

1 International Criminal Court

2 Trial Chamber I

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

4 Case against Thomas Lubanga Dyilo

5 Hearing - Open Session

6 Wednesday, 8 April 2009

7 The hearing starts at 9.34 a.m.

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

10 PRESIDING JUDGE FULFORD: Good morning.

11 This decision deals with two written applications made jointly by
12 the victims representatives.

13 The first, document 1647, dated the 26th of January, 2009,
14 concerns the notification of confidential filings. In essence, the legal
15 representatives request notification of all filings except for those
16 which are ex parte.

17 The second addresses the issue of access by the victims
18 representatives to the documents that the parties intend to rely on
19 during the trial. This was raised during the hearing on Thursday, the
20 26th of February, 2009, and resulted in a request from the Chamber for
21 written observations.

22 This latter filing (document 1740) contains two proposals in the
23 alternative. First, the representatives seek advance access to the
24 documents and materials that the parties intend to introduce at trial
25 which are not already included in the court record, and alternatively,

1 where the Defence questions a witness about a document hitherto
2 undisclosed to the legal representatives, the latter should be entitled
3 to examine the witness when appropriate following questioning by the
4 Defence.

5 In essence, the representatives submit that victims have the
6 right to participate in the hearings pursuant to Rule 91 of the Rules of
7 Procedure and Evidence and to consult the case files without having to
8 prove a particular interest. Additionally, it is argued that by Rules
9 121(10) and 131(2), the victims should be bound by the same principles of
10 free access to all the documents and evidence relevant to the case as the
11 other participants. A key ingredient of the submissions is that it may
12 be impossible for a victim to know whether a witness is to give evidence
13 that engages his or her interest until they are aware of the documents
14 that are to be used during the examination.

15 The Defence and the Prosecution responded to this application in
16 filings documents 1746 and 1747 respectively. The Defence stress there
17 is a material distinction between the position of the parties and that of
18 the participants. It submits that even if victims are granted leave to
19 participate, that does not justify granting them access to all the trial
20 documents, and they argue that any disclosure obligations imposed on the
21 Defence should not undermine the tactical advantages which they maintain
22 belong to the accused. The Prosecution similarly urged a restrictive
23 approach to the relevant provisions, and it underlined the large number
24 of anonymous victims who are currently involved in the case. The
25 Prosecution emphasises that:

1 "7. In terms of access to the case record, Rule 131(2) of the
2 Rules of Procedure and Evidence ('Rules') grants victims participating in
3 the proceedings or their legal representative the right to access 'the
4 record of the proceedings' subject to confidentiality restrictions.
5 According to Regulation 21(2) of the Regulations of the Registry, the
6 record of the proceedings contains, amongst others, materials submitted
7 by the parties such as filings and evidence registered by the Registry.
8 This provision grants participating victims access to materials only once
9 they have been registered in the case file and subject to confidentiality
10 restrictions. Consequently, Rule 131(2) of the Rules does not grant
11 victims access to materials that the parties intend to use at trial
12 before they have actually been tendered into evidence unless, upon an
13 application, such materials had determined by the Trial Chamber to be
14 relevant to their personal interests."

15 In our decision of January the 18th, 2008, the Chamber addressed
16 the right of victims to gain access to the record, documents, and
17 filings. The Court stated as follows:

18 "105. As a general rule the Trial Chamber considers that
19 paragraph 131(2) provides participating victims the right to consult the
20 record of the proceedings, including the index, subject to any
21 restrictions concerning confidentiality and the protection of national
22 security information.

23 "106. Due to the fact that confidential filings within the
24 record often contain sensitive information related to national security,
25 protection of witnesses and victims and the Prosecution's investigations,

1 the presumption will be that the legal representatives of victims shall
2 have access only to public filings. However, if confidential filings are
3 of material relevance to the personal interests of participating victims
4 consideration shall be given to providing this information to the
5 relevant victim or victims so long as it will not breach other protective
6 measures that need to remain in place.

7 "107. In accordance with Rule 92(5) of the Rules, victims or
8 their legal representatives shall be notified in a timely manner of all
9 public proceedings and filings before the court and if the Chamber
10 determines that a victim's personal interests are materially affected, of
11 any that are confidential to the extent that this does not breach other
12 protective measures that need to remain in place. This will enable
13 victims to identify the parts of the proceedings which may affect their
14 interests. The Trial Chamber reiterates its general approach set out in
15 the Order on notification of filings of 19th of November, 2007, that 'the
16 party or participant filing a document bears responsibility for
17 determining the appropriate recipients.' Accordingly, confidential
18 filings which include the names of the legal representatives of the
19 victims on their cover shall also be notified to the victims by the
20 Registry."

21 In relation to the inspection of evidence, the Chamber has
22 established the following:

23 "111. Turning to inspection, the Trial Chamber agrees with the
24 Prosecution that inspection, as provided for in Rules 77 and 78 of the
25 Rules, relates only to the Prosecution and the Defence. However, as a

1 matter of principle and in order to give effect to the rights accorded to
2 victims under Article 68(3) of the Statute, the Prosecution shall, upon
3 request by the victims' legal representatives, provide individual victims
4 who have been granted the right to participate with any materials within
5 the possession of the Prosecution that are relevant to the personal
6 interests of victims which the Chamber has permitted to be investigated
7 during the proceedings and which have been identified with precision by
8 the victims in writing. The participating victims should also be
9 provided with the public evidence listed in the Prosecution's annexes 1
10 and 2 to its 'summary of presentation of evidence' subject to a
11 demonstration of relevance to their personal interests as stated above.
12 If part of a document in this context is confidential, the document
13 should be made available in a suitably redacted form."

