

1 International Criminal Court. Pre-Trial Chamber III
2 Situation Central African Republic, case ICC-01/05-01/08
3 Status conference - Ex Parte hearing- Prosecution - Closed Session
4 Pursuant to Decision ICC-01/05-01/08-528, this transcript including
5 redactions is re-classified as public redacted.
6 Wednesday, 8 October 2008 - The hearing starts at 9.37 a.m.

7 COURT USHER: The International Criminal Court is now in session.
8 You may be seated.

9 JUDGE DIARRA (interpretation): Good morning. I'd like to
10 welcome to office of the prosecutor -- I cannot hear anything. Is the
11 interpretation working? Can you please speak in the booth? (No
12 interpretation) (In English) Please, could you tell me some words.

13 As I was saying. I'd like to welcome the Office of the
14 Prosecutor and I would like you to introduce your team.

15 MR. YILLAH: Good morning, your Honours. Representing the office
16 of the Prosecutor this morning, on my right, Mr. Shkelzen Zeneli, Legal
17 Officer; on my immediate left, Marion Rabanit, Legal Assistant; and
18 myself, Ibrahim Yillah, Trial Lawyer.

19 JUDGE DIARRA (interpretation): Thank you. I would like now to
20 start the status conference concerning, mainly, the Confirmation Hearing
21 and disclosure of evidence. So we are preparing the Confirmation Hearing
22 and the disclosure or the organisation of the disclosure of evidence. I
23 would like to start with the questions concerning the Prosecutor's
24 application dated 30th September, 2008, entitled (In English)
25 "Prosecution Application for Proposed Summaries and the Reductions

1 Pursuant Rule 68(5) of the Rome Statute and the Rules 81(2) and 81(4) of
2 the Rules of Procedure of Evidence" (Interpretation) The Chamber notes
3 that despite the late filing of this application, the Prosecutor under
4 paragraph 2 of their document intends to base themselves on the content,
5 the statement of 11 new witnesses for the Confirmation Hearing. We would
6 like clarifications concerning the application. To start with, we will
7 ask general questions concerning the applications, and then more specific
8 ones concerning witnesses.

9 So I would like to start immediately if the OTP is ready with the
10 general questions.

11 Under paragraph 4 of the application for redactions dated 30
12 September, 2008, you explicitly refer to the Chamber's decision of 31
13 July 2008 on the disclosure system, which means that you are well aware
14 of the deadlines set by the Chamber in the operative part of the
15 decision, which states:

16 (In English) "To submit any request under Rules 81 and 82 of the
17 rules at the latest on 3 September 2008."

18 (Interpretation) You may also recall paragraph 15 of your
19 submission of 4 September 2008 entitled (In English) "Prosecutor's
20 position regarding disclosure of additional witnesses for referral to VWU
21 in response to Pre-Trial Chamber II's order dated July 23, 2008."

22 (Interpretation) You then stated:

23 (In English) "The Prosecution does not currently foresee
24 disclosing any additional witnesses upon whom it intends to rely.

25 (Interpretation) In light of the foregoing, how do you explain

1 your sudden application which was filed only on 30 September 2008? And
2 how do you reconcile it with the Chamber's decision setting a deadline
3 for the filing of any application for redactions on 3 September 2008? I
4 would now like to hand you the floor to respond to these concerns before
5 we move on. If you need clarifications, or you want me to go back to any
6 point, please request so.

7 MR. YILLAH: Your Honours, to the extent that the Prosecution
8 may, we would attempt to answer the question and clarify the issue that
9 your Honours raised.

10 Firstly, your Honour, the Prosecution notes the terms of your
11 Honours' decision setting out the 4th September as the cutoff date for
12 the request of redactions on any additional witness that the Prosecution
13 may seek to rely upon. However, your Honour, the Prosecution, in
14 carrying out its investigations and especially when it was preparing the
15 charging document, the document containing the charges, the Prosecution
16 realized that pursuant to its obligation under Article 54, it has a duty
17 to present its case or to prosecute to the full extent of the evidence
18 available to it. The Prosecution notes the Chamber's concerns, and quite
19 rightly so, especially with regard to your Honours' inherent powers to
20 manage and control proceedings. However, the circumstances presenting
21 themselves at the time of this filing warranted a change in the
22 Prosecution's position vis-a-vis the deadline that was imposed by the
23 Chamber.

24 Firstly, your Honour, the Prosecution submits that some of the
25 witnesses for whom the Prosecution currently seeks redactions were

1 interviewed after the 4th of September. Some, the majority were
2 interviewed before the 4th of September.

3 Secondly, the Prosecution further submits that a decision had to
4 be made, taking into consideration witness protection concerns as to
5 whether to rely on any additional witness or not.

6 But as I submitted earlier, we have an obligation under Article
7 54 to present the best available evidence that we have, and it was not an
8 easy decision, but at the end of the day, the Prosecution realized that
9 to present the full evidence in its possession, it would have to rely on
10 additional witnesses.

11 Again, this is with the full respect for the Chamber's inherent
12 powers to control proceedings, to manage, regulate, and control
13 proceedings before the Court.

14 Secondly, your Honour, the Prosecution refers to the Trial
15 Chamber's jurisprudence in the Prosecutor versus Lubanga. This is
16 decision number 568. It is titled "Judgement of the Prosecutor's Appeal"
17 against the decision of Pre-Trial Chamber I, entitled "Decision
18 Establishing Principles Governing Applications to Restrict Disclosure,"
19 pursuant to Rule 81(2) and 81(4) of the Rules of Procedure and Evidence.
20 In particular, the Prosecution draws the Chamber's attention to
21 paragraphs 49 to 51, in which the Appeals Chamber pointed out that
22 investigations - this is my recapping, this is my interpretation - but
23 basically what the Appeals Chamber said was that investigations do not
24 terminate with a Confirmation Hearing. In other words, if you look at
25 the last sentence of paragraph 51, the Appeals Chamber said, and I quote:

1 "Thus it must be possible for the Prosecutor to continue his
2 investigation in respect of crimes that are not covered by the charging
3 document, or the document containing the charges, because in the Appeals
4 Chamber' opinion, this would convict with Article 61(9) of the Statute."

