

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 Friday, 16 January 2009.

6 The hearing starts at 10.04 a.m.

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

9 PRESIDING JUDGE FULFORD: Good morning. The various parties and
10 participants are represented in the way set out in the court record.

11 The Chamber will now give its oral decision on nine separate
12 issues.

13 Issue 1: This first issue concerns the Prosecution's
14 confidential filing (document 1591) entitled: "Prosecution's Request for
15 Protective Measures for Prosecution Witnesses." This filing was made on
16 the 9th of January, 2009, in response to the order of the Chamber on the
17 9th of December, 2008, stipulating that the responsibility of filing
18 applications for protective measures lies primarily with the party
19 calling the witness (see document 1547).

20 In this application, the Prosecution requests image and voice
21 distortion during the testimony of, and the assignment of pseudonyms for,
22 20 witnesses in the protection programme. The witness numbers are 0298,
23 0299, 0041, 0030, 0010, 0213, 0008, 0011, 0297, 0294, 0293, 0007, 0002,
24 0012, 0014, 0055, 0015, 0157, 0089, and 0017. The witnesses include a
25 range of individuals all of whom have been admitted into the court's

1 protection programme.

2 The Prosecution consulted with the OPCV, which currently
3 represents four dual-status victims, and with the legal representatives
4 of the two others who are in the same category, and they agree with the
5 Prosecution's request for these three protective measures with respect to
6 their clients.

7 The justification for this request is put as follows:

8 "(the) in-court protective measures ... will further protect the
9 security of these at-risk witnesses by ensuring their public anonymity.
10 At the same time, the measures sought will not adversely affect the
11 accused's rights at all since the witnesses' identities will be known to
12 the accused and his Defence team and the witness's testimony will be
13 accessible to the public (paragraph 9 of the filing)."

14 The Defence oppose this request. In essence, counsel suggested
15 that when the protective measures proposed for this case are looked at
16 globally, one of the essential elements of a criminal trial is
17 significantly undermined: the right of the accused to a public hearing.
18 In the submission of the Defence, although there will be an opening
19 session during at least the major part of the testimony of these
20 witnesses, their identities will be wholly unknown to the public, and the
21 court will need to go into closed session whenever issues arise which may
22 reveal their names or location. It is argued that on the proposals
23 generally before the Chamber, the proportion of unknown witnesses will be
24 markedly higher than has been the case at the Tribunals for Rwanda and
25 the former Yugoslavia, and that, overall, unfairness will result.

1 Counsel for Witness 0002 reminded us that one unique and
2 important aspect of the arrangements for this case is that the public
3 sessions are broadcast live on the internet, albeit with a 30-minute
4 delay. This means that for protected witnesses without these measures
5 their identities will be immediately available anywhere in the world.
6 Counsel for the OPCV pointed out that some of these witnesses are minors
7 who have families living in the affected areas.

8 The Chamber notes that the Victims and Witnesses Unit, in a
9 report on a separate issue, "strongly recommends granting to (individuals
10 who have a dual status of victim and witness and who are in the
11 protection programme) facial and voice distortion and assigning a
12 pseudonym" (paragraph 18 of "Victims and Witnesses Unit report on its
13 assistance to the Trial Chamber in relation to individual risk
14 assessments and requests for protective and special measures,"
15 document 1593 filed confidentially on the 9th of January, 2009).

16 The Chamber recognises the importance of truly open justice as
17 enshrined in the Statute. By Article 67(1), the accused is "entitled to
18 a public hearing, having regard to the provisions of (the) Statute." The
19 importance of this principle has been emphasised by the European Court of
20 Human Rights in its repeated observations that the public character of
21 proceedings is an essential element of a fair hearing. (See B. and
22 P. v the United Kingdom, application numbers 36337/97 and 35974,
23 judgement delivered on the 24th of April, 2001). Any derogation from
24 that principle must be for good reason, and the proceedings must remain
25 fair. It is of note that it is well established under the European

1 Convention that the press and the public may be excluded for a variety of
2 reasons and including in order to protect the safety of witnesses (see B.
3 and P., paragraph 37).

4 This court is trying alleged war crimes that relate to a part of
5 Africa where there is continuing and serious instability. All of these
6 witnesses have been taken into the Court's protection programme because
7 of the risks to their personal safety which have been carefully and
8 objectively assessed by the Victims and Witnesses Unit. The court has a
9 statutory obligation to protect witnesses, and by Article 68(2), an
10 exception is made to the principle of public hearings to enable the court
11 to protect its witnesses by in camera hearings, electronic presentation
12 of evidence, or other "special means."

13 If any of their identities were to become known, the whole
14 purpose of the protection which has been afforded to the witnesses would
15 be undermined, and they, together with their families would be at risk
16 for an indefinite period of time. The accused has been given the full
17 identifying details for these witnesses and is able, therefore, to deal
18 with their evidence without restriction.

19 The Chamber has no doubt that this application is well founded.
20 Without the totality of these measures, there is a real risk that
21 witnesses before the court will be put at significant risk of harm and
22 the court would thereby have failed to discharge its obligations under
23 Article 68. They do not in any way render the trial against the accused
24 unfair; and in all the circumstances they are necessary and
25 proportionate. Pursuant to Article 68 and Rule 87, the application is

1 granted in its entirety.

2 Before I move on to issue two, I want to ensure that I am not
3 speaking too quickly for the transcribers and the interpreters. Can you
4 indicate whether it is all right or not to the Court Officer. It seems
5 to be acceptable.

6 Issue 2: This relates to the "Prosecution's provision of the
7 anticipated order of testimony for Prosecution witnesses and request for
8 adjustment" document 1586 which was filed on the 8th of January, 2009,
9 publicly, with a confidential Annex, Defence and Legal Representatives of
10 Victims only.

11 In this application the request is made that Mr. Prunier, the
12 Prosecution's expert on context and background matters, is the third
13 witness called in the trial so that a former child soldier and his father
14 can become the first and second witnesses. It is suggested that this
15 will allow local communities and the wider public to relate to the
16 proceedings which may not happen if expert testimony is the first
17 evidence in the case.

18 The Defence opposed this application, submitting that the
19 evidence of all the witnesses as to fact should be heard after the expert
20 witnesses on contextual matters have been considered. It is argued that
21 this will ensure that the issues relating to the individual witnesses of
22 fact are dealt with appropriately and are fully understood.

23 Although the Chamber has previously indicated that the
24 Prosecution's expert on background matters should be the first witness in
25 the case since it will be possible for communities in the DRC and

1 elsewhere to follow these proceedings (wherever a computer and internet
2 connection is available), the court acknowledges the force in the
3 argument that the hearing is likely to be more readily comprehensible if
4 the first testimony relates to the "primary" evidence in the case which
5 is said to support the charges the accused faces. There is a real risk
6 that if immediately following the opening statements the court turns to
7 matters of history and context, it will be difficult to understand the
8 nature and true course of the trial to come.

9 Although the questioning of the expert will not have taken place
10 before these two witnesses are called, no material prejudice will arise
11 if they are called as the first and second witnesses in the case.
12 Instead, the trial will be better understood by the public at large if
13 this adjustment is made to the order of witnesses. If something
14 exceptional arises during the expert's evidence which necessitates either
15 witness being recalled, an application can be made to the Chamber. It
16 may be sensible to consider delaying their return to the DRC until after
17 the expert's evidence. This is, overall, a sensible suggestion that will
18 not lead to any unfairness, and the application is accordingly granted
19 (pursuant to Article 64(6)(f) and Regulation 54 of the Regulations of the
20 Court).

21 Issue 3: This relates to an application filed by the Defence on
22 the 6th of January, 2009 (document 1581) entitled "Observations de la
23 Defense sur la Requete de la Defense aux fins de cessation des poursuites
24 datee du 2 juin 2008."

25 The Chamber is reminded that at the Status Conference on the

1 29th of November, 2008, the parties were asked to file a fresh
2 application on any outstanding pre-stay issues that require determination
3 in order to take account of the current situation. This application
4 addresses an issue in relation to which the Defence seeks a ruling.

5 In the context of what is said to be the entitlement of the
6 accused before trial and in time to enable the preparation of his defence
7 to have full information concerning all charges brought against him, of
8 Defence highlights that the Prosecutor has expressly mentioned on
9 "numerous" occasions that he is continuing investigations into crimes
10 other than those confirmed by the Pre-Trial Chamber and that the
11 Office of the Prosecutor suggests it is its right to bring further
12 charges against the accused.

13 It is argued that this is manifestly contrary to the fundamental
14 principle of fairness of proceedings and seriously undermines the
15 fundamental rights of the accused. It is said it puts him in the
16 position of having to present a defence to the crimes with which the
17 Chamber is seized absent any knowledge of the further charges which the
18 Prosecutor envisages bringing which are or may be distinct but closely
19 connected.

20 If the potential charges "held in reserve" by the Prosecutor
21 against the accused arise from the same situation and his responsibility
22 is founded on identical or connected facts as the present trial, it is
23 suggested their examination by the International Criminal Court should be
24 made the subject of a single set of proceedings thereby enabling the
25 Defence to set out the accused's defence once when in possession of the

1 entirety of the case alleged against him.

2 It is argued that this possibility or "threat" of future
3 proceedings runs contrary to the principle of fairness of proceedings in
4 that the Prosecution should not use procedural devices to undermine the
5 fundamental rights of the accused.

6 For those reasons, the Chamber is invited to rule that the
7 accused cannot be the subject of proceedings arising out of events in the
8 Democratic Republic of the Congo other than those contained in the
9 Decision on the Confirmation of Charges in the present case. These
10 written submissions reflected the oral submissions of the Defence on this
11 subject advanced on the 10th of June, 2008, when in essence it was
12 suggested there can only be "one trial."

13 The Prosecution resists this application. It submits that
14 investigations against the accused continue although they will have no
15 impact on the current trial. The Court has been told unequivocally there
16 will be no application to amend or to add to the present charges, and the
17 Chamber is informed that the ongoing investigations concern alleged
18 crimes which are not connected with the current charges against
19 Mr. Lubanga. Furthermore, it is submitted that the Chamber has no
20 jurisdiction to make the order sought given that it concerns hypothetical
21 proceedings which are not before the court. The Chamber has no authority
22 over charges that may be brought in the future, and the limit of this
23 Bench's jurisdiction is over the case currently before it. It is said
24 that any complaints as to unfairness should be raised in due course
25 before the relevant Chamber if the accused faces further proceedings.

