of the witness, and therefore it
13 will become impossible to hear the witness in public.

14 Everyone knows that some questions will relate to the civil
15 status of witnesses, whether they're married or unmarried, and all
16 questions asked to verify the credibility of the witness will refer to
17 dates and location. However, if the witness has to remain anonymous,
18 these questions won't be able to be asked in an open public session, and
19 that's why, as I was saying earlier on, that this could mean we will be
20 in -- we'll have a trial in closed session, because a lot of questions
21 might reveal the identity of a witness. So this is a crucial issue, and
22 I -- I repeat the word "critical mass," because in this case when
23 two-thirds of witnesses are concerned by this measure, there can no
24 longer be a fair trial.

25 Now, I refer to the situation at the ICTY, subject to the

1 statistics and information that was transmitted to us that this never
2 happened in such proportions at the ICTY. The majority of witnesses
3 testified without any measures being taken to guarantee their anonymity.

4 Now, I don't -- I need not mention the ICTR.

5 I don't think we should allow such an approach by the ICC, and so
6 we believe that this application is not necessary. The specificity of
7 the ICC and the progress made in the area of witnesses is to have a
8 section which is able to set up protection programmes to ensure the
9 safety of people. These protection programmes should allow for the
10 identity of all witnesses to be revealed because they're protected in
11 other ways. This is the progress made, compared to other tribunals, by
12 the ICC. Other courts and tribunals were only -- were barely able to
13 implement such protection measures.

14 This was my contribution on this issue.

15 PRESIDING JUDGE FULFORD: Thank you, Mr. Biju-Duval.

16 Anything on this, Mr. Walley, Ms. Bapita?

17 MR. WALLEY: Thank you, Mr. President. (interpretation)
18 President, ladies and gentlemen, I do not share in the opinion of the
19 Defence. We are talking here about people who are part of a protection
20 programme. We're not only talking about their identities, but we need
21 also to protect this protection programme.

22 You say that they're protected so that everybody should be able
23 to know who they are. Well, no. It's not because they're protected that
24 they're locked up somewhere in a cell, and, no, they live somewhere. And
25 therefore, the specificities of this court and the publicity of the

1 debates relate to the broadcasting of what is happening at the hearing.

2 The hearings are not only broadcast, but the pictures of people
3 are already -- are also shown on internet in the whole world, and in
4 particular in the regions and countries where these people live. They
5 could be recognised at any time, even if they appear under another
6 identity through these images.

7 Even in other courts and tribunals, such as in France and in
8 Belgium which have open hearings, the press doesn't usually use the image
9 of the person at television and in papers, because their identities are
10 protected and there are rights attached to their image.

11 Now, I am fully in support of the position of the Prosecution.
12 Even if a certain degree of publicity is tolerated here in the room
13 towards the public gallery, but we shouldn't allow for their images to be
14 broadcast on internet.

15 MS. BAPITA (interpretation): Nothing to say.

16 PRESIDING JUDGE FULFORD: Thank you very much. Ms. Massidda.

17 MS. MASSIDDA: Thank you, Your Honour. The office represents
18 four victims who are in the position of being the dual status, victims
19 and witnesses. The office has held extensive discussions with the Office
20 of the Prosecutor on the matter. We agree on the protective measures
21 suggested which are also being discussed with the Victims and Witnesses
22 Unit. Some of our clients are minors, their families still live in areas
23 where conflict is ongoing. Some of them might be concerned by other
24 procedures before the court, procedures in which the suspects are still
25 at large, and this is also major concern for us. So we support the

1 Office of the Prosecutor request in the matter.

2 Thank you very much.

3 PRESIDING JUDGE FULFORD: Succinct and helpful. Thank you very
4 much. Anything from the Prosecution, Mr. Sachdeva.

5 MR. SACHDEVA: Thank you, Mr. President. Just one point -- two
6 points, in fact. The fact that the witnesses will be protected does not
7 inhibit the Defence to ask those questions that my learned friend has
8 raised. In fact, those questions can be asked in full freedom in closed
9 session if the need arises. So the credibility of the witnesses can and
10 indeed will be tested.

11 Secondly, at the ICTY, in fact to the contrary. We had -- there
12 were quite a few witnesses that were either vulnerable witnesses or
13 witnesses that were part -- were termed as insider witnesses that
14 typically testified with face and voice distortion if not in closed
15 session. And in this instance the testimony will be public, just that
16 the identity of the witnesses will not be provided to the public.

17 So in our submission, we maintain the application we made on the
18 9th of January.

19 PRESIDING JUDGE FULFORD: Yes. I think Mr. Biju-Duval
20 acknowledges and accepts that he will be able to ask questions in the
21 same way as if these devices weren't in place. His complaint is, I think
22 really putting it in the round, is it has a tendency to turn this into
23 some kind of closed-session trial with the public being effectively
24 excluded from an important element of it. I don't know whether there's
25 anything else you want to say about that, Mr. Sachdeva.

1 MR. SACHDEVA: That's fine, Mr. President. Thank you.

2 PRESIDING JUDGE FULFORD: Thank you very much. Have I fairly
3 summarised your position, Mr. Biju-Duval? Yes. And do you wish to come
4 back on any of the points that have been raised? No. Thank you very
5 much indeed.

6 As with many of these points, we will reserve our decision until
7 Friday, when we will deliver an oral judgement covering a number of
8 matters.

9 I now want to turn to opening statements and their length, but
10 before I do, may I apologise collectively to the Registry for having
11 ignored them completely at the beginning of this hearing, having not
12 acknowledged that we have an extremely impressive array of individuals
13 here representing different parts of the Registry. Thank you very much
14 for attending.

15 As regards opening statements, for the moment we need say little
16 about the Prosecution or the Defence. The Prosecution have already
17 indicated that inevitably an opening statement is to be made. At one
18 stage we were given an estimate of an hour and a half for that opening
19 statement. Obviously if that has changed, please can we be informed.

20 As regards the Defence, we have asked that an outline of
21 opening -- of an opening statement is provided seven days before the
22 trial. We are still some way away from that, and so I will not press
23 Maitre Mabilille this afternoon in relation to it.

24 Much more importantly is the subject of opening statements for
25 victims. There are some 93, I think, now participating in these

1 proceedings. On my slightly crude maths, I worked out that if there was
2 an hour's opening speech for each of those victims who are participating,
3 those opening statements would take four weeks to deliver. That is not
4 going to happen.

5 We have been given some extremely sensible suggestions as regards
6 how the participating victims are going to be represented, and I'm going
7 to delegate to Ms. Bapita and Mr. Walley, please, for the two of you to
8 coordinate with the other representatives so that you can come back to
9 the Chamber a week from today, if that is convenient, by 4.00 p.m., with
10 a proposal as to how this work will be divided up between the advocates
11 and what your clear estimate is as regards the overall length for all
12 opening statements for all of the participating victims. I'm sure you
13 will both readily understand that in the end we have got to remember that
14 this is a criminal trial brought against the accused, and the proceedings
15 must not become unbalanced by one element such as this which has the
16 potential for lasting far too long not to do so.

17 So I hope with that fairly clear indication, can you please come
18 back with a sensible, and can I say with a small c, conservative proposal
19 as regards how long the victims' opening statements will last.

20 Is that acceptable, Mr. Walley, in terms of you being delegated
21 to coordinate this work with Ms. Bapita?

22 MR. WALLEY (interpretation): President, I don't think we'll
23 need a week. We have already had an exchange of views with the seven
24 counsel here, as all victims are represented by seven lawyers, other than
25 the group represented by the OPCV.

1 The group of lawyers would like to be present at the opening of
2 the trial and make a statement for their clients. However, we all agree
3 that this should be possible and that -- within 15 to 20 minutes per
4 person and that all opening statements will take 2 to 2.5 hours maximum.

5 PRESIDING JUDGE FULFORD: Fifteen to 20 minutes per lawyer.
6 Right. Well, that starts to come closer to what we had in mind,
7 Mr. Walley, but could you nonetheless set out in writing, obviously if
8 it's quicker than a week all well and good, but set out in writing
9 exactly what is proposed and overall how long you think it will take.