5 So the Prosecution sought these additional requests. As I said,
6 we note carefully the Chamber's inherent powers to regulate proceedings;
7 however, we were constrained based on our duties under Article 54 and the
8 guidance of the Appeals Chamber.

9 And for these reasons that I have set out above, in addition to
10 what was canvassed in the application, the Prosecution urges your Honours
11 to consider its request of the 30th September 2008. Thank you.

12 JUDGE DIARRA (interpretation): Thank you. I tried to follow
13 your reasoning, but it appears that some of the statements were taken in
14 (redacted), for instance, Witness (redacted) for Witness (redacted), and others
15 were taken (redacted), and unfortunately, some even at the
16 (redacted). So if you yourself are saying that you are
17 authorised to pursue investigations even after the Confirmation Hearing,
18 in order to comply with the rules regulating the Confirmation Hearing,
19 you could have given us the names of the witnesses contacted (redacted),
20 (redacted), a lot earlier, whilst still having the right to contact
21 others after the Confirmation Hearing.

22 Your obligation under Article 54 would have been fulfilled by
23 applying this method, and you could have used the guidelines given by the
24 Appeals Chamber to comply with the rules of the Pre-Trial Chamber. We
25 would have, in this Chamber, appreciated this approach rather than see

1 you violating the provisions, whereas you had other alternatives.

2 MR. YILLAH: Your Honour, the Prosecution regrets that it has to
3 reach this point, but quite frankly we are -- the Prosecution is very
4 mindful of the tasks, the enormous tasks facing your Honours. But as I
5 pointed out earlier, I concede that some of the statements were taken
6 prior to the deadline set out by the Chamber. That is not in dispute.
7 And the majority of the statements were taken before.

8 But there are also several considerations that we have to factor
9 in in deciding. A decision has to be made whether or not to rely upon a
10 witness' statement, and in reaching this decision, we have to consider
11 significantly what would be the impact of witness protection
12 considerations on these witnesses. And in the submission of the
13 Prosecution, your Honour, the paramount reason why it took us up to the
14 30th of September to make this request was because the Prosecution was
15 weighing what would be the impact of witness protection concerns should
16 it seek to rely on these witnesses.

17 Furthermore, your Honour, we have carefully, in making the
18 request for redactions, we have tried, to the extent that we may, to
19 follow the general policy guidelines that have been established in the
20 two Status Conferences and in the first decision on redactions. Your
21 Honour would observe, and I stand to be corrected here, that most of the
22 redactions that have been requested for these additional witnesses have
23 generally followed the general policy framework that has been established
24 by the Chamber in the Status Conferences and in the first decision on
25 redaction. Again, we regret that it has to reach this point.

1 But your Honour, to recap on this point, the Prosecution submits
2 that witness protection concerns were very paramount in influencing our
3 decision and the timing when to rely on these additional witnesses.

4 But furthermore, your Honour, the Prosecution's attention is
5 drawn to Rule 121(4) of the Rules of Procedure and Evidence, and -- which
6 allows us to amend a charging document and gives us 15 days before the
7 start of Confirmation Hearing to make any such amendments.

8 Now, this provision has been cited to support the late request
9 that we have made, but over and above that we understand the Chamber's
10 concerns. We know that it has to do with management of proceedings and
11 carefully regulating the conduct of proceedings. The Prosecution takes
12 very seriously the Chamber's concerns and would weigh these concerns in
13 any further request that it would make. These concerns, I can assure
14 your Honour, would have a significant effect on any further request or
15 any further step that we take in this direction.

16 Thank you, your Honour.

17 (The Pre-Trial Chamber confers)

18 JUDGE DIARRA (interpretation): Thank you very much. I grant you
19 the right to justify the option chosen through Rule 121(4); however, I
20 would like to ask you whether or not you're aware of our duty under Rule
21 121(3) which provides under the circumstances that the person concerned
22 should be provided, and the Defence should be provided, with statements
23 in a redacted form 30 days before the Confirmation Hearing. And in this
24 situation, this date upon which the person concerned and Defence should
25 have received the statements in that redacted form is 28 October 2008 --

1 23 of October 2008. So how could a Chamber which received an application
2 on 30 September carry out the requested redactions and still provide the
3 Defence with the redacted statements by 3 October?

4 The Chamber has to strike a balance here between the Prosecution,
5 the protection of witness and victim safety, and the rights of the
6 Defence, the rights of the person concerned, of the defendant, to a fair
7 trial in compliance with their rights. So every time you base yourself
8 upon a rule to carry out your work, your duty as a lawyer and cooperation
9 should order you to respect -- to comply with this rule to allow all to
10 have a fair trial whilst ensuring the security and safety of victims and
11 witnesses.

12 I hand the floor to Judge Hans-Peter, who would like to add some
13 clarifications.

14 JUDGE KAUL (interpretation): Thank you very much, President.

15 (In English) I will nevertheless continue in English.

16 I have an decisional question to the Prosecution. Essentially,
17 essentially, I understand that your main argument is that because of
18 victims'/witness' protection necessities, you, well, submitted this
19 application so late on 30 September. It is my understanding that, well,
20 the usual, the usual method and means of witness protection are, in the
21 first place, redactions that you seek now and summaries of evidence -
22 this is another possibility - as you have indicated in your application.
23 So you are using the -- you are using two proven methods of witness
24 protection but you are using them at a very late stage. How do you
25 explain this, which I would call some kind of a contradiction in your

1 argument? You have the floor.