14 The underlying rationale of this approach is that if the
15 representatives of victims are to receive material beyond that which is
16 publicly available, they must first have demonstrated, with precision,
17 that the personal interests of a victim they represent are materially
18 affected. This will enable an informed decision to be made as to whether
19 confidential information should be disclosed provided always this does
20 not infringe a necessary protective measure.

21 This approach was emphasised by the Chamber on the 2nd of June,
22 2008, in its decision entitled "Decision on the legal representatives'
23 request for clarification of the Trial Chamber's 18th of January, 2008,
24 decision on victims participation," (document 1368), when the Chamber
25 returned to these issues as follows:

1 "28. In accordance with paragraph 103 of the decision on
2 victims' participation, the legal representatives of victims that have
3 been allowed to participate are instructed to 'set out in a discrete
4 written application the nature and detail of the proposed intervention'
5 and the 'victim must describe the way in which his or her personal
6 interest is affected' in order to participate at a particular stage of
7 the proceedings."

8 On the 5th of February, 2009, see transcript 119, page 1, the
9 Chamber indicated that those victims wishing to participate by way of
10 questioning are to file a request in writing seven days before the
11 relevant testimony. During the trial, this has been varied to the extent
12 that the Chamber has allowed oral applications when appropriate.
13 However, the Chamber emphasises that unless there is good reason, the
14 decision of the 5th of February, 2009, is to be followed.

15 On the 11th of July, 2008, the Appeals Chamber decided that it
16 was consistent with the spirit and purpose of Article 68(3) of the
17 Statute to restrict victim participation to those circumstances where
18 their interests are affected by the issue or evidence in question.
19 Contrary to the submissions of the victims' representatives in this
20 application, the Appeals Chamber has determined that victims are
21 participants in these proceedings and not parties. It is appropriate,
22 therefore, to decide on the extent of their participation case by case.
23 The Appeals Chamber described the issue thus:

24 "99. ... the Trial Chamber did not create an unfettered right
25 for victims to lead or challenge evidence. Instead, victims are required

1 to demonstrate why their interests are affected by the evidence or issue
2 upon which the Chamber will decide on a case-by-case basis whether or not
3 to allow such participation. For example, should a victim demonstrate
4 that his or her personal interests would be negatively affected if a
5 particular witness who could attest to the harm suffered by the victim
6 was not called to testify, or if a piece of evidence which would have
7 ramifications on the safety and security of the victim were to be
8 declared admissible, then the victim would be able to move the Chamber to
9 exercise its powers under Article 69(3) to present the evidence or
10 challenge the admissibility of the evidence respectively.

11 "100. In deciding each application, the Trial Chamber, being
12 vigilant in safeguarding the rights of the accused, could take into
13 account, *inter alia*, whether the hearing of such evidence would be
14 appropriate, timely, or for other reasons should not be ordered. If the
15 Trial Chamber decides that the evidence should be presented, then it
16 could rule on the modalities for the proper disclosure of such evidence
17 before allowing it to be adduced, and depending on the circumstances, it
18 could order one of the parties to prevent the evidence, call the evidence
19 itself, or order the victims to present the evidence."

20 A little later, the Appeals Chamber set out:

21 "104. The Trial Chamber has correctly identified the procedure
22 and confined limits within which it will exercise its powers to permit
23 victims to tender and examine evidence: (i) a discrete application, (ii)
24 notice to the parties, (iii) demonstration of personal interests that are
25 affected by the specific proceedings, (iv) compliance with disclosure

1 obligations and protection orders, (v) determination of appropriateness,
2 and (vi) consistency with the rights of the fair trial."

3 In relation to the Prosecution's obligations, on the 16th of
4 January, 2009, the Chamber ordered the Prosecution to provide the Court,
5 the Defence, and the participants with "a list of any documents that as
6 far as the Prosecution is concerned are going to arise during the course
7 of the evidence of those witnesses together with any documents that the
8 Prosecution is going to introduce at the bar table" at least seven days
9 before a witness is expected to testify. (See transcript 104, page 38
10 and page 39.)

11 More specifically, the mechanism by which the Prosecution is to
12 disclose material, when appropriate, to victims was considered by the
13 Chamber in some detail in its decision of the 2nd of June, 2008 (document
14 1368, see above) as follows:

15 "31. However, the Decision on victims' participation does
16 provide a mechanism whereby the victims who have been given the right to
17 participate may be provided with 'any materials within the possession of
18 the Prosecution that are relevant to the personal interest to the
19 victims.' The mechanism for the provision of this information shall
20 operate in the first instance between the relevant victims' legal
21 representative and the Prosecution. The relevant victim's legal
22 representative shall identify first the victim's personal interest and
23 second, the nature of the information that may be within the evidence in
24 the possession of the Prosecution which is material to the preparation of
25 the victim's participation during a particular phase of the proceedings

1 (e.g. material relating to involvement in particular events at a given
2 time or location). This will enable the Prosecution to identify whether
3 material in its possession is relevant."

4 This clearly puts on the Prosecution the obligation of ensuring
5 that the various documents in its possession that are relevant to the
6 interests of individual victims are disclosed (without the need for a
7 discrete order from the Chamber). It is also to be noted that the
8 Prosecution has disclosed to the representatives of participating victims
9 all of the statements of the witnesses that it proposes to call in the
10 same form as provided to the Defence.

