

1 International Criminal Court

2 Trial Chamber II

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/07

4 Status Conference - Open Session

5 Case of Germain Katanga and Mathieu Ngudjolo Chui

6 Tuesday, 3 February 2009

7 The hearing starts at 4.31 p.m.

8 COURT USHER: All rise.

9 PRESIDING JUDGE COTTE (intrepretation): You may sit down. The
10 hearing will now commence. The meeting will now commence.

11 Could the security officers please bring Mr. Germain Katanga and
12 Mr. Ngudjolo into the courtroom.

13 Thank you. Madam Registrar, could you call the case that we will
14 be discussing today.

15 COURT OFFICER (interpretation): Case number in the Democratic
16 Republic of the Congo, the Prosecutor versus Katanga and Ngudjolo,
17 ICC-01/04-01/07.

18 PRESIDING JUDGE COTTE (intrepretation): Thank you,
19 Madam Registrar.

20 Before we introduce those present in the courtroom, I'd like to
21 inform you that on 30th of January, 2009, Ms. Bapita, pursuant to Rule 82
22 of the rules of the court filed a request for leave to withdraw.
23 Ms. Bapita stated the victims 0330/07, and 0331/07, whom she had been
24 representing to date, had designated another lawyer to replace her. On
25 the 2nd of February, the Registry filed the two victims' documents on

1 representation in which they designated Mr. Vincent Lurquin, Ms. Floro
2 Anboyoy -- Angeli (as interpreted) and Mr. Fidel Nsita Luvengika as their
3 new Legal Representatives, and they have been informed of the subject of
4 this hearing. The Chamber takes note of the request made by Ms. Bapita
5 and the reasons justifying it and grants the request for withdrawal. We
6 will now have the various parties introduce themselves.

7 Could the Prosecution please introduce themselves.

8 MR. MacDONALD (interpretation): Certainly, Mr. President. On
9 behalf of the OTP, your Honours, Ms. Florence Darques-Lane, Ms. Dianne
10 Luping, Mr. Gilles Dutertre, Mr. Pubudu Sachithanandan, and Mr. Pierre
11 Belbenoit and myself, Eric MacDonald.

12 PRESIDING JUDGE COTTE (intrepretation): Thank you. And could
13 the Defence please introduce themselves. Mr. David Hooper.

14 MR. HOOPER: On behalf of Mr. Germain Katanga myself, David
15 Hooper, assisted this afternoon by Sophie Menegon.

16 PRESIDING JUDGE COTTE (intrepretation): Thank you, Mr. Hooper.
17 Mr. Kilenda.

18 MR. KILENDA (interpretation): Thank you, Mr. President. To my
19 left, Ms. Aurelie Roche, who is our case manager; to my right, Professor
20 Mr. Jean-Pierre Fofe Djofia Malewa, and myself, Jean-Pierre Kilenda as
21 lead counsel.

22 PRESIDING JUDGE COTTE (intrepretation): Thank you, Mr. Kilenda.

23 MR. KILENDA (interpretation): I represent Mr. Ngudjolo.

24 PRESIDING JUDGE COTTE (intrepretation): Mr. Ngudjolo. Yes, of
25 course. Could the Office of Public Counsel for the Victims introduce

1 themselves. They can do it in any order they desire.

2 Ms. Bapita, you'll be commencing.

3 MS. BAPITA (interpretation): Yes, I'm representing the usual
4 victims with the exception of the two who have withdrawn. Thank you.

5 PRESIDING JUDGE COTTE (intrepretation): Thank you.

6 MR. DIAKIESE (interpretation): Thank you, Mr. President.

7 I represent the victims who've already been better identified
8 before your Chamber. Mr. Keita, Joseph, I, together with Counsel
9 Gilissen has been prevented to come. She's in Viage and we represent two
10 victims as usual.

11 Thank you.

12 PRESIDING JUDGE COTTE (intrepretation): Mr. Mulamba Nsokoloni.

13 MR. NSOKOLONI: I represent the victims who have already been
14 identified in the file.

15 MR. LURQUIN: Mr. President, your Honours, Vincent Lurquin from
16 the Brussels Bar. I'm honoured to participate in this hearing for the
17 first time. I represent victims who were previously represented by
18 Counsel Bapita.

19 PRESIDING JUDGE COTTE (intrepretation): Thank you. You're
20 welcome. It seems opportune for the Chamber before dealing with certain
21 items on the agenda to briefly go over the main issues the Chamber
22 believes it would be useful to discuss since the conference is -- the
23 Status Conference is of the 27th and 28th of November and we should
24 remind you of the decisions taken with regard to this case. The
25 objective of this meeting is to set a date, one of the main objectives is

1 to fix a date for the trial. This is a legal obligation for the Chamber.
2 You have understood that we first wanted to receive as much information
3 as possible. Since the last Status Conference the Chamber rendered a
4 number of decisions on a number of subjects of particular importance in
5 the Chamber's opinion. There are still many questions that have not been
6 definitively dealt with and this is why it seemed useful to us to take
7 stock of the situation and to remind you of the main decisions that had
8 been handed down.

9 The first subject concerns the disclosure of Prosecution and
10 Defence evidence by the Prosecution to the Defence or, rather,
11 exculpatory and incriminating evidence. We will examine in detail this
12 question in the course of this hearing and perhaps in the course of
13 tomorrow's hearing.

14 For the moment I would like to remind you that on the 23rd of
15 January, 2009, the Chamber rendered an order establishing the time table
16 for the disclosure of evidence of an exculpatory and incriminating nature
17 before the commencement of the trial. The Prosecution said that they had
18 disclosed to the Defence all evidence of an incriminating nature last
19 Friday. A systematic presentation and an organisation by the Prosecution
20 of its evidence would be a very important facet of this disclosure and
21 therefore the Chamber requested that the Prosecution put forward a
22 suggestion on a table in -- which links would be established by --
23 between the charges confirmed by the preliminary Chamber -- Pre-Trial
24 Chamber I and the mode of liability, a link to the alleged facts and the
25 evidence they will rely on. A suggestion was made with regard to such a

1 table and forwarded to us on the 9th of January, 2009. The two Defence
2 teams made submissions on the 23rd of January with regard -- on the 23rd
3 of January with regard to the matter. The Legal Representatives of the
4 victims did not express themselves. We've go back to the subject of this
5 table when we examine item 2 on the agenda.

6 With regard to exculpatory evidence the Chamber asked the
7 Prosecution to file a brief, to present them with a brief presenting
8 their conception of the obligation that they have pursuant to Article
9 54(1)(a) of the Statute. And, likewise, the Prosecution should give
10 grounds for which it believes they don't have to provide a table in which
11 they organise its evidence of an exculpatory nature and in which they
12 would precise -- in which they would say in which way they intend to
13 present exculpatory evidence. The Prosecution filed this report on the
14 19th of January 2009. The Chamber received the Defence responses and the
15 Prosecution can respond before the 9th of February 2009. We agree on
16 that.

17 With regard to Prosecution disclosure of its evidence, the
18 Chamber also rendered a number of decisions on what may hinder the
19 effective disclosure of evidence to the Defence, namely the procedure
20 pursuant to Article 54(3)(e) of the Statute and redactions of documents.

21 Let's dwell on the agreements reached pursuant to 54(3)(e) of the
22 Statute by the Prosecution with certain sources of information. These
23 agreements are the first potential obstacle to effective disclosure to
24 the Defence.

25 The Chamber asked the Prosecutor to present an overall report on

1 the documents or information obtained pursuant to confidentiality
2 agreements which are based on Article 54(3)(e) of the Statute. This
3 document was filed on the 5th of January, 2009. The Defence teams made
4 submissions on the 19th of January. The victims Legal Representatives
5 did not make any submissions.

6 After the filing of the report by the Prosecution, the Chamber
7 hand down on the 21st of January, 2009, an order asking for additional
8 information, additional information on Prosecution evidence that hadn't
9 been provided in the first report and also additional information on the
10 reasons for which they directly disclosed documents to the Defence in a
11 redacted form. We will go back to these issues when we examine items 2
12 and 3 of the agenda.

13 The redactions present a second potential obstacle, a restriction
14 to the effective disclosure of evidence. The Chamber, I would like to
15 point out, has established a new procedure for redactions. On the 12th
16 of January 2009, the Chamber handed down a decision in which it defined
17 the new methods of presenting requests for redactions. The Chamber would
18 like to remind you that redacting proprio motu is not authorised.
19 Redactions by the Prosecution proprio motu is not authorised, even if
20 this is on the basis of documents that have been obtained pursuant to
21 Article 54(3)(e) of the Statute. The Chamber orders the Prosecution to
22 justify with regard to the 30th of January, 2009, the fact that they
23 maintained redactions which, with the authorisation of the Pre-Trial
24 Chamber, they made in 47 documents. We received this, the report, on the
25 date agreed on.

1 The Chamber also ordered the Prosecution to justify why it
2 maintained redactions that had been decide on by preliminary Chamber --
3 by Pre-Trial Chamber I in eight decisions. And finally this decision
4 gives the Defence seven days to make submissions with regard to all the
5 new requests presented.