2 MR. YILLAH: Thank you very much, your Honour.

3 Your Honour, I would go straight to the issue that you've raised.

4 In my earlier submission, I stated that witness protection was one of the
5 concerns that we had to consider in deciding whether or not to rely on a
6 particular witness. So it was not the sole consideration. That is the
7 Prosecution's first submission.

8 (redacted)

9 (redacted)

10 (redacted)

11 (redacted)

12 (redacted)

13 (redacted)

14 (redacted)

15 (redacted)

16 (redacted)

17 Furthermore, your Honour, the Prosecution gauges in totality the
18 Chamber's concerns and is very much aware of what your Honour Judge
19 Diarra earlier pointed out as to the Chamber's duty to manage and control
20 proceedings. But we have also, as the Prosecution, considered this
21 factor and in this regard the Prosecution had submitted the charging
22 document, the document containing the charges, and a significant amount
23 of its disclosure evidence, of its evidence, two days before the deadline
24 to enable the Defence comments, preparation, for the Confirmation
25 Hearing.

1 Over and above the submissions that I have made this morning, the
2 Prosecution submits further that its timely disclosure, its pre-timely
3 disclosure of the charging document and about 60 items of incriminating
4 evidence, about 30 items of potentially exonerating evidence, and about
5 1.977 items of Rule 77 documents, the Prosecution has significantly met
6 its burden to assist the Defence in its -- to enable the Defence to
7 prepare for the Confirmation Hearing.

8 This is the Prosecution's submission, your Honour.

9 JUDGE DIARRA (interpretation): So through your answer I am to
10 (redacted)
11 (redacted) to the
12 Defence.

13 MR. YILLAH: The Prosecution can confirm that that process is
14 ongoing, because at the -- we learnt our lesson the last time, that it's
15 always better to (redacted) earlier whilst the application is being
16 made. But of significance is the fact that the application is before the
17 Chamber, your Honour, and we can only fully tell them, of course, those
18 whose names for whom we do not seek redactions, because there are 11
19 witnesses, we have sought redactions for the identities of four, which
20 are crime base victims, based on your earlier decision, and we have not
21 sought redactions for about five of them, and for those for which we have
22 not sought redaction, the contact is ongoing. They have been informed.

23 Of course, for those for which we have sought redaction, it would
24 be premature at this stage to tell them because the application is before
25 the Court, unless and until your Honours rule on those applications. For

1 the ones for which we request redactions, we cannot go further to tell
2 them. It would be prejudging or preempting the Chamber's decision.

3 JUDGE DIARRA (interpretation): Mr. Prosecutor, I'm afraid that I
4 am not satisfied by your answer. Have you contacted all of the
5 witnesses? What does it cost you to ask a witness whether he agrees to
6 you disclosing his identity to the Defence?

7 Now, if the Chamber does grant your redactions, then the identity
8 will not be disclosed so nothing will be lost. However, if the Chamber
9 refuses that measure of confidentiality, time will have been lost. To
10 wait until the Chamber has taken a decision, for instance, to grant
11 redactions and that therefore they will not be disclosed or that the
12 Chamber has decided not to grant redactions and therefore that identity
13 will be disclosed and that in that latter case the person must be
14 contacted. No. You should contact all 11 witnesses. Those who are not
15 subject to a request for redactions must be informed that their name is
16 to be disclosed to the Defence, and those who are covered by a request
17 for redactions need to know that the Chamber has yet to make a decision.
18 But coming here this morning to say, Oh, well, we await your decision
19 before approaching witnesses is unsatisfactory to me.

20 I'd like to hear further from you and then we will move on to
21 another area.

22 MR. YILLAH: Your Honour, the Prosecution regrets that the
23 position it has submitted has warranted the reaction, and we want to
24 assure your Honours that the contact with the witnesses, including these
25 four victims for which we have sought redactions, are ongoing and, as I

1 submit, as I stand here this morning, investigators on a daily basis, in
2 the mornings on a daily basis, contact witnesses. And if we have -- if
3 we receive any further information regarding these four witnesses in
4 the -- before the close of these proceedings today, your Honour, we would
5 definitely -- definitively tell you what the position is regarding the
6 four witnesses, before the close of today's proceedings.

7 JUDGE DIARRA (interpretation): Thank you.

8 This matter has been a tricky one. I've moved, in fact, into the
9 area of my specific questions, and my first specific question was whether

10 (redacted)

11 (redacted)

12 (redacted)

13 (redacted)

14 (redacted)

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16 JUDGE DIARRA (interpretation): Thank you.

17 I would now like to move on to the issues concerning the
18 procedure for the disclosure of evidence. I'd like to start with the
19 disclosure of exculpatory evidence, incriminating evidence, and then
20 evidence that is subject to inspection by the Defence, according to Rule
21 77 of the Rules of Procedure and Evidence.

22 So first, the exonerating evidence. The decision of 31 July 2008
23 on the system of evidence disclosure required the Prosecutor to analyse
24 both incriminating and exonerating evidence. Does the Prosecutor agree
25 that the document ICC-01-05/01-08-130 CONF only analyses a third of the

1 exonerating evidence, ten documents analysed on 30. Can you give us the
2 exact date you wish to file a complete analysis of the exonerating
3 evidence?

4 MR. YILLAH: Your Honour has raised a very -- a very crucial
5 point. Regarding the -- if I'm not mistaken, I think we disclosed about
6 30 items of exonerating evidence to the suspect. Now, regarding the
7 analysis chart, the Prosecution sought to follow the guidance of the
8 Chamber in the decision on the evidence disclosure system, and the
9 Prosecution recalls in particular that your Honour -- your Honours used a
10 particular expression, that in making the analysis chart, the Prosecution
11 has to consider the truly relevant evidence - truly relevant evidence.

12 So far the Prosecution, having disclosed 30 items of exculpatory
13 evidence, in compliance with your Honours' direction, assessed among
14 these 30 items of exculpatory evidence what is the most truly relevant
15 evidence, and we made a choice among these 30 items of evidence and did
16 the analysis of the ten considered by the Prosecution to be the most
17 truly relevant evidence.