10 In light of that, Maitre Mabilille, is there anything you would
11 wish to say?

12 MS. MABILLE (interpretation): In light of this information, the
13 Defence would like three hours. We are used to being brief within the
14 Defence, and we won't necessarily -- we won't necessarily -- sorry. I
15 resume. It's the new year. It's difficult for Mr. Walley, but
16 everything should go smoothly now.

17 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
18 you were saying that --

19 MS. MABILLE (interpretation): So the general idea would be for
20 the Defence to have three hours. And I repeat, we are used to being
21 brief, concise, and we might not use the whole of the three hours, but
22 just now we would like to request that amount of time, and we will see
23 later on whether we'll use the whole time allotted.

24 PRESIDING JUDGE FULFORD: I'm going to raise an issue which isn't
25 on the agenda formally, but there may have been notification of it to

1 you. It is that we were informed on the 9th of January by
2 Mr. Woltenburg, that there are arrangements being made as regards
3 passports and visas for those witnesses travelling from the
4 Democratic Republic of the Congo to The Hague in order to give evidence.

5 Mr. Woltenburg, I'm not going to ask you now to give chapter and
6 verse, it would probably be inappropriate anyway for me to do so, I'm not
7 going to ask you to give chapter and verse of those arrangements, but can
8 you ensure, please, that if you are fearful that any of the procedures or
9 the arrangements look as though they may cause delays to the trial, which
10 is to begin on the 26th of January, that we are given the earliest
11 warning, witness by witness, as regards exactly what the difficulties are
12 and how long the individual delays are likely to be.

13 MR. VAATAINEN: Your Honour, well, I might --

14 PRESIDING JUDGE FULFORD: Sorry, Mr. Vaatainen. I'm sorry.

15 MR. VAATAINEN: Not a problem.

16 PRESIDING JUDGE FULFORD: It's been so long since we've seen you,
17 Mr. Vaatainen, that I'd forgotten your name.

18 MR. VAATAINEN: I fully appreciate that, being that me and
19 Mr. Woltenburg share the similar hairstyle --

20 PRESIDING JUDGE FULFORD: Exactly.

21 MR. VAATAINEN: -- it's difficult to tell the difference.

22 PRESIDING JUDGE FULFORD: Almost indistinguishable.

23 MR. VAATAINEN: Indeed, indeed. Well, we do have a quite serious
24 problem with the passports because the DRC authorities have stopped
25 issuing passports as of last week, these are the new passports, and they

1 probably will resume issuing those documents only as of 1st of April.
2 However, with the kind assistance of the DRC authorities, we have been
3 able to secure a travel document that is acceptable to the Dutch
4 authorities for issuing the visa for some of the witnesses, and if -- if
5 you wish, we can keep the Chamber updated witness by witness on the --
6 the process in that regard. However, this matter is outside our control.
7 We are hopeful that the permanent solution will be found, but it is
8 outside our control.

9 PRESIDING JUDGE FULFORD: Mr. Vaatainen, you must keep your
10 finger very firmly on this particular pulse. You must remain in very
11 regular contact with the DRC authorities, because it doesn't need for me
12 to say that this has a huge disruptive potential. And it's not only the
13 Chamber that must be kept very closely informed but also the Prosecution,
14 because this may alter the order in which witnesses are going to be
15 called, because the Prosecution may have to box-cox [phoen] in order to
16 make sure that the Chamber doesn't fall short of work once the trial has
17 begun. But if there are any major problems looming, we need to know
18 those early rather than later.

19 MR. VAATAINEN: We shall make sure that we will keep the finger
20 on the pulse, and maybe suffice it to say that for the first 14
21 witnesses, we've been able to secure travel documents for the first nine.

22 PRESIDING JUDGE FULFORD: Anything, Mr. Sachdeva?

23 MR. SACHDEVA: Nothing, Mr. President, just that we are -- the
24 Prosecution is willing to extend its assistance if required to the
25 Registry.

1 PRESIDING JUDGE FULFORD: Thank you very much.

2 We turn next to the scheduling of witnesses.

3 Mr. Sachdeva, on our calculations there are some 34 witnesses who
4 the Prosecution are intending to call. In May we were provided with
5 estimates as to length which -- the total of which seemed to go to
6 180 hours. That has now stretched to 208 or thereabouts. We are mindful
7 that that is a -- well, both figures are reasonably substantial. It is a
8 lot of court time. We are hopeful that the Prosecution is looking
9 carefully at ways in which proper and sensible economies can be made as
10 regards the ways in which evidence is introduced so as to save there
11 being long periods when we are sitting listening to evidence that either
12 needn't be given at all or could be presented in a different way, but
13 we're not giving any firm directions at this stage, but we are asking you
14 to scrutinise carefully how long it will take for the overall Prosecution
15 case to last.

16 That then takes us to the discrete filing made on the 8th of
17 January, Thursday of last week. This is number 1586, which is
18 effectively a request by the Prosecution that the expert should be called
19 as witness number three with two witnesses who are related to each other
20 being called first. Your reasons for that are set out very clearly, and
21 unless there's anything urgent that you want to say now, I will ask
22 Maitre Mabilille whether there are any observations on this proposal.

23 Yes, Ms. Mabilille.

24 MS. MABILLE (interpretation): Yes, President. The Defence is
25 against the Prosecution's request because we believe that starting a

1 trial with an expert giving us information about a conflict and the
2 historical and political situation is necessary. We are, therefore,
3 against the request by the Prosecution. And I would like to add that the
4 Defence had requested, just after your decision on the 18th of November,
5 it was an oral decision, the list of the Prosecution's witnesses. Three
6 weeks later, the Prosecution answered and provided us with a list. The
7 list has been amended four or five days ago. It was amended extensively.

8 The Defence would like to submit that we understand some people
9 could have passport and visa problems. However, we would like to have a
10 list of witnesses now, as far as this is possible, and we understand that
11 sometimes exceptions have to be made, but we would like to have a correct
12 updated list, because in the past month it has been completely amended.
13 So could we please have a list that we now consider as almost final.

14 PRESIDING JUDGE FULFORD: (Previous translation continues)...
15 able to provide an up-to-date list of witnesses to the Defence, will you
16 not?

17 MR. SACHDEVA: Mr. President, absolutely. In fact, what was
18 filed last week is indeed the updated order of witnesses.

19 PRESIDING JUDGE FULFORD: Your application is opposed. Is there
20 anything you want to say by way of response to Maitre Mabilille's
21 submissions.

22 MR. SACHDEVA: Nothing more than what's contained in our
23 submissions, Mr. President. Thank you.

24 PRESIDING JUDGE FULFORD: This, then, will be added to the list
25 of issues to be dealt with by us on Friday.

1 Item 2 on the agenda. This is essentially the renewed Defence
2 request that the ongoing investigations are discontinued and that there
3 is reassurance that Mr. Lubanga will not face any potential additional
4 charges arising out of this general theatre.

5 Today, Mr. Sachdeva, I think the Prosecution have filed a
6 response. Just in a sentence or two, because it may well be the position
7 that Maitre Mabilille has not had an opportunity to consider that response
8 yet, your position is?

9 MR. SACHDEVA: Mr. President, may I hand over to my colleague
10 Ms. Criscitelli on that issue.

11 PRESIDING JUDGE FULFORD: Of course, yes.

12 MS. CRISCITELLI: Thank you, your Honour. Our position is
13 threefold. First, there is no basis in the Statute for the request that
14 the counsel has sought or that the accused has sought. This Court has no
15 jurisdiction to stop an investigation. It's a matter before the
16 Pre-Trial Chamber. And third, if there were a later investigation, if
17 there were a later charge, and if there were a claim at that point that
18 the accused suffered prejudice and on account of having to go to trial in
19 this case without knowing those later charges or that later
20 investigation, that claim could be raised in the context of the
21 subsequent investigation, subsequent charges. The remedy would be
22 offered there against the concrete facts that would be presented and a
23 true claim for relief. Thank you.