6 The question on redactions will be dealt with under items 2 and 3
7 of the agenda.

8 To the extent that the Prosecution, in order to justify its
9 demands for redactions mentions pressure exercised and attempts to
10 intimidate carried out by the accused on the witnesses and victims from
11 the detention unit, the Chamber rendered an order and requested that the
12 Registry file documents on the influence that the accused may have
13 maintained in the Democratic Republic of the Congo and on the pressure
14 that they might be exerting at the time. Last week the Chamber had a
15 Status Conference with the Prosecution and the Registry and debated the
16 matter.

17 Second subject which follows on the disclosure of exculpatory and
18 incriminating evidence of the Prosecution and the Defence and also
19 concerns the victim participation. This second subject with regard to
20 which the Chamber would like to say a few things, even though it is not
21 in the agenda, is a very important subject. The VWU or the Section for
22 the Participation of Victims filed on the 16th and 19th of December,
23 2008, as agreed, two reports requesting instructions from the Chamber and
24 forwarding new applications for participation. I would like to remind
25 you that 57 victims have been authorised to participate in this case by

1 the Pre-Trial Chamber and that if no mistake has been made there are 94
2 new requests for leave to participate that have been forwarded to the
3 Chamber. In addition, there are seven requests for participation that
4 are still pending. The Chamber will soon render its decision on the
5 instructions requested, and it will ask the parties to forward their
6 comments that arise from these new applications for participation.

7 In its order of the 10th of December, 2008, the Chamber asked
8 Mr. Mathieu Ngudjolo's Defence to provide them with information that
9 support the request for re-examination of the way in which victims
10 participate in the case. When we say "participate" such as defined by
11 the Appeals Chamber in a judgement rendered on the 11th of July, 2008, in
12 the Lubanga case. The Prosecution and the Victims Legal Representatives
13 will make their submissions on the 5th of February, 2009, at the latest.
14 So we are waiting to hear comments on this subject, and we will respond
15 to the comments later.

16 In the same order of the 10th of December 2008, the Legal
17 Representatives of the Victims were invited to approach the Registry to
18 examine the conditions for the regrouping that would be in the interests
19 of the victims. The Chamber asked to provide them with specific
20 suggestions in a timely fashion. This item -- this subject will be
21 examined under item 6 of the agenda. Under item 6 we will also examine
22 the question of the security of Legal Representatives of the Victims.
23 The Chamber in fact asked these representatives to organise as soon as
24 possible a working meeting with the Registry that would be dedicated to
25 the subject of their security, the purpose of which would be to ensure

1 the highest level of protection for them. And they should inform the
2 Chamber of the result of this consultation. Under item 6 this subject
3 will be further debated.

4 The last information the Chamber would like to give you before we
5 go into the heart of the matter at this hearing, the Court's services
6 department filed, as was requested, a report and an additional report in
7 which instructions were requested on a certain number of questions. For
8 example, the familiarisation of witnesses, assistance in the course of
9 the hearings, the testimony, the dual status of being a victim and a
10 witness, direct broadcasting of audio and video recordings, and so on and
11 so forth.

12 Those participating in the procedure or at least some of them
13 made comments. These issues are being examined at the moment and the
14 Chamber will rule very soon on the matter.

15 And finally, the Registry filed, as requested, a report on
16 providing interpretation into Lingala for the benefit of the accused, and
17 in particular for the benefit of Mr. Germain Katanga. The submissions of
18 the participants should arrive by tomorrow, the 4th of February, 2009,
19 and the Registry's response should be given by the 11th of February or on
20 the 11th of February, 2009.

21 Once more we thought that this introduction was necessary at this
22 point of the proceedings. It was necessary to remind you of the main
23 decisions handed down by the Chamber over the last two months. We will
24 now deal with item 2 on our agenda. This item concerns the disclosure of
25 incriminating evidence, Prosecution evidence.

1 First of all, the amount of Prosecution evidence. How much
2 evidence, how many pieces of evidence have been disclosed and how many
3 pieces of evidence still have to be disclosed. It seems that the
4 Prosecution has completed the disclosure of the Prosecution evidence, and
5 this was completed on Friday -- last Friday, the 30th of January, as they
6 said they would do on the 27th of November, 2008, and the Chamber
7 reminded them of this obligation in its scheduling order. When I say
8 "completed," this means that the Prosecution disclosed all the
9 incriminating evidence that could be disclosed without making redactions
10 or without putting into place protective measures.

11 With regard for this disclosure to be fully completed, it is
12 necessary for the Chamber to rule on all the redactions of documents that
13 have been requested or on not authorising these redactions. The Chamber
14 shall also rule on the protective measures requested.

15 Could the Prosecution now give us the exact number of pieces of
16 evidence that are incriminating and that have been disclosed without any
17 restrictions, and could you at the same time make a distinction between
18 documents and audio-visual material. Could you tell us this?

19 MR. MacDONALD (interpretation): No, I can't provide you with
20 information, exact information. We had some information in our last
21 filings. I think there were 44 documents, if I'm not mistaken, on
22 Friday, and the night before there was a certain number. I can't
23 remember the number. The Prosecution hasn't listed all the documents of
24 an incriminating nature that it has disclosed. This was not done by the
25 30th of January. We don't have the precise figure, but I could obtain

1 the figure for the hearing tomorrow.

2 PRESIDING JUDGE COTTE (intrepretation): Very well. So
3 disclosure is very gradual. It's evolving. That's the case now. The
4 Chamber has had certain difficulties when it came to making calculations.
5 That's why we are addressing you, the source. If you can provide us with
6 these figures, these precise figures tomorrow, the Chamber will be very
7 grateful. Are you in a position to inform us of how many pieces of
8 evidence still have to be disclosed subject to Chamber's decision
9 authorising redactions, or are you still in the same situation?

10 MR. MacDONALD (interpretation): As far as the Prosecution
11 evidence is concerned, I'm in the same situation, but as for the
12 exculpatory evidence, I do have the precise numbers, but yet again I can
13 find these figures and provide them to the Chamber tomorrow. But one
14 thing is certain, as you said and as stated in our document 859, all the
15 documents that are incriminating that have to be disclosed are documents
16 for which we have requested redactions or these requests are pending.
17 Those that haven't been provided -- those requests that aren't before the
18 Chamber I now file 859, but it concerns references to witnesses for whom
19 there are protective measures in place. I'm referring to Witness 132,
20 287, and 249, and then there are other witnesses who are concerned for
21 whom protective measures are not in place at the moment, and the OTP is
22 working on this. Once these measures have been decided on, once the
23 Chamber has ruled, we can proceed and disclose this evidence.

24 PRESIDING JUDGE COTTE (intrepretation): Very well. So you have
25 understood, in any event, that to make sure that everything is

1 transparent in the upcoming weeks we need a response that is precise as
2 possible with regard to the two questions that have just been put to you.
3 That would be very good. So we would like to have these figures before
4 the hearing that commences tomorrow at 9.00 -- at 16.30.

5 As far as Prosecution witnesses are concerned, are you in a
6 position to tell us the exact number of such witnesses, and if it's
7 possible, how many Prosecution witnesses do you intend to call to testify
8 here? Would you like me to repeat that question? I'll repeat it.

9 We would like you to tell us the exact number and to the extent
10 that it's possible the definitive number of the Prosecution witnesses
11 that you intend to call to testify in the hearing, and I'll add how many
12 new witnesses with regard to the hearing on the confirmation of charges
13 do you intend to call?

14 I know this issue was dealt with in the ex parte hearing on the
15 28th of January, but the Chamber believes that it would be good if you
16 could state publicly what your intentions are today.

17 MR. MacDONALD (interpretation): I can start with a witness from
18 the OTP. We're trying to have this witness described as an expert
19 witness. He had a medical exam. This will also concern the wounds of
20 witnesses 132, 287, and 244. The Prosecution relied on this witness in
21 the course of the confirmation hearing. The Prosecution will also call,
22 as stated in its report 859, Witness 219, Witness 292, and Witness 353.
23 These are new witnesses. Likewise, there's another witness known as W30.
24 This concerns video matters that were disclosed or that is in the list of
25 Prosecution evidence. There's another witness. 323 is the number of

1 this witness, who is already disclosed. There's a request for redactions
2 that is pending with regard to that witness. And the Prosecution would
3 also like to add certain witnesses to this list, but all will naturally
4 depend on the protective measures that will be available.

5 At this point in time, once again I don't have the list in front
6 of me, unfortunately, but I can inform the Chamber that there are one or
7 two additional witnesses, additional to the witness I have mentioned just
8 now, but naturally we'll wait for certain responses for some of them.

9 I'm also referring to the anonymous witness that the Prosecution
10 relied on in the course of the confirmation hearing and only a summary
11 was disclosed for that witness. It's possible that maybe one or two of
12 these witnesses might be added officially to this list of Prosecution
13 witnesses.

14 PRESIDING JUDGE COTTE (intrepretation): That means that right
15 now you'll have, provisionally speaking, how many witnesses?

16 MR. MacDONALD (interpretation): Without including 167 and 258,
17 the two witnesses who have died, well, the figure varies, but it would
18 amount to about 25 witnesses in total.

19 PRESIDING JUDGE COTTE (intrepretation): We're still dealing with
20 the figure that you mentioned at the Status Conference of the 27th and
21 28th of November.