18 However, if your Honour so directs that the Prosecution
19 continues -- completes the analysis of the remaining items of exculpatory
20 evidence that were disclosed to the Defence, the Prosecution would be
21 obliged to submit that. The Prosecution would be much obliged to submit
22 this assessment. But it was -- it was not that the Prosecution only
23 sought to assess ten. The Prosecution was guided by the expression
24 "truly relevant evidence," and in our assessment, among the 30 items of
25 evidence, the ten that were assessed were the most truly relevant

1 evidence.

2 But if the Chamber wishes to -- wishes the Prosecution to analyse
3 all the items of exculpatory evidence, upon the request of the Chamber,
4 the Prosecution would be obliged to do so.

5 JUDGE DIARRA (interpretation): We would like to recall that the
6 analysis in annex 1 of document ICC-01/05-01/05-130 CONF is incomplete.
7 For instance, only seven of the 14 first witnesses were analysed by the
8 Prosecutor.

9 MR. YILLAH: Again, your Honour, this is a very -- it's a very --
10 it's a very crucial point, and again at the risk of sounding repetitious,
11 the Prosecution would further submit that in the decision on the evidence
12 disclosure system, the request for analysis of summary chart - that's the
13 expression that was used in the decision, summary chart - for which the
14 Prosecution is requested to make an analysis of incriminating and
15 exculpatory evidence, the Chamber required the Prosecution to make an
16 assessment of what it considers to be the truly relevant evidence. Maybe
17 it appears that this expression is ambiguous. But in the Prosecution's
18 view, we have looked at all the evidence and quite rightly, as your
19 Honour Judge Diarra has pointed out, we made only ten analyses out of the
20 14 witness statements. Because again, the question facing the
21 Prosecution was, Do we have to make an analysis of all the evidence that
22 we disclose as incriminating evidence in the chart? Do we have to make
23 an analysis of only the truly relevant evidence? So the Prosecution, in
24 line with the decision, chose what it considered to be the truly relevant
25 evidence, incriminating evidence, and the truly relevant exonerating

1 evidence to make the analysis.

2 JUDGE DIARRA (interpretation): So the Office of the Prosecutor
3 is telling us now that they have filed non-relevant evidence. What was
4 the aim of doing that? What purpose did that serve if evidence is not
5 relevant, whether exonerating or incriminating? You refer a lot to the
6 decision of the 31st and the notion of relevance, but this relevance also
7 applies to the choice of evidence and therefore the analysis.

8 MR. YILLAH: Thank you very much, your Honour.

9 Your Honour, the Prosecution notes that all the evidence, all the
10 items of evidence disclosed as exonerating evidence, are absolutely
11 relevant. That's is not the issue in dispute. We concede: That's not
12 in dispute. What is in dispute is how to examine what is truly relevant
13 evidence, because the idea, your Honour, is that -- I can give an example
14 to clarify our position.

15 We disclose normally a hundred and something items of evidence on
16 our list of evidence. These are all relevant evidence. But among these
17 relevant evidence, the witness statements constitute more the core
18 evidence, so that's what -- that was the situation facing the
19 Prosecution. All items of evidence disclosed as exonerating and
20 incriminating and Rule 77, it's not in dispute, your Honour; they're all
21 relevant to the case. That's not in dispute. But the guidance -- the
22 guidance that the Prosecution will seek, the guidance we will seek from
23 your Honour, is under the meaning of -- on how to determine truly
24 relevant evidence, because the Prosecution's assessment -- for example,
25 your Honour, if you look at Article 67(2) which talks about potentially

1 exonerating evidence, it says that: "In addition to any other disclosure
2 provided for in this Statute, the Prosecutor shall, as soon as
3 practicable, disclose to the Defence evidence in the Prosecutor's
4 possession or control which he or she believes shows or tends to show the
5 innocence of the accused ..." et cetera, et cetera.

6 So, again, it's an assessment. Of course we have guidelines and
7 criteria which we have shared with this Chamber on determining
8 potentially exonerating materials. Following those guidelines and
9 generally wide ambit, we have disclosed 30 items of evidence. Among
10 these 30 items of evidence, we believe that some evidence rank more than
11 others. In fact, this is the guidance that we will seek from the
12 Chamber.

13 So from these 30 items of evidence, we chose ten that we
14 considered to be truly, in our assessment, to be of more relevance than
15 the others, and those are the ones on which we did the analysis for the
16 summary chart. But we still seek guidance from the Chamber on that point
17 and we would follow the directions issued by the Chamber in this regard.

18 JUDGE DIARRA (interpretation): Thank you.

19 Judge Trendafilova has a question.

20 JUDGE TRENDAFILOVA: Mr. Prosecutor, you are seeking guidance on
21 our decision on disclosure and you said that the decision, in some parts,
22 is ambiguous to you. That is why your approach, as you have described
23 and as we have identified until now with regard to disclosure.

24 I would very shortly try to explain to you what the idea of the
25 decision on the system of disclosure is. The Prosecution's office is

1 absolutely independent body. It is up to your strategic plan for the
2 Confirmation Hearing to decide on which evidence you would like to rely
3 in order to convince the Chamber that charges should be confirmed.

4 Of course, we have to bear in mind the limited purpose of the
5 Confirmation Hearing and the limited tasks that the Pre-Trial Chamber has
6 to establish substantial grounds to believe that the person has committed
7 the crime charged. With regard -- so it is up to you to choose your best
8 evidence, your core evidence. And by the way, it is up to the
9 Prosecution's office even how the Prosecution's office is going to
10 approach the Trial Chamber as well. You're not supposed, if you have
11 10.000 evidence -- pieces of evidence, to present them all either to the
12 Pre-Trial or to the Trial Chamber.