11 As regards the obligation on the Defence to disclose materials to
12 the representatives of victims, by Regulation 52 of the Regulations of
13 the Registry, the parties and participants shall provide the court
14 officer at least three working days before the hearing the evidence they
15 intend to use (in an electronic form, if possible). In the Chamber's
16 decision entitled "Decision on various issues related to witnesses'
17 testimony during trial," the Court observed:

18 "34. Furthermore by Regulation 52 of the Regulations of the
19 Registry, the parties and participants have the obligation to provide the
20 Registry with the electronic version whenever possible of any evidence
21 they intend to use at a hearing at least three full working days in
22 advance. However, the Chamber recognises that the questioning of a
23 witness by a party not calling that witness is to some extent reactionary
24 and as such could entail on occasion the unanticipated use of documents."

25 Further, the Chamber in its decision on disclosure by the Defence

1 (20th of March, 2008, document 1235) ordered the Defence (in paragraph
2 41) to "provide the Chamber, the Prosecution, and the participants (viz
3 not just the Registry) with any evidence for use by the Defence other
4 than oral testimony of a witness three days in advance of its
5 presentation."

6 The question raised on this application is whether these
7 decisions are sufficient for the purposes of a fair and appropriate
8 disposal of these issues or whether the Chamber needs to consider issuing
9 a more wide-ranging order.

10 In our judgement, for those victims who are participating (as
11 regards an area of evidence or an issue), Regulation 52 and the
12 jurisprudence set out above sufficiently caters for their legitimate
13 disclosure requirements. As rehearsed herein, the Prosecution is to
14 provide the Chamber, the Defence, and the participants with "a list of
15 any documents that, as far as the Prosecution is concerned, are going to
16 arise during the course of the evidence of those witnesses together with
17 any documents that the Prosecution is going to introduce at the bar
18 table" at least seven days before a witness is expected to testify. The
19 Chamber immediately observes that for victims who are participating as
20 regards a particular piece of evidence or issue, if those victims do not
21 have access to a relevant document, this should be provided to the
22 participant by the Prosecution (subject to any protection, privacy, or
23 confidentiality issues).

24 Furthermore, it is provided that the victims representatives are
25 to receive advanced notice of the materials on which the Defence intend

1 to rely (three days in advance). Ordinarily, this should be effected by
2 the court's electronic database, but on occasion - for instance if an
3 issue has arisen late - it may be provided in some other electronic form
4 or by way of paper copies. The precise means ever disclosure will depend
5 on a variety of factors, including timing, convenience, cost, and the
6 volume of the materials. However, we stress that in normal circumstances
7 Regulation 52 and the Chamber's decisions on this issue should not be
8 ignored (as has been suggested). It is important, therefore, that
9 victims apply to the Chamber in advance if they wish to participate on a
10 particular issue or area of evidence, and if the application is granted
11 in advance, the Defence will know which of them is entitled to receive
12 the materials that are to be relied on. If these requirements are
13 complied with, the difficulties raised by Mr. Walley yesterday will be
14 met.

15 For victims who have not been granted leave to participate as
16 regards a particular area of evidence or issue, we are unpersuaded that
17 there should be any extension to the basic approach set out above, namely
18 that the parties do not bear a responsibility of disclosure to them.
19 Essentially, when evidence or other material does not engage the
20 interests of victims, they are in the same position as any member of the
21 public who is interested in these proceedings, and they will have access
22 to such part of the court's record as is already in the public domain.
23 It is to be stressed that the materials they will have received already
24 from the Prosecution, as described above, means they are well-placed to
25 decide whether or not they have an interest in the evidence or issue.

1 However, common courtesy should encourage the Prosecution and the Defence
2 to provide non-sensitive information whenever this does not raise any
3 significant security or confidentiality issue and it is not unduly
4 onerous to the lawyers who are in court on a daily basis following these
5 proceedings on behalf of the victims. The Chamber notes that the
6 Prosecution, at paragraph 11 of its submissions set out:

7 "Finally, the Prosecution submits that although the victims'
8 legal representatives have to date been provided with materials listed on
9 the Prosecution's weekly list of documents, this has been done as a
10 courtesy. In the Prosecution's submission, this courtesy is not intended
11 to be interpreted as recognition of a legal right to access the documents
12 nor as establishing a practice that the Prosecution will necessarily
13 follow in other cases."

14 The Chamber also emphasises this is a question of professional
15 courtesy and not in any other sense an obligation to the extent that this
16 practice goes beyond, first, the order made on the 16th of January, 2009
17 (see above) that the Prosecution provides the Court, the Defence, and the
18 participants with "a list of any documents that, as far as the
19 Prosecution is concerned, are going to arise during the course of the
20 evidence of those witnesses together with any documents that the
21 Prosecution is going to introduce at the bar table" at least seven days
22 before a witness is expected to testify, and second, paragraph 31 of the
23 decision of the 2nd of June, 2008 (document 1368, see above) which
24 obliges the Prosecution to disclose to the participating victims those
25 documents which are relevant to their interests on a given issue or area

1 of evidence.

2 As rehearsed above, the applicants argue that it is only when
3 they have had prior notice of the relevant evidence or other material or
4 non-public filings that they are able to assess whether they engage their
5 interests. Although this submission carries a certain superficial force,
6 on analysis it involves a significant misunderstanding of the basic
7 approach that has been laid down by this Chamber and the Appeals Chamber.
8 It is for the victims to establish their interest in the area of evidence
9 or issue prior to disclosure to them of non-public material and not the
10 other way around. There are profound confidentiality and security
11 considerations that mean that it would be inappropriate to give a
12 potentially unlimited number of victims the right of disclosure of
13 confidential material on a purely speculative basis, namely that it may
14 reveal something in which they are interested. In each instance, there
15 is a proper reason for its non-public designation, and if victims are
16 granted access to material in the possession of either party (regardless
17 of whether it is proposed to use it at trial) for the sole reason of
18 enabling them to decide whether or not it may contain material in which
19 they are interested, it will generally become impossible to control the
20 extent to which confidential material is disseminated. Any victim from a
21 potential pool of hundreds or thousands could suggest that they should
22 receive the non-public information so that they can investigate whether
23 it engages their interests. Accordingly, the essential prerequisite of
24 disclosure of confidential evidence or other material or notification of
25 non-public filings to victims is that the evidence or issue relates to

1 the interests of a particular individual who seeks to participate. With
2 evidence or other material, this approach is correct even if it is
3 proposed to utilise the documentation in due course in court, because,
4 first, it frequently happens that in the event it is not used, and,
5 second, the period between disclosure and use of the material in court
6 can, itself, create material security risks.