24 PRESIDING JUDGE FULFORD: Ms. Criscitelli, if I could just
25 intervene in this way. As I understand the particular or one of the

1 particular points that Maitre Mabilille makes, is that it's unfair to ask
2 the accused in these proceedings to waive his right of silence and to
3 respond to the allegation that's made against him in this trial whilst he
4 doesn't know whether there are going to be further linked charges which
5 he may have to meet in due course in relation to which he does have a
6 notional right of silence, and so it is said that that potentially may
7 cause unfairness.

8 MS. CRISCITELLI: Well, I think the claim is that he would be
9 unfairly prejudiced in the second event --

10 PRESIDING JUDGE FULFORD: That's exactly right.

11 MS. CRISCITELLI: -- because he has waived his right to
12 silence --

13 PRESIDING JUDGE FULFORD: That's right.

14 MS. CRISCITELLI: -- and that's the claim that would be raised in
15 the second matter.

16 PRESIDING JUDGE FULFORD: All right. Yes, I see. That's so
17 straightforward.

18 Maitre Mabilille, is there anything else you would wish to add to
19 this?

20 MS. MABILILLE (interpretation): President, my learned colleague
21 Mr. Jean-Marie Biju-Duval pleaded all this remarkably orally on the 13th,
22 and I could only paraphrase very badly, so I won't do so. However,
23 there's one point in the Prosecution's planning which I believe to be
24 unacceptable, and that is when they say that the Defence is complaining,
25 however, that the complaint is premature.

1 Today we don't yet know whether there will be additional charges
2 against Thomas Lubanga or not, so just wait calmly until the charges are
3 communicated and then your point could be made.

4 I would just like to say to the Chamber that the threat of new --
5 of new prosecution already represents a prejudice, a serious prejudice.
6 That's the only point I wanted to make.

7 PRESIDING JUDGE FULFORD: Thank you all very much.

8 We turn then to item 3, which is the Prosecution's application
9 for protective measures. This is document 1579, and it relates to one
10 trial witness only.

11 Mr. Sachdeva and Ms. Massidda, I want to make sure, and I address
12 you, Ms. Massidda, because I think this is one of the victims who you
13 represent. I want to make sure that we're not being invited to make a
14 decision in the abstract when in fact the -- the problem, insofar as
15 there is one, may go away in the fullness of time, because in your
16 filing, Mr. Sachdeva, you do indicate that there is a real possibility
17 that if there's an acceptance that the witness should testify in open
18 court, then the various protective measures which are sought may no
19 longer be relevant.

20 Now, are we any closer to knowing what the position is in
21 relation to what is going to be asked for by this witness?

22 MR. SACHDEVA: Mr. President, our understanding of the situation
23 at this stage is that protective measures will be sought and the witness
24 will testify under protection. So the application stands as is.

25 PRESIDING JUDGE FULFORD: The real application. Is that right,

1 Ms. Massidda? All right.

2 MS. MASSIDDA: That's correct, your Honour.

3 PRESIDING JUDGE FULFORD: All right. Well, summarising it very
4 quickly then, this relates to a particular document which is some
5 70 pages in length, and the Prosecution are seeking, and I won't read
6 them out, various restrictions on what can happen to the material that is
7 contained within that document to ensure, in reality, that it goes no
8 further than the inside of this courtroom on this side of the glass
9 partition.

10 Maitre Mabilille, Mr. Bijou-Duval, do you have any submissions in
11 response to this application?

12 MS. MABILILLE (interpretation): Marc Desalliers, my learned
13 colleague, will intervene on this point.

14 MR. DESALLIERS (interpretation): Thank you. On the specific
15 point concerning the conclusions requested by the OTP, well, the Defence
16 opposes it because it goes back to what my learned colleague
17 Jean-Marie Bijou-Duval was saying about the publicity of debates, because
18 if protection measures have already been set up to protect a witness and
19 whenever information has been given in advance to the Defence and then
20 the Defence requests a public debate on these points, we believe that the
21 information that was taken out of the public version should be included
22 in the discussion. Actually, the UN, in its letter to the Office of the
23 Prosecutor, suggests this possibility by saying that if the Chamber
24 considers that all protection measures have been taken, that then the
25 redacted information does no longer need to be redacted, and there is no

1 need to have a closed session on these parts of the document.

2 So those are my remarks about the conclusions, but the Defence
3 would also like to raise another concern about the stage in the
4 proceedings that the discussion will take place on the document.

5 The application -- in its application the Prosecution doesn't say
6 when they received Annex 2, the document concerning the witness.
7 However, according to the annexes, the request to raise confidentiality
8 was made on the 20th of November, 2008, and that the UN responded on the
9 5th of December, 2008. So it's very recent. However, we only have an
10 extract of the document. However, it is clear that it was drafted in
11 2004 by the only witness heard by the Pre-Trial Chamber. This witness
12 was heard over two years ago. It concerns the Witness 10, which last
13 been on the list for a long time already, and the Defence believes, in
14 light of these documents, that the document in question was known to the
15 Office of the Prosecutor for a long time already.

16 Actually, if we've properly understood the numbering system for
17 documents, the fact that the document was identified, DRC-OTP-0001-0189
18 suggests that the document was registered in the Prosecution system a
19 long time ago. It was one of the first documents registered. However,
20 the fact that the document is covered by Article 67(2) is quite clear
21 because it contradicts itself elements that were -- points that were in
22 the statement of Witness number 10. So the Defence would like to
23 underline this, as the Prosecution has underlined in their procedure, and
24 rightly so, that they have an obligation to disclose how -- continually.

25 However, this does not mean they can spread the disclosure across

1 the whole trial. Article 67(2) is very clear. The charges must be
2 communicated as soon as possible, and the Defence is worried because it
3 appears that in this case this obligation to disclose as soon as possible
4 has not been respected, and we wanted to draw the Chamber's attention to
5 this.

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

7 Mr. Sachdeva, could you focus on that second issue, please?

8 MR. SACHDEVA: Mr. President, I -- in answer to my learned
9 colleague's statement, the fact that this document related to a
10 Prosecution witness was -- became cognisant to the Prosecution recently,
11 and upon knowing that, the material was disclosed or at least attempted
12 to be disclosed.

13 Since the stay of proceedings and since the -- what happened in
14 the summer, the Prosecution has attempted to enhance and review its
15 disclosure reviews and processes, and in doing that it has -- it has come
16 up -- come up with this document which had been disclosed, and if there
17 are other issues that arise that require the Trial Chamber's attention,
18 they will be -- they will be provided to your Honours as soon as
19 possible. However, if there are disclosures, they will be undertaken in
20 the normal inter partes fashion.

21 PRESIDING JUDGE FULFORD: I just want to understand. Are you
22 saying that you only became aware of this document relatively recently or
23 that it only came into your possession relatively recently? Which of the
24 two is it, Mr. Sachdeva?

25 MR. SACHDEVA: We only became aware of the connection recently.

1 PRESIDING JUDGE FULFORD: Right.

2 MR. SACHDEVA: With our trial witness.

3 PRESIDING JUDGE FULFORD: So the document was in your possession
4 but you only recently linked it to this particular witness.

5 MR. SACHDEVA: That's right, Mr. President. And in fact in some
6 situations when you have a mass of documents that the Prosecution has,
7 there are going to be circumstances when some documents go amiss. And in
8 light of what happened in the summer, we have renewed our processes and
9 tried to establish a system whereby it's as foolproof as possible.

10 PRESIDING JUDGE FULFORD: Right.

11 MR. SACHDEVA: Thank you.

12 PRESIDING JUDGE FULFORD: Anything on the first point?

13 MR. SACHDEVA: Nothing more to add, Mr. President.

14 PRESIDING JUDGE FULFORD: Thank you very much indeed.

15 This issue will be added to those that we are going to deal with
16 on Friday.

17 Item 4 on the agenda is the Registry's report on practices used
18 to prepare and familiarise witnesses for giving testimony. This is
19 document 1578.