22 MR. MacDONALD (interpretation): Yes. I must also add that the
23 Prosecution has completed its -- will complete its investigation in the
24 upcoming weeks, as soon as possible, and the witnesses that it intends to
25 interview in the upcoming weeks are witnesses for whom no protective

1 measures will be necessary with the exception of one witness if this
2 witness appears. At this point in time we don't have any clear
3 information for the Chamber. We can't say whether this witness is ready
4 to be met and interviewed and to give a statement to the OTP.

5 We have perhaps three additional witnesses, civil witnesses, if
6 you like, and they don't require protective measures. It's possible, but
7 we haven't met these witnesses yet. It's possible that out of this list
8 of 25 there'll be -- well, there will be a few witnesses added to this
9 list of 25. As soon as we have statements from them we'll be able to
10 disclose the statements to the Defence. So I have three or four
11 additional persons in mind, plus the witness for whom we don't know
12 whether the witness will cooperate or not and whether measures will be
13 requested. So the maximum number of witnesses would be 30. So the
14 number would be between 25 and 30. Unfortunately, I can't provide you
15 with the exact figures right now.

16 PRESIDING JUDGE COTTE (intrepretation): So, for the time being,
17 bearing in mind that we are at a Status Conference point where we have to
18 be sure to not drag out these delays too much. Thank you.

19 Now we're still on disclosure of incriminating evidence. This
20 disclosure has to be effective, and we're going to look at the measures
21 of protection that the Prosecution has been asking for.

22 First of all, the redactions. Now, the redactions which
23 Prosecution has requested, you seized the Chamber -- let's be clear about
24 this. This is why we're having our Status Conference. You seized the
25 Chamber of three requests for redactions concerning eight witness

1 statements, 001, 155, 172, 176, 280, 281, 284, 312, and 323, and an
2 investigator's memo concerning Witness 176.

3 The Defence teams were invited to comment and they haven't done
4 so yet.

5 The Chamber, Mr. Prosecutor, can allow these requested redactions
6 in the three requests. It will submit a written decision very soon. So,
7 Mr. Prosecutor, as of tomorrow, you can disclose these documents to
8 Defence, and you will, as you usually do, accompany this with a memo of
9 disclosure.

10 Aside from these three leaves for authorisation, the Chamber
11 received other requests, and we'd like information on this.

12 In your application 859 which was filed on 30 January 2009, you
13 mentioned that in paragraph 3 for four witnesses whose testimony has just
14 been taken, you're not in a position to submit these applications for
15 redactions right now. When do you intend to submit these applications?
16 When will the transcripts of the statements be ready?

17 MR. MacDONALD (interpretation): I can't give you an exact date
18 for the simple reason that these are audio recordings which have to be
19 transcribed. There's about an hour of transcription for redaction, about
20 20, 30 pages. So this requires time, especially because the interview
21 with the witness is either in Swahili, particularly, or in French. So
22 there are two language services that are required for finalising the
23 transcript.

24 These are urgent requests. They have been submitted to our
25 language services and transcript services, and we're looking at the

1 transcripts, and we're working as quickly as possible on this request for
2 redaction.

3 What we would like, of course, is that at most the end of
4 February for submitting this request for redaction. For most of the
5 transcripts will be ready before that, and we'll get them to you as they
6 come in. But this also concerns the exculpatory evidence. All of the
7 evidence, be it incriminating, but before the 28th of February that is
8 our goal.

9 PRESIDING JUDGE COTTE (intrepretation): That's your objective.
10 So as you've understood, anything that could speed this up is best.

11 MR. MacDONALD (interpretation): Mr. President, when we received
12 your orders, especially the decision on the schedule, the Prosecution
13 fully understood the message coming from this Chamber to proceed
14 expeditiously for providing all of the incriminating and exculpatory
15 evidence and finishing the investigations as quickly as possible. We
16 fully apprehended that message.

17 PRESIDING JUDGE COTTE (intrepretation): So the Chamber would
18 like more information.

19 On the 30th of January, in your application 860 for maintaining
20 or leaving out redactions in 47 documents, you refer in paragraph 8 to
21 incriminating documents.

22 The Chamber had understood that these 47 documents were
23 exculpatory pieces of evidence. Could you please clarify whether they
24 are incriminating, exculpatory, or both? This is something we don't
25 fully understand, but of course you will provide clarification.

1 MR. MacDONALD (interpretation): I don't have document 860 with
2 me but I think it's in error, because these 47 documents of which one is
3 exculpatory, according to Article 67 and the other according to Rule 77,
4 Article 77. I would have to find the document and refer to it so I can
5 specifically look at paragraph 8.

6 PRESIDING JUDGE COTTE (intrepretation): Yes. It's paragraph 8.
7 It's a request for maintaining redactions, in 860 of 30 January, and the
8 Prosecution is requesting authorisation for maintaining redactions in
9 some Prosecution documents.

10 MR. MacDONALD (interpretation): Paragraph 8, page 4 of report
11 860.

12 PRESIDING JUDGE COTTE (intrepretation): Prosecution in 54(3)(f).

13 MR. MacDONALD (interpretation): You have correctly seen,
14 Mr. President. It's an error. It's exculpatory, exculpatory.
15 Exculpatory. And you've also looked at our explanation, and I could add
16 to that so that everyone fully understands why Prosecution has taken out
17 redactions which it put in according to 81(4). With Defence, we had been
18 discussing procedure for managing redactions, and Prosecution had taken
19 the opportunity to take out the redactions, to remove the redactions, but
20 it was certainly not to sidestep the authority of the Chamber.

21 PRESIDING JUDGE COTTE (intrepretation): Thank you very much,
22 Mr. Prosecutor.

23 The Chamber now moves to redactions on documents obtained on the
24 basis of Article 54(3)(e) of the Statute and required by the source of
25 these documents. So redactions based on Article 54(3)(e) and required by

1 the source of the documents.

2 The Chamber has observed in your notes on disclosure and report
3 852 of 26 January 2009, that you directly submitted to Defence the pieces
4 of evidence incriminating in nature in redacted form without you having
5 before that seized the Chamber for implementation of the procedure as
6 defined by the Appeals Chamber in decision 1486 of 21, October 2008, in
7 the Lubanga case, and in particular paragraph 48.

8 You pointed out in one of your filings that the procedure which
9 should have been followed was not exactly that indicated by the Chamber
10 but came through a ruling of the Appeals Chamber, and you said that in
11 your opinion when the redactions do not impact on the requirement of a
12 fair trial the modes of disclosure are inter partes procedure and that
13 the issue does not have to be overseen by the Chamber.

14 The Chamber does not subscribe to your interpretation of that
15 decision. Paragraph 48, paragraph 48 of the decision in the Lubanga
16 case, does foresee in our mind that there is oversight by the Chamber
17 before the documents are disclosed to Defence so everyone can be sure
18 that in no case the rights of the accused can be affected by redaction
19 which would make incomprehensible or unapprehendable or useless by
20 Defence this document in question.

21 Now, according to the Chamber procedure in paragraph 48 of the
22 decision of the Chamber -- the Appeals Chamber is applicable both to
23 exculpatory and Prosecution evidence. The Chamber underscores that
24 redaction, be it on the initiative of the Prosecution or required by the
25 source of information must be monitored by the Chamber before the

1 document is surrendered to Defence.

2 Now, when the document is obtained by the Prosecution by virtue
3 of Article 54(3)(e) of the Statute, the leeway of the Chamber is not the
4 same as when there is a redaction requested by the Prosecution on your
5 own initiative. In the latter case, the Chamber can impose disclosure of
6 the document and not accept your request for deletions. On the other
7 hand, in the context of Article 54(3)(e) of the Statute, the Chamber
8 cannot impose disclosure of the document, and in case it feels that the
9 deletions required by the source would make the document unusable or
10 incomprehensible, then the Prosecution must be asked to find another
11 solution in cooperation with the source of information to try to amend
12 the deletions requested and required. But any redaction has to be under
13 judicial oversight, be it for exculpatory or incriminating evidence and
14 even though the Appeals Chamber decision was rendered in the context of
15 exculpatory evidence.

16 Therefore, Mr. Prosecutor, as you suggested in your report of 26
17 January that you have to disclose all of the documents that are now
18 redacted with the original version so that the Chamber can examine the
19 redactions which have been required by the source of information. And
20 the Chamber will render a written decision on this, but I wanted to be
21 sure already, Mr. Prosecutor, that you have fully understood. Is that
22 the case?

23 MR. MacDONALD (interpretation): Yes, it's fully clear.

24 PRESIDING JUDGE COTTE (intrepretation): If that's the case, then
25 the Chamber would like to know the exact number of incriminating

1 documents which have been disclosed to Defence directly or, at minimum,
2 obtain confirmation of the numbers contained in order 838 of 21 January,
3 because we're not sure of these figures, because the Status Conferences
4 force us to make changes on a daily basis and we're not always right down
5 to the last penny, if I can use that expression. So once we have the
6 number, we will convene you to ex parte hearings and as soon as possible
7 we'll give you the procedure.

8 Now we come to the summaries. Mr. Prosecutor, I turn to you once
9 again. The reading of documents appended to your report 852 of 26
10 January did not allow the Chamber decide with certainty. The Chamber
11 wanted to know whether pieces of evidence, incriminating in nature,
12 obtained on the basis of Article 54(3)(e) of the Statute, and having
13 brought a request for lifting of the confidentiality have been, at the
14 request of the source, directly transmitted to Defence through your
15 offices in the form of summary since the confirmation of the charges.
16 This is 54(3)(e), Article 54(3)(e).