7 It is noteworthy in this regard that of the 93 participating
8 victims in the present case, the Prosecution and the Defence are only
9 aware of the identity of six dual-status victims (two of whom are
10 participating "jointly"). The parties, therefore, have no means of
11 discovering for the overwhelming majority of victims whether they
12 individually have a legitimate interest in the material.

13 While the Chamber accepts the frustration of the participating
14 victims on the miscommunication of filings, it does not consider this
15 discrete problem or any of the other submissions warrants a change to the
16 current procedure as regards the notification of confidential filings as
17 requested given the reasoning as set out above. Nonetheless, the Chamber
18 urges the parties to ensure that all of the relevant recipients are
19 indicated on the cover of any document submitted to the Registry and that
20 the established right to participate on the part of individual victims as
21 regards an area of evidence or an issue has been reflected. Any enduring
22 problems in this regard should be brought to the attention of the
23 Chamber.

24 When the Defence introduces evidence during questioning which has
25 not been disclosed in advance, the victims' representatives have

1 requested the opportunity to examine the witness on that evidence as far
2 as the interests of their clients are affected. This issue is not
3 susceptible to a general ruling, but instead each application of this
4 kind is to be decided on its own merits, weighing in particular the
5 relevant interests of the victims along with the underlying need to
6 ensure the trial of this accused is fair. Furthermore, pursuant to Rule
7 140(2)(d) of the Rules of Procedure and Evidence, the Defence has the
8 right to be the last to examine a witness. This entails a right of
9 response to any issues raised by the victims' representatives at any
10 point in the proceedings.

11 That concludes this decision. We apologise it has taken 40
12 minutes to deliver.

13 Now, Ms. Samson, if I could address the bar -- or, sorry,
14 Mr. Sachdeva, you're in the -- or is it Ms. Bensouda. I don't know who
15 is going to be responding for the Prosecution.

16 MS. BENSOUDA: It's both Mr. Sachdeva and Ms. Samson depending
17 on --

18 PRESIDING JUDGE FULFORD: On which issues.

19 MS. BENSOUDA: On which issue. Yes.

20 PRESIDING JUDGE FULFORD: All right. So both remain seated and
21 only rise if the issue relates to you. The first, I think, is
22 Ms. Samson. We wish to take up, Ms. Samson, your offer, please, for
23 possible experts on the use of names in the DRC. The Chamber wishes to
24 investigate this further. We haven't made a final decision yet as to
25 what will happen, but we wish to be in a position of understanding what

1 experts are available so that we can make a decision.

2 Could you please today file -- not file, send via e-mail a list
3 of those experts of which you are aware.

4 MS. SAMSON: At present, your Honour, we have heard of one
5 potential expert not investigated at all by ourselves. Should the
6 Prosecution -- should the Chamber desire a more informed list of experts,
7 the Prosecution would need some time to put that together.

8 PRESIDING JUDGE FULFORD: How long is "some time"?

9 MS. SAMSON: The proposal in the communication to the Chamber was
10 that we would take the Easter break to investigate that issue more
11 thoroughly and then provide a list of names to the Chamber following the
12 Easter break.

13 PRESIDING JUDGE FULFORD: I should have read the e-mail
14 communications more closely, Ms. Samson. That's entirely acceptable, and
15 thank you for the offer of assistance on that issue.

16 MS. SAMSON: Thank you.

17 PRESIDING JUDGE FULFORD: There has been an application from
18 Mr. Keta, this is filing 1812, for the participation in person of certain
19 victims.

20 Are the Prosecution proposing to respond to that application,
21 Ms. Samson?

22 MR. SACHDEVA: Mr. President, good morning to you and to your
23 Honours. We -- we might possibly respond to that, indeed. I can't -- we
24 can't give you a final answer at the moment, with your leave.

25 PRESIDING JUDGE FULFORD: Would it be inconvenient if we shorten

1 the time for a response, if there is to be one, to -- I don't want to be
2 unkind given that Easter is coming up, if we were to say two weeks from
3 today, Mr. Sachdeva?

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

5 PRESIDING JUDGE FULFORD: So we'll say a fortnight from today,
6 4.00 p.m., please. Thank you very much.

7 Maitre Mabilie, I would anticipate that you will wish to respond
8 to this filing. Would it be appropriate for us to say your filing's in
9 by three weeks from today? So that would give you a week with the
10 Prosecution's response.

11 MS. MABILLE (interpretation): No problem, your Honour. We will
12 take three weeks.

13 PRESIDING JUDGE FULFORD: Thank you very much.

14 Ms. Samson, have you heard back from the United Nations yet?

15 MS. SAMSON: No, not as yet, your Honour.

16 PRESIDING JUDGE FULFORD: Thank you. We'd ask you to continue to
17 apply a little bit of pressure, please, to achieve a response.