20 There are a number of contentious issues which arise here. I
21 highlight two. The first is that it is the suggestion of the Victims and
22 Witnesses Unit that only signed statements should be provided to the
23 witness for the purposes of refreshing their memory. And secondly, that
24 support assistance will not necessarily be present all the time.

25 The Prosecution have set out a very full and clear opposition to

1 some of the proposals that have been made, but particularly I think I'm
2 right in saying those two.

3 Is there anything that you, on behalf of the Prosecution, wish to
4 add, Mr. Sachdeva, to this?

5 MR. SACHDEVA: Not to those two particular points.

6 PRESIDING JUDGE FULFORD: But are there points you'd wish to make
7 as regards other VWU proposals?

8 MR. SACHDEVA: We had -- we had said in the filing that we sought
9 clarification as to whether the party -- a representative of the party
10 not calling the witness is also present during familiarisation.

11 PRESIDING JUDGE FULFORD: Yes.

12 MR. SACHDEVA: And just to add to that position, we would submit
13 that there is no need for a party not calling the witness to be present
14 during familiarisation, and in fact in some instances, especially with
15 respect to vulnerable witnesses, it may -- it may, for whatever reason,
16 be an intimidating factor for Prosecution witnesses and indeed Defence
17 witnesses.

18 PRESIDING JUDGE FULFORD: So whilst the VWU have -- have said
19 that there could be three silent observers, you would -- you would say
20 the maximum should be two, the representative of the party calling the
21 witness and, if it's a dual status witness, his or her own
22 representative.

23 MR. SACHDEVA: Absolutely.

24 PRESIDING JUDGE FULFORD: Right. That's very clear. Thank you.

25 Maitre Mabilie.

1 MS. MABILLE (interpretation): Mr. President, four points, with
2 your permission. You have already mentioned two points, but we have four
3 points to raise.

4 The first problem is the contents of the documents. You issued a
5 decision on the preparation of witnesses, and we found that your
6 objective was to ensure that testimonies are spontaneous. That was the
7 objective.

8 Today the Prosecutor is telling us that we are going to give to
9 the witnesses their signed statements. We have no problem with that. If
10 there are no signed statements, we are going to give them videos, because
11 certain witnesses gave video statements and they did not have written
12 statements, and so they say that these are the two approaches which they
13 are going to use to send information to the VWU. We say we are okay with
14 that. But then the Prosecution team is adding other information, which
15 is the notes of the investigators, certain draft documents, as well as a
16 certain number of documents, but they do not specify which document they
17 are talking about. But for us, when we talk about the spontaneity of
18 testimonies, this means that the only documents that have to be used
19 should be video statements as well as written and signed statements.
20 That is what we are saying. We should agree that these are the two forms
21 of evidence that will be shown to the witnesses.

22 I would like to add a proposal, and it is that we would like the
23 Prosecutor to notify us, as well as the victim protection team, the
24 documents which will be read out to the victims. I say this because we
25 noticed about a year ago that sometimes there could be problems with the

1 disclosure of documents, and so in order to avoid any confusion, we
2 should agree on the documents which will be used for preparing the
3 witnesses. That way if there are any inconsistencies, then we will bring
4 such inconsistencies to the attention of the Chamber.

5 Those are the two comments I would like to make for now.

6 Also, it is difficult for the Defence to be present when the VWU
7 is giving that information to witnesses during familiarisation. I give a
8 concrete example: There are certain videos, Mr. President, which have a
9 duration of about 18 hours. We don't see how we can ask a member of our
10 team, and you know we have a very small team, to spend 18 hours ensuring
11 that such evidence is valid. I don't know if you have issued a decision
12 on that point, but I think that this is an item which we need to discuss
13 again.

14 If the Prosecutor tells us which documents will be used precisely
15 and if we know that the premises of the VWU would actually be a neutral
16 venue for this exercise, then I think that the exercise will be carried
17 out objectively in the interest of all parties.

18 I cannot remember the exact terms of your decision, but we are of
19 the opinion that the Office of the Prosecutor cannot be present if we are
20 not present, and so I think that we should allow the VWU to play the role
21 of neutral arbiter in the exercise, and we are willing to send -- or,
22 rather, it will be difficult for us to send a member of our team to spend
23 his whole time or her whole time attending this exercise.

24 The last point I would like to raise has to do with the
25 observations made by the VWU. They propose that after the witness has

1 finished giving his or her testimony that witness can discuss with the
2 party or the entity that called him or her.

3 I think it would be important to say that this should be done at
4 the end of the trial. If the Chamber decides to call the witness again,
5 it would be important to make sure that the testimony that will be given
6 would be spontaneous testimony.

7 So the proposal I would like to make, therefore, is that the
8 witness can speak with the entity that called him or her at the end of
9 the trial and not at the end of the testimony that he or she gives.
10 Thank you.

11 PRESIDING JUDGE FULFORD: Thank you, Ms. Mabilie.

12 MR. WALLEYN (interpretation): Mr. President, I support the
13 position of the Prosecutor. The presence of the other party during the
14 familiarisation process could intimidate the witness, especially if the
15 witness is a minor.

16 If I were in the Defence team, I would easily understand that the
17 presence of a member of the Prosecution team during the familiarisation
18 process for my witness would be troubling to the witness, and so I think
19 that in the interests of good sense it -- we should allow only a
20 representative of the entity that called the witness to be present during
21 the familiarisation exercise, as well as a representative of the VWU if
22 the witness had a dual status.

23 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
24 originally for allowing three potential individuals to be present was to
25 ensure that the position of the accused was secured in the most effective

1 way. Now Maitre Mabilie understandably informs us from a realistic point
2 of view it may be impossible for a Defence representative to be present
3 whilst this process is taking place, meaning that only the Prosecution
4 will be represented along with the Victims and Witnesses Unit. We are
5 obviously going to have to look again at what fairness overall dictates
6 in these new circumstances. That's very helpful. Thank you very much.

7 Yes, Mr. Sachdeva.

8 MR. SACHDEVA: Mr. President, just in respect to that point
9 that's why we suggest that a member of the VWU should always be present
10 when a party is present with the witness, and in that respect, it ensures
11 the validity of the process.

12 PRESIDING JUDGE FULFORD: But you're asking for something else as
13 well, Mr. Sachdeva, aren't you? You're asking not only for a
14 representative of the Victims and Witnesses Unit but for a representative
15 of the Prosecution's team when it's the Prosecution witness.

16 MR. SACHDEVA: That's right, Mr. President. But the fairness is,
17 in my submission --

18 PRESIDING JUDGE FULFORD: You say fairness is protected because
19 there's a representative of the Victims and Witnesses Unit there.
20 Defence and Mr. Walleyne say there's a potential for unfairness simply by
21 virtue of the presence of a representative of the Office of the
22 Prosecutor, and I think that is the disagreement that we're going to have
23 to resolve. Thank you very much.

24 Thank you. There is an addendum to this point in that Ms. Schon
25 and I hope I correctly pronounce her name, sent an e-mail to the legal

1 advisor to the Chamber on the 9th of January which, although it does have
2 relevance to, really, the parties and the participants, was at that stage
3 only seen by us. It has been re-presented in an e-mail this afternoon,
4 but I'm going to ask Ms. Schon if it's going to be possible, very
5 briefly, to summarise the contents of this material so that the parties
6 have an opportunity of responding to it if they wish. If that is asking
7 too much, we will understand and there can be written submissions in
8 24 hours' time.

9 MS. SCHON: Thank you, Your Honour. Just very briefly I'll try
10 to address it.

11 This e-mail was sent upon request of the legal advisor of the
12 Trial Chamber's division after we had met with the Court Officers, and it
13 came up that we were discussing the procedure if -- if information gets
14 revealed in a public proceedings inadvertently and how such information
15 could be redacted from the live stream and the public records of the
16 case. So we were asked to propose a mechanism on how this information
17 could be identified, and then consequently redacted from the public
18 records.