1 The decision of this Chamber is that it has no authority over the
2 Prosecution's investigations into other crimes that may result in further
3 charges against Mr. Lubanga (see Article 61(9) and Rule 128 which limits
4 authority over additional charges to the Pre-Trial Chamber).

5 The extent of this Bench's jurisdiction, subject to those
6 provisions, is these proceedings which are based on the Pre-Trial
7 Chamber's confirmation of charges. Whether or not another trial arising
8 out of events in the DRC can fairly be brought against this accused is
9 not a decision that this Chamber can take. The sole issue for us is
10 whether the continuing investigations into other crimes render this trial
11 unfair. There are no grounds for reaching that conclusion. Indeed,
12 Mr. Lubanga is unaffected in presenting his defence to these alleged
13 crimes because he may at some stage in the future have to meet other
14 different charges in relation to another case. It would be contrary to
15 the interests of justice to suggest that all possible crimes that an
16 individual may face in one country must be fully investigated before any
17 of them can be brought to trial even if there is some kind of
18 circumstantial connection between them or an element of overlap as
19 regards the underlying facts. It is common place in national and
20 international jurisdictions for an accused to stand trial in relation to
21 particular allegations whilst the Prosecution continues to investigate
22 other possible wrongdoing.

23 If other proceedings are brought in due course, Mr. Lubanga will
24 be entitled, depending on the circumstances, to advance arguments based
25 on alleged unfairness before the Chamber or Chambers seized of that case.

1 In this trial, the continuing investigations have led to no identifiable
2 unfairness.

3 Accordingly, this application is dismissed.

4 Issue 4: This issue concerns the Prosecution's application for
5 protective measures filed on the 5th of January, 2009, (document 1579).

6 The Chamber has been informed that pursuant to its ongoing
7 disclosure obligations, the Prosecution identified a further item
8 relating to trial witness 0010 that potentially falls within
9 Article 67(2) and Rule 76(1). The document was obtained pursuant to
10 Article 54(3)(e). Once its significance in this regard was understood,
11 the Prosecution asked the United Nations, the provider, to lift the
12 restrictions on disclosure in the event the United Nations agrees to the
13 disclosure of the document to the Defence in a fully non-redacted form on
14 condition that certain protective measures are applied to the use of the
15 document in open court.

16 The proposed measures are as follows:

17 (i) the accused and his Defence team, the legal representatives
18 of the victims, the staff of the Office of the Prosecutor, and the staff
19 of the Trial Chamber are prohibited from divulging to any third person
20 ordered body the information contained in those parts of the document
21 that are redacted in the copy of the document that is enclosed with the
22 letter attached to the filing;

23 (ii) in the event that the document is used in proceedings before
24 the Chamber, the public record of the proceedings contain only the
25 material set out in the redacted document and dissemination of the

1 non-redacted version is restricted to the Chamber and its staff, the
2 Office of the Prosecutor, the accused and his Defence team, and the legal
3 representatives of the victims;

4 (iii) in the event that the Defence, the Office of the
5 Prosecutor, the Chamber, or the legal representatives of the victims wish
6 to quote from or to paraphrase or to discuss in proceedings before the
7 Chamber any part of the redacted information contained in the document,
8 this occurs in closed session and the relevant non-redacted transcripts
9 and recordings of these parts of the proceedings are restricted to the
10 Chamber and its staff, the Office of the Prosecutor, the accused, and his
11 Defence team, and the legal representatives of the victims;

12 (iv) in the event that reference is made in open court to the
13 individual who is the source of the statement contained in the document
14 or to the family members of that individual, they are to be identified by
15 means of pseudonyms only.

16 The application makes it clear that this is to cover not only the
17 Trial Chamber but also the Appeals Chamber.

18 The information provider requests that the non-redacted
19 information is not disclosed to the Defence unless and until the Chamber
20 has authorised these protective measures. Against that event, the
21 Prosecution has attached a non-redacted version of the information in a
22 separate confidential ex parte Prosecution only Annex.

23 The Defence opposed this application in part on account of its
24 potential for reducing the public element of the trial. The Defence
25 highlighted that if the witness chooses to give evidence without any of

1 the in-court protective measures referred to above this application is
2 rendered unnecessary. However, the Court was told by the representative
3 of the OPCV that the witness has requested that his or her evidence is
4 protected in the way that is described elsewhere in the course of this
5 oral decision.

6 Finally, the Defence raises the timing of this application given
7 that the document in question - which is about 70 pages in length - was
8 seemingly drafted in 2004 and its numbering indicates that it has been in
9 the Prosecution's possession for a considerable period of time. The
10 suggestion is made, therefore, that there is, potentially, an inexcusable
11 delay on the part of the Prosecution in effecting this pre-trial
12 disclosure given that the obligation on Article 67(2) is to disclose
13 material "as soon as practicable."

14 There is no doubt that this is another example of late disclosure
15 seemingly as a result of a further oversight in the sense that the
16 document's relevance to the evidence of this witness has only recently
17 been understood. Particularly in light of the general disclosure
18 difficulties in this case, this is unacceptable. The Prosecution must
19 review and revise its disclosure procedures to eliminate this kind of
20 mistake.

21 However, addressing the merits of this application, the
22 observations set out elsewhere in this decision as regards the proposed
23 protective measures for the trial witnesses in the court protection
24 programme apply without qualification to this witness. This is a
25 potentially exculpatory as opposed to incriminatory document which will

1 be given to the Defence in its entirety if the Bench approves the
2 suggested restrictions as regards its use.

3 The proposals, in our view, are proportionate. They are
4 necessary to protect the witness, and on the basis of the information
5 currently before the Chamber they cause no unfairness to the Defence.
6 Once the Defence has received the document, it has the right to raise any
7 consequential issues with the court.

8 This application is granted in full, and the protective measures
9 are to be implemented. The relevant annex shall be provided to the
10 Defence forthwith pursuant to Article 64(6)(f).

11 Issue 5: This is the Defence request for leave to appeal the
12 Chamber's decision on the applications by victims to participate in the
13 proceedings, dated the 16th and 18th of December, 2008, which was filed
14 publicly on the 22nd of December, 2008 (document 1570).

15 The grounds of appeal are:

16 First, that the Chamber has exceeded, it is suggested, its legal
17 competence by admitting the victims of crimes other than those confirmed
18 by the Pre-Trial Chamber.

19 Second, the Chamber has committed an error by admitting victims
20 whose applications contain significant contradictions on points upon
21 which their admissibility depends. (The contradictions the Defence
22 particularly focus on are the age of the victim at the time of the crime
23 together with the date, the duration, and the circumstances of their
24 enrollment. It is suggested for these victims the conditions for
25 participation are not satisfied).

1 Third, it is suggested that the Chamber committed an error of law
2 in considering the applications of minors because it is suggested they do
3 not in law have the capacity to give their consent to an a third party
4 submitting an application on their behalf.

5 It is said these questions substantially affect the speed and
6 fairness of the trial and may particularly have a significant effect on
7 the number of victims participating in the case. Therefore, it is
8 argued, the immediate resolution of these matters by the Appeals Chamber
9 may expedite the proceedings because, inter alia, it will bring legal
10 certainty to each of the applications.

11 This application is resisted by some of the participating victims
12 (see documents 1575 and 1577).

13 Under Article 82 ("Appeal against other decisions") either may
14 appeal a "decision that involves an issue that would significantly affect
15 the fair and expeditious conduct of the proceedings or the outcome of the
16 trial and for which in the opinion of the ... Trial Chamber an immediate
17 resolution by the Appeals Chamber may materially advance the
18 proceedings." It is self-evident that in order to be granted leave to
19 appeal a party must first set out in sufficient detail its arguments as
20 to why each of the criteria within the test are met.

21 The Defence relies substantially on a previous decision of this
22 Chamber in which it granted leave to appeal on fundamental questions of
23 principle relating to victims' participation (see document 1191, 26th of
24 February, 2008).

25 The Chamber granted leave, finding, inter alia, that the

1 resolution of these matters would materially advance the proceedings. It
2 was stated at paragraph 33 that:

3 "The resolution ... of involvement by victims in the proceedings
4 could significantly affect the content and length of the case because the
5 extent of their participation is likely to affect the nature and extent
6 of the evidence called and the issues raised, and a decision by Appeals
7 Chamber defining the Court's position as regards victims' participation
8 will be beneficial by bringing legal certainty to the Chamber's
9 consideration of each of the applications to participate. This in turn
10 will materially advance the proceedings."

11 However, in the first and second issues raised by the Defence in
12 this application (set out above), the accused is seeking to challenge the
13 Chamber's application of the criteria that is now established in relation
14 to victims' participation following the earlier appeal. Therefore, in
15 the present application the Defence must demonstrate how the Chamber, in
16 applying the relevant test when granting leave to participate to
17 particular victims, has potentially erred in making a decision or
18 decisions which in its estimation will significantly affect the fair and
19 expeditious conduct of the proceedings or the outcome of the trial.
20 Therefore, this proposed appeal (unlike the situation when leave was
21 granted on the 26th of February, 2008) is not concerned with defining the
22 approach that is to be applied. It is instead essentially directed at
23 the application of established principles to particular facts.

24 In the event, the Defence has failed to indicate the number of
25 participating victims, save in very general terms, who this application

1 relates do, nor has it provided any sufficient particularity as to the
2 way in which it is suggested their individual potential involvement may
3 significantly affect the expeditious content of the proceedings or the
4 outcome of the trial.

5 Although the general complaints made by the Defence are clear,
6 the underlying merits of an application of this kind can only be resolved
7 on the basis of a detailed analysis of the relevant particular victims
8 who have been given leave to participate, along with an assessment of
9 their individual likely impact on the case. The failure by the Defence
10 to provide the Chamber with any detailed argument in this regard is fatal
11 to the first two parts of this application.

12 As regards the third issue, the Chamber is unpersuaded that a
13 resolution at to this point in time as to whether minors can give consent
14 to a third party submitting an application on their behalf will
15 materially advance the proceedings. No sufficient material has been
16 advanced to demonstrate that the involvement of this particular group of
17 participating victims merits the immediate attention of the
18 Appeals Chamber. This limb of the application required detailed
19 submissions dealing with the circumstances of the relevant individual
20 participants rather than a general reference to a loosely defined group
21 of victims.

22 Accordingly, for these reasons this application is rejected.

23 Issue 6: This is the Chamber's determination of the matters
24 raised in the Registry's report on practices used to prepare and
25 familiarise witnesses for giving evidence at trial filed on the

1 31st of December, 2008 (document 1578).