18 MS. SAMSON: Yes, your Honour.

19 PRESIDING JUDGE FULFORD: Ms. Samson, you needn't rise for this.
20 We need, briefly, to address the position of Participating Victim
21 0002/06. There was a filing on the 6th of February, 2009, by the
22 Prosecution, document 1675, which is reflected in a redacted version that
23 was filed on the 9th of February, document 1679, dealing with proposals
24 for redactions relating to a document that is connected to that victim.

25 The position shortly is as follows: Following an ex parte Status

1 Conference on the 1st of April, 2009, the position now is that the
2 Prosecution considers that all of the redactions to that document should
3 be lifted save for the identifying details of one individual and that
4 individual's role. As we understand it, in fact, the professional
5 position of that individual has been set out in the public filing.

6 Now, Ms. Samson, do I see a nod to indicate that I'm -- my
7 understanding is correct in that?

8 MS. SAMSON: Yes, that's correct, your Honour. What's redacted
9 is the name and the entity for which this person works but not the title.

10 PRESIDING JUDGE FULFORD: Right. We have looked at the
11 suggestions by the Prosecution as to the continuance of the redactions as
12 just outlined by Ms. Samson, and in our judgement those details are
13 wholly irrelevant to the known issues in the case. There are legitimate
14 protection issues that have been raised, and in particular as regards the
15 security and safety of this individual, and accordingly we approve the
16 maintenance of the redactions now proposed by the Prosecution in what is
17 effectively its amended application.

18 We next wish to raise the issue of two other witnesses who are
19 either Chamber witnesses or may be. We wish to inform the parties and
20 the participants that the Chamber is considering calling Mr. Garreton
21 during the first week in July. So that is something that we have in
22 mind. If that is seen as posing a problem, we would wish please to be
23 alerted to any perceived difficulties sooner rather than later.

24 Secondly, the Chamber is considering calling the UN rapporteur.
25 Her details have been circulated already to everyone involved in this

1 case. If there are any objections to that individual being called, they
2 are to be set out in a formal filing within the next 14 days.

3 Dr. Schauer has supplied a redacted version of her shorter and
4 longer curriculum vitae, if I can properly describe them in that way. In
5 order for them to become public documents, the Registry needs to file
6 them by way of a formal filing, and we ask, therefore, that someone on
7 behalf of the Registrar undertakes that task, and in a moment I'm going
8 to ask the Court Officer to assign EVD numbers to each of those two
9 documents. If that could please happen now.

10 COURT OFFICER: Thank you. The evidence number to the PowerPoint
11 presentation was assigned during the hearing and it was EVD-CHM-0002
12 (sic), while the other evidence number that was assigned was the number
13 given to the report of the expert's. The curriculum vitae, if filed,
14 shall carry a court record number.

15 PRESIDING JUDGE FULFORD: And so doesn't need an EVD number.

16 COURT OFFICER: No.

17 PRESIDING JUDGE FULFORD: Right. No EVD number then. Thank you
18 very much.

19 Now, as far as the Prosecution are concerned, Mr. Sachdeva,
20 Ms. Samson, those are the only matters that we had. Before I turn to
21 Maitre Mabilille, are there any other matters that you would wish to raise
22 with us?

23 MR. SACHDEVA: Yes, Mr. President. Thank you. It's an
24 application to amend the witness list. The first witness is Witness 297,
25 and for -- for medical reasons, acute medical reasons, it is now the

1 position that the witness would be unable to testify, and regrettably --

2 PRESIDING JUDGE FULFORD: At all?

3 MR. SACHDEVA: That's right, Mr. President. And therefore,
4 regrettably, the Prosecution seeks leave to withdraw this witness from
5 the list.

6 PRESIDING JUDGE FULFORD: I'm afraid I don't carry the numbers in
7 my head, Mr. Sachdeva. Can you help us just to the extent of indicating
8 the general area of evidence covered by 297.

9 MR. SACHDEVA: The witness is a former child soldier,
10 Mr. President.

11 PRESIDING JUDGE FULFORD: And so the application simply is to
12 remove that individual, who we are sorry to hear is clearly unwell, to
13 remove him or her from the list and to move to the next witness, as it
14 were, down?

15 MR. SACHDEVA: Precisely, Mr. President, yes.

16 PRESIDING JUDGE FULFORD: Well, I can't imagine there can be any
17 objection to that, but we'll hear from Maitre Mabilille in a moment.

18 Anything else?

19 MR. SACHDEVA: And also with respect to Witness 4. For reasons
20 that are known, it now seems unlikely that the witness will come and
21 testify. However, the Prosecution would like to provide a final answer
22 after the recess. But just for planning and convenience purposes, I
23 raise it now.

24 PRESIDING JUDGE FULFORD: Thank you for giving that advance
25 warning. Obviously, if there are any exculpatory elements within the

1 material provided by either 297 and 4, if 4 doesn't attend, we will need
2 to look, in due course, at an appropriate means of assisting the Defence
3 in that regard, if necessary, but we can in all probability cross that
4 bridge if an issue is raised.

5 MR. SACHDEVA: Yes, Mr. President.

6 PRESIDING JUDGE FULFORD: Thank you very much.

7 MR. SACHDEVA: There is one other matter, and forgive me if I
8 raise it -- if we raise it prematurely. However, it's in relation to the
9 bar-table application, and that's document 1703 filed on the 17th of
10 February, 2009. We raise it simply for planning and preparation purposes
11 for the witnesses that are to come after the recess. Should there be no
12 decision prior to the second or third week of May where witnesses that
13 are coming to testify may be in a position to discuss those documents --

14 PRESIDING JUDGE FULFORD: I'm going to interrupt you. You will
15 have had a decision by the second week in May, Mr. Sachdeva.