17 Can you answer this question now? This is a clarification we
18 would like now. It's not to trip you up. It's not a trick question. We
19 just want to be sure so we could have fuller information as to the date
20 of the trial.

21 MR. MacDONALD (interpretation): In the report submitted on 26
22 January under 852, it's the only document which we transmitted to
23 Defence. It's from Article 77. It's not exculpatory, because in the
24 annex we certainly identified to a --

25 PRESIDING JUDGE COTTE (intrepretation): We just wanted a

1 confirmation, because you sent in a report with very specific annexes.
2 They're more specific than initially, and we can read through them quite
3 easily, but we want to make sure there was no direct communication of
4 incriminating evidence under Article 54(3)(e) in summary form. We want
5 to be sure that we've correctly read your documents.

6 MR. MacDONALD (interpretation): If we didn't indicate it such,
7 it was not exculpatory.

8 PRESIDING JUDGE COTTE (intrepretation): We have to be sure. We
9 have to be sure.

10 MR. MacDONALD (interpretation): I'll come with you -- I'll come
11 tomorrow with a clear answer to your question. From memory, I don't
12 think we submitted -- I don't think we transmitted incriminating
13 evidence.

14 PRESIDING JUDGE COTTE (intrepretation): Now on protection of
15 Prosecution witnesses. As the Prosecutor asked 27, 28 November, the
16 Chamber held an ex parte hearing with the Office of the Prosecutor and
17 the Registry to examine the situation of new witnesses who have consented
18 to the disclosure of identity. These are Prosecution witnesses and have
19 not been put into the court's protection programme. And you suggested
20 the implementation of a protection procedure which could be based on
21 keeping anonymity of these witnesses until very close to the date of the
22 trial, indeed until the date when the witness would be called to give
23 testimony.

24 Could you explain, then, at this Status Conference, what this
25 procedure would be so that Defence could react orally right away,

1 knowing, of course, that Defence could file a written document if it
2 prefers with its comments on your proposals which you're probably going
3 to repeat.

4 Have I correctly understood?

5 MR. MacDONALD (interpretation): Are we talking about
6 Prosecution?

7 PRESIDING JUDGE COTTE (intrepretation): No, no, no. We're
8 talking about exculpatory witnesses. Now, of course this is theoretical.
9 It's not specific witnesses. But do you want to have anonymity until a
10 close time before the trial?

11 MR. MacDONALD (interpretation): Thank you, Mr. President. Yes.
12 The Prosecution has this proposal of Prosecution, to disclose in a
13 redacted manner all information which could lead to identifying the
14 witness in this statement, in the witness statement. I don't have a
15 complete transcript for the witness I'm thinking about, and once I have
16 it we could submit a request for redaction to the Chamber, a request for
17 protection also. Not only for redaction but protection of identity, and
18 disclosure of identity 30 days before the testimony, 30 days before the
19 testimony of aforesaid witness. And before disclosure, there could be
20 other protective measures. Rule 87(3) -- (2), I think is the correct
21 one, where we specify -- I'm going to take the Rules of Evidence and
22 Procedure.

23 87(3)(b) or a variation. Once the identity has been disclosed,
24 then this identity could not be transmitted to third parties.

25 This is a propose that will we're working with right now, and it

1 might help us to avoid relocation of a number of witnesses who refuse to
2 be relocated, because it's difficult for them or it's not possible for
3 them. That's for just a specific category of witness.

4 Likewise, there's another category of witness where we cannot
5 divulge the identity of the witnesses even in a redacted form. As long
6 as we don't have measures in place, it would only be through a summary.
7 That would be the only form of disclosure possible. And our favoured
8 approach of late in cooperation with VWU would be relocation, or we
9 divulge the identity to Defence once the sufficient protective measures
10 are in place. And we would have to discuss this with the witness
11 involved. There are about two of them in this scenario right now.

12 That's where we are right now. And if you'd just allow me a
13 moment, sir.

14 (Prosecution counsel confer)

15 MR. MacDONALD (interpretation): Just one clarification. There's
16 case law from international courts where it's two weeks or even a shorter
17 period, but we do think 30 days concurrently with the fact, bearing in
18 mind the travel of the witness to The Hague and -- so he can be safe.
19 Thirty days, that's a long time, but maybe two weeks, 15 days before.

20 PRESIDING JUDGE COTTE (intrepretation): David Hooper, would you
21 like to reply to the Prosecution? Do you have any comments, or do you
22 want to put them into writing? We're listening to you, sir.

23 MR. HOOPER: Thank you, Mr. President. I've had the opportunity
24 of discussing this very briefly with Mr. MacDonald earlier today, and it
25 strikes me that his ideas are still a work in progress. He is

1 struggling, really, to come to a -- some modality which would both
2 protect his witnesses and the interests of the accused, and I appreciate
3 that, and he's clearly finding it a bit of a struggle. And it may be
4 that we'd all be assisted if the Prosecution could, perhaps, write down
5 its proposals and we could react quickly and, I hope, briefly to that.

6 We're not at present, I know, talking about very many witnesses
7 here, but some of them, of course, we -- we do not know what their
8 evidence is, and we feel that the Prosecution proposal that there should
9 be divulgation of the name 30 days before testimony leaves far too short
10 a time for the Defence to investigate properly the evidence of these
11 witnesses, knowing their identity.

12 I'm not going to suggest at this stage that the Defence would be,
13 for example, content with 30 days before trial. The problem in this
14 case, and it is a significant problem, is the nature of the
15 investigations that the Defence may have to do in terms of the place
16 where those investigations are going to be, and the DRC poses particular
17 difficulties and limitations, in practical terms, on effective
18 investigations.

19 So what I'd come down to is I'd submit it's appropriate here for
20 the Prosecution to let you, the Judges, know what it is that they
21 variously propose, because they are matters expressed in the alternative
22 and reflecting different situations, and then we can perhaps more
23 properly react to them, because I'm unclear at the moment what my friend
24 said a moment ago. And it may be, as I say, that we'll all be better off
25 if it can be more clearly stated in writing.

1 Thank you.

2 PRESIDING JUDGE COTTE (intrepretation): Thank you, Mr. Hooper.

3 Mr. Kilenda, I give you the floor.

4 MR. KILENDA (interpretation): Thank you, Mr. President. It's
5 for the Chamber alone, naturally, to put questions to the parties and the
6 participants, but when I hear that the Prosecution is stating certain
7 things, well, I think I should ask why they're proposing a 30-day period
8 and not ten days. I mean, why not two days? Why wouldn't they suggest a
9 hundred days, for example?

10 I don't want to waste time, but the suggestion my colleague
11 Mr. Hooper made, I think that would be the best solution. The
12 Prosecution should put down in writing what it has said. They should
13 justify why they think that 30 days would be sufficient for the Defence
14 to prepare for the hearing, and then we would be able to respond to the
15 Prosecution in a serene manner, and we could make submissions to you and
16 you could Rule. But if I were to express myself right now, well, I would
17 say that 30 days isn't sufficient given the weighty nature of case.

18 As we have said in one of our submissions, as we said a few days
19 ago, the Prosecution has had sufficient time, and only the Prosecution is
20 familiar with the entire case for the moment, and I think it would be
21 fairer if we were also allocated sufficient time to reflect on the matter
22 and on the suggestion made to your Chamber.

23 Thank you.

24 PRESIDING JUDGE COTTE (intrepretation): Thank you, Mr. Kilenda.

25 The Chamber thank you. This brief exchange was useful after all.

1 Mr. Prosecutor, it would obviously be good for you to draft a
2 report and to present to us and the Defence the suggestions or the
3 modalities that you have in mind. What would also be useful is if you
4 could perhaps specify in this report the case law in other tribunals with
5 regard to the subject, and as a result, all the parties would then have
6 available the maximum amount of information with regard to the various
7 solutions that you are putting forward.

8 If, as Mr. Kilenda said, you have to work serenely, you also have
9 to work expeditiously. So it would be ideal -- today is Tuesday, the 3rd
10 of February. It would be ideal if this report were filed with us next
11 week. You have everything in your head. All you have to do is put it
12 down in writing, and you would then have to add some references to the
13 case law. So I think I should ask you to file this report by the 16th of
14 February, Monday, the 16th of February. Isn't that the right date? Let
15 me see. Just a minute. Somebody has to help me.

16 Mr. Kilenda, usually you help me when I'm encountering
17 difficulties.

18 MR. KILENDA: (No interpretation)

19 PRESIDING JUDGE COTTE (interpretation): So it's the 9th. It's
20 the 9th of February. So this should be done by the 9th of February at
21 1600 hours, and then we will hear the submissions made by Mr. David
22 Hooper and by Mr. Kilenda. So the deadline has been set.

23 Personally, I don't regret having had this exchange, although it
24 was quite brief, with regard to disclosure matters, the disclosure of
25 Prosecution evidence.

1 We have to deal with the question that we referred to at the
2 beginning of this hearing and that concerns the organisation, the
3 presentation of the evidence in a tabular form.

4 I referred to this matter a while ago. The Prosecution has
5 provided us with a suggestion for a table in which the charges confirmed
6 by Pre-Trial Chamber I and the modes of liability would be linked to the
7 alleged facts and the evidence that the Prosecution intends to rely on in
8 the course of the hearing.