13 But with regard to the exculpatory evidence, the Chamber is
14 requiring that you present all pieces of exculpatory evidence, of
15 exonerating evidence, in order for the Chamber to be able to fulfil its
16 task; namely, to filter the good cases from the bad cases, and to send
17 only the good cases that we have reliable convincing evidence to trial.
18 If necessary, however, we could proceed with further guidance. But it is
19 up to you to choose the evidence supporting your case, and all the
20 evidence that is material for the Defence and for the Chamber to properly
21 perform its duties should be disclosed; namely, the exculpatory evidence.
22 And as long as you have decided to disclose your core evidence and you're
23 disclosing the exculpatory evidence, the Chamber is expecting you to
24 proceed with the analysis as required in the decision for disclosure of
25 the 31st of July.

1 MR. YILLAH: Thank you very much, your Honour. The Prosecution
2 has, as is evidenced by its filings last week, the Prosecution has
3 disclosed significantly evidence in its possession or control which --
4 which is exonerating and 1.977 items which we consider material to the
5 preparation of the Defence as well under Rule 77. So in terms of meeting
6 its disclosure obligations, the Prosecution has, as is evidenced by last
7 week's filings, met its disclosure obligations. And of course as
8 regarding future disclosure, the Prosecution would await your Honours
9 decision on our present request for redactions, and as we collect new
10 items of exonerating or Rule 77 evidence, we will disclose them on a
11 regular basis.

12 Regarding the analysis, again, your Honour, the point is the
13 Prosecution submits that we have followed the decision. The evidence
14 that we consider core to our case we have disclosed on our first list of
15 evidence - 60 items of incriminating evidence have been disclosed. Of
16 this evidence we have chosen ten witness statements. In order to comply
17 with your Honours' decision of the 31st of July, we have considered those
18 ten witness statements to be truly relevant evidence. We are not saying
19 the others are not true, they are not relevant evidence. But based --
20 it's the wording of the decision. It says "truly relevant evidence." So
21 we have chosen among those what we consider to be truly relevant evidence
22 and made the assessment. Again, we disclosed 30 items of exonerating
23 evidence. Among these 30 items of exonerating evidence, we chose again
24 ten that we considered, by the wording of the decision of the 31st of
25 July, truly relevant evidence and made this assessment. And that's the

1 position that the Office of the Prosecutor has followed regarding --
2 regarding the analysis chart.

3 So I believe that what is in issue before the Chamber right now
4 is the analysis chart. Regarding the disclosure obligations, we have met
5 significantly, as I said, two days before the deadline of one month
6 before the confirmation, we have disclosed the DCC, 60 items of
7 incriminating evidence, 30 items of exonerating evidence, and 1.977
8 items, if I'm not mistaken, of Rule 77 evidence. So we are on course
9 with respect to our disclosure obligations. But what appears to be the
10 sticking point now is the analysis chart and how the Chamber would -- how
11 the Chamber expects us to meet our obligations under this analysis chart.

12 So that was the guidance -- that was the direction that the
13 Office of the Prosecutor has followed, choosing from these items of
14 evidence what we considered to be truly relevant evidence, and making
15 analysis of this truly relevant evidence.

16 JUDGE DIARRA (interpretation): Thank you very much.

17 Now I'd like to know whether you've already been in touch with
18 the Defence to organise the inspection of the 1.979 items that have been
19 disclosed already.

20 MR. YILLAH: Yes, your Honour. In the past few days since last
21 week, the Prosecution has been continuously disclosing to the Defence and
22 has also informed them of our obligation of inspection under Rule 77, and
23 of course they have all the items with them now in terms of any
24 disclosable form. And once the Defence gets in touch with the
25 Prosecution, because I believe they're probably assessing the significant

1 amount of documents they presently have in their possession, once they --
2 we have informed them that these are items of Rule 77, you know, which
3 are ready for inspection, which we have given to them at a disclosable
4 form, and at any time they get in touch with the Prosecution, the
5 Prosecution would immediately organise the physical inspection of these
6 documents. But we're still waiting for the Defence to get in touch as to
7 when to -- to inspect the documents. But already they have the documents
8 in their possession.

9 JUDGE DIARRA (interpretation): Do you agree that annex A of
10 document 138 is just a list of evidence to expect and that document 130
11 that consists of analysis charts does not take the 1.979 documents that
12 the Defence has to inspect into account. And are you sure that each of
13 the 1.979 items is relevant as evidence? And could you give us the date
14 you -- upon which you expect to finalise the analysis of this evidence
15 under Rule 77 of the Rules of Procedure and Evidence?

16 MR. YILLAH: Your Honour, again, in terms of -- in terms of the
17 items of evidence already disclosed to the Defence as Rule 77 evidence,
18 the Prosecution notes that the bulk, majority of these items, were items
19 that were seized from the premises of the suspect and have therefore now
20 been disclosed to him because they belong to him. And once they complete
21 their analysis, once the Defence completes their analysis of the Rule 77
22 documents, which we have disclosed to them, and they request inspection,
23 once they complete the inspection of these documents, the Prosecution
24 would undertake to inform the Chamber as to what has happened.

25 Now, regarding the analysis chart, I'm not too clear, the

1 Prosecution is not too clear on the -- on your Honour's question. Is
2 your Honour -- can your Honour please repeat the question again?

3 JUDGE DIARRA (interpretation): I just recall that you didn't
4 provide the Defence with any analysis for the 1.979 items that were
5 disclosed under Rule 77, and I said that annex 1 of document 138 only
6 consists in a list of evidence to be inspected, and that document 130,
7 which consists of charts, analysis charts, that it does not take the
8 1.979 documents that the Defence must inspect into account. And I also
9 asked you whether you're sure that 1.979 items are relevant as evidence,
10 and I also asked you whether you could give us the date upon which you
11 intend to complete the analysis of the evidence under Rule 77 of the
12 Rules of Procedure and Evidence.