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

17 PRESIDING JUDGE FULFORD: It's not an altogether easy area, in
18 fact, given the suggested illegality, and that is why it has taken us
19 slightly longer than otherwise may have been the case, but thank you for
20 raising it.

21 MR. SACHDEVA: Thank you, Mr. President. And also just to inform
22 the Chamber that there will be some filings during the recess. The
23 Prosecution will make some filings. One of them is another bar-table
24 motion with respect to the communications logbook, and another is an
25 application for redaction of certain metadata in respect of the e-court

1 decision.

2 PRESIDING JUDGE FULFORD: Right.

3 MR. SACHDEVA: And there may be one other, I think.

4 PRESIDING JUDGE FULFORD: Well, thank you for the warning.

5 There's no bar on you making filings, Mr. Sachdeva. What their fate is
6 is of course an entirely different matter.

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

8 PRESIDING JUDGE FULFORD: Thank you very much.

9 Maitre Mabilie, the substantive matter that I wanted to raise for
10 your consideration relates to the difficulties that you have had as
11 regards access to the accused at the close of play. At the moment, there
12 is a problem that I'm not going to explain at this time as regards legal
13 visits being able to extend beyond 5.00 p.m.

14 We are, of course, conscious that with the Court rising at a
15 quarter to 5.00 that gives you precious little time for any substantive
16 discussion with the accused. We are also aware of the inconvenience and
17 the sheer amount of time involved if you have to follow the accused to
18 the place where he is currently residing in order to see him, I imagine
19 after he has been given his evening meal.

20 We want to achieve, if we can, a sensible compromise that
21 preserves the court's sitting day but also gives you the access that you
22 need to Mr. Lubanga. I don't ask for a response now, but one possibility
23 that we have in mind is that we set aside two or three days each week
24 when the luncheon adjournment will be reduced by quarter or, if
25 necessary, half an hour so that we will rise earlier in the afternoon,

1 either by quarter or half an hour so that you can have more time. And
2 indeed on days when for some particular reason you really do need to have
3 longer than that, you are, of course, always welcome to make a discrete
4 application, and we will, in any event, rise earlier if you need greater
5 time with the accused. But I suspect that it's not on every day that you
6 need a substantive period of time at the end of the day to see
7 Mr. Lubanga. It's only going to be on certain days during the week.

8 And so without setting this in stone now, what we're generally
9 proposing for your consideration is a more flexible approach to this so
10 that you can keep the Chamber informed of your requirements, as it were,
11 and what we will work towards is rearranging slightly the luncheon
12 adjournments as and when necessary to give you more time at the end of
13 the day.

14 So unless you want to, please don't feel obliged to respond to
15 this now, but reflect on them over Easter. What we do undertake,
16 however, is that one way or another we will ensure that you have adequate
17 conference facilities from here on.

18 MS. MABILLE (interpretation): Thank you very much, your Honour.
19 I appreciate your assistance on this matter. We do, nonetheless, have a
20 slight concern. When there is an examination in the afternoon, it's very
21 hard to anticipate what's going to happen in the afternoon, and it is
22 precisely at that time that we need to have a discussion with our client.
23 We always spend part of our lunchtime break to discuss what has happened
24 in the morning session with our client.

25 We are very interested in a pragmatic solution. We only have

1 time available from a quarter to 7.00 to 8.00 in the evening, and given
2 the time it takes for security and what not, we lose about two hours. We
3 do understand that on an exceptional basis we can certainly go to the
4 detention centre, but nevertheless we very much appreciate your
5 assistance on this.

6 I would like to make mention of withdrawal of witnesses from the
7 Prosecution's list. I had sent communication to the Prosecution. I
8 asked if the Defence could have access to the witness once the witness
9 had been withdrawn from the list. That was the point upon which I had
10 put a question. It was an ad hoc question. The Prosecutor did respond
11 in the affirmative.

12 I would like to raise a problem in this respect now. We would
13 like a general principle to be recognised, namely that we can have access
14 to a Prosecution witness once the witness has been withdrawn from the
15 Prosecution's list.

16 PRESIDING JUDGE FULFORD: Do you want time, Mr. Sachdeva, or do
17 you want to respond to that now?

18 MR. SACHDEVA: May I have just one moment, Mr. President?

19 PRESIDING JUDGE FULFORD: Certainly.

20 (Prosecution counsel confer)

21 PRESIDING JUDGE FULFORD: Yes, Mr. Sachdeva.

22 MR. SACHDEVA: Mr. President, we -- we do not have an objection
23 to that, as stated before. It's just that it should be made clear to the
24 witnesses, as long as they consent, that it is members of the Defence
25 team that are intending to meet with the witness or contact the witness.

1 With respect to Witness 297 at this stage, as I stated, there are
2 serious medical conditions. In our submission it would be unwise for
3 contact to be made at this stage while the witness is undergoing
4 treatment.

5 PRESIDING JUDGE FULFORD: That's very helpful, Mr. Sachdeva. I'm
6 sure that Maitre Mabilille knows only too well, given her very considerable
7 experience, that obviously communication with Prosecution court witnesses
8 is only for the professional purposes relating to the preparation of the
9 accused's defence. She will know that very well, and so there's almost
10 no need to say it, but there we are.

11 As regards this particular witness, again I'm sure the Defence
12 will react sensitively to his or her current medical condition. One
13 request, therefore, Mr. Sachdeva, could the Defence be informed when the
14 time is reached, as hopefully it will, when the witness is sufficiently
15 in a state of health which would reasonably permit some kind of
16 communication from those representing the accused?