9 The Trial Chamber will be rendering an oral decision on this
10 proposal, and naturally a written decision will be handed down in the
11 following days.

12 I am fully aware of the fact that this is a technical issue, but
13 it's an important one, and it's an issue that you should pay particular
14 attention to.

15 The Chamber has taken note of the Prosecution's proposal and has
16 analysed the usefulness of this proposal in the light of the responses
17 made by the Defence. The Chamber does understand the concerns expressed
18 by the two Defence counsel, and the Chamber is of the opinion that the
19 quantity of evidence is such in this case that the Defence cannot rely on
20 an initial analysis of the evidence presented by the Prosecution. It
21 would require a lot more time to prepare.

22 The Chamber believes, like the Defence, that the Defence has the
23 right to be informed in advance, sufficiently in advance before the
24 hearing, of the evidence the Prosecution intend to rely on. Although,
25 the Prosecution has rightly given itself a certain freedom when it comes

1 to the choice of evidence that will be presented, the Defence must be in
2 a position to correctly prepare its response, to choose its evidence, and
3 to raise objections with regards to relevance, admissibility, and/or the
4 authenticity of the Prosecution evidence.

5 As a result, although we have taken note of the proposals made by
6 the Prosecution, the Chamber believes that the proposed table, the table
7 proposed by the Prosecution, doesn't allow the parties or the Judges to
8 have sufficiently ordered, systematic, and detailed view of the
9 Prosecution evidence. To be more precise, it does not seem possible to
10 the Chamber to use the suggested model in order to establish links
11 between the charges, the elements of crime, the alleged facts, and the
12 relevant passages of evidence.

13 As the proposed model takes as its point of reference pieces of
14 evidence and links all the subjective areas to this element, it's not
15 possible for the Chamber to identify the relevant passages in the
16 elements of evidence in question.

17 In addition, the Chamber would like to point out that the area
18 entitled "Element of statement of facts," does not seem to link the
19 alleged facts with specific charges and/or with elements of a crime, and
20 as a result it is somewhat difficult to appreciate the links that have
21 been required between the evidence, the alleged facts, and the charges
22 that they refer to. As a result, the Chamber is of the opinion that this
23 table does not make it possible to analyse the Prosecution evidence in an
24 expeditious and useful manner. To allow the Chamber to organise matters
25 in a rational manner, organise the presentation of evidence in a rational

1 manner, and to make it possible for the two Defence teams to prepare
2 their cases in a more efficient manner, the Chamber invites you, the
3 Prosecution, to fill in a table that the Chamber will provide you with as
4 soon as possible.

5 This table shall refer to the relevant passages in each piece of
6 evidence and will link this piece of evidence to the specific alleged
7 facts that the Prosecution wants to prove in order to establish elements
8 of crime that the accused have been charged with, and this would include
9 the contextual elements of the crime as well as the elements that
10 constitute the mode of responsibility that the accused have been charged
11 with.

12 The Chamber is fully aware of the fact that the founding texts,
13 the basic texts of the Court aren't very explicit when this comes to
14 defining modes of responsibility, and the Chamber is also aware of the
15 fact that with this regard there are no documents that are equivalent to
16 what we call elements of crime.

17 The Chamber has not forgotten that the Defence contested the mode
18 of responsibility referred to by the Pre-Trial Chamber in its decision on
19 the confirmation of charges, and this issue will probably be debated once
20 more in the course of the trial.

21 As a result, the Chamber is requesting that the Prosecution
22 present its evidence in the table, evidence that refers to the mode of
23 responsibility as set out in the decision on the confirmation of charges,
24 and the factual elements should also be clearly stated, the factual
25 elements that prove this form of mode of responsibility, of liability.

1 Having said that very briefly, the Chamber is fully aware of the
2 somewhat technical nature of the problem. However, this is an issue that
3 is very important, so we will provide you, together with all the
4 necessary explanations, a new table, and this will be attached to our
5 written decision. You should fill it in by date that we will set and
6 then provide this table to the Chamber and the Defence.

7 As far as the Legal Representatives of Victims are concerned, the
8 Chamber will express itself on the matter as to whether this table should
9 be disclosed to them or not.

10 So, we have now dealt with the issues that we wanted to deal with
11 at this Status Conference, at least, or the issues that concern
12 Prosecution evidence, disclosure of Prosecution to the Defence.

13 Does the Prosecution wish to take the floor now? Apparently yes.
14 We're listening to you.

15 MR. MacDONALD (interpretation): Yes, I take note of your
16 decision and naturally we'll wait for the details. We'll wait to see the
17 table. But I'd like to speak about the timetable for filling in this
18 table. If the Chamber wants to have such a table you should take into
19 consideration the time needed to analyse all the evidence. We have to
20 analyse in detail each and every piece of evidence. For the confirmation
21 of charges, we submitted our list of exhibits, list of evidence. This
22 relates to the DCC. There were factual elements, and then there were
23 statements which said what the pieces of evidence referred to.

24 If you want to analyse this together with the elements that
25 relate to violations, if you want to do that in detail, we have 449

1 elements, documents, transcripts, statements, well, if we were to do all
2 of this, we would need a certain amount of time. We have to bear in mind
3 the other tasks that we have, redactions, disclosing all the exculpatory
4 evidence by the end of the month. We have a lot of work.

5 PRESIDING JUDGE COTTE (intrepretation): We are fully aware of
6 the importance of the tasks that you have at the moment and of the
7 importance of the instructions, if I may put it that way, that you have
8 been given, but hasn't your office carried out this analysis?

9 MR. MacDONALD (interpretation): Yes, of course. It's ceratin
10 that -- however, sometimes it has to be redone in the right order or in a
11 different order.

12 PRESIDING JUDGE COTTE (intrepretation): So it's all a matter of
13 how to present the table.

14 MR. MacDONALD (interpretation): Yes. It has to do with the
15 details that one is requesting. A piece of evidence can be valid for a
16 lot of charges, for a lot of elements in the charges.

17 PRESIDING JUDGE COTTE (intrepretation): Thank you,
18 Mr. Prosecutor.

19 Is there anything that the Defence would like to say, anything
20 the Defence would like to add to what has been said? No? No. Fine.

21 Well, we will now move on to issue 3, item 3 on the agenda, which
22 has to do with the disclosure of evidence pursuant, now, to Article 67(2)
23 of the Statute and to Rule 77.

24 In our order, our scheduling order of the 23rd of January, we
25 asked you, Mr. Prosecutor, to complete the disclosure of exculpatory

1 evidence on the 27th of February, 2009, in order to make it possible for
2 the Defence to have sufficient time for preparation. We also stated that
3 if it was necessary, to make requests for redactions, such requests
4 should be filed before the 16th of February, 2009.

5 At this point in time it is important to know at this stage of
6 the proceedings how this disclosure was carried out today. We're dealing
7 with exculpatory evidence, and we need to know whether this disclosure
8 has been effective, and now yet again we have to deal with the issue of
9 redactions.

10 With regard to the documents that were obtained pursuant to
11 Article 54(3)(e) of the Statute, and we'll go back to this matter, the
12 Chamber yet again noted in the light of the communication notes it
13 received and in the light of reports 811 and 852 dated the 5th and 26th
14 of January, 2009, the Chamber noted that the Prosecution directly
15 disclosed to the Defence evidence of an exculpatory nature pursuant to
16 Rule 77 evidence, elements for which the source of information had been
17 redacted, and this was done before the Chamber had been seized with
18 regard to implementing the procedure defined by the Appeals Chamber in
19 its judgement 1486 of the 21st of October, 2008.

20 We referred to this issue a while ago when examining disclosure
21 of Prosecution evidence.

22 The Chamber would like to know the exact number of documents that
23 have been directly disclosed to Defence in this manner in order to plan
24 for an ex parte hearing that would make it possible to put into place the
25 procedure defined by the Appeals Chamber in paragraph 48 of its decision.

1 Mr. Prosecutor, are you in a position to provide us with this
2 figure?

3 MR. MacDONALD (interpretation): We provided you with this figure
4 in document 852. This was on Monday, the 26th.

5 PRESIDING JUDGE COTTE (intrepretation): Monday the 26th. So
6 nothing's changed since the 26th, since Monday the 26th?

7 MR. MacDONALD (interpretation): No there are no redacted
8 documents that have been disclosed since then. We completed the
9 disclosure in light of the order and the comments made by the Chamber.

10 PRESIDING JUDGE COTTE (intrepretation): Very well. So things
11 are quite clear. So that report of the 26th of January is final. Thank
12 you.

13 With regard to the documents obtained pursuant to 54(3)(e), the
14 Chamber will have an ex parte hearing on Thursday in order to take stock
15 of the negotiations in course in order to lift confidentiality. If the
16 Chamber is not mistaken, Mr. Prosecutor, and in the light of the
17 information in your report 811 of the 5th of January, 2009, it seems to
18 the Chamber that there are still ongoing consultations with regard to 14
19 documents that fall under Article 67(2) of the Statute, four documents --
20 for four documents the lifting of confidential was refused. So there's
21 consultation for 14 documents, and there's the denial of the request for
22 four documents.

23 With regard to the documents that concern Rule 77, there are 25
24 documents that are being debated. Three documents -- for three documents
25 confidentiality will not be lifted.