2 The Registry's proposals are as follows:

3 Point 1. The commencement of the familiarisation process.

4 On the basis that once this process has commenced, any further
5 interaction between a party and its witnesses outside of court is
6 prohibited, the Registry suggests it is essential that the commencement
7 of the familiarisation process is clearly delineated (paragraph 3).

8 The VWU takes this to be the moment when the witness arrives in
9 the Netherlands prior to giving evidence or arrives at the location of
10 the videolink if relevant (paragraph 4). It is said that this approach
11 has the benefit of providing a clear starting point, and if the process
12 of familiarisation has begun in the field, it helps remove any
13 ambiguities.

14 Point 2. Reading the witness statements.

15 The VWU indicates that it will make a copy of the statement
16 available in order for the witness to refresh his or her memory.
17 However, the party calling the witness must already have provided a copy
18 to the VWU (paragraph 5).

19 The VWU's interpretation is that this requirement relates only to
20 "statements" and not to any related materials (paragraph 6).

21 It is suggested that the review by the witness will take place
22 within the premises of the VWU, which is open to the VWU and Security
23 Services Section staff only (paragraph 7).

24 The proposal is made that the witnesses will not be allowed to
25 take their statements back to their accommodation (where other witnesses

1 may be living). The statements will be locked in a safe within the VWU
2 premises (paragraph 7).

3 Point 3. The presence of others while the statements are read.

4 At present the Chamber has indicated that representatives of the
5 parties or participants may be present during this process. Furthermore,
6 if the witness is also a victim, the representative can be present
7 subject to the witness's consent (see the Chamber's decision of the 23rd
8 of May, 2008, document 1351, paragraph 39).

9 The VWU has concerns as to how this is to be implemented, and in
10 particular as regards the "high number" of people who may be present
11 (paragraphs 8 and 9). It is suggested that this process may take a
12 number of days. For instance, if the witness is illiterate. The VWU
13 highlights that this process may itself be highly emotional, and the
14 pressure on the witness may be increased if he or she is being watched in
15 this way. In particular, the witness may be inhibited in seeking support
16 from the VWU support assistance (paragraph 10).

17 In order to minimise these suggested adverse effects, the VWU
18 recommends restricting the number of "silent observers" to a maximum of 3
19 (i.e. one representative for the Prosecution, one for the Defence, and
20 one for the legal representatives. Paragraph 11).

21 It is noted that support assistants will not necessarily be
22 present at all times in the room where the witness is reviewing the
23 statement. The role of the support assistants is explained in the
24 following way: "(They) provide psychosocial support to the witness while
25 keeping professional boundaries."

1 It is said that they must refrain from any direct involvement in
2 the statement reading in order to provide neutral support to the witness
3 (paragraph 12).

4 In these circumstances, it is pointed out that there is a
5 possibility that the witness may be left alone with a representative of a
6 party or a participant (paragraph 13). However, it is proposed that the
7 assistants will check on the psychological and physical well-being of the
8 witness regularly and provide any support that is deemed necessary,
9 including the permanent presence of an assistant. The rooms are equipped
10 with alarms or panic buttons.

11 If anything exceptional occurs during the process, all concerned
12 will be informed. That is to say the Chamber, the parties, and the
13 participants (paragraph 15).

14 Point 4. Providing witness statements.

15 The proposed arrangements for witnesses to keep a copy of their
16 witness statements are as follows: For those with dual status who have a
17 legal representative, a copy of the statement together with any related
18 materials will be provided to the representative of the witness by the
19 relevant party (paragraph 17). For those witnesses who do not have legal
20 representation or assistance, fact-sensitive decisions will be taken as
21 to whether to withhold all or part of the materials depending on the
22 circumstances of each witness (paragraph 18).

23 We note that the familiarisation film is to be updated
24 (paragraphs 24 and 25). Until this process is complete, a member of
25 staff reading from a text which has been prepared in advance will explain

1 the matters that are not yet included in the film (paragraph 26).

2 The Prosecution, on the 9th of January, 2009, filed a response to
3 the VWU's report on the practices to prepare and familiarise witnesses
4 (document 1578). This is filing 1590. It is a public document entitled
5 "Prosecution's Response to the 'Victims and Witnesses Unit's report on
6 practices to prepare and familiarise witnesses for giving testimony at
7 trial,' dated the 31st of December, 2008, and request for clarification."
8 It takes issue with the VWU's proposals in a number of ways.

9 Point 2. Reading the witness statements.

10 The Prosecution disagree with the VWU over whether only written
11 and signed statements constitute "statements" for the purposes of
12 familiarisation (paragraph 8). The Prosecution submits this approach is
13 overly restrictive, not least because of the range of relevant documents
14 above and beyond signed witness statements which may provide the best
15 record of the evidence originally provided by the witness. For instance,
16 the evidence may have been recorded in an interview or interviews rather
17 than or as well as in a written statement. With interviews recorded
18 under Article 55(2), the best or only adequate record will often be the
19 original audio or video recording or both, supplemented by the written
20 transcript which is usually generated later. Furthermore, there may be
21 unsigned screening notes and draft statements. The Prosecution submits
22 that each witness interviewed under Article 55(2) should be given the
23 audio or video recordings of his or her interview or both. Additionally,
24 they argue that where relevant, the witness should be provided with a
25 copy of the screening note or the draft statement (paragraph 9). They

1 submit the same applies to the audio and video recordings of
2 re-interviews which may not have been turned into statements.

3 The Prosecution take issue with the suggestion of the VWU that it
4 will not provide the witness with additional materials related to witness
5 statements for the purpose of familiarisation. The Prosecution raises
6 two arguments against their position.

7 First, the Trial Chamber's decision of the 23rd of May, 2008,
8 expressly included related materials as part of the documentation to be
9 provided to witnesses. Second, documents provided in a witness statement
10 are an integral part of the statement itself.

11 The Prosecution suggests, however, that these documents should be
12 limited to those that have been disclosed because questioning will be
13 limited to these materials. It is submitted that if this does not
14 happen, the familiarisation process will be incomplete.

15 Point 3. The presence of others while the statements are read.

16 In particular, the Prosecution suggests that the VWU's role "is
17 to ensure that witnesses, in particular vulnerable witnesses, are fully
18 supported during the familiarisation process" (paragraph 5). At least
19 nine of the Prosecution's witnesses are former child soldiers, and it is
20 submitted they require a heightened level of support and assistance by
21 the VWU. At a minimum, it is argued this should include the continuous
22 presence of a VWU representative during the familiarisation process. The
23 Prosecution describes the matter in the following way:

24 "As the neutral manager (the VWU) will ... safeguard against
25 unauthorised communications between the witnesses and legal

1 representatives who may be present as observers and/or to respond to
2 questions from witnesses that may be inappropriately addressed to
3 observers.

4 Moreover, the absence of a VWU representative when a party or
5 legal representative is with a witness could lead to allegations at trial
6 of witness tampering. The presence of a VWU representative should
7 prevent most allegations, and the VWU representative could shed light on
8 any allegations that might thereafter be made." (Paragraph 6).

9 The Prosecution's position is that a VWU support assistant should
10 be present during a significant portion of the familiarisation process,
11 and should be nearby and readily available to assist when not in the
12 room. As regards the nine vulnerable witnesses, there should be an
13 assistant present throughout. Moreover, an assistant should always be
14 present when the representative of a party or a participant is present
15 (paragraph 7).

16 The Prosecution seeks guidance on whether the decision of the
17 23rd of May, 2008, "permits representatives of both parties to be present
18 as silent observers during the familiarisation of witnesses called by one
19 party."

20 The Defence addressed these issues orally at the Status
21 Conference on the 12th of January, 2009. There is agreement with the use
22 of signed statements and "electronic" recordings of interviews
23 (particularly videoed evidence) for the purpose of the memory refreshing
24 exercise. The Defence opposes the introduction of other documents such
25 as investigators' notes and draft documents. The Defence indicated that

1 in its view the Prosecution should provide advance indication of the
2 documents to be given to each witness during the memory refreshing
3 exercise to ensure that it has fulfilled its disclosure obligations.

4 Importantly, the Defence set out that it would be difficult for
5 it to be present during the witness familiarisation process, not least
6 because some of the video evidence is lengthy. In essence, the Defence
7 indicated that so long as the exercise is undertaken by the VWU as a
8 "neutral arbiter" in its premises following advanced notification of the
9 documents to be supplied to the witnesses, that will provide a sufficient
10 guarantee of fairness. Additionally, it's submitted that if the Defence
11 was absent during this process, the Prosecution also should not attend.
12 Finally, the Defence submit that any discussions between a witness and
13 the party calling him or her about their evidence should wait until the
14 end of the trial, not least because the witness may be recalled.

15 Counsel for some of the participating victims, Mr. Walley, n,
16 supported the position of the Prosecution and submitted that it would be
17 sufficient if a representative of the VWU and the party calling the
18 witness are present. Indeed, he argued that the representative from the
19 opposing party could intimidate the witness, particularly if he or she is
20 a minor.

21 In the joint observations of the Legal Representatives of Victims
22 (document 1605) filed on the 15th of January, 2009, the legal
23 representatives submitted that they should be allowed to be present
24 whilst their clients are undergoing the process of familiarisation. They
25 suggested that they were better placed than the Registry in this regard.

1 They further argued that they should not be prevented from discharging
2 their professional obligation to assist their clients on all appropriate
3 matters, and nothing should interfere with the opportunity for them to
4 speak with their clients about any matter affecting their participation
5 before the Court so long as this does not prejudice any procedures before
6 the Chamber.

7 The decision of the Chamber is as follows:

8 Point 1. This has not been the source of any dispute and the
9 proposal is sensible. Accordingly, the familiarisation process begins
10 when the witness arrives in Holland or at the location of the videolink
11 (if relevant).

12 Point 2. We are unable to accept the VWU's submission as regards
13 the documents that should be made available to the witnesses for the
14 memory refreshing exercise. The evidence from the witness may have been
15 recorded in a signed statement, but it may also have been recorded in a
16 taped interview (audio or video or both). All of these methods provide a
17 reliable record of the witness's evidence, and depending on the record
18 that was made, they should each be available to each and every witness.