13 MR. YILLAH: Thank you very much, your Honour. I will take
14 the -- I will take the questions in part.

15 In terms of whether the 1.979 disclosed as Rule 77 evidence, your
16 Honour's question was whether, firstly, they are relevant evidence. Yes,
17 indeed, in the Prosecution's assessment, and following the wording of
18 Rule 77, the Prosecution believes that all those items that were
19 disclosed as Rule 77 evidence are, indeed, Rule 77 documents. In this
20 regard the Prosecution would like to point out that the majority of these
21 documents were documents that were seized from two premises of -- of the
22 suspect. So these documents belong -- within the wording of Rule 77, the
23 Prosecution believes or submits that these documents were obtained from
24 or belonged to the suspect. So yes, in response to that question, the
25 Prosecution submits that the majority of those items of evidence were

1 documents taken from the premises of the suspect and they therefore
2 belong to him.

3 With regard to your second question as to whether -- as to when
4 the Prosecution would make the analysis chart for these Rule 77 evidence,
5 the Prosecution would not give a clear court time. But knowing the
6 pressing -- you know, having regard with the state of events within the
7 Chamber and the closeness of the Confirmation Hearing, the Prosecution
8 would undertake to do the Rule 77 analysis in groups, because as I have
9 pointed out, we have about three categories of evidence under Rule 77 in
10 terms of the materials. About 1.400 of these were materials that were
11 taken from the house of the suspect and they therefore belong to him. So
12 maybe a better approach would be the Prosecution would make an
13 assessment, an analysis chart, in respect of those group of documents and
14 then the other group of documents the Prosecution would make the analysis
15 chart and make probably the submission by close of business on Monday,
16 because it's a considerable number of documents. I mean, we're craving
17 the indulgence of the Chamber on this point.

18 JUDGE DIARRA (interpretation): But do you agree that it's not up
19 to the Defence to analyse your evidence, the evidence furnished by
20 yourselves.

21 MR. YILLAH: Your Honour, this is -- it's an interesting point.
22 We had advanced our position in the leave to appeal that was rejected
23 regarding that decision. But the Prosecution would like to reiterate
24 that, I mean, if we look at Article 67(2), it says that evidence that
25 tends to show, that the Prosecution believes shows or tends to show, so

1 what we're saying is that the analysis that we're making now on, for
2 instance, the exonerating evidence, it will be our assessment of how we
3 see the evidence, how this evidence tends to show the innocence of the
4 suspect or to mitigate his guilt. But in terms of the Defence's
5 preparation, the Defence may have its own strategy. It may have a
6 completely different strategy to present its case. It may choose to
7 abandon our analysis completely because it does not align with its
8 strategy. It may choose to adopt our analysis because it aligns with its
9 strategy. And at the end of the day, the Prosecution submits that it is
10 for the Defence, it is up to the Defence, to use exonerating evidence.

11 And under Article 67(1), the rights of the accused, they may have
12 a completely different approach. They may have their own defence
13 strategy. So the analysis that we will be making now might be of
14 absolutely no relevance to them because of -- because they have a
15 completely different defence strategy. That is also a concern that the
16 Prosecution has in making this assessment.

17 JUDGE DIARRA (interpretation): Thank you.

18 Judge Kaul has a question.

19 JUDGE KAUL (interpretation): Thank you, President.

20 (In English) I would like to ask, well, to make a comment, a
21 comment in English. Mr. Prosecutor you have said, and it's appreciated
22 by the Chamber, that you seek guidance on the implementation of the
23 decision on the evidence disclosure system of 31 July, and this is now --
24 this is now an attempt from this Member of the Chamber - and I'm pretty
25 sure that I speak on behalf also for my colleagues - to give you some

1 guidance and the guidance is now in this framework very friendly and very
2 collegial, but it is nevertheless very serious.

3 The Chamber appeals - appeals - to the Prosecutor and to the
4 entire team of the Prosecution to implement fully, to implement
5 correctly, to implement in all parts the decision regarding the evidence
6 disclosure of 31 July, and I want to be more specific. The Chamber will
7 monitor, will follow continuously, and will supervise continuously
8 whether this decision is correctly and fully respected and followed in
9 practice by the Office of the Prosecutor.

10 This is a message which I now say in friendly terms, but if we
11 should observe that the evidence disclosure system is only partially
12 followed and is followed in a piecemeal manner, it is quite clear that
13 the Chamber will draw appropriate conclusions, and I'm pretty sure that
14 we all want to avoid such a situation in which the Chamber would be
15 forced to draw appropriate conclusions.

16 Now, regarding two specific points that have also come out in
17 this quite interesting exchange. You have conceded that you have
18 provided the analysis only with regard to, well, is it ten or is it seven
19 witnesses but not all out of the 14 witnesses. At the same time - and
20 this is on our mind, it's in the documents - you continue to assert that
21 all these 14 witnesses are core witnesses. If they are core witnesses,
22 the logical conclusion would be that you apply the evidence disclosure
23 system to all the witness statements.

24 A second point. You have used several times the term of the
25 "truly relevant evidence." And again, I want to be very clear: The term

1 "truly relevant evidence" should not - should not - be used as an excuse
2 not to fully implement the decision of 31 July on the disclosure of
3 evidence. This is not, this is not a way out of full -- for full
4 implementation and full respect for the decision of the Chamber.

5 Well, after this interesting exchange, I wanted to clarify this
6 point, and again I would be pleased if this message would be heard and
7 would be followed also in the future.

