

1 International Criminal Court
2 Trial Chamber 1 - Courtroom 1
3 Presiding Judge Adrian Fulford, Judge Elisabeth Odio Benito and Judge René Blattman
4 Situation in the Democratic Republic of the Congo - ICC-01/04-01/06
5 In the case of The Prosecutor v. Thomas Lubanga Dyilo
6 Wednesday, 9 December 2009
7 (The hearing starts at 12.23 p.m.)
8 (Open session)

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

11 PRESIDING JUDGE FULFORD: Welcome to everyone. This is now the public part of
12 this status conference, which, looking at the time, is probably going to have to be divided
13 between this morning and this afternoon.

14 The first item on the agenda relates to the consequences of last night's decision
15 from the Appeals Chamber, and I think all we need say is, that the trial will recommence
16 at the beginning of January. We have hitherto provided the parties and the participants
17 with a date of 6 January. In fact, for administrative reasons, that will slip by one
18 day to 7 January, which I think is a Thursday.

19 Now, we then need to address the order in which evidence will be given starting
20 on the 7th. The proposal that we make is, that the two experts called as I recall it
21 by the Chamber will give evidence first. One of those has indicated that he is available
22 throughout the whole of January, so he should give evidence, as it were, second of the
23 two. And the witness who has indicated that she is -- or, rather, has only made herself
24 at the moment available for the first week in January should give evidence first. And
25 if we commence her evidence on the Thursday, I would hope that she would be completed

1 by the end of Friday. That's proposal one.

2 Proposal two is, that the three participating victims should come and give evidence
3 immediately afterwards; and the proposal that we have is, that they should be available
4 from 11 January onwards. Their evidence should then be followed by evidence called by
5 the accused; save that at a convenient point during the Defence evidence, Witness 15
6 will be called. The proposal that we make in that regard is that Witness 15 gives evidence
7 after Witness 16. Now, that's the proposed agenda.

8 Mr. Sachdeva, any observations on it from the point of view of the Prosecution?

9 MR SACHDEVA: None, Mr President.

10 PRESIDING JUDGE FULFORD: Maître Mabilille?

11 MS MABILLE: (Interpretation) We do not have any comments to make, Mr President,
12 but we are clear on the fact that -- maybe I did not quite grasp what you said. A witness
13 will come before the beginning of -- Witness 15 will come before the beginning of our
14 Defence case; is that correct?

15 PRESIDING JUDGE FULFORD: No. Following on from the discussion that we had in
16 the ex parte hearing, the proposal is, that Witness 15 will be called at some stage during
17 the course of the Defence evidence, effectively we will insert him at a convenient moment,
18 but after Witness 16 so as to give the Prosecution the opportunity of interviewing Witness
19 16, who will have been brought to The Hague and who will have given evidence in advance.
20 And after Witness 16, at a convenient point in time, the Prosecution will then recall
21 Witness 15, who will then be - to use the common law expression - cross-examined by both
22 parties.

23 MS MABILLE: (Interpretation) Thank you, Mr President. I have no comments to
24 add. I did not quite grasp the situation. Thank you.

25 PRESIDING JUDGE FULFORD: Mr. Walley?

1 MRWALLEYN: Yes. Thank you, Mr President. As such, we do not have any objections
2 to raise with regard to this order of appearance. I presume that we will then discuss
3 the consequences of yesterday's decision; and we are still mindful as to the issue of
4 the Defence disclosure question, which is important in terms of how we are going to plan
5 our work. But, of course, we are also waiting for a decision from the Chamber.

6 PRESIDING JUDGE FULFORD: Yes. You will be -- yes. In a moment. In a moment.
7 Mr. Walley, you will be receiving -- we will be handing down probably this afternoon
8 an oral decision in relation to that outstanding request. So, don't panic about that.

9 In relation to yesterday's decision, the view of the Bench is, that there is
10 nothing further to discuss, Mr. Walley. The Appeals Chamber has ruled on Regulation
11 55 and effectively on the application that was made by the victims; and as we see the
12 matter now, the trial simply proceeds on its original basis. Now, if you are going to
13 suggest some other result, well, we'll have to discuss as to whether that's appropriately
14 done orally or whether you are going to have to put in a further written filing, Mr.
15 Walley, if you're saying that there's some other course that needs to be adopted. Now,
16 can you in outline indicate what you had in mind by saying there needs to be further
17 discussion about Regulation 55?

18 MRWALLEYN: Yes. Thank you, Mr President. Mr President, your Honours, indeed,
19 we have studied the Appeals Chamber decision, which answered the first question by providing
20 an answer that we do not have a problem with, because, in our submissions, we did not
21 criticise the position of the other people involved on this issue. Now, with regard to
22 the second question, the Appeals Chamber did not provide a response because it thought
23 that such a response should be provided by the Trial Chamber on the basis of the case
24 file.

25 PRESIDING JUDGE FULFORD: I'm going to interrupt. If you have substantive

1 submissions on Regulation 55 to the effect that re-modification of the legal description
2 is still a live issue, in writing, please, in seven days. Friday of next week, 4.00 p.m.

3 MR WALLEYN: (Interpretation) We are in agreement, Mr President.

4 PRESIDING JUDGE FULFORD: Fine. This trial has to continue, and it is not going
5 to be indefinitely delayed while there are further debates that could cause huge delay.
6 But if you wish to pursue the matter further, you've got until Friday of next week.