17 MR. SACHDEVA: Yes, of course, Mr. President. Yes.

18 PRESIDING JUDGE FULFORD: Thank you very much.

19 Maitre Mabilille, having heard your helpful submission just now as
20 regards the difficulties at the end of the day, and the three of us have
21 just had a short discussion about this, we wonder whether it would be in
22 fact more appropriate for us to deal with this on a truly flexible basis,
23 and as the day unfolds, if by the time we reach 1.00 and one is looking
24 forward to the evidence that is going to be heard in the afternoon, you
25 feel it's likely that you will need some time at some stage during the

1 afternoon with Mr. Lubanga, why don't you alert us to that fact and then
2 we can make a responsive decision either to shorten luncheon or to rise
3 early or to have a break during the course of the afternoon, whichever
4 will provide you with access to the accused. So rather than setting this
5 in stone, try to respond to what are your real needs rather than
6 establishing a rigid agenda that may give you periods of time with the
7 accused that you don't actually need to avail yourselves of.

8 Would that be a sensible approach?

9 MS. MABILLE (interpretation): It would indeed, Mr. President.

10 PRESIDING JUDGE FULFORD: Now, Mr. Walley and Ms. Massidda, I'm
11 very conscious, and Judge Odio Benito has kindly just reminded me of the
12 fact that this has been a very, as it were, three-way conversation so far
13 this morning rather than a four-way conversation.

14 Are there any matters that either the OPCV or individual
15 representatives of victims would like to raise with us during this house
16 keeping exercise?

17 MR. WALLEYN (interpretation): Thank you very much,
18 Mr. President. We have indeed discussed this amongst ourselves to
19 determine if we had any items to raise. In fact, there are some
20 information points for the Chamber and other participants.

21 The first is that we, too, have identified an expert who could
22 give information regarding the issue of names. I can certainly forward
23 the details regarding this expert to the Chamber.

24 Second piece of information is as follows: We intend, probably
25 in the first two weeks of May, to make a filing regarding an

1 interpretation of Rule 55, which relates to qualification of facts.
2 Regulation 55 is at issue, and this relates to recruitment of children,
3 which at times was qualified as sexual slavery. We're concerned about
4 this type of qualification or the possibility that it arise. I do not
5 wish to raise this for consideration now. I wish only to inform the
6 Chamber and other participants that we intend to make a filing regarding
7 this.

8 And the third point of information is something which is not
9 relevant for you. However, we do feel it useful to inform the Chamber.
10 For the time being, discussions are under way between legal
11 representatives, as well as Defence counsel, with exception of the
12 Lubanga team. However, other teams are involved.

13 There was a decision from the Registry whereby legal
14 representatives having premises in this building should move to a
15 different building. This is something which was planned for the
16 holidays. Apparently now it's a question of having the moving after the
17 holidays whilst the court is sitting, and we're concerned. We're
18 concerned that this might have consequences upon the unfolding of the
19 procedure. It seems to us that this could well impede our participation.

20 I merely wanted to alert the Chamber that the problem does exist.
21 At present it is in the hands of the Presidency.

22 PRESIDING JUDGE FULFORD: Mr. Walley, just in a sentence what
23 has stopped the move from taking place during the three-week break that's
24 about to unfold?

25 MR. WALLEYN (interpretation): I think that Maitre Massidda

1 should respond to that.

2 PRESIDING JUDGE FULFORD: Let me then just quickly respond to the
3 other two points.

4 If you currently have some possible names of one or more experts
5 on names, could you furnish those by e-mail to the legal advisor to the
6 division today, please.

7 MR. WALLEYN (interpretation): I shall do that.

8 PRESIDING JUDGE FULFORD: And as regards your filing, we'll await
9 with interest.

10 Yes, Ms. Massidda.

11 MS. MASSIDDA: Thank you, your Honour. Following a decision
12 which was communicated by the Deputy Registrar, the external counsel and
13 the offices of public counsel requested a review of the decision. The
14 review is ongoing, and a decision will be taken today at 1.00 in relation
15 to the fact if the move will be finally decided or not.

16 The information that I have is that in accordance with the
17 availability of IT sections and other sections involved, the move could
18 take place between the 29th and 31st of May, which is just in the middle
19 of -- of the trial.

20 I would like simply to raise one brief question with the Chamber.
21 If the move will take place, members of the office will not be able to
22 attend the hearings for certain amount of days, because of course we need
23 to reorganise our offices in the new building, first. Then in our
24 understanding, one transit office will be available in the Arc. This
25 transit office will be equipped apparently with only two working

1 stations, which we render absolutely impossible for the four people of
2 the office to follow the trial, Lubanga. So we need to reorganise a
3 little bit the entire work, and this will mean probably non-attendance to
4 hearings for a certain period.

5 Thank you.

6 MR. SACHDEVA: Mr. President, I'm sorry. Just the last two
7 things if I may. Firstly, my -- our initial submissions on the contact
8 with witnesses should in no way be seen as an indication of a lack of
9 professionalism of the Defence. It's simply that on occasion there may
10 be inadvertent misunderstandings, and that's the reason why the
11 Prosecution raised.

12 And secondly with respect to Witness 297, the Prosecution wants
13 to be as transparent as it can within the limits that it can be, and
14 therefore we state that primarily the -- the problems regarding Witness
15 297 are psychological and mental as opposed to physical.

16 PRESIDING JUDGE FULFORD: I think this needs to be dealt with
17 very carefully and very sensitively, Mr. Sachdeva, because it would be
18 highly regrettable if for very understandable reasons there was to be an
19 attempt by the Defence to contact the witness when the accused is unaware
20 of the nature of the problem and the possible consequences if there were
21 to be contact which could be seen as -- as upsetting or disturbing.