1 At this point in time we would like to know if these figures are
2 still the right figures. And naturally, it's in the course of the
3 ex parte hearing on Thursday that we will express our position in greater
4 detail with regard to the actual stage of these negotiations or, rather,
5 consultations, or perhaps they're negotiations, too, and we'll also see
6 whether confidentiality can be lifted for four documents and for the
7 three Rule 77 documents.

8 Are you in a position to provide the Chamber with any
9 information? Are these figures in fact correct, Mr. Prosecutor?

10 MR. MacDONALD (interpretation): Yes. In order to have the
11 precise numbers, well, I can refer you to the document of the 26th of
12 January.

13 PRESIDING JUDGE COTTE (intrepretation): I don't think that in
14 this document reference is made to the consultations still in course and
15 to refusal, but it's the document of the 26th of January that is still
16 authoritative.

17 MR. MacDONALD (interpretation): Yes. And there's list 2A, 2B,
18 3 --

19 PRESIDING JUDGE COTTE (intrepretation): Yes. We'd like you to
20 confirm.

21 MR. MacDONALD (interpretation): Yes. Yes, the discussions are
22 continuing and we will be able to provide you with all the details at the
23 ex parte hearing.

24 PRESIDING JUDGE COTTE (intrepretation): Very good. These can be
25 dealt with in an open hearing and I think that all the participants in

1 the hearing are interested in this matter. We're still dealing with
2 exculpatory evidence, and now I'd like to deal with the issue of
3 summaries.

4 Mr. David Hooper with regard to Mr. Katanga or representing
5 Mr. Katanga. You, Mr. Hooper, in your comments on report 811 from the
6 Prosecution, dated the 5th of January, 2009, a report that concerns
7 documents obtained pursuant to Article 54(3)(e), you contested the
8 possibility for the Prosecution of disclosing to the deference a version
9 in summary form of the evidence that fall under Rule 77. If I'm not
10 mistaken, this is the last point made in your comments, and you contested
11 the possibility of providing the Defence with a summary of evidence.

12 In your report of the 26th of January, paragraph 9, when asked
13 about the matter, Mr. Prosecutor, you said -- had initially been
14 identified -- you said that this document had initially been identified
15 for disclosure in a separate case, in the Lubanga case, and you said that
16 the source of the information requested that certain confidentiality
17 restrictions be maintained. And you said that document could not be
18 redacted easily, and the source asked you to prepare a summary version of
19 the document that had been approved of by Pre-Trial Chamber I, which is
20 dealing with the Lubanga case.

21 With regard to this matter you mentioned a written decision
22 handed down in the Lubanga case. Could you provide the Chamber with the
23 exact reference of this decision, and could you also give us the numbers
24 of the relevant paragraphs, and could you orally tell us, and in brief,
25 what your position is. In other terms, can you restate your position

1 expressed in paragraph 9 of your report and, if necessary, it would make
2 this possible -- it would make it possible for Mr. Hooper to respond
3 orally unless he would prefer to respond in writing. Before I give you
4 the floor -- well, no, I'll give you the floor immediately and then I'll
5 go back to an additional issue. Have I made myself quite clear,
6 Mr. MacDonald, or would you like me to rephrase my question?

7 MR. MacDONALD (interpretation): With your leave, I'm trying to
8 find something.

9 PRESIDING JUDGE COTTE (intrepretation): In your report dated the
10 26th January, you provided answers. In paragraph 9, page 6, paragraph 9.
11 We would like you to rephrase this response and perhaps add something
12 here. And Mr. Hooper contested the possibility of disclosing evidence in
13 summary form. This was in his observation dated -- his observation in
14 the report of the 26th of January.

15 MR. MacDONALD (interpretation): With your leave, Mr. President,
16 I'd like to point out something. I understand that the Chamber set an
17 agenda before we came to the hearing. However, I should point out, and
18 everyone can take note of the fact that there were certain general
19 subjects that were to be dealt with. Details hadn't been referred to,
20 the details that the Chamber wanted to discuss. The Prosecution prepared
21 for certain things. Perhaps not for everything that the Chamber had in
22 mind. So I do not have all the filings that we have made since the last
23 Status Conference.

24 PRESIDING JUDGE COTTE (intrepretation): We'll have to force you
25 to be more precise in future.

1 MR. MacDONALD (interpretation): I don't have the exact reference
2 to the question you have put, but there is one thing that is certain.
3 The point we want to make is as follows: It's not because Pre-Trial
4 Chamber I accepted such summaries that you are bound by this decision.
5 That's the first point I would like to make. And once again, this
6 Chamber will have to approve of the proposed redactions, the method of
7 disclosure, and the Chamber will also have to approve of such summaries
8 in the light of the original documents. Non-redacted documents can be
9 resubmitted to the Chamber so that the Chamber can familiarise itself
10 with the information that might fall under Article 67(2) or Rule 77. And
11 this would be linked to the summary suggested by the source.

12 We've explained the context in which we disclosed this summary to
13 the Defence. This summary had already been approved of by the source,
14 and they endorsed the summary pursuant to Rule 67, if I'm not mistaken,
15 and it was then disclosed to the Lubanga case. So this summary was
16 approved by the source, and we immediately disclosed it to the Defence.
17 But ultimately it's for the Chamber to decide. We can review the summary
18 in the case, but we're dealing with the same conflict, the same foreign
19 actors. So that's the context.

20 The purpose was to disclose this as soon as possible and to
21 provide the Defence with elements that fall, in our opinion, under Rule
22 67. That's the context.

23 PRESIDING JUDGE COTTE (intrepretation): Thank you. Tomorrow
24 you'll provide us with the necessary references.

25 And Mr. David Hooper, is there anything you would like to say

1 with regard to this issue? It's an issue that you emphasised in
2 particular in the submissions that you made.

3 MR. MacDONALD (interpretation): Sorry, Mr. President. It's a
4 very significant issue, and in some respects this -- this document is --
5 is perhaps a useful example of the difficulties that lie between the
6 Prosecution and the Defence that need, of course, to be obviously
7 addressed by you, the Judges.

8 The document which is referred to in our filing 835, which you've
9 identified in paragraph 4, is a specific document dealing with events in
10 Bunia after the ejection of the UPC in March of 2003. And in the course
11 of this document where there's no particular party that's identified
12 by -- by name, either as author of the document or, indeed, in the main
13 in terms of the reportage that is -- that features in this -- in this
14 summary, it refers to, for example, the observation that the government,
15 that's the DRC government, did not hide its support for the Lendu
16 fighters. The statements made by the officers sent by Kinshasa
17 contrasted sharply with the neutrality required of them.

18 We make no secret that the participation of -- of persons outside
19 Ituri is a significant aspect of our case, and we come to a document like
20 that and it shines out to us as being document that we should have in
21 full and in detail. It's for that reason that we're concerned that it's
22 been served in the particular way that it has, and indeed that it's been
23 served by the Prosecution making its own redactions, making its own
24 summary, effective redactions, without the oversight of the Court.

25 In the future, one -- one can see that it may be, from time to

1 time, that you, the Judges, would be better assisted perhaps by knowing
2 the geography of the case in terms of this side of the courtroom. It may
3 be that there would also need to be, from time to time, ex parte
4 discussions between the Defence and you, the Judges, but at the moment
5 that is a document that's come to us that sets the alarm bells ringing,
6 and we've objected to it in that summary form.

7 I don't know if that meets -- meets your query.

8 PRESIDING JUDGE COTTE (intrepretation): Thank you, Mr. David
9 Hooper. So you are confirming orally your written objection, and the
10 Chamber has heard you, and we've heard the Prosecutor likewise.

11 Now, on the same subject, on the same subject we see in 852, 29
12 January, 2009, that unless we're mistaken for two documents under 67(2)
13 of the Statute, DRC-002-OTP-85003, and for Rule 77, OTP-2124-0034 to
14 67(2) and another 77, a source would only consent to disclosure only as
15 summary now. So that we can have the proper numbers, can you confirm the
16 number which comes out of your annex from the report of 26th January, and
17 before disclosure it's appropriate to seize the Chamber according to the
18 Appeals Chamber decision. Is this the case then?

19 MR. MacDONALD (interpretation): No summary has been disclosed
20 yet.

21 PRESIDING JUDGE COTTE (intrepretation): Perfect.

22 MR. MacDONALD (interpretation): Divulgation was stopped after
23 the Chamber's ruling.

24 PRESIDING JUDGE COTTE (intrepretation): Still in keeping with
25 item 3 and disclosure under 67(2) and 77 to Defence. We're dealing with

1 protection of potentially exonerating information contained in the
2 Prosecution documents which the Prosecution is not going to use.

3 In an ex parte hearing, the Prosecutor -- in fact, this took
4 place yesterday. The Prosecutor told the Chamber that they had a
5 proposal which could be submitted to Defence on disclosure of former
6 Prosecution documents containing potentially exculpatory elements.

7 Mr. Prosecutor, are you going to take stock of these proposals so
8 that Defence can reply to the Prosecutor's suggestions? We'll listen to
9 you then. Thank you.

10 MR. MacDONALD (interpretation): Essentially, we're trying to
11 find alternative measures rather than disclosure of some victims'
12 identities who are refusing disclosure of identity to Defence at this
13 point. And the measures, which I'm going to cite for you, relate to
14 those for documents and Prosecution witnesses. The most drastic would
15 then be to keep anonymity and to still use summary statements. The
16 Chamber would appreciate the information as such in view of other
17 elements which are similar in nature that have already been disclosed to
18 Defence before divulging or forcing the disclosure of the identity.