19 So our submission -- or our proposal for the mechanism was, A, to
20 take a very cautious approach because there's, I believe, half an hour
21 delay between the live broadcast and the actual hearing. So there
22 wouldn't be a lot of time for the Court Officers to identify any
23 information that would possibly have to be redacted towards the larger
24 part of the public. So we basically submitted that any victim or witness
25 who has been granted pseudonyms or their identity not to be revealed to

1 the public should be redacted or any identifying information in addition
2 to any witness or victim where those protective measures have not been
3 decided upon so not pre-empt a later finding of the Chamber. And also
4 just in order to be on -- to be on the safe side of things, any
5 individual that is named during testimony of a witness or submission of a
6 victim that could potentially be put at risk by their identity being
7 revealed to the public -- yes, identify those three categories on any
8 identifying information or the identity of those individuals should be
9 redacted from the public case record to ensure that no further measures
10 are later -- necessary at a later stage.

11 I hope this clarifies.

12 PRESIDING JUDGE FULFORD: Absolutely. That's an extremely good
13 summary of what was set out. Thank you very much indeed, Ms. Shon.

14 Now, I'm conscious that the parties have had, really, very little
15 time to consider this.

16 Mr. Sachdeva, would you prefer to respond orally this afternoon
17 or in writing within the next 24 hours?

18 MR. SACHDEVA: Mr. President, perhaps in writing in the next
19 24 hours.

20 PRESIDING JUDGE FULFORD: So be it.

21 Yes, of course, Maitre Mabilille.

22 MS. MABILLE (interpretation): No observation now, Mr. President.

23 PRESIDING JUDGE FULFORD: Well, we'll give Prosecution and
24 Defence, and I was going to say the participants -- do you want to say
25 something now, Ms. Massidda? All right.

1 MS. MASSIDDA: Thank you, Your Honour. We are also in the Bemba
2 confirmation of the charges so we prefer to respond now. We agree with
3 suggestions by the Victims and Witnesses Unit. We have only one question
4 in relation to point 4 of the main category B.4. The suggestion is for
5 identifying information of court staff, Defence, and individuals.

6 I want simply to make sure that court staff includes also the
7 interpreters. I'm raising the point because we had one issue in
8 Central African Republic relating to the interpreters assisting the legal
9 representative in that case. You will understand, your Honours,
10 sometimes interpreters speaking one language are rare, so they are quite
11 easily identifiable in the procedure if their name are known. So I
12 wanted simply to make sure that also this kind of information will be
13 redacted for the public.

14 Thank you.

15 PRESIDING JUDGE FULFORD: Very clear. Thank you very much
16 indeed.

17 Well, we'll adjourn that point for written submissions by 4.30
18 tomorrow, please. I'm sorry it's not long, but I don't think this should
19 take a significant amount of time to deal with, and we will then deliver
20 a decision on this on Friday.

21 (Microphone not activated)

22 THE INTERPRETER: The interpreters are sorry. The Judge's
23 microphone is off.

24 PRESIDING JUDGE FULFORD: I'm very sorry. I'd forgotten the
25 mike.

1 We will, therefore, deal with the last point on Friday, having
2 given until 4.30 tomorrow afternoon to set out any observations in
3 writing.

4 Point 5 is the Defence request for leave to appeal the decisions
5 on the applications by victims to participate in the proceedings. This
6 is filing 1570.

7 There have been written responses from Mr. Walley and the Office
8 of Public Counsel for Victims.

9 Maitre Mabilille, I have one question, if I may, for the Defence on
10 this. As one of the proposed grounds of appeal, it is suggested that the
11 Chamber exceeded its competence in admitting alleged victims who have
12 been prejudiced as a result of crimes other than those confirmed by the
13 Pre-Trial Chamber. It may be too difficult to ask you to do this at
14 short notice, but it would be helpful to us if an example or two of that
15 could be given either this evening or by midday tomorrow so we can
16 understand exactly what the point is that's being made.

17 Yes, Mr. Biju-Duval.

18 MS. MABILLE (interpretation): My colleague Jean-Marie Biju-Duval
19 and I have prepared certain concrete examples to answer your question.

20 MR. BIJU-DUVAL (interpretation): Mr. President, just one example
21 which is of concern to us and it relates to Victim A16207. This is an
22 applicant who alleges to have been subjected to sexual violence committed
23 by UPC soldiers. We do not want to get into the details of this example,
24 but this case, and there are many more, but in the interests of time I
25 can't go into all of them, but this case shows that this is harm suffered

1 as a result of another crime, another crime of enlistment.

2 PRESIDING JUDGE FULFORD: Thank you. Very helpful.

3 Anything by way of response to this application, Mr. Sachdeva?

4 No. All right.

5 We've had your written response, Mr. Walley. We've had your written response, Mr. Walley.

6 Anything, Ms. Bapita?

7 MR. WALLEY (interpretation): On behalf of everyone, I would
8 like to say that what concerns us most is the consequences of the crimes.
9 So if you authorise observations on this point, then we don't know who
10 can participate on the 26th of January. You ask us to discuss with other
11 legal representatives to prepare our interventions, and I think that if
12 we proceed in this order then we may not be able to respect the date of
13 the 26th of January.

14 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
15 decision in favour of the Defence on this point, Mr. Walley. You must
16 continue, please, preparing as earlier indicated by the Chamber. That's
17 the short way of dealing with that point. Thank you very much.

18 Thank you. We will rule on this on Friday.

19 Point 6 is the Prosecution's request for non-disclosure of
20 information in the statements of 15 individuals providing tu quoque
21 information. This is filing 1567.

22 In essence, and I'm not going to set out the whole list, the
23 Prosecution highlight a number of areas where they seek to retain the
24 veil of secrecy, interview locations, the identity of intermediaries,
25 certain sources, et cetera, et cetera, clearly set out in that filing,

1 and now is the opportunity if any -- if the Defence or the participants
2 wish to make oral submissions on this request for them to do so.

3 Maitre Mabilille, is there anything you wish to say about this
4 filing?

5 MS. MABILLE (interpretation): The Defence already spoke quite at
6 length about the tu quoque issue and has not changed opinion in 2009.
7 However, there's another point in the filing which we would like to draw
8 your attention to. One of the reasons we give is that a number of
9 documents were redacted by a Chamber that is related to this one
10 concerning decisions in the Katanga case. I have difficulty
11 understanding the reasoning behind this, because we are told that when
12 decisions are made in the Katanga case to protect a number of names,
13 these names can't be given to you in the Lubanga case either. So in a
14 way, we are told the decisions of other Chambers in another case are
15 necessary and apply to us.

16 Well, what is the objective to protect? The objective concerns
17 people who incur serious risk. How can you say that in a completely
18 different case to our own that the same protective measures should be
19 taken and that because a Pre-Trial Chamber Judge has taken -- Chamber or
20 Judge has taken a decision in another case it applies to us too?

21 We have to recall the objective which is to protect persons at
22 risk. Why would a person be at risk in our own case? I don't believe
23 that the reasoning is reasonable.

24 That's what I had to say.

25 PRESIDING JUDGE FULFORD: Any response to that, Mr. Sachdeva?

1 MR. SACHDEVA: Mr. President, the names have been redacted
2 because their names can't go to the public, and the Prosecution sees no
3 reason why that can't be transported to our case. Of course if -- if
4 decisions are made whereby the names can -- should be provided to the
5 Defence, then there should be a variation application for protective
6 measures, and we would abide by that, of course.

7 PRESIDING JUDGE FULFORD: Thank you very much.

8 This is added to Friday's somewhat lengthening list.

9 Issue 7, victims participation. First of all, the issue that
10 I've already referred to which is common legal representation, I think as
11 far as the main proposal is concerned, there is nothing that the Bench
12 would wish to say at this stage save to thank you all for the clearly
13 sensible discussions which appear to have taken place.

14 Is there anything, however, Maitre Mabilille, that you would wish
15 to say about it, the idea being there be two teams rather than 90 teams?
16 Are there any submissions that you would wish to make?

17 MS. MASSIDDA: My apologies, your Honour.

18 PRESIDING JUDGE FULFORD: In a moment, Ms. Massidda, in a moment.

19 MS. MASSIDDA: Okay.

20 PRESIDING JUDGE FULFORD: Not yet.

21 MS. MABILLE (interpretation): Were we informed previously
22 already, because we haven't received anything about this common legal
23 representation. So I wonder whether the information was ever given to
24 the Chamber or given to everyone.