19 The Chamber equally rejects the Prosecution's suggestion that
20 witnesses should be shown screening notes or investigator's notes, or
21 similar documents. These are not the same as a signed witness statement
22 or an electronic recording of an interview, both of which provide a
23 certain record of the witness's evidence approved by or coming from the
24 witness. Screening notes and investigator's notes will be a personal
25 record - not the witness's - of what the latter said. Critically, the

1 witness should refresh his or her memory from documents that they have
2 expressly agreed as reflecting their recollection of the relevant events.
3 The presumption will be that unsigned statements are not shown to
4 witnesses, because the lack of a signature casts doubt over whether the
5 witness accepted the contents as accurate.

6 Discrete applications may be made to the Chamber if there are
7 exceptional reasons for showing an unsigned statement to a witness, for
8 instance, if the witness clearly agreed with its content but for some
9 good reason did not add a signature.

10 Any document referred to in the statement or electronic recording
11 which are to be shown to the witness by the party calling him or her
12 should also be shown to the witness during this process. The party
13 calling the witness should inform the other party and the legal
14 representatives of dual-status witnesses, if relevant, in advance of the
15 documents to be provided to the VWU for the purposes of memory
16 refreshing. Any dispute is to be resolved by the Chamber before the
17 material is given to the witness.

18 While the legal representatives of dual-status witnesses are of
19 course entitled to speak with their clients, they must not infringe the
20 Chamber's decision on "Witness Proofing" (see decision of the 30th of
21 November, 2007, document 1049). In essence, they should refrain from
22 holding substantive discussions with the witness about the topics that
23 are to be dealt with in court during their evidence or the exhibits which
24 may be produced. The Chamber will not be assisted if there is a risk
25 that some witnesses in this category have been "coached" or "prepared"

1 for their evidence. If there are exceptional reasons in particular
2 instances for adopting a different approach, the matter can be raised in
3 court.

4 The Chamber considers that this is consistent with the obligation
5 on the victims' representatives not to prejudice any of the court's
6 procedures.

7 Discussions with a witness about his or her testimony should be
8 delayed until the close of the evidence in the case unless the Chamber
9 has made an order on a application for this to happen earlier. We agree
10 that the witnesses will not be allowed to take their statements back to
11 their accommodation and that the statements will be locked in a safe
12 within the VWU premises. Similarly, we agree with the VWU as to their
13 proposals for providing copies of the statements to victims set out at
14 paragraphs 17 and 18 of their filing.

15 Point 3. As regards the presence of others when the statement is
16 read, the Chamber reminds itself that in its decision of the 23rd of May,
17 2008, entitled "Decision Regarding the Protocol on the Practices to be
18 Used to Prepare Witnesses for Trial," (document 1351), it is stated at
19 paragraph 39:

20 "Although representatives of the parties or participants may be
21 present during the familiarisation process, including when written
22 records are read, they will be unable to speak with the witness about the
23 evidence and, as a result, they will only be permitted to watch the
24 procedure. Similarly, if the witness is also a participating victim who
25 is represented, with the witness's content the representative can be

1 present during this process."

2 This had been intended to cover the representative of both
3 parties along with the representative of dual-status witnesses. However,
4 in view of the submissions of the Defence that they may well not be able
5 to attend and bearing in mind the possibility that vulnerable witnesses
6 may feel intimidated if they are being watched and scrutinised whilst
7 looking at the record of their evidence by a number of persons, the
8 Chamber now varies this particular aspect of its earlier decision.

9 The representatives of the Prosecution, the Defence, and
10 dual-status victims will be excluded from this process unless the Chamber
11 is persuaded that exceptional reasons set out in an application justify a
12 departure from this approach. The VWU will be able to provide proper
13 support for witnesses in an appropriate environment, and the presence of
14 any of the representatives may well be a distraction or an impediment.

15 Furthermore, given the Defence apprehends it will not be able to
16 attend the memory refreshing exercise, the accused may reasonably
17 apprehend that the Court is failing to ensure "equality of arms" between
18 the parties if the Prosecution alone has the resources to be present.

19 The VWU should be present, however, whilst this process is being
20 completed, although as regards its role, the Chamber reminds the VWU of
21 paragraph 40 of the decision of the 23rd of May, namely:

22 "Unless something exceptional occurs, the VWU is not under an
23 obligation to provide a report on the statement-reading process to the
24 parties and the Chamber. If a witness indicates to a representative of
25 the VWU that they wish to say something about the content of their

1 statement(s), they should simply be told that the representative is not
2 allowed to speak with the witness about the evidence in the case save to
3 say that any concerns about what they have read (or other issues) should
4 be explained to the Court when their evidence in court begins. The VWU
5 is not under any duty, unless something exceptional comes to their
6 attention, to provide the parties or the court with the originals or
7 copies of any notes by the witness during this process."

8 The Chamber agrees with the Prosecution that the VWU support
9 assistant should be present at the very least during a significant
10 portion of the familiarisation process for every witness and otherwise
11 should be nearby and readily available to assist when not in the room.

12 As regards any minors, former child soldiers or others who are
13 vulnerable or who may become upset during the process, there should be an
14 assistant present throughout. In the view of the Chamber, the VWU should
15 err on the side of caution in providing support assistance and if in
16 doubt someone should be present throughout.

17 The protocol should be amended to reflect this Decision.

18 On a linked issue, the Prosecution has raised the matter of the
19 familiarisation of expert witnesses in its "Consolidated Motion" of the
20 12th of January, 2009 (document 1596). In essence it is submitted that
21 the general approach to this topic does not apply to expert witnesses to
22 whom the importance of lack of rehearsal and the need for spontaneity do
23 not apply. It is submitted that it will be helpful for the Prosecution
24 to meet their experts in conference to discuss the relevant scientific
25 and technical issues in order to facilitate a more coherent examination

1 for the benefit of the court. The Defence has not opposed this
2 application.

3 The Chamber is persuaded that different considerations apply as
4 between "lay witnesses as to fact," and experts and that the
5 disadvantages of discussions prior to giving evidence do not apply to the
6 latter category of witness. Instead, the court is likely to be helped by
7 the lawyers calling the expert having the best possible understanding of
8 the issues involved, thereby leading to a focussed and accurate
9 presentation of the evidence.

10 Accordingly, discussions between the parties and their experts
11 may take place at any stage prior to calling the witness.

12 (Trial Chamber and legal officer confer)

13 PRESIDING JUDGE FULFORD: Issue 7: The wording of the charges.

14 The Pre-Trial Chamber confirm the charges in the following way:

15 "Confirms on the evidence submitted for the purpose of the
16 confirmation hearing that there is sufficient evidence to establish
17 substantial grounds to believe that Thomas Lubanga Dyilo is responsible
18 as a co-perpetrator for the charges of enlisting and conscripting
19 children under the age of 15 years into the FPLC and using them to
20 participate actively in hostilities within the meaning of Articles
21 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002, to
22 2nd of June, 2003;"

23 and:

24 "Confirms on the evidence submitted for the purpose of the
25 confirmation hearing that there is sufficient evidence to establish

1 substantial grounds to believe that Thomas Lubanga Dyilo is responsible
2 as a co-perpetrator for the charges of enlisting and conscripting
3 children under the age of 15 years into the FPLC and using them to
4 participate actively in hostilities within the meaning of Articles
5 8(2)(e)(vii) and 25(3)(a) of the Statute from the 2nd of June to the
6 13th of August, 2003."

7 The Chamber has sought agreement as to the precise wording of the
8 charges to be read out at the beginning of the trial on the basis of
9 Article 64(8)(a) which states: "At the commencement of the trial the
10 Trial Chamber shall have read to the accused the charges previously
11 confirmed by Pre-Trial Chamber ..."

12 The Prosecution proposes the following wording:

13 "Thomas Lubanga Dyilo is charged as a co-perpetrator for having
14 enlisted and conscripted children under the age of 15 years into the
15 UPC/FPLC and for having used them to participate actively in hostilities
16 within the meaning of Articles 8(2)(b)(xxvi) and 25(3)(a) of the
17 Rome Statute from early September 2002 to the 2nd of June, 2003.

18 Furthermore, Thomas Lubanga Dyilo is charged as a co-perpetrator
19 for having enlisted and conscripted children under the age of 15 years
20 into the UPC/FPLC and for having used them to participate actively in
21 hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of
22 the Rome Statute from the 2nd of June, 2003, to the 13th of August,
23 2003."

24 The Defence notes that the Prosecution's text adds the letters
25 "UPC" and it proposes the following:

1 "Monsieur Thomas Lubanga Dyilo est accuse, en qualite de
2 coauteur, des chefs d'enrolement et de conscription d'enfants de moins de
3 15 ans dans les FPLC et du fait de les avoir fait participer activement a
4 des hostilites, au sens des articles 8-2-b-xxvi et 25-3-a du Statut, de
5 debut septembre 2002 au 2 juin 2003.

6 Monsieur Thomas Lubanga Dyilo est accuse, en qualite de coauteur,
7 des chefs d'enrolement et de conscription d'enfants de moins de 15 ans
8 dans les FPLC et du fait de les avoir fait participer activement a des
9 hostilites au sens des articles 8-2-e-vii et 25-3-a du Statut, du 2 juin
10 au 13 aout 2003."

11 In September 2007, the following wording was prepared for the
12 Chamber and read out to the accused. (See the transcript for the 4th of
13 September, 2007, T-50, pages 26 to 27):

14 "Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for
15 the charges of enlisting and conscripting children under the age of 15
16 years into the FPLC and using them to participate actively in hostilities
17 within the meaning of Articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute
18 from early September 2002 to the 2nd of June 2003."

19 And "Thomas Lubanga Dyilo is responsible, as a co-perpetrator,
20 for the charges of enlisting and conscripting children under the age of
21 15 years into the FPLC and using them to participate actively in
22 hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of
23 the Statute from the 2nd of June to the 13th of August, 2003."

24 The Prosecution have added the letters "UPC" into the wording of
25 the charges. This constitutes a departure from the charges confirmed by

1 the Pre-Trial Chamber and it thereby contravenes the terms of
2 Article 64(8)(a): the Prosecution's formulation would not reflect the
3 charges previously confirmed. There has been no application to amend
4 under Article 61(9), and the Prosecution's draft is therefore
5 inappropriate.

6 The wording proposed by the Defence is wholly consistent with the
7 decision confirming the charges and is, in the view of the Chamber, the
8 most appropriate text.