19 Another option would be to keep anonymity but to have redacted
20 divulgation, redacted divulgation of the statement. And you could ask
21 what is the difference, but there are some witness statements where you
22 can't really redact them because sometimes these statements are so
23 precise that it would reveal the identity of the deponent. So it's not
24 possible to have a summary. And some we could have a redaction. Another
25 option would be 30 days before the trial we would disclose identity,

1 before the beginning of a trial. Thirty days before the beginning of the
2 trial with appropriate protective measures in Rule 87(3)(b).

3 Another measure would be disclosure to the Defence only of the
4 identity, but the accused would not know the identity. So the Defence
5 would get the identity. They would receive the witness identity but not
6 the accused.

7 Another possibility using Rule 69 where the Prosecution would
8 recognise facts or underline facts which are exculpatory in nature in the
9 broad sense. But in short, when the Defence receives this information,
10 redacted or in summary form, then the Defence has to analyse them, see if
11 they fit into the theory of their defence rather than saying Defence has
12 to have everything and needs everything.

13 Our court operates in an area where there is ongoing conflict and
14 where you ever volatile security conditions. In Ituri it's a very
15 difficult situation, so all of us must bear in this mind. Rather than
16 the Prosecution have the burden of divulging the identity of all of the
17 witnesses, we have to balance the rights of the accused with the safety
18 of the witnesses.

19 So those are essentially our proposals from Prosecution's side.

20 PRESIDING JUDGE COTTE (intrepretation): So there are no more?

21 MR. MacDONALD (interpretation): Those are the measures we have
22 in mind, but we might have others.

23 PRESIDING JUDGE COTTE (intrepretation): David Hooper, do you
24 have any comments on what the Prosecution has just said, or would you
25 rather have them in writing and you could reply in writing also?

1 MR. HOOPER: They're very closely allied. The principles that
2 are being raised here are very closely allied to the matters that were
3 raised earlier in respect of item 2 and disclosure when it was discussed
4 there, and perhaps if the Prosecution can -- Mr. MacDonald can place all
5 these briefly in writing then we can all, perhaps, respond succinctly to
6 them. And some of them do raise -- well, one or two of the matters do
7 raise quite difficult issues; for example, the issue that he raised or
8 suggested as one possibility of reserved divulgation where and counsel is
9 told but he can't discuss it with his client. I know within my system
10 that that was regarded as a -- as a breach not only of the relationship
11 between counsel and his client, but also the duty of counsel to divulge
12 what he knows to his client. And the bar was forbidden, in fact, to go
13 along with that which resulted in all manner of difficulties for
14 divulgation, but it was based on arguably sound principles. So it's not
15 an easy -- an easy matter to resolve, we appreciate that, and I think
16 written responses will best assist us and, I hope, the Court. Thank you.

17 PRESIDING JUDGE COTTE (intrepretation): Mr. Kilenda.

18 MR. KILENDA (interpretation): Mr. President, I attentively
19 listened to the Prosecutor, and I do think they should be submitted in
20 writing. So we could reply serenely, and Defence will deem whether this
21 is the procedure to be followed for the trial. And then, of course, it's
22 yourselves as Judges to determine from our exchange how we can preserve
23 the -- a fair nature of the trial.

24 PRESIDING JUDGE COTTE (intrepretation): So Prosecution and
25 Defence will have to reply, and the Judges will do their best to ensure

1 useful discussions.

2 You might want to have two different reports, but I think in a
3 single report you could have exculpatory and Prosecution evidence for the
4 9th of February. Monday, 9 February at 1600. Give the information
5 desired. You could make the proposals that you have just orally
6 described, and giving all of the useful references so that we could have
7 all of the beneficial documents that will provide useful information for
8 everyone.

9 MR. MacDONALD (interpretation): Can you give me extra time for
10 the exculpatory evidence, because it's more sensitive. Without
11 minimising, of course, incriminatory evidence.

12 PRESIDING JUDGE COTTE (intrepretation): A first report for
13 Monday, and then Wednesday for the second report. So it would be
14 Wednesday the 11th.

15 Perfect. We're now going to wind up the exonerating evidence.
16 We're talking about a table now.

17 In my introduction, I pointed out that the Prosecution had
18 proposed a table specifying which charge or which mode of responsibility
19 went along with the evidence of exculpatory nature falling under Article
20 67(2) and Rule 77.

21 Defence and the Legal Representatives of Victims had until the
22 2nd February to submit comments. We have some of them, and the
23 Prosecution has the possibility to reply until 9 February. So we're not
24 going to do this now. But let me just recall this for you and our
25 calendar, and then the Chamber will give its opinion.

1 We do have until 6.30 this evening, don't we?

2 Now, point 4. David Hooper, during the Status Conference 27 and
3 28 November last, you had mentioned that your team might submit an
4 application based on Article 17 of the Statute, and I if recall
5 correctly, you had mentioned that the application would fall before
6 Christmas and then afterwards you mentioned that you had to go to the DRC
7 in December, and then you would require more time.

8 If you indeed were going to submit that application based on
9 Article 17, today could you let us know whether you intend to file this
10 type of application and in the affirmative, since this is an important
11 preliminary issue and the Chamber needs to have the time to look at it
12 closely and reply? Can give you (as interpreted) this information,
13 please, on both regards?

14 MR. HOOPER: Yes. I'm afraid I have a reputation for being
15 overoptimistic from time to time, and this was such an act of optimism.

16 The Defence are, in fact, lodging such a motion, and with the
17 leave of the Court, we'd like to do it by the 13th of this month. That's
18 Friday week. And if we can do it a little earlier we will, but it will
19 just be a matter of days, I think, at the moment. And 13th is, on a
20 careful review, and looking at the stage of the drafting at the moment,
21 for us a wholly realistic date now.

22 PRESIDING JUDGE COTTE (intrepretation): Thank you, David Hooper.
23 So we expect by 13 February your motion based on Article 17.

24 Item 5 of the agenda now, which brings the Chamber to put a
25 question to you on agreements for evidence falling under Rule 69 of the

1 Rules of Procedure and Evidence. This question appeared in a
2 questionnaire that you replied to 24 November last, and you had replied
3 in writing and also during the Status Conference 27 and 28 November,
4 which was a bit premature, that it was too early to have this type of
5 agreement, but there was no objection in principle on your part for
6 conclusion of this type of agreement. No agreement had yet been
7 concluded, but the Chamber wanted to know now at the beginning of
8 February if there's been any change here or it's still the same case as
9 in November.

10 Mr. Prosecutor, do you have anything else that's new here?

11 MR. MacDONALD (interpretation): No, nothing new. Nonetheless,
12 this afternoon we approached Mr. Hooper by phone, and which I relayed to
13 Mr. Kilenda, and we discussed a point which could become an admission
14 according to Rule 69. And if we agree, then we would come back to the
15 Chamber to inform you. But we're just in the preliminary part of this,
16 preliminary discussion with the Defence team.

17 PRESIDING JUDGE COTTE (intrepretation): Mr. Hooper, Mr. Kilenda,
18 do you have additional information?

19 MR. HOOPER: No, your Honour.

20 MR. KILENDA (interpretation): No, nothing new, but there might
21 be something new very soon.

22 PRESIDING JUDGE COTTE (intrepretation): So the Chamber would
23 like to be informed of this, and we thank you in advance.

24 It's 17 after 6.00. So we have 12 minutes left. Maybe five
25 minutes more, but we would have to have a five-minute break. And we

1 cannot underestimate item 6 and 7 of the agenda, so we'll see if we can
2 conclude our Status Conference tonight, and if we don't have enough time,
3 we'll continue tomorrow, and tomorrow it won't be very long if we do so.

4 Item 6, protection and organisation of the common legal
5 representation of victims.

6 We very succinctly touched upon this in the introduction, and now
7 we're talking about safety of Legal Representatives. What about the
8 safety of Legal Representatives who discussed this at length at the
9 hearings on 27, 28 November.

10 Now, we'd like to know if on the ground in DRC the situation has
11 improved, stabilised, or worsened, and Chambers would like to know
12 whether here, in The Hague, at the court, there has been implementation
13 or cooperation with the Registry as recommended by the Chamber. Have the
14 Legal Representatives of Victims or one of them tell us what the case is
15 or maybe the Registry? And since we don't have a lot of time, please do
16 it briefly, and if you want to do it at greater length we'll take this
17 item up tomorrow.

18 How would you like to do this?

19 MR. DIAKIESE (interpretation): This is the legal representation
20 of victims. It's a very sensitive issue, and so we would ask the Chamber
21 to postpone this tomorrow, because we have a great deal to say.

22 PRESIDING JUDGE COTTE (intrepretation): But perhaps not too
23 lengthy a discussion.

24 For the court reporters, interpreters, and all the technical
25 people it might be wise then to stop at 6.20. We're going to meet at

1 4.30 tomorrow. It probably won't last two hours, and we'll look at
2 security of Legal Representatives and victims, and the grouping of Legal
3 Representatives for Victims, and also we'd like to have news about the
4 investigations in the DRC from Defence side to see whether things are
5 moving along smoothly.