22 To the extent that you feel able, could you please have a frank
23 conversation with Maitre Mabilille about this after we've risen and see
24 whether a modus vivendi as to how we deal with this can be established
25 between the two of you and come back to us, either Prosecution or

1 Defence, after the break if there are any enduring problems.

2 MR. SACHDEVA: Absolutely, Mr. President. Our caution is simply
3 that we seek the necessarily consent from the witness himself.

4 PRESIDING JUDGE FULFORD: Well, I can understand that. This is a
5 slightly difficult area on the extent to which contact by the Defence can
6 be limited by an indication from the witness, transmitted by the
7 Prosecution, as to whether or not he or she is prepared to allow that
8 contact to take place, that's not something I think that we have yet
9 ruled on, and so this is not at the moment a clear-cut issue. So I think
10 we need to tread carefully in relation to this, see whether a pragmatic,
11 workable solution can be established first. In the absence of that, we
12 may have to intervene ourselves. But can you see whether you can sort
13 this out, to use the vernacular, with Maitre Mabilille.

14 MR. SACHDEVA: Yes, Mr. President, absolutely.

15 PRESIDING JUDGE FULFORD: Thank you very much.

16 (The Trial Chamber confers)

17 PRESIDING JUDGE FULFORD: Ms. Massidda, please don't rise. In
18 relation to the proposed move that you have referred to from this
19 building to another building, clearly we need to distinguish between
20 those matters which are purely administrative and affect the Registry and
21 possibly the Presidency on the one hand, and matters which fall -- which
22 fall properly within the purview of this Chamber, because there may be
23 consequences which affect, for instance, fairness as regards
24 participating victims.

25 What you have said to us today as regards the suggested dates for

1 the move clearly have the potential to impact not only on the interests
2 of participating victims but also on the ability of this court to
3 function if the consequence is to be that we are going to have to adjourn
4 because you and your other professional colleagues cannot be expected to
5 be in two places at the same time.

6 Given the potential impact not only on those participating but
7 also on the proper work of this Chamber, we consider that the Judges
8 should be consulted and that no decision should be taken in relation to
9 this proposed move that may impact on these judicial proceedings without
10 us having been informed beforehand as to what is proposed so that we can,
11 in the first instance, if we choose to express a view to those who will
12 be taking any administrative decisions, and, if necessary, thereafter to
13 make and to promulgate a decision during the course of these proceedings
14 as to what will happen should a particular course be followed.

15 So we are grateful to you for having raised this matter with us,
16 and we will ask you, please, to bring these short observations which I
17 make on behalf of all three Judges to the attention of the Registrar, and
18 if you consider it appropriate, the Presidency at the earliest possible
19 stage.

20 MS. MASSIDDA: Thank you very much, your Honour. I will do
21 immediately as we resume, because a meeting has already been convened
22 today at 1.00 to deliver the decision. Thank you.

23 PRESIDING JUDGE FULFORD: Well, this is timely then. Thank you,
24 Ms. Massidda.

25 Maitre Mabilie.

1 MS. MABILLE (interpretation): I just wanted to raise a point
2 related to the move. Verbally we haven't had a written notification
3 about this yet. Verbally, we were told that Mr. Lubanga's Defence team
4 would have to move from the 5th to the 1st floor, and therefore move as
5 well.

6 Now, I would like to mention that this hasn't been notified in
7 writing yet, and we will not move because we're in the middle of a trial,
8 so even moving just from the 5th to the 1st floor when all our working
9 tools are currently there at present, and on top of it we're being given
10 smaller rooms than the ones we currently have, well, what I have made
11 clear up until now is that we have time for the case but not for a move
12 at this stage in the proceedings.

13 That's what I wanted to mention just for you to be fully informed
14 of what's going on.

15 (The Trial Chamber confers)

16 MR. SACHDEVA: Mr. President, I just note like the Defence and
17 the participants, we are also, the Prosecution, expected to move.

18 PRESIDING JUDGE FULFORD: Well, Mr. Sachdeva, we shall wait with
19 baited breath for notice to quit to be served on the Judges to be told
20 that we're going to move to Utrecht in order to continue our work.

21 Maitre Mabilille, I'm not going to repeat what I've just said to
22 Ms. Massidda. Exactly the same applies in relation to a suggested move
23 for the Defence and a suggested move for the Prosecution, although
24 potentially the Prosecution may have more resources available to it to
25 ensure a smooth transition.

1 What is absolutely critical is that the work of this Chamber is
2 not disturbed by rearranging the desks and chairs in this building at an
3 inconvenient time, particularly since for many months it has been known
4 that there is to be a break starting today, lasting for three weeks, and
5 that there will be another break, if this trial is still running, as it
6 is likely to be, over the summer, and any decision made administratively
7 that is going to impact on the proper functioning of this trial should
8 not be made before the Judges have been consulted as to whether or not it
9 is appropriate. I hope that it is recognised by everyone associated with
10 this court that our prime purpose is the proper discharge of our judicial
11 function and that ought to take priority over everything else.

12 We will return to this issue, if we need to, as soon as the break
13 is completed.

14 Anything else from anyone else? No. Well, I am very sorry for
15 the large numbers of members of the public who have just arrived, no
16 doubt hoping to see a long session of the International Criminal Court in
17 session. We have, in fact, I'm afraid just reached the point at which we
18 are going to adjourn for a three-week Easter break. I hope that those
19 who are looking after you at the court today will find something else
20 useful for you to do or to see, but I'm afraid we do not sit for the
21 benefit of the public who happen to come to see us.

22 We wish you all a pleasant Easter, and we will meet again in
23 three weeks' time. We will adjourn.

24 COURT USHER: All rise.

25 The hearing ends at 10.56 a.m.