25 PRESIDING JUDGE FULFORD: (Previous translation continues) ...

1 referred to it in general terms earlier on this afternoon. I'm aware --
2 and we only became aware of the proposed solution very, very recently,
3 and of course you've had even less time than we have.

4 Mr. Walley, I think it would be helpful for everyone concerned
5 if the final proposed arrangements could be set out shortly in a document
6 so that if there are concerns on the part of either the Bench or the
7 Defence, these can be ventilated in due course.

8 The reason why I have been indicating that I think it's unlikely
9 is that there are going to be very few teams rather than a lot of teams,
10 and I would have thought the greater the number the teams the more likely
11 it was going to be that there would be objections as to the arrangements,
12 but I may have misunderstood. There may be, even with the arrangements
13 that you're proposing, valid objections that can be made, and so I think
14 it would be helpful if you could, within 48 hours, set out just briefly
15 what the proposed arrangements are. Thank you very much.

16 Now, a discrete issue is the position of the Office of
17 Public Counsel for Victims --

18 MS. MASSIDDA: My apologies, your Honour, to interrupt you, but I
19 still have an issue on the common legal representation.

20 PRESIDING JUDGE FULFORD: The two-team proposal.

21 MS. MASSIDDA: This is actually the issue. The office was never
22 informed of this consultation, so I'm not in a position to know nothing
23 about it.

24 There was an order of the Chamber requesting the legal
25 representative to consult. The office was ever consulted on the matter

1 despite the fact that I'm still legal representative of a group of
2 victims. So at this point in time I have really no idea of which kind of
3 proposed arrangement has been proposed. So I kindly request to be
4 consulted on the matter in the next 48 hours. Thank you.

5 PRESIDING JUDGE FULFORD: I had no idea that you had been
6 excluded from these discussions, Ms. Massidda. I had made the assumption
7 that you would have played a not insignificant role in those discussions.

8 Right. Perhaps when we rise you can take Mr. Walley and
9 Ms. Bapita to task for having excluded you from their arrangements, and
10 if you have any concerns over the two-team plan, could you please within
11 the next 48 hours, albeit, if necessary, briefly set out what your
12 objections are.

13 The particular issue that arises for the Office of Public Counsel
14 for Victims is really twofold. In fact, there are two issues. One is
15 whether you should continue to represent, I think the choice in reality
16 is eight victims, four victims, or none, and if you are representing
17 victims, should you be a separate team or should you be incorporated into
18 one of the two?

19 I think what is being recommended is that the Office of
20 Public Counsel for Victims stands alone as a separate entity and you're
21 not incorporated in either of the two major teams.

22 Well, I certainly detected a slant in that direction,
23 Mr. Walley. But that needs to be resolved, and I think that would be
24 very fruitful subject for discussion between the three of you this
25 afternoon after we've risen, please, to work out what your preferred

1 stance is in relation to that.

2 Ms. Massidda, to be direct about it, I think there is varying
3 strength in your application to represent victims in this sense. As
4 regards the four with dual status, it could be said there are more
5 powerful reasons for you remaining representing those four than for the
6 other four for whom I think there have been no special reasons advanced
7 at all apart from the fact that they've signed consents.

8 Now, are you maintaining an application for all eight, or is it
9 only the four who have dual status?

10 MS. MASSIDDA: Thank you, Mr. President. We have a serious
11 concern essentially for the four dual status victims and witnesses for
12 several reasons already said in the application, plus a more recent
13 reason. We have learned that these four will be amongst the first
14 witnesses to be heard by the Chamber, which means by mid-February, and
15 this implies sort of familiarisation and other matters which need to be
16 discussed, and we fear that if we are not still representing the -- these
17 persons, there could be a disruption in the trust relationship and an
18 attempt to their well-being before their testimony. This is essentially
19 our main concern.

20 Two seconds. I can ensure publicly the legal representatives and
21 the Chamber that the office is at this moment prepared to continue as
22 legal representative of part of the victims, and also to assist the
23 entire teams of legal representatives. The same amount of people will be
24 for the legal representative during the trial in any case if the
25 principal counsel will continue to represent or if the principal counsel

1 will not continue to represent victims. Thank you.

2 PRESIDING JUDGE FULFORD: Very helpful.

3 Ms. Bapita.

4 MS. BAPITA (interpretation): Thank you, President. As I said at
5 the outset, I received a proxy from two learned colleagues, and therefore
6 I would like to ask the following question for it to be in the
7 transcript: The issue which we discussed within this group concerned the
8 date on which the victims gave the OPCV a mandate. The group believes
9 that if the OPCV is to ensure the defence of the victims and that that
10 would be their duty until the person is recognised as a victim, and then
11 that the Registry would be given the discretion to give the victim the
12 right to choose their counsel. That's how we approached it.

13 Now, in light of the debate we wonder in which situation the OPCV
14 could leave its mandate to assist the victim before this is due to be
15 able to come and be present in the hearings.

16 Now, this is what we discussed, and I wanted to underline this
17 because both my learned colleagues came back to this and wanted to know
18 how the OPCV was given the proxies to represent these victims after they
19 had already been accepted as victims in the proceedings, because we
20 recognise this at the -- before the proceedings start, but we don't know
21 how this could be possible after they have started.

22 Secondly, we have 250 counsel on the list. They are waiting to
23 be appointed and to participate in the proceedings. What will we do with
24 these counsel if the Registry believes that the OPCV should continue to
25 represent the victims? This is difficult for our conscience of lawyers,

1 because we -- lawyers will come back to us and wonder and ask us why we
2 haven't raised this in the courtroom. So that is why I have to raise it
3 here.

4 Thirdly, some of us have had difficulties, and we will be able to
5 give you details later, about requests for opinions, and we believe that
6 if the OPCV has a problem answering these it's because they have too many
7 other tasks.

8 Now, these are the points that were raised, and that's why we
9 believe that the OPCV's role should be limited as regards representation
10 in the proceedings.

11 I was given this -- the mandate to raise these concerns here.
12 That's why I have raised it just now, and I would like to give you time
13 now to look into these issues.

14 PRESIDING JUDGE FULFORD: Ms. Massidda, I don't want to turn this
15 into a courtroom battle between the Office of Public Counsel for Victims
16 and those representing individuals, and although Ms. Bapita is entirely
17 entitled to raise the first main question that she addressed, I think in
18 the first instance, unless there is something important to be said now,
19 it's probably best left for discussions between the two of you so that
20 the representatives of victims can be given, to the extent that it's
21 appropriate, chapter and verse as to how you came to have the mandates
22 which you do from particularly the four who have dual status.

23 As regards the last point that Ms. Bapita made, I think you
24 assure us that if you are allowed to represent individual victims, you
25 will provide the same service, as it were, to the other representatives

1 as if you were representing none.

2 MS. MASSIDDA: That's correct, your Honour. (Interpretation) I
3 just wanted to intervene on a minor point. I won't respond to the issues
4 raised by Ms. Bapita. I will do so in private with the legal
5 representatives, but I can't in public accept that it is said that the
6 office grabbed proxies from people. I don't think it's acceptable to use
7 such terms in a courtroom. Thank you.

8 PRESIDING JUDGE FULFORD: Yes, Ms. Bapita.

9 MS. BAPITA (interpretation): Your Honour, I would like to
10 withdraw that statement if it has vexed anyone.

11 PRESIDING JUDGE FULFORD: Can I encourage a moderate and full
12 exchange of views in half an hour's time to try and clear the air on
13 this, please.

14 Good. Any -- yes, Mr. Sachdeva.

15 MR. SACHDEVA: Mr. President, the Prosecution has not up until
16 now received an application, and also if Mr. Walleyne is going to submit
17 the summary document, we would be -- we would be -- we would like to
18 receive that document.