8 Thank you very much.

9 MR. YILLAH: The Prosecution appreciates the comments of the
10 Chamber and would follow it scrupulously, thanks.

11 JUDGE DIARRA (interpretation): Judge Trendafilova.

12 JUDGE TREDAFILOVA: Mr. Prosecutor, I would only add some
13 comments to the comments made by my colleagues until now. Of course
14 you're right saying that the Defence could have a different assessment,
15 the exonerating evidence, the incriminating evidence -- all the evidence
16 that you're going to disclose to it. But my first point is that under
17 the statutory provisions, the Prosecutor is supposed to be objective and
18 not only to collect incriminatory but equally exculpatory evidence and to
19 take care of the interests of the Defence. So when you're disclosing
20 evidence and in particular evidence of exculpatory nature, the Chamber is
21 convinced that you're going to act in good faith, and hopefully what
22 you're going to disclose will be very useful for the Defence itself to
23 properly prepare its case.

24 Second, about the analysis that we are so much discussing now,
25 the evidence, I cannot imagine that a professional prosecutor decides to

1 disclose evidence without taking prior the decision that this is his or
2 her best evidence supporting the charges, and not only supporting the
3 charges in general but that this evidence will be selected on the basis
4 of a very careful understanding which element of which crime this
5 evidence specifically supports. So what the Chamber is expecting from
6 you is only to put on the paper this analysis in order to make it easy
7 for the Defence in the short period of time that it has for getting
8 acquainted with the evidence, preparing itself for the Confirmation
9 Hearing, just to speed up its work.

10 And thirdly, this approach is expected by the Chamber that the
11 Prosecutor follows for the Confirmation Hearing as well; that you will
12 try to convince the Chamber with the evidence that you're going to
13 present, that these crimes have been committed by supporting each element
14 of the crime from the objective and subjective side of what we have to
15 take our decision on with the specific evidence. So we are not asking
16 you to do something which you have not done when you are taking your
17 decision on which evidence you're going to rely during the Confirmation
18 Hearing, and for the purposes of the Confirmation Hearing, you decide to
19 disclose to the Defence. Thank you.

20 MR. YILLAH: Your Honour, the Prosecution takes note of all the
21 comments that have emanated from all the Judges of this Chamber. But,
22 your Honour, quite importantly, the Prosecution, in carrying out its
23 task, fulfils the principles of objectivity, as enunciated under Article
24 74. We certainly do. That is why in making the disclosure, the first
25 priority was given to the items of exonerating evidence. Those were the

1 first items for which the Prosecution gave priority in carrying out -- in
2 meeting its disclosure obligations.

3 Secondly, your Honour, in terms of the analysis chart, as the
4 Prosecution has pointed out, it's not in dispute, the relevance of all
5 the evidence. I mean, we have sourced all the items, the 60 items that
6 we have disclosed as incriminating evidence, we have sourced each of them
7 to the statement of facts that we have adduced in the document containing
8 the charges which shows which area it goes to. I mean, that is one
9 separate analysis. But -- so in terms of the incriminating evidence, all
10 the items of evidence which are indicated on the Prosecution's list of
11 evidence are sourced to a statement of fact in the allegations contained
12 in the document containing the charges in order to help the
13 Prosecution -- in order to help the Prosecution, the Defence, and the
14 Chamber to determine to which statement of fact, to which crimes that any
15 item on the list of evidence is linked to. So that is one separate
16 analysis -- I mean, that's another means of analysis that assists the
17 Prosecution, the Defence, and the Chamber in terms of the relevance of
18 each and every item of evidence indicated in the Prosecution's list of
19 evidence.

20 With regard to the analysis chart for the incriminating evidence,
21 again, your Honour, at the risk of sounding repetitious, the Prosecution
22 would submit that in -- all the evidence contained in its list of
23 evidence are relevant evidence, because as can be seen from the DCC that
24 was filed under seal with the Chamber, all those items of evidence that
25 were disclosed to the Defence which are part of the list of evidence have

1 been sourced or have been linked to a statement of fact, whether it
2 regards crimes, whether it regards modes of liability or the constituent
3 elements of the offence, they have been sourced. Anywhere where such a
4 specific allegation has been made in the charging documents, these items
5 have been sourced to assist the Chamber, to assist the Prosecution, and
6 to assist the Defence in its preparation.

7 But with regard to the exonerating evidence, I mean, the
8 Prosecution would point out that in terms of meeting -- in response to
9 comments made earlier by your Honour Judge Kaul, in terms of meeting its
10 disclosure obligation, the Prosecution submits that in terms of
11 disclosing to the Defence and disclosing through the Registry, the
12 Prosecution submits that it has met its obligations under the terms of
13 those decisions insofar as its disclosure obligations are concerned. I
14 mean, what remains outstanding, and the Prosecution submits that in terms
15 of the breadth and extent of disclosing, according to the terms of that
16 decision, the filing of the originals, disclosing to the Registry,
17 disclosing to the Defence, we submit that we have met the terms of that
18 decision.

19 And the only outstanding issue that is now to be resolved is the
20 question of the analysis chart and the extent to which your Honours want
21 the Prosecution to prepare this analysis chart. We are submitting in
22 response to the comments that have been made and concerns that have been
23 expressed again that all the evidence listed or indicated on the list of
24 evidence are relevant to the Prosecution's charging document. All the
25 evidence indicated as exonerating evidence are exonerating to the

1 suspect. They help the suspect; they mitigate his guilt or they promote
2 his innocence, if you -- if I may say so.

3 But the question is, in terms of the decision, your Honour, I
4 believe -- I refer to paragraph 64 through 67, in particular paragraph 67
5 and 68 of that decision. I mean, in paragraph 67, the decision reads, in
6 part and in part: "In the Chamber's opinion, the most important factor
7 both in regarding the rights of the Defence and in enabling the Chamber
8 to exercise its function is not for the Prosecutor to disclose the
9 greatest volume of evidence but to disclose the evidence which is of true
10 relevance to the case, whether that evidence be incriminating or
11 exculpatory."