9 This is to be read out in French to the accused at the
10 commencement of the trial.

11 We'll have a break and sit in half an hour at 5 to midday.

12 Break taken at 11.25 a.m.

13 On resuming at 11.54 a.m.

14 COURT USHER: All rise. Please be seated.

15 PRESIDING JUDGE FULFORD: Issue 8: This concerns the legal
16 representation of victims 47/06 to 52/06, 78/06, and 149/06, as addressed
17 in document 1565 which the OPCV filed originally ex parte, available to
18 the OPCV and the Registry only on the 19th of December, 2008, and later
19 publicly at the Chamber's request. The OPCV was authorised by the
20 Chamber to continue to represent these victims on a temporary basis up
21 until a decision was made (e-mail from legal advisor on the 23rd of
22 December, 2008).

23 The other legal representatives in their filing of the 26th of
24 December, 2008, then opposed the continued representation of the victims
25 by the OPCV (see document 1576).

1 The OPCV reminded the Chamber that in its decision of the
2 6th of March, 2008, it was stated that "(t)he office of public counsel
3 for victims shall continue to represent the victim applicants it
4 currently represents until the Chamber issues a decision on their
5 application to participate (paragraph 2 of the application)." The OPCV
6 pointed out, correctly, that this leaves a gap, in the sense that once a
7 decision on participation has been made, and before a decision has been
8 reached on representation, they will be without legal assistance. It
9 submitted it is appropriately placed to deal with all relevant issues
10 until representation has been resolved. The Chamber has already resolved
11 this issue, accepting the OPCV's offer to continue as representative for
12 the victims it has represented until a decision as to representation is
13 made.

14 As regards four victims (47/06, 48/06, 50/06, and 52/06) who will
15 be called by the Prosecution and who are in the protection programme
16 (viz. dual-status victims), they have been represented by principal
17 counsel since August 2007. A relationship of trust has been established
18 and it is suggested that "disruption of such an appointment could be
19 detrimental for their well-being in the delicate period which precedes
20 their testimony at trial (paragraph 20)." Each victim has said that they
21 wish for principal counsel to continue acting for them during the trial.

22 In the course of oral argument, counsel for the OPCV made it
23 clear that her concerns as regards representation by her office of
24 victims during the trial are focussed on these four witnesses. She added
25 that the problem for these victims has become more acute because they

1 will be amongst the first witnesses in the case. She made it clear that
2 her participation in the trial on behalf of these four dual-status
3 victims will not diminish the extent to which the OPCV is able to assist
4 the other participating victims.

5 For the Defence, it was observed orally that whether or not the
6 OPCV represents individual victims was not, essentially, a matter of
7 concern to the accused. Instead, counsel's submissions focussed on,
8 first, whether or not the Defence are entitled to documents in the
9 possession of the OPCV which may be of relevance to the trial, and,
10 second, the risk that dual-status victims may be "proofed" before giving
11 evidence; however, these two issues are not the subject matter of this
12 decision. In written submissions, the Defence sets out its opposition to
13 the permanent representation of victims by the OPCV, inter alia, as being
14 contrary to the Chamber's decision of the 6th of March, 2008, on the role
15 of the OPCV (see the Defence response filed on the 15th of January, 2009,
16 document 1604).

17 In their most recent filing, the legal representatives (jointly)
18 indicate their support for the permanent assignment of the OPCV to
19 represent these four victims with dual status (see paragraph 4 of
20 filing 1602 of the 14th of January, 2009).

21 In all the circumstances, the Chamber is persuaded that there are
22 good reasons for the OPCV to continue acting for these four dual-status
23 victims. A long-term relationship of trust and confidence has been
24 established between them and the staff and counsel of the OPCV; they have
25 expressly requested counsel from the OPCV to continue to be their

1 representative; they will require particular and sensitive assistance
2 when they come to The Hague to give evidence, which the OPCV is
3 well-placed to provide; and their evidence will be heard in the
4 relatively near future, and in the result, continuity of representation
5 is a particularly important factor. Weighing those matters together,
6 they provide a persuasive basis for continuity of representation. The
7 application to this extent, therefore, is well-founded and is granted.

8 As regards the other four victims currently represented by the
9 OPCV, immediate decisions will need to be made as to alternative
10 representation by the Registry (this relates to witnesses 49/06, 51/06,
11 78/06 and 149/06).

12 Issue 9:

13 This is the Chamber's decision on Rule 140. The Rule is entitled
14 "Directions for the Conduct of Proceedings and Testimony," and in
15 paragraph 2 it is particularly directed at the issue of questioning of
16 witnesses.

17 Put shortly, an issue that arises for consideration by the
18 Chamber is the order of questioning of witnesses given the absence in the
19 Rule of any indication as to the sequence in which this should happen,
20 save that the Defence has the right to examine a witness last
21 (Rule 140(2)(d)). In the written submissions of the parties there is no
22 apparent dispute that the party calling a witness should question the
23 witness first. The Prosecution submitted that both the Prosecution and
24 the Defence should be permitted to ask further questions after the other
25 party and the participants have questioned the witness, although the

1 Defence observed that this latter opportunity as regards the Prosecution
2 is not expressly set out in Rule 140. There is agreement that leading
3 questions should be avoided during this latter examination by the party
4 calling the witness, and including in the final Defence questioning. It
5 is also accepted that this later questioning by the party calling the
6 witness should be limited to matters arising out of the questioning by
7 others, and that the Defence in its final questions should be limited to
8 those matters that were raised with the witness in the questions that
9 followed the earlier questioning by the Defence. On this last issue, the
10 Defence suggests that sometimes new issues may require addressing as a
11 result of the answers given by the witness.

12 In its decision of the 29th of January, 2008, (document 1140)
13 entitled "Decision on various issues related to witnesses' testimony
14 during trial," at paragraph 32 the Chamber indicated:

15 "In line with Article 69(3) of the Statute, the Trial Chamber
16 considers that a party may question a witness it has not called about
17 matters which go beyond the scope of the witness's initial evidence. The
18 concept of 'other relevant matters' under Rule 140(2)(b) of the Rules,
19 includes, inter alia, trial issues (e.g. matters which impact on the
20 guilt or innocence of the accused such as the credibility or reliance of
21 the evidence), sentencing issues (mitigating or aggravating factors), and
22 reparation issues (properties, assets and harm suffered). The parties
23 are under an obligation to put such part of their case as is relevant to
24 the testimony of a witness, inter alia, to avoid recalling witnesses
25 unnecessarily."

1 Addressing these new issues, the Chamber's conclusions are as
2 follows: On the issue of later (secondary) questioning by the party
3 calling the witness, the Chamber is of the view that it is necessary for
4 both the Prosecution and the Defence to have the opportunity to explore
5 issues raised in questions by the opposing party. If this does not
6 occur, the evidence may be presented in an incomplete and unfair manner.
7 Otherwise:

8 1. The party calling a witness ordinarily will ask questions
9 first. To the extent that it is known or anticipated that part or all of
10 the evidence of the witness is in dispute, leading questions should not
11 be used for contentious areas.

12 2. To the extent that leave has been granted, the participants
13 will next question the witness.

14 3. Questioning by the party not calling the witness will then
15 follow.

16 4. The party calling the witness will thereafter be entitled to
17 ask questions if they are necessary, but these are limited to the matters
18 raised in questions by the opposing party and the participants. An
19 application will need to be made if the party at this stage wishes to
20 raise new issues. Leading questions are to be avoided.

21 5. If the Defence did not call the witness, it may ask questions
22 again at this point if they are necessary, limited to those matters that
23 have been raised since its earlier questioning. Leading questions are to
24 be avoided.

25 The Chamber will ask questions whenever the Judges consider it

1 appropriate, ensuring that the Defence rights under Rule 140(2)(d) are
2 respected and that the parties generally have the opportunity to explore
3 any new issues to the extent that is necessary.

4 That concludes our oral decision on nine issues. We now wish to
5 turn to a number of other matters that can conveniently be dealt with
6 during the course of this Status Conference, but we indicate immediately
7 that it is our intention, subject to any representations brought to the
8 attention of the legal advisor to the division after we've risen, to hold
9 a further Status Conference at 10.00 on Thursday of next week.

10 We wish, first of all, to deal with the Prosecution's
11 consolidated motion, which bears the number 1596, and which was filed on
12 the 12th of January, 2009.

13 Point (A) in that consolidated motion is a request for an order
14 requiring the advance notification of documents and exhibits to be used
15 or tendered through witnesses.

16 Mr. Sachdeva, I think the position is that in our decision in
17 relation to certain Defence issues and the way in which the Defence from
18 a procedural point of view should be involved in the trial, we indicated
19 really in accordance with the Regulations of the Registry that there
20 should be three days' notification of any documents that are to be used
21 during the examination of witnesses by the Defence. We now need to set
22 parameters as regards the Prosecution principally but also certainly
23 theoretically as regards the participants.

24 What we have in mind is requesting the Prosecution to supply the
25 Chamber on a Friday with a list of the witnesses who are to be called

1 during the week to come, together with an anticipated schedule as to
2 which days during the week they will be called. Of course you cannot
3 provide finality in relation to that because it depends on the length of
4 question, but your anticipation, together with a list of any documents
5 that, as far as the Prosecution is concerned, are going to arise during
6 the course of the evidence of those witnesses, together with any
7 documents that the Prosecution is going to seek to introduce from the bar
8 table.

9 Now, putting that rather more shortly, we're suggesting that on a
10 Friday we have warning, Mr. Sachdeva, as to what the next week holds as
11 regards Prosecution evidence. Any difficulty in that for you?

12 MR. SACHDEVA: Not at all, Mr. President.

13 PRESIDING JUDGE FULFORD: Thank you.

14 Any objections to that proposal, Mr. Desalliers?

15 MR. DESALLIERS (interpretation): No, Mr. President.

16 PRESIDING JUDGE FULFORD: Anything you want to say, Ms. Massidda?

17 MS. MASSIDDA: It's our understanding that the list will also be
18 provided to the party and the participants.

19 PRESIDING JUDGE FULFORD: Yes.

20 MS. MASSIDDA: Thank you.

21 PRESIDING JUDGE FULFORD: Unless for some exceptional reason it
22 should not have general distribution, of course this is for general
23 distribution.

24 Mr. Walley and Ms. Massidda, on this topic, and can I stress by
25 way of introduction that we are acutely conscious of the fact that

1 decisions as to participation have only relatively recently been made,
2 and I'm sorry, this is for Ms. Bapita as well, she was hidden from view
3 by a computer screen immediately in front of me, so all three of you, I
4 wasn't rudely leaving you out, Ms. Bapita, that our order has been that
5 applications to participate must be set out for the Chamber's
6 consideration, and so if, for instance, it is proposed that there should
7 be questioning of witnesses, we need advance notice of that proposed
8 intervention, and we need a sufficiently full indication of the areas
9 that it is proposed are going to be covered.