19 PRESIDING JUDGE FULFORD: You'd like to play as well.

20 MR. SACHDEVA: Yes, Mr. President.

21 PRESIDING JUDGE FULFORD: All right, you may. Make sure the
22 Prosecution are included, please.

23 Maitre Mabilie, can I make it clear that in the remarks I made
24 earlier, we have not remotely come to a final conclusion as to what is
25 appropriate. The reason I made the remarks that I did was that it came

1 as a pleasurable surprise to us that rather than there being many teams
2 there it seemed as though there were going to be either two or three
3 which was less than we anticipated. So it was no more than the
4 reflection of our initial reaction to the proposals that were made.

5 Now, if those arrangements seem to you to be inappropriate,
6 please make any observations in writing that you wish and we will
7 consider them in the usual way, wholly unprejudiced by any initial
8 reaction.

9 We turn now -- yes, certainly, Mr. Biju-Duval.

10 MR. BIJU-DUVAL (interpretation): Thank you, President. The
11 Defence doesn't have a clear-cut position about the status of the OPCV.
12 It doesn't concern us directly. The fact that the OPCV represents some
13 victims in the long-term and actually throughout the whole proceedings
14 can be confusing. However, I would like to draw the Chamber's attention
15 to a problem which is of concern to us and which relates directly to some
16 of the victims defended by the OPCV and to others too. I'm talking here
17 about the victims with the dual status, witnesses for the Office of the
18 Prosecutor and Victims.

19 Now, the Chamber has not yet decided whether or not the documents
20 prepared for applications for participation should be transmitted to the
21 Defence in unredacted form. However, the Defence does -- would like to
22 draw the Chamber's attention to this point which is still pending.
23 There's another difficulty arising concerning the proofing of the
24 witnesses.

25 Unless I'm mistaken, I do not believe that the Chamber has yet

1 solved the procedure that should apply to legal representatives
2 concerning the proofing of witnesses, witnesses for the Office of the
3 Prosecutor that are also victims. Now, we need to protect the
4 testimonies. The Chamber has issued a decision, however -- which was
5 clear. However, the Defence has concerns concerning the counsel of
6 victim witnesses, because we are afraid that the spontaneity of the
7 testimony could be affected by the procedure.

8 This is a very broad issue. We might need to spend longer on it.
9 It is directly related to investigations that could be carried out by
10 OPCV and legal representatives, and from what I have understood upon
11 reading Ms. Massidda's observations, as a legal representative the OPCV
12 also collected a number of documents, and I think that this was what was
13 said.

14 We are concerned about these documents, because they raise the
15 whole issue of disclosure of evidence to the Defence, any evidence that
16 may have been collected, gathered by a victim or their representative.

17 I'm not closing the issue here. I have other issues I would like
18 to raise. However, I wanted to draw the Chamber's attention to this
19 complex and difficult and serious matter which hasn't been solved through
20 the texts of the court and hasn't been solved by the Chamber either yet.

21 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
22 Mr. Biju-Duval, because on the one hand there's the obligation of making
23 disclosure to the accused; on the other hand, there's the legal
24 relationship between the witness for dual status and his or her own
25 lawyers, and I suspect that is something that we are going to have to

1 wrestle with. Thank you very much for raising it.

2 Doings anyone else want to say anything about this subject?

3 MR. WALLEYN (interpretation): President, I'm not sure the issue
4 raised here has never been the object of any debate. Perhaps we should
5 first discuss it among ourselves, among Defence counsel and legal
6 representatives. However, it's true. You can't prevent a legal
7 representative from being in touch with their client. Of course they
8 have to respect certain rules and a code of conduct. Other problems
9 arise too. For instance, legal representatives can in some cases furnish
10 evidence. This was confirmed by the Appeals Chamber. However, we
11 haven't had yet time to consult each other among legal representatives.
12 We have to look into it once the teams have been formed, but it could be
13 that legal representatives suggest certain -- or suggest evidence or are
14 asked to hear witnesses, certain witnesses. This possibility should be
15 borne in mind. I don't want to go into too much detail. We haven't had
16 time yet to think about these issues among ourselves. However, these are
17 matters we'll have to deal with, I believe, during the proceedings.

18 PRESIDING JUDGE FULFORD: Time is precious, Mr. Walley. We are
19 going to be hitting these issues very soon now, and if there are going to
20 be any substantive observations on this point from the representatives of
21 victims, we're conscious that you've been given very little time, but
22 we're going to have to deal with them soon because otherwise it's going
23 to be a case of trying to close the stable door long after the horse has
24 bolted. So if there is anything substantive on this within 48 hours,
25 please.

1 Now, the next issue which I'm going to take briefly, because time
2 is -- is short, is one that is potentially of considerable importance,
3 Mr. Walley, Ms. Bapita, and Ms. Massidda, to those who you represent.

4 It is clear from the filings that have been -- that have been
5 received by the Court recently that a number, a not insignificant number,
6 of victims have indicated that they wish to participate in person. No
7 details have been given about this at all at this stage.

8 We wish to make some short observations which we would ask you,
9 please, to reflect on carefully and to communicate with those who are
10 contemplating making an application of that kind.

11 It needs to be remembered that this is a court of law and, in
12 particular, this is the criminal trial of an accused, and the presumption
13 is that those who participate in the proceedings will be lawyers, lawyers
14 acting for individuals or for bodies, for entities.

15 If individuals are to be allowed to participate in person, there
16 would have to be cogent, indeed powerful, reasons for that exceptional
17 course to be waived, because it doesn't need for us to say that people
18 without legal training coming to talk about very difficult things that
19 have happened to them could have a real capacity for destabilising these
20 court proceedings. So if proposals of this kind are to be made, they
21 need to be made in writing, they need to be made fully, and they need to
22 set out very clearly why it is both necessary and appropriate for
23 individuals to be asking the Chamber to appear in person, to participate
24 in person, rather than through the legal representatives who have been
25 made available to them. At the end of the day, this is not a truth and

1 reconciliation commission or a body of that kind.

2 So we're not saying no, but we're saying exceptional and for good
3 reason.

4 There was a confidential filing, document 1593, on the 9th of
5 January, in which the Victims and Witnesses Unit set out their very
6 general but extremely helpful proposals as regards the measures that are
7 to be taken for general protection in this area. Although it's a
8 confidential document, it's been indicated that so long as
9 paragraphs 5 to 10 are not referred to, there is no difficulty in
10 discussing it in open court.

11 I'm not sure whether there will be any submissions, in fact, on
12 this document given its general nature. 1593.

13 MS. MASSIDDA: Your Honours.

14 PRESIDING JUDGE FULFORD: It doesn't look as though you have,
15 Ms. Massidda.

16 MS. MASSIDDA: No. I think it was not notified, at least not to
17 the Office of Public Counsel for Victims. I'm not sure for the other
18 legal representatives.

19 PRESIDING JUDGE FULFORD: No. There we are. Then it seems as
20 though this is not an issue that we can deal with. If it hasn't been
21 notified -- Mr. Vaatainen.

22 MR. VAATAINEN: Your Honour, actually it has been notified to the
23 Legal Representatives of Victims.

24 PRESIDING JUDGE FULFORD: But not to Ms. Massidda.

25 MR. VAATAINEN: Including Ms. Massidda, but her name appears

1 under the Legal Representatives of Victims and not under the Office of
2 the Public Counsel for Victims.

3 PRESIDING JUDGE FULFORD: Have you got this document,
4 Mr. Sachdeva?

5 MR. SACHDEVA: Yes.

6 PRESIDING JUDGE FULFORD: You have. Right. Well, Ms. Massidda,
7 we'll come back to you on that in a moment.

8 Mr. Sachdeva, was there anything you wanted to say about the
9 proposals excluding paragraphs 5 to 10?

10 MR. SACHDEVA: Mr. President, we would just say that with respect
11 to the anonymous victims that the disclosure should be commensurate with
12 their rights to participate.

13 PRESIDING JUDGE FULFORD: Yes. Yes. I'm sorry, Maitre Mabilille.

14 MS. MABILLE (interpretation): Presiding Judge, I'm sorry. I
15 think we missed this filing, and so I have no comment to make on it right
16 now.