12 But in particular, the Prosecution draws your Honours' attention
13 to paragraph 68, but I will read in part and in part paragraph 69, which
14 says that:

15 "This analysis consists of presenting each piece of evidence
16 according to its relevance in relation to the constituent elements of
17 crimes presented by the Prosecutor in his application. Each piece of
18 evidence must be analysed page by page or, where required, paragraph by
19 paragraph relating each piece of information contained in that page or
20 paragraph with one or more of the constituent elements with one or more
21 of the crimes with which the person is charged, including the contextual
22 elements as well as the constituent elements of the modes of
23 participation in the offence with which the person is charged. The same
24 analysis shall apply mutatis mutandis to photographs, maps, et cetera."

25 And, your Honour, again, the sticking point, as the Prosecution

1 has pointed out, emanates solely from the wording of paragraph 67 in
2 which it says that the Prosecution need not disclose or make its analysis
3 of all the evidence but of evidence which is of true relevance to the
4 case. So, I mean, it's -- I understand your Honours' concerns to say --
5 I mean, as far as the professionalism of the Prosecution is concerned, we
6 have -- all evidence we have -- that's why all the incriminating evidence
7 that we disclosed were described as evidence on our list of evidence, and
8 if you look at -- we submit that in line with Rule 121 the charging
9 document is read together with the list of evidence.

10 But in terms of the analysis, it is not the -- in terms of the
11 professionalism of the Prosecution, the Prosecution would like to submit
12 that that is not what is in issue here, because as far as professionalism
13 is concerned, we have met the onerous terms, the most difficult terms of
14 this decision which is carrying out the disclosure to the Registry, to
15 the Defence, to the filing of the originals. We have met all those
16 obligations as far as the decision sets out.

17 The problem here is the analysis chart, your Honour, and this is
18 where the sticking point -- but the Prosecution now understands the
19 Chamber's opinion on this issue. I think that has been expressed loud
20 and clear by the Bench today. Thank you.

21 JUDGE DIARRA (interpretation): Thank you very much for your
22 response and for those assurances.

23 We would now like to know what is the status regarding the
24 disclosure of evidence covered by confidentiality pursuant to Article
25 54(3)(e) of the Statute? Has that evidence only been -- or does that

1 evidence only have the purpose of enabling the Prosecutor to generate new
2 evidence and has the Prosecutor obtained consent of the person providing
3 the evidence; and if not, what measures does the Prosecutor intend to
4 take to obtain consent?

5 MR. YILLAH: As will be observed, the Chamber has been requiring
6 the Prosecution to update the Chamber every two weeks, if I'm not
7 mistaken, so far in this case, and from the Prosecution's calculation, by
8 Tuesday of next week the Prosecution -- the two weeks will be up and the
9 Prosecution would update the Chamber regarding the full extent of the
10 amount of documents which are potentially exonerating evidence which are
11 covered by 54(3)(e) agreement and the full extent of the number of
12 documents which are Rule 77 documents and which are covered by 54(3)(e).

13 The Prosecution -- because the Chamber has been requesting an
14 update every two weeks, the Prosecution would undertake to make a filing
15 with the Chamber on Tuesday giving you the full extent of the number of
16 documents in both the CAR and DRC collection which has been completely
17 reviewed by the Prosecution, and the Prosecution would give you the full
18 number of documents covered by confidentiality agreement which are
19 potentially exonerating and those which are Rule 77. We believe that our
20 two weeks' time will be up on Tuesday next week and we'd make a full -- a
21 complete filing to the Chamber giving full information and disposition on
22 this issue.

23 JUDGE DIARRA (interpretation): Have you encountered any
24 difficulties with the current system for transmitting evidence through
25 the Registry?

1 MR. YILLAH: Your Honour, I -- it has not been easy because, I
2 mean, there's a slight departure in terms of the normal system of
3 disclosure -- or in terms of the system of disclosure in the other cases
4 in which some of us have been involved. But as we pointed out, it's very
5 difficult disclosing to the Registry. I think we expressed all our
6 concerns in our leave to appeal application which was rejected by the
7 Chamber. But so far we have -- we have -- we have disclosed -- we have
8 disclosed two ways, just to avoid any problem that would arise, we have
9 disclosed through the Registry and we have disclosed inter partes as
10 well.

11 THE INTERPRETER: Microphone, please.

12 (redacted)

13 (redacted)

14 (redacted)

15 (redacted)

16 (redacted)

17 (redacted)

18 (redacted)

19 (redacted)

20 (redacted)

21 (redacted)

22 (redacted)

23 (redacted)

24 (redacted)

25 (redacted)

1 (redacted)

2 (redacted)

3 (redacted)

4 (redacted)

5 JUDGE DIARRA (interpretation): Thank you.

6 And in connection to the 14 witnesses presented, you were to
7 contact nine of them to inform them that their names would be disclosed
8 to the Defence. You have also informed the Chamber - this was at the
9 first Status Conference on the 17th of September, 2008 - (redacted)
10 (redacted)
11 (redacted). What is the current status on this matter?

12 MR. YILLAH: Based on information in the possession of the
13 Prosecution, all those witnesses whose identities were required to be
14 disclosed, including those for whom it was difficult, they have been
15 contacted by the Prosecution.

16 JUDGE DIARRA (interpretation): And now my final question. Do
17 you have any questions regarding the holding of the upcoming Confirmation
18 Hearing? Thank you.

19 MR. YILLAH: Can you -- please, your Honour, can I ask --

20 JUDGE DIARRA (interpretation): I just asked whether you have
21 questions or concerns which you would like to put to us regarding the
22 holding of the upcoming Confirmation Hearing on the 4th of November.

23 MR. YILLAH: Your Honour, the Prosecution's position is that it
24 is -- the Prosecution is willing, able, and prepared -- and is preparing
25 towards meeting the Confirmation Hearings on the -- for the dates that

1 have been scheduled by the Chamber.

2 JUDGE DIARRA (interpretation): Thank you for your answer.

3 I'd like to thank the interpreters and all those present in the
4 room. The hearing is adjourned. We shall convene again at -- not 1.00,
5 excuse me, at 12.00.

6 The hearing adjourned at 11.32 a.m.

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