10 Now, I've just set a proposal as regards the Prosecution. I
11 would like to find a device whereby at a convenient stage, once you know
12 what is coming, the Chamber has sufficient time to consider any
13 application on your part to participate.

14 I am concerned that if your applications are left until the
15 Friday in the week before the evidence that is too late. So the
16 provisional suggestion I'm going to make is that we need to have a
17 greater period of time in advance of that for us to consider applications
18 by you to participate during the evidence of witnesses, and I would like
19 to hear what your views are as to what is reasonable in that regard.

20 Now, it may be, given that I have bowled this at you without any
21 warning, that you would like to think about this and come back to us with
22 a joint proposal on Thursday of next week.

23 MS. MASSIDDA: My apologies, your Honours.

24 PRESIDING JUDGE FULFORD: You've been up and down slightly,
25 Ms. Massidda. What is it you want to say.

1 MS. MASSIDDA: We understand the concern of the Chamber and we
2 think we may be able to provide the Chamber with first discrete written
3 applications before the start of the trial if we ourself have all the
4 documents. At this point in time in our Ringtail we have 93 documents
5 which I think is probably the 000001 per cent of the document that the
6 Prosecution and the Defence would like to use during the trial. So if we
7 are served with the documents, let's say, by mid of next week, we can at
8 least start providing you with some guidance on what we intend and the
9 way in which we can participate. This is our first point.

10 We have a second point. In accordance with your decision of
11 18 of January, 2008, we provide -- paragraph 108, if I'm not mistaken, we
12 provided the Office of the Prosecution, myself and the other legal
13 representatives, with a list of documents which we think are in the
14 possession of the Office of the Prosecution and which relate to our
15 clients.

16 Now, personally I could only do this on 29 of December, if I'm
17 not mistaken, because of a decision was given -- issued on 15 of
18 December.

19 Now, this list identified the item we need to receive, let's say
20 as a priority, in order to start giving you some extent of application in
21 relation to how the interests of our clients will be affected during
22 proceeding. So if also this process could be expedited little bit, it
23 could be that the legal representatives will be in a position by the end
24 of next week already to provide the Chamber with some applications.

25 Thank you.

1 PRESIDING JUDGE FULFORD: Mr. Walley.

2 MR. WALLEYN: If I can just complete, Mr. President. I think we
3 made the same request on 23 March, 2008, and it's still promised for next
4 week. But we did receive -- we did receive the statements of the
5 witnesses of the Prosecution. So that documents can be prepared by us
6 only recently, but -- but we don't have the documents that will be
7 presented and other information we requested.

8 PRESIDING JUDGE FULFORD: Well, Mr. Sachdeva, this needs urgent
9 attention, doesn't it. We're now just over a week away from the trial.
10 The first witness is going to be called on Wednesday morning. The
11 victims must have -- time is very short, must have an opportunity to deal
12 with this. Now, when can you reassure me -- when will, can you reassure
13 me, the victims have been provided with all that they are entitled to.

14 MR. SACHDEVA: We will undertake that next week and we have
15 commenced the process.

16 PRESIDING JUDGE FULFORD: Well, next week, Mr. Sachdeva --

17 MR. SACHDEVA: Early next week. As soon as we can. We have
18 commenced the process and once the decision with respect to OPCV has now
19 been clarified we can commence disclosure, at least with the statements,
20 and then with the documents that we're intending to use, yes, that can be
21 done. But in respect to other issues that arise from our pre-trial
22 brief, we've indicated that the legal reps should, if they can, identify
23 specific areas and topics for which we can then review the materials and
24 disclose it to them.

25 PRESIDING JUDGE FULFORD: Right. Well, I'm going to give you an

1 absolute final deadline of midday on Wednesday of next week so that the
2 victims have got Wednesday afternoon to review what you've supplied to
3 them before the Status Conference on Thursday morning. And can I urge
4 you to focus in the first instance on the first four or five witnesses
5 who are to be called to ensure that absolutely everything from those
6 witnesses is in the possession of the victims' representatives if
7 possible by 5.00 today.

8 MR. SACHDEVA: For the first four witnesses that can be done,
9 Mr. President.

10 PRESIDING JUDGE FULFORD: Good. All right. So I then make an
11 order that everything relating to those must be in their possession by
12 5.00 p.m. today.

13 MR. SACHDEVA: Thank you, Mr. President.

14 PRESIDING JUDGE FULFORD: That's very helpful, Mr. Sachdeva.
15 Thank you very much. (Microphone not activated)

16 Good. There is next - this is (B) of the consolidated motion - a
17 request for reclassification of victim applications of Prosecution
18 witnesses. Now, Mr. Sachdeva, can I have some clarification, please, as
19 to precisely what is meant by -- under this heading.

20 MR. SACHDEVA: Mr. President, the Prosecution is of the opinion
21 that the victim applications that are signed by or at least endorsed by
22 the victims that are witnesses in this trial fall under Rule 76 and,
23 therefore, are prior statements, and in that regard, we would want to
24 disclose or at least transmit that information to the Defence.

25 PRESIDING JUDGE FULFORD: Right. This is -- this is effectively

1 an issue that's already before us, isn't it? You are, I think, awaiting
2 a decision from us in relation to the applications and whether or not
3 they are disclosable.

4 MR. SACHDEVA: That's correct, Mr. President. We just wanted to
5 be sure that all the trial witnesses that --

6 PRESIDING JUDGE FULFORD: Well, the concern is rightly brought to
7 our attention. You are about to get a written decision on this issue,
8 but thank you, Mr. Sachdeva, for raising it again at paragraph (B).

9 The next issue is (C), is a request for leave to use an
10 additional visual aid during opening statements.

11 Now, Mr. Sachdeva, this, I think, should be dealt with in
12 conjunction with your filing of yesterday where you've raised a further
13 two or three visual aids for use. Now, we want to know more, please,
14 about what these visual aids are, who made them, and whether the person
15 who made the visual aid is going to be called as a witness during the
16 trial. So shall we take the one first in your consolidated motion.

17 MR. SACHDEVA: The four visual aids that we now seek leave to add
18 or use during the opening are video excerpts. They're not technically

19 visual aids. We are going to tender them during the trial, accordingly,
20 if the criteria are satisfied, and I think -- I believe that one or two
21 of them are going to be authenticated by a witness who is coming to
22 testify in this trial.

23 PRESIDING JUDGE FULFORD: I'm very worried at the suggestion that
24 some of the visual aids you wish to use during your opening may not be
25 authenticated by witnesses who are coming give evidence, Mr. Sachdeva.

1 MR. SACHDEVA: I'll ask Ms. Struyven to --

2 PRESIDING JUDGE FULFORD: Now, Ms. Struyven, it may be
3 that I'm -- because I've taken this without warning, you need more time
4 to prepare this or are you ready to advance submissions on this?

5 MS. STRUYVEN: Your Honour, I can provide you with a short answer
6 on your first question. There's three visual aids -- well, there's three
7 groups of visual aids. The first one is -- the first and the second one
8 are infographics. They were made by a member of the Office of the
9 Prosecutor. They combine evidence that was disclosed, and basically in
10 short, they are maps that indicate on the one hand side the attacks that
11 were -- that occurred in Ituri between 2002 and 2003; on the other hand,
12 they provide for an overview of the places of recruitment and -- and use
13 of the children that we are calling as trial witnesses. These are the
14 first two visual aids.

15 PRESIDING JUDGE FULFORD: No, no, don't go on. I want to have a
16 look at those. First of all, have those visual aids, these maps I'm
17 going to describe them as being, have they been given to the Defence and
18 the participants in the form in which you wish to use them during the
19 opening?

20 MS. STRUYVEN: No, your Honours, but we believe that according to
21 the decisions of the Trial Chamber of the 2nd of December we had seven
22 days prior to the use of those visual aids at trial to disclose them to
23 the parties and the participants, so we intend to disclose them on
24 Monday.

25 PRESIDING JUDGE FULFORD: Fine. Well, we're not going to renege

1 on the order that we've made. Disclose them on Monday. Make sure copies
2 are provided to the Judges via the usual channels, and we will make a
3 decision on Thursday as to whether or not you are to be allowed to rely
4 on them.

5 It is absolutely right that we have authorised the use of visual
6 aids, that is correct. We want to make sure that the visual aids that
7 you are intending to rely on are appropriate. So there's no objection in
8 principle to the use of visual aids, but given that the Defence have
9 raised a question about this, we want to ensure that there is nothing
10 either impermissible, inadmissible or unfair about the aids which are
11 proposed. So for safety's sake, service, please, no later than Monday,
12 provision to us and, if necessary, we will address this on Thursday
13 morning. And if anybody wishes to raise any objections on Thursday, this
14 must -- objections must be set out in writing prior to midday on
15 Wednesday.

16 That's group one. Group two?

17 MS. STRUYVEN: Then for the second group, the second group
18 concerns the -- the video excerpt for which we had sought authorisation,
19 if I'm not mistaken, on the 12th of December, and that concerns a video
20 that was disclosed to the Defence and that we intended at that time to
21 show with -- with subtitles. However, that is a video or that group
22 actually -- on that group we made a new application yesterday in order to
23 add a -- certain excerpts of videos.

24 PRESIDING JUDGE FULFORD: Well, on at that verbal description
25 it's very difficult to have any real understanding as to what this --

1 this involves. I think we're going to have to follow the same procedure
2 with this, Ms. Struyven. Can you please make sure that the actual
3 extracts you wish to rely on during the opening are served no later than
4 Monday evening on everyone and including us, and if there are any
5 objections to the use of this material, those objections must be set out
6 in writing by midday on Wednesday, and we will review whether or not this
7 request is appropriate at the Status Conference on Thursday morning.

8 MS. STRUYVEN: No problem, your Honour.

9 PRESIDING JUDGE FULFORD: Ms. Struyven, before you sit down, one
10 final thing that is absolutely critical for each and every one of these
11 items is that we are told who made either the map or the video recording
12 and whether or not that individual is going to give evidence, and if they
13 are not, whether they are available to give evidence.