6 Does anyone else want to take the floor now or we meet tomorrow
7 at 4.30 tomorrow? So 4.30 tomorrow we meet again.

8 Please go ahead.

9 MS. BAPITA (interpretation): Mr. President, from this august
10 body we would like to have an ex parte hearing without the accused on
11 dealing with the participation.

12 PRESIDING JUDGE COTTE (intrepretation): All right. All right.
13 We'll look into that.

14 MS. BAPITA (interpretation): But their counsel, of course will
15 be there.

16 PRESIDING JUDGE COTTE (intrepretation): Thank you, Ms. Bapita.
17 We'll look into that.

18 So I thank the court reporters and the interpreters -- who is
19 asking for the floor?

20 MR. KILENDA (interpretation): I'm sorry.

21 PRESIDING JUDGE COTTE (interpretation): But if Ms. Bapita gives
22 the reasons --

23 MR. KILENDA (interpretation): Defence would like to know the
24 reasons why our clients are excluded. We didn't get objections from the
25 Legal Representatives of Victims and the Registry's report. It was about

1 whether they were impacting from their detention centre on victims.

2 PRESIDING JUDGE COTTE (intrepretation): No. We break for ten
3 minutes and then we come back. We have a break for ten minutes.

4 COURT USHER: All rise.

5 Recess taken at 6.25 p.m.

6 On resuming at 6.35 p.m.

7 COURT USHER: All rise.

8 PRESIDING JUDGE COTTE (intrepretation): We will now resume.

9 Please sit down.

10 Could the security officers bring the accused into the courtroom,
11 please. Thank you.

12 I'd first like to thank the interpreters and the court reporter
13 for having accepted continuing with this hearing.

14 We will ask Mr. Hooper and Mr. Kilenda to tell us in brief and in
15 simple terms whether their schedule for investigations in the field is
16 being respected, whether they're managing to comply with it. As far as
17 security issues are concerned, the issues raised a minute ago, we'll deal
18 with these issues tomorrow at 1400 hours. We'll deal with them in an
19 ex parte hearing, and only the Legal Representatives of the Victims and
20 the Registry will be present. And on the basis of what we learn in the
21 hearing, the Chamber will see what the Defence should be informed of. We
22 don't want to exclude the Defence from the excused (as interpreted).
23 When we receive the schedule -- well, you said that you would prefer to
24 deal with the issue in an ex parte hearing. It's not dramatic. You've
25 just said that. So tomorrow at 1400 hours in the small courtroom on the

1 1st floor we will deal in your presence and in the presence of the
2 Registry with the issues that you want to address. These are issues that
3 you are supposed to debate. You were supposed to discuss these issues.

4 The Chamber now wants to know whether the two Defence teams, in
5 spite of the difficult context, difficult local context, are able to
6 investigate as they wish.

7 Mr. Hooper, we don't want to be familiar with the contents of
8 your work, but we just want to know whether you've been able to travel as
9 planned, whether you have little trips that have been planned. And we'll
10 put the same question to Mr. Kilenda. We just want to see what the
11 situation is in the forthcoming weeks.

12 Mr. Hooper.

13 MR. HOOPER: Yes. Mr. President, as you know, it was indicated
14 on the last occasion that the Defence had the intention of going to Ituri
15 and, indeed, that mission was accomplished with two of us going there
16 just before Christmas for, I think, about ten days or so. And that was
17 followed up over the last few days, in fact, I arrived back just this
18 morning with a visit to Kinshasa for some two weeks.

19 Bunia itself, as the Court is very aware, is not the easiest
20 locality to conduct any form of investigation. It has its difficulties.
21 But we were very much assisted there by the Registry in terms of
22 accommodation and other facilities, and I'm very grateful for that, and
23 may I publicly acknowledge the work that was done on our behalf both in
24 organizing and in sustaining our visit there.

25 In respect of the Kinshasa visit, I don't want to say too much

1 this afternoon, but we went there with an objective of seeing a number of
2 particular identified witnesses or potential witnesses. I have to say
3 with regret that it is my view that our investigations were deliberately
4 obstructed while we were there by some authorities in the DRC. On the
5 other hand, there were other authorities in the DRC who I feel met their
6 obligations to us, but the effect of the difficulties we met, and may I
7 perhaps use the word "difficulties" at this stage rather than
8 obstruction, the difficulties that we met effectively lost us a week of
9 investigation. In fact, I'd go further than that, because the work it
10 entailed and the distractions it entailed, those difficulties, really
11 caused a lot of the objectives of this mission to be frustrated.

12 I say that because I'm aware that a principal objective of you,
13 Mr. President, and fellow Judges this afternoon, is to, as it were, feel
14 the pulse of this case in order to better assess a practical and a --
15 date for trial.

16 Before Christmas, I think some seven or eight weeks ago, at our
17 last hearing, and one comments how time flies in seven or eight weeks, I
18 think we were saying there that we were optimistic that this trial start
19 at the beginning of June. I'm afraid the experience of the last two
20 weeks has caused me to very much alter that view. I cannot see, given
21 the kind of difficulties that we were confronted with, and they were the
22 kind of difficulties I feel will be met again and again, that this --
23 that that is a reasonable, a reasonable, objective.

24 This is not the first time, though, I've had the experience of
25 being charged with the duty of investigating aspects of a case and doing

1 it in Africa, but I have met difficulties over the last two weeks which
2 struck me as being greater than difficulties I've met with before. And
3 so it is with regret, may I say, that I feel that we did not receive the
4 appropriate cooperation that really I think was reasonably -- it was
5 reasonable to expect from people who were in every position and capacity
6 to assist us and who plainly did not. So those are really my comments in
7 respect of what's happened to date. Our team is -- at the moment I think we
8 have a mission to go away again next week, and basically for about two weeks,
9 a month after that. And if these matters are repeated, the problems are
10 repeated or get worse, then certainly we will be bringing our concerns more
11 forcibly before the Court. That's all on the matter I feel I can raise this
12 afternoon. I don't know if there's any other matters that you wish to ask me
13 this afternoon.

14 PRESIDING JUDGE COTTE (interpretation): Very well. Thank you,
15 Mr. Hooper, for this information. When you have received all elements
16 you need, well, how much time do you think you will need? Are you in a
17 position to assess the time you will need right now?

18 When you have all the elements you need, once everything has been
19 done, how much time will you need? In another case before this court
20 three months was decided on.

21 MR. HOOPER: Six months.*

22 PRESIDING JUDGE COTTE (interpretation): Oh my God. Oh my God.
23 Very well. Mr. Kilenda.

24 MR. KILENDA (interpretation): Mr. President, for the moment I
25 really couldn't provide you with any dates, deadlines. As you certainly

1 know, our team is involved in its first investigation mission. My
2 assistant Maryse Alie, now in the DRC, it's a one-month mission.
3 According to the information we have, everything is running smoothly, and
4 the Registry have placed everything we needed at our disposal. We're
5 waiting for Maryse Alie to return. She will submit a report to us, and
6 then we will certainly provide you with more ample information.

7 PRESIDING JUDGE COTTE (intrepretation): Thank you very much,
8 Mr. Kilenda. Given the Legal Representatives of the Victims, there's an
9 issue that isn't an ex parte issue and is a question I'll put to you very
10 briefly, to you and the Registry, but I'm fully aware that the Chamber,
11 naturally, needs to take a position with regard to the applications for
12 participation that are before it. But with regard to your organisation
13 and the issue of recruitment, well, is this a matter that is now being
14 discussed with the Registry? Have there been any changes? Could one of
15 you just answer that question?

16 MR. DIAKIESE (interpretation): Yes, Mr. President. Since
17 yesterday we had a meeting with the Registry. We also had a meeting
18 between us, the Legal Representatives. As a result of this meeting, the
19 regrouping of the Legal Representatives in a team is a possibility that
20 we could envisage, and we have already expressed our opinion with regard
21 to the issue and in relation to the Registry. And right now we can tell
22 you that there will be three teams. Three teams have been composed in
23 relation to certain issues that have to do with the charges. And in
24 relation to the status of the victims, the recruitment has already been
25 done. We've provided the Registry with the necessary information that

1 will be provided to you.

2 PRESIDING JUDGE COTTE (intrepretation): We appreciate any
3 information with regard to this issue. As soon as you are in a position
4 to provide us with such information, do so.

5 MR. DIAKIESE (interpretation): I think I can do that with the
6 Registry. We'll present you with a relevant report very soon.

7 PRESIDING JUDGE COTTE (intrepretation): We've listened very
8 carefully to what was said on this last item on the agenda, and we
9 believe we have sufficient information that will make it possible for us
10 to comply with our legal obligation, namely that of setting a date for
11 the trial. We will fairly soon inform you of our decision on that date.

12 We will now adjourn. Once more I would like to thank everyone
13 who stayed on here a lot later than initially planned, and tomorrow at
14 1400 hours we will hold an ex parte hearing that will involve the
15 representatives of the victims and the Registry.

16 I thank all of you for having stayed here until quite late. It
17 was perhaps not very practical for all of you. You know that the
18 courtroom's are very much in demand right now.

19 We will now adjourn.

20 The Status Conference ends at 6.49 p.m.

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1 CORRECTION REPORT

2 The following sentence has been omitted and is added into the transcript:

3 * p51 line 21 "MR. HOOVER: Six months." is added.

4