17 PRESIDING JUDGE FULFORD: Maitre Mabilille, we'll give you 24 hours
18 to come back in writing if you will, please. Thank you very much.
19 Certainly.

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

21 PRESIDING JUDGE FULFORD: (Previous translation continues)...
22 issues. The first is the trial date. It is now confirmed as being the
23 26th of January. On that day the sitting schedule will be as follows:
24 The Court will sit at 10.00 through to 11.30. We will sit again at 12.00
25 through to 1.30, although we recognise that on this particular day and

1 this day alone that may cause some difficulties over the luncheon
2 adjournment, and the final session will be between 3.00 and 4.30.

3 We wish to make it clear that on the 26th of January we propose
4 to commence the hearing with the Prosecution's opening speech, and it
5 will need very powerful reasons indeed for us to deal with any issue
6 before the Prosecution's opening speech. Therefore, if there are any
7 further matters that should be resolved prior to the Prosecution's
8 opening of the case, they must be dealt with at a status conference in
9 advance of the 26th. So no last-minute applications, please, at two
10 minutes to 10.00 on the 26th of January. In any event, it is likely that
11 the Chamber will list a final status conference at some stage before --
12 in the week before the beginning of the trial.

13 The final matter is the usual sitting schedule, certainly to
14 begin with, will be as follows, and we are conscious that this will not
15 suit the -- the wishes of some, but given the delays to this trial, it is
16 our view that we must proceed with all proper speed.

17 On Mondays, we will sit at 12.00 through until 2.00, and then
18 from 3.00 until 5.00. On Tuesdays, Wednesdays, and Thursdays, we will
19 sit at 9.30 until 11.00, 11.30 until 1.00, and then again between 2.30
20 and 4.00. And on Friday, we will sit from 9.30 until 11.30 and from
21 12.00 until 2.00.

22 Now, there may be exceptional things which arise which will cause
23 us to vary that schedule. Please make any applications as far in advance
24 as possible so that if there are proper reasons for varying the schedule
25 those who have got other arrangements that they would wish to make have

1 the maximum opportunity for doing so.

2 Those are the matters that we wish to raise at this status
3 conference. There any other points that anyone wishes to raise this
4 afternoon? Yes, Mr. Sachdeva.

5 MR. SACHDEVA: Thank you, Mr. President. There are just three
6 issues I would to raise. The first one being on the 5th of January of
7 this year, we were expected to receive the Defence lines as was ordered
8 by the Trial Chamber last year, in other words, three weeks prior to the
9 start of trial. And it may be that the reason that it has not been
10 forthcoming is aligned to the Defence's filing last week, but I just note
11 that for your Honours' consideration.

12 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
13 encourage you to talk to (Microphone not activated)

14 THE INTERPRETER: The interpreters are sorry. The microphone is
15 off.

16 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
17 after we've risen, Mr. Sachdeva, and it may be that there will be
18 compliance in the near future. If it's a matter of continuing concern to
19 you, could you please raise it formally and we will add it to the agenda
20 for the status conference that's likely to take place in the near future.

21 MR. SACHDEVA: Very well, Mr. President. The second point is in
22 relation to the Trial Chamber's decision on familiarisation, and I raise
23 this with a view to -- to -- to ensuring that the procedures are known to
24 the Court. One of the witnesses that the Prosecution in this case is
25 calling is being interviewed by another team in relation to the Katanga

1 case, and I just note that none of the members of the Lubanga team are
2 present and have been present or will be present in that interview, and
3 it's simply an inquiry as to issues related to a different case.

4 PRESIDING JUDGE FULFORD: Are those interviews likely to touch
5 the areas of interest in this case, Mr. Sachdeva?

6 MR. SACHDEVA: The interview is specifically related to the
7 Katanga case. Of course any statements that are generated will be handed
8 over to the accused as soon as possible. In other words, there will be
9 prior statements under Rule 76 of the Rules of Procedure and Evidence.

10 PRESIDING JUDGE FULFORD: Right.

11 MR. SACHDEVA: And should there be issues that relate to this
12 case, then of course that will be communicated to the Defence and to the
13 Trial Chamber if needed.

14 PRESIDING JUDGE FULFORD: I'm going to go back to the question I
15 asked. Are the issues that are going to be canvassed in those interviews
16 not just Rule 77 general background of potential use by way of
17 preparation, but are they issues that on what is known or what one can
18 assume is likely are live issues in this trial?

19 MR. SACHDEVA: Mr. President, there are issues related to the
20 Katanga case.

21 PRESIDING JUDGE FULFORD: Right.

22 MR. SACHDEVA: That's the reason for the interview.

23 PRESIDING JUDGE FULFORD: Right. So another way of putting it is
24 no.

25 MR. SACHDEVA: Correct, Mr. President.

1 PRESIDING JUDGE FULFORD: All right. Point two. Point three
2 then.

3 MR. SACHDEVA: Point three is in respect to the order of
4 witnesses or the scheduling of witnesses, with respect to the entry
5 number 22, the court code has been listed as 5 and in fact it should be
6 55. I just want to put that on the record for clarification.

7 PRESIDING JUDGE FULFORD: On the second of those, Maitre Mabilie,
8 the witness being interviewed in the Katanga case, is there anything
9 you'd wish to say about that?

10 MS. MABILLE (interpretation): The Defence team proposes that we
11 will contact the Prosecution team and discuss with them to see if there
12 are any potential difficulties.

13 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
14 concerns, let us know.

15 MS. MASSIDDA: I'm very sorry, your Honour, very small matter.
16 I'm aware of a document which was not notified to the office. My
17 apologies, document 1593 was notified. The problem was we had not the
18 link but now it's solved. Thank you. But there is one document which in
19 my understanding is a Trial Chamber order of 17 December 2008, document
20 1559, filed confidential, related to proposal to call expert witnesses on
21 child soldiers and trauma which was not notified to the office and which
22 is evidently of interest for us because four of our clients are former
23 child soldiers.

24 I've seen that both the Prosecution and the Defence have provided
25 the Chamber with observation and Mr. Walleyne has also provided the

1 Chamber with his observation.

2 Could please this document be notified to the office and could we
3 have 24 hours to file any submission we may consider useful in the
4 matter?

5 (The Trial Chamber confers)

6 PRESIDING JUDGE FULFORD: It will be made available to you,
7 Ms. Massidda. I will ask the legal advisor to the division to make sure
8 that it's transmitted to you this evening, and 24 hours or slightly less,
9 4.30 tomorrow, please, for your responses.

10 MS. MASSIDDA: Thank you.

11 PRESIDING JUDGE FULFORD: Good. Yes. Well, Mr. Walley, I was
12 going to ask you to make sure that you bring Ms. Massidda in out from the
13 cold, please, and join her into the discussions, but there's something
14 else you wanted to say.

15 MR. WALLEYN (interpretation): Yes, your Honour. The Prosecution
16 gives the impression that I was not understood by the Chamber when I
17 talked about the presence of the representative of the Prosecution team
18 and the Defence during witness familiarisation.

19 I did not say that the Prosecution team should not have a
20 representative in the room when the Prosecution witness is being
21 familiarised. What I was saying was that the entity which calls the
22 witness should at least be present passively during witness
23 familiarisation but that the other parties should not be present in the
24 room in order not to intimidate the witness. But personally, I have no
25 problem with a scenario where none of the parties is present during

1 familiarisation.

2 PRESIDING JUDGE FULFORD: (Previous translation continues) ...
3 helpful clarification. Thank you very much.

4 I repeat our thanks to everyone for sitting late this afternoon.
5 We're very grateful. Something else, Maitre Mabilille, of course?

6 MS. MABILILLE (interpretation): Very respectfully, I would like to
7 ask the Chamber if we can have the decision which you issued orally on
8 the 18th of November.

9 (The Trial Chamber confers)

10 PRESIDING JUDGE FULFORD: It's very close to the forefront of our
11 minds, Maitre Mabilille, and a reasonable request.

12 That concludes this Status Conference. Thank you all very much
13 indeed.

14 COURT USHER: All rise.

15 The hearing ends at 6.30 p.m.

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