14 MS. STRUYVEN: Your Honours, you want us to provide you also with
15 that information on Monday?

16 PRESIDING JUDGE FULFORD: Please.

17 MS. STRUYVEN: No problem.

18 PRESIDING JUDGE FULFORD: So, what I'm really indicating is the
19 provenance of these items needs to be clear, because I can anticipate
20 that unless their provenance is clear, there are going to be
21 admissibility objections and I want us to be in the best possible
22 position to resolve those objections if they come.

23 MS. STRUYVEN: No problem, your Honour.

24 PRESIDING JUDGE FULFORD: Now, Mr. Desalliers, in terms of
25 putting you in the position of being able to deal with this, is the

1 timetable and the approach that I've outlined for resolving it
2 appropriate as far as you are concerned?

3 MR. DESALLIERS (interpretation): Mr. President, as regards the
4 timing, the schedule, there's no problem as far as I'm concerned.
5 Perhaps you mentioned one point that there's one thing I'd like to
6 confirm. Next Monday we are to receive the information from the
7 Prosecutor's Office regarding the provenance. I'm referring here to
8 article 2 of the application. I think we need to be perfectly clear to
9 identify this. Apparently this was -- journalists were informed of this,
10 and we need to know exactly who is come to testify. But there's no
11 problem as regards the scheduling.

12 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Desalliers.
13 You're absolutely right. By close of play on Monday, in accordance with
14 our order, we should know everything that is relevant about the
15 provenance of these materials so that you can then make a decision as to
16 whether or not there are well-founded applications for the exclusion of
17 this material that can be advanced on behalf of the accused.

18 Now (D), Mr. Sachdeva, of your consolidated motion for
19 determination has been resolved earlier today, so I think that
20 conveniently resolves all of the matters that you've raised in that
21 document.

22 Now, I now want to turn to two further --

23 MR. SACHDEVA: Mr. President, I apologise. There was just one
24 further issue related to the closed session testimony of one of the
25 witnesses, Witness 46, that we wanted -- wanted it to be transmitted to

1 the legal representatives. It's within section (B) of the omnibus -- on
2 the consolidated motion.

3 PRESIDING JUDGE FULFORD: Can you just in two sentences give us a
4 description of what's being requested in relation to this.

5 MR. SACHDEVA: Witness 46 during the confirmation hearing and
6 part of that testimony was in closed session. We want that testimony to
7 be disclosed to the legal representatives but it needs to be reclassified
8 because it was given in closed session.

9 PRESIDING JUDGE FULFORD: Are there any protection issues that
10 arise out of that reclassification that should cause us concern?

11 MR. SACHDEVA: Not as far as we're aware, Mr. President.

12 PRESIDING JUDGE FULFORD: No. So as far as you're concerned,
13 this is really a technical matter that needs to be resolved in order to
14 effect disclosure.

15 MR. SACHDEVA: And if there are issues we will inform you but --

16 PRESIDING JUDGE FULFORD: Thank you. Mr. Sachdeva, subject to
17 you ensuring that there are no protection issues that need to be brought
18 to our attention, you may serve that material on the victims'
19 representatives.

20 MR. SACHDEVA: Yes, Mr. President. Thank you.

21 PRESIDING JUDGE FULFORD: Thank you.

22 Now, Mr. Sachdeva, next I want to look again at a filing that we
23 received this morning and a part of your filing on the 15th of January
24 entitled "The Prosecution's request to use additional video excerpts,
25 1606." The reason I want to do this is that first all taking 1606, a

1 part of that filing purports to be a reply to Defence objections to the
2 use of any evidence during the opening statement. Today's filing is in
3 its entirety in reality a response to oral submissions that were made as
4 regards a matter that we have in fact determined in one of our oral
5 decisions today, namely contact with witnesses post-evidence. The
6 Regulations are absolutely clear on this. By Regulation 24(5) the
7 participants may not reply to a response -- may only reply to a response
8 with the leave of the Chamber, and both of these filings were made
9 without any accompanying application for leave.

10 Now, we are minded to ignore the first of them because it's now
11 moot, us having resolved it this morning, and we're minded to ignore the
12 second because there's been no application, but you'd better have an
13 opportunity of saying whether you resist that approach.

14 MR. SACHDEVA: Mr. President, with respect to the first item, if
15 that is to -- if that deals with the discussion with witnesses after
16 their testimony, I recognise the oversight. However, when the
17 submissions were made by the Defence, it was our -- our view that these
18 submissions would not be made if indeed an order had been already been
19 rendered and we thought it was therefore it was a live issue, and so it
20 was an oversight, if I may so, from both parties. When we went back to
21 look at the decision, in our opinion it was very clear that we could
22 discuss with witnesses post-testimony unless the Chamber directs
23 otherwise and therefore we brought that to the attention. Knowing that a
24 decision would be given today, we wanted it to be in the Court's
25 consideration. So we would push that if amenable to the Court.

1 PRESIDING JUDGE FULFORD: Well, we've rendered a decision on
2 this, Mr. Sachdeva, and in future any replies must be preceded by an
3 application for them to be considered, and the Chamber must not, as it
4 were, find itself the victim of confetti, with pieces of paper arriving
5 unheralded at times when they are unexpected, and as a result, I'm afraid
6 your most recent application of this morning is simply going to be
7 ignored.

8 MR. SACHDEVA: Thank you, Mr. President.

9 PRESIDING JUDGE FULFORD: Thank you very much.

10 Now, in no particular order, I want to raise a series of other
11 issues.

12 One matter that we wish the parties and the participants to
13 consider before Thursday is this: We are going to have a series of
14 witnesses in relation to whom it is likely that most of their evidence
15 can be heard in public session, but there may be small areas such as
16 their identity and present or previous locations which need to be dealt
17 with in closed session. Regrettably, there are very cumbersome
18 procedures in this court for moving between public and closed session
19 which often leads to a delay of 30 minutes whilst we go from one to the
20 other. This trial must not be peppered with the Bench continually having
21 to rise in order for the shutters to come down and for tapes to be
22 replaced.

23 Can the parties and the participants therefore in advance of
24 Thursday think of ways in which we can deal with this problem, and I make
25 two preliminary suggestions. First this: If with a witness the only

1 closed-session material in reality is the identity of him or her and
2 there is no dispute, in fact, as to their identity, then would it be
3 possible for when the witness in open session first comes to be sworn and
4 to introduce him or herself if they are handed a piece of paper which has
5 been seen by everyone this side of the glass divide setting out their
6 name and relevant circumstances, for the witness then to have to read and
7 to confirm or otherwise whether or not the details are correct. That
8 would mean that we could then immediately go into the public part of the
9 witness's evidence without the need for the Bench to rise.

10 If identity is in dispute and/or there are other matters that
11 need to be dealt with in closed session, would it be convenient to have
12 all of those closed session issues dealt with at one go together with
13 questions taking place from everyone concerned before or at a convenient
14 stage in the witness's evidence, before the public part of that witness's
15 testimony?

16 Those are two proposals that we would ask for your help on, and
17 it would be hugely convenient to us if we could have definitive proposals
18 in this regard for Thursday morning.

19 I repeat, it would be highly undesirable if there are repeated
20 applications for the Chamber to rise because we've got to go into closed
21 session because we're about to encounter an issue that cannot be dealt
22 with in open court.

23 Mr. Sachdeva, we're going to impose on you, I'm afraid, the
24 obligation of providing the Chamber, the parties -- the other party and
25 the participants with a consolidated list of admissions, a tentative list

1 in this regard, please, by 4.00 p.m. on Monday of next week, and a final
2 list by 4.00 p.m. on Friday next week, that is the 23rd of January.

3 I've already alluded to the need every Friday to be a list of
4 witnesses, exhibits and other material for the following week.

5 The Prosecution, as I understand it, have agreed to provide a
6 list -- what is effectively an improved list of the evidence that it is
7 going to rely on during the course of the trial. This will in fact be,
8 as I understand it, a -- an improved version of Annex 2 of filing 1354
9 which was a confidential filing on the 23rd of May. There are going --
10 there is going to be additional information provided as regards this
11 material, new fields are going to be created, and the general
12 organisation and layout of the relevant document is going to be improved.
13 We ask, please, that that is filed by 12.00 on Friday, the 23rd of
14 January.

15 Similarly, there is going to be an improved list of the
16 witnesses' statements. This also is a list that is covered by
17 filing 1354, and although the Defence already have this document, it is
18 going to be improved.

19 Same deadline, Mr. Sachdeva, for that, please.

20 Now, can I ask everyone for a moment to have in mind Rule 134,
21 and for those who do not have a copy of the Rules in court, let me remind
22 you that under sub-rule (2): "At the commencement of the trial, the
23 Chamber will ask the Prosecutor and the Defence whether they have any
24 objections or observations concerning the conduct of the proceedings
25 which have arisen since the confirmation hearings. Such observations --

1 such objections or observations may not be raised or made again on a
2 subsequent occasion in the trial proceedings without leave ..."

3 Our proposal is that this formal requirement that rests on our
4 shoulder should not take place on Monday but instead should take place at
5 10.00 on Thursday of next week. It would be, on our preliminary view, a
6 patent nonsense if we were to ask this question on the moment when the
7 trial is about to start, and so unless there are any objections, we
8 intend to fulfil and comply with the formality of that requirement on
9 Thursday of next week.

10 Any -- no. Thank you. I imagine you don't object to that,
11 Mr. Sachdeva. No.

12 Rule 94 next, please. This is matter for the Registry and,
13 Mr. Sachdeva, I'm going to ask you, please, immediately after this
14 hearing to bring this to the Registrar's attention.

15 By Rule 94(2): "At the commencement of the trial and subject to
16 any protective measures, the Court shall ask the Registrar to provide
17 notification of the request to the person or persons named in the request
18 or identified in the charges ..." And this all relates to reparations to
19 victims.

20 To ensure that meritless technical objections are not taken
21 hereafter if they ever become relevant, the Registrar needs to ensure
22 that any requirements resting on her are complied with suitably in
23 advance of the commencement of the trial. We therefore ask that this is
24 brought to her attention by the Prosecution.

25 Finally, Mr. Desalliers, in Article 64(8)(a): "At the

1 commencement of the trial, the Trial Chamber shall have read to the
2 accused the charges previously confirmed by the Pre-Trial Chamber," and
3 it "... shall satisfy itself that the accused understands the nature of
4 the charges. It shall afford him or her the opportunity to make an
5 admission of guilt in accordance with Article 65 or to plead not guilty."

6 Mr. Desalliers, our preliminary view is that given that
7 Mr. Lubanga Dyilo is represented by counsel, that it is most appropriate
8 for that question to be addressed directly to Maitre Mabilille rather than
9 to the defendant, and it is our preliminary view that you have the
10 obligation in advance of Monday, the beginning of the trial, of ensuring
11 that your lay client fully understands the nature of the charges. We do
12 not wish to arrive at the position where when that question is put on
13 Monday, the accused for the first time announces that he doesn't
14 understand the detail or the nature of the charges he faces. That is not
15 to happen. So can you ensure, please, that by Monday he does understand
16 the nature of the charges, and if there are any difficulties in this
17 regard, they are brought to our attention no later than 10.00 on Thursday
18 morning of next week.

19 MR. DESALLIERS (interpretation): No problem, Mr. President, yes.

20 PRESIDING JUDGE FULFORD: On our calculations, the first witness
21 will be -- we will have reached the time in the schedule for the first
22 witness by late on the day, on Tuesday the 17th of January. We do not
23 intend to require the Prosecution to introduce any evidence on Tuesday,
24 and so, Mr. Sachdeva, you needn't have your first witness here until
25 10.00, prompt, on Wednesday -- no, 9.30 -- 9.30 prompt on Wednesday, the

1 18th of January. Quite right. I'm a week ahead of myself. Wednesday
2 the 28th of January.

3 Mr. Desalliers, an issue touched on by Mr. -- by Mr. Sachdeva
4 during the last Status Conference was the apparent, and I underline that
5 word, apparent failure thus far of the Defence to furnish the Chamber
6 three weeks in advance of the trial with a document setting out in
7 general terms any substantial or factual legal issues that he intends to
8 raise.

9 If it's convenient, but it is a matter for you as to whether or
10 not you wish to answer this or to leave it to Maitre Mabilie next week,
11 but if it's convenient, is there an answer, please, as to why there has
12 been apparently an infringement of that direction?

13 MR. DESALLIERS (interpretation): Mr. President, we could respond
14 in writing next week if you would allow that. Would you like us to
15 present our response in written form?

16 PRESIDING JUDGE FULFORD: I'm not sure, Mr. Desalliers, if you
17 mean your presentation of the factual or legal issues you intend to raise
18 or the reason why we to date have not been furnished with that document.
19 Which of the two are you referring to?

20 MR. DESALLIERS (interpretation): No. I'm referring to the
21 explanations. It is the Defence's opinion that we will be providing more
22 details to the Chamber to explain why there has not been written
23 submissions on this particular point on behalf of the Defence, but we
24 could do so in writing if that -- if you will allow us to do that and
25 explain the precise reasons why there has not been a written submission

1 on the part of the Defence explaining the aspects that you've just
2 referred to.

3 PRESIDING JUDGE FULFORD: Well, Mr. Desalliers, we have raised
4 this with you without warning, and I think it would be fairer to give you
5 the opportunity to formulate in writing your response to our concern in
6 this regard. It's nonetheless important for the Chamber, the
7 Prosecution, and indeed the participating victims to have this matter
8 resolved early. Would you be able to provide a document which
9 sufficiently sets out the reasons by 4.00 p.m. on Monday of next week?

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

11 PRESIDING JUDGE FULFORD: Thank you. Do so, please. If there is
12 any Prosecution response to that filing or indeed anything from the
13 participants, can you please ensure that the responses are filed by
14 midday on Wednesday of next week, and if necessary, we will address this
15 issue during the course of the Status Conference on Thursday.

16 On disclosure of visual aids generally, we simply remind, and
17 this to an extent goes back to an issue already dealt with, remind
18 everyone in court of the decision of the 2nd of December, 2008,
19 document 1528, which refers to a seven-days deadline. That has been
20 referred to already today, but it is to underline that point.

21 Mr. Desalliers, we've now had filed with the Court the outline
22 from those representing participating victims the structure of the teams
23 that are envisaged. In light of that filing, is it, do you know, the
24 intention of Maitre Mabilille to enter any kind of response?

25 MR. DESALLIERS (interpretation): To be perfectly frank,

1 Mr. Chairman -- Mr. President, I don't want to speak on behalf of the
2 Defence now because I didn't know that this item was going to be
3 discussed today, but I can give our position to you very rapidly as
4 regards that issue.

5 PRESIDING JUDGE FULFORD: Monday of next week in writing, by
6 midday, please. Thank you.

7 Opening statements and their length next. Subject, and I stress
8 that word, subject to any discrete submissions next week by the Defence
9 as regards the position of the representatives of victims, we are content
10 with the suggestions that have been made as regards the length of opening
11 statements in this case. We will, if necessary, however, subject to any
12 further representations by the Defence, revisit the amount of time which
13 is granted to the representatives of victims, but for the time being we
14 encourage the representatives of victims because some work clearly has to
15 be ongoing, to work to their proposed timetable, which of course may be
16 subject to amendment, if necessary, at some stage next week.

17 Mr. Walley, can I address the representatives of victims through
18 you.

19 In order to ensure that what happens during opening statements
20 remains proportional and appropriate, we will, I'm afraid, be acting as
21 astute policemen and policewomen of the length of time that speeches
22 take. One sees at conferences that delegates are asked to speak for ten
23 minutes and end up speaking for an hour and a half. It's not going to
24 happen. So if an estimate of time is given, we expect, within reason,
25 for it loyally to be abided by, and I put you on notice that you are

1 likely to see my pencil start to rap impatiently on the desk if I feel
2 that anyone is exceeding the time-limit given to them in any significant
3 way.

4 Now that concludes, subject to the legal advisor telling me that
5 I've missed something out, all of the matters that we wish to raise, but
6 Mr. Walleyne, I think you have a point.

7 MR. WALLEYNE (interpretation): Your Honour, as regards the
8 organisation of the joint legal representation, the consequence of the
9 deadline that you gave to the Defence to respond to the written
10 submissions, if I understood correctly, a decision will only be made next
11 Thursday. The problem with that is that the representatives of the
12 victims are waiting for that decision as well as the Registrar, which is
13 going to have to organise things, and therefore the confirmation of the
14 number of teams, et cetera, there are consequences to these decisions.

15 PRESIDING JUDGE FULFORD: Mr. Walleyne, we've got two competing
16 interests here. On the one hand, the Defence are entitled to address any
17 issues of substance that arise in relation to how this trial is to be
18 conducted, and given that this has arisen recently they've got to be
19 given that opportunity.

20 On the other hand, looking at the matter realistically, the
21 proposals that have been made pare the teams down to only a very few,
22 indeed two, together with the OPCV. Therefore, I repeat what I said a
23 little bit earlier. Unless and until we vary the proposals that have
24 been made, you are to proceed on the basis that your proposals are going
25 to be acted on. But I stress, as I have stressed today and on the last

1 occasion, that that is not to shut the Defence out from making any points
2 which are well-founded and which in due course we consider to be
3 appropriate. But in order to make sure that this case can be prepared to
4 start on Monday week, please continue on the basis of your proposals
5 which we will only upset for good reason, that good reason having been
6 provided by the Defence during the course of next week. Now, that's the
7 best we can do, I'm afraid.

8 MS. BENSOUDA: Mr. President.

9 PRESIDING JUDGE FULFORD: Yes, Ms. Bensouda.

10 MS. BENSOUDA: Your Honours, I just wish to inform the Court that
11 I will be lead counsel in these proceedings and a formal filing,
12 notification -- communication will be sent to the Chamber as soon as
13 possible. But as has always been the case with the practice of the
14 Prosecution's team, different members of the team will be addressing
15 different issues, and we would wish to continue that practice as well.

16 PRESIDING JUDGE FULFORD: Thank you, Ms. Bensouda. It is useful
17 to know who is going to be taking responsibility for prosecuting this
18 case.

19 As a matter of convenience for us, it would be helpful if lead
20 counsel for the day or for the issue that we're dealing with could sit,
21 please, where Mr. Sachdeva is this morning, because otherwise I will not
22 know who I'm supposed to be addressing the Bench's queries to. Of course
23 if a number of you are dealing with a number of different issues all at
24 the same time that is impossible, but I anticipate that it is likely that
25 there is going to be one person who is going to be running the show, as

1 it were, for the day. Could they please sit in that position so I know
2 who it is.

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

4 PRESIDING JUDGE FULFORD: Very well. If that proves to be
5 inconvenient because it means shuffling papers around, let me know.

6 Order of opening statements. I forgot this. Our proposal is
7 that the Prosecution should go first, the victims' representatives should
8 go second, and the Defence should go last, really to ensure that there is
9 consistency between this and the provision that we've dealt with earlier
10 today as regards the order of questioning witnesses.

11 We apprehend that it is likely to be considered fairest for the
12 accused if he goes last, having heard everyone else.

13 If there is any disagreement with that proposal, please raise it
14 in writing in advance of Thursday by Wednesday at 4.00 p.m.

15 Finally, the deadline, we remind the parties and participants,
16 for outlines of opening statements is Monday the 19th of January, and we
17 fix the time of 4.00 for that.

18 Ms. Massidda.

19 MS. MASSIDDA: Thank you, your Honour. May I seek the guidance
20 of the Chamber on the matter of the representation of the four victims
21 that the office will not anymore represent? In principle, in accordance
22 with the legal texts it's for the Registry to help the victims to choose
23 a new legal representative. One of the person is in the ICC protection
24 programme still. I plan contact, phone conversation with all my clients
25 for next week. So I kindly request the Chamber if I may contact the --

1 also the four that we will not be represented by the office, suggesting
2 maybe then the names of the other legal representatives involved in the
3 case so that they can already think about the options they have.

4 PRESIDING JUDGE FULFORD: During the transitional period can you
5 keep a watching brief, as it were, Ms. Massidda, to make sure that
6 there's no period where those victims are left really without
7 representation, and can you please provide, it seems to us, the very
8 help -- can you provide the very helpful assistance that you've just
9 outlined.

10 MS. MASSIDDA: Of course, your Honour. It could be that I will
11 be able to provide the Chamber with information on new legal
12 representative chosen at the Status Conference next week.

13 PRESIDING JUDGE FULFORD: Yes. And obviously it would be most
14 convenient if they could be assimilated by the two teams, if there are to
15 be two teams, that have been proposed.

16 MS. MASSIDDA: Thank you.

17 PRESIDING JUDGE FULFORD: Thank you very much.

18 We're very grateful to you all for your attendance, and we'll
19 meet again on Thursday of next week.

20 COURT USHER: All rise.

21 The hearing ends at 1.07 p.m.

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