7 MR WALLEYN: (Interpretation) Very well, Mr President.

8 PRESIDING JUDGE FULFORD: Thank you. Right. Defence witnesses and passports.
9 We've received a fairly full report from the Registry, which appears to give hopeful
10 indications, but is there anything else today which needs to be brought to our attention?

11 MS MABILLE: (Interpretation) This is a point of information, but I'm sure that
12 the VWU is aware of this. We have heard that on Radio Okapi it was indicated that passports
13 could now be issued in Kampala. This is an hour away from Bunia, and, of course, this
14 could really facilitate the process. This information was given to us yesterday.

15 PRESIDING JUDGE FULFORD: Well, I'm not going to ask for a response from the
16 Registry on that. It's been brought to your attention, and no doubt appropriate enquiries
17 can be made of the officials in the DRC to see whether or not that is a live and real
18 possibility.

19 Now, very shortly before we came into court we were provided with some questions
20 from the Registry in relation to the -- some of the arrangements to be made for the evidence
21 of participating victims. We can deal with them fairly shortly by way of indicating
22 preliminary conclusions on which the parties or the participants can make observations,
23 if they wish.

24 It seems to us, first of all, that there are certain core arrangements which
25 inevitably are going to be the same for participating victims as they have been for witnesses,

1 in the sense that there will need to be a familiarisation process. The victims will need
2 to be shown how the Court works and all that's going to be involved with giving evidence.
3 So, whilst it must be remembered that, of course, they're not witnesses called by a party,
4 but they are participating victims who are giving evidence with suitable adaptation,
5 the same procedures need to be followed.

6 We can see no objection to the legal guardian for two of the participating victims
7 being present during the familiarisation process, nor on the basis of the information
8 before us can we see any difficulties with the victims travelling and being accommodated
9 together, subject, of course, to any submissions.

10 Finally, given that they are to be giving evidence, we agree that they should
11 take the solemn undertaking at the commencement of their testimony. Now, those are our
12 proposals based on the request that's been made by the Registry. Any observations, Mr.
13 Sachdeva?

14 MR SACHDEVA: No, Mr President.

15 PRESIDING JUDGE FULFORD: Thank you. Maître Mabilille? Thank you. Yes, of
16 course.

17 MR KETA: (Interpretation) Yes. Thank you, Mr President, for allowing me to
18 address the Court. With regard to fundamental arrangements, the presence of lawyers is
19 a good idea, but I would also like there to be the presence of a psychologist, because
20 there will be two children amongst the victims who will come to testify.

21 PRESIDING JUDGE FULFORD: Well, I think the Victims and Witnesses Unit has someone
22 employed within the Unit who could easily fulfil that role. So, unless there is -- yes.
23 Certainly.

24 MR. WALTENBURG: Mr President, your Honours, maybe just for the protocol and
25 for due format, let me introduce my colleague, Assistant Legal Officer, Shaknoza Abdullaeva.

1 I don't believe you've seen her in Court before.

2 PRESIDING JUDGE FULFORD: We haven't. Thank you for that courtesy. And, Madam,
3 you're very welcome.

4 MR. WALTENBURG: And to the substantial issue, Mr President, your Honours, I
5 can confirm what you're saying; namely, that we would suggest to apply the same protocol
6 for a vulnerability assessment of the participating victims as we use for normal witnesses.
7 In other words, that our psychologist would do an assessment on the vulnerability when
8 the victims arrive here in The Hague.

9 Just one request for clarification, it would be the form in which the Bench
10 envisages the participating victims to give their evidence. Are they forcing to provide
11 a written statement before or would it be in the form of oral testimony? The reason why
12 I'm asking is, that this would impact on the type of familiarisation and whether they
13 would need to review any documents before appearing.

14 PRESIDING JUDGE FULFORD: Very helpful, Mr Waltenburg. Thank you. Mr. Walley, n,
15 could you help me, please, or Mr Keta? As I recall it, we have not made an order requesting
16 either a witness statement or a summary being provided by the three victims who are coming
17 to give evidence; is that right?

18 MR WALLEYN: (Interpretation) (Microphone not activated) ... (In English) Mr
19 President, so --

20 PRESIDING JUDGE FULFORD: Well, it may be we're both fallible, Mr. Walley, n,
21 but I have no memory of that order.

22 It looks as though, Mr Waltenburg, there will, therefore, be that inevitable
23 variation on the procedure, in that an essential part of the usual familiarisation process
24 is taking the individual through his or her witness statement. In this instance, there
25 will not be that document in the possession of the VWU to be dealt with, so that responsibility

1 is removed from your shoulders.

2 Yes, Mr Keta.

3 MR KETA: (Interpretation) Thank you, Mr President. Unless I am mistaken, by
4 way of written testimony I think that we have the transcript of the interviews that the
5 victims need to have before them in order to testify, and this has already been disclosed
6 to all the parties and participants; that is to say, the record of the interview.

7 PRESIDING JUDGE FULFORD: Well, that raises something of a new issue. In terms
8 of refreshing their memories before coming to give evidence, speaking for myself, it
9 would seem to me that reading the interviews beforehand, much in the same way as witnesses
10 have done, is likely to be unobjectionable. Having the interviews with them when they
11 give their evidence will, to an extent, be a new departure in that if that's happened
12 it's tended to be the exception rather than the rule.

13 Now, do I understand your submission to be that when they're in court giving
14 evidence, they should, all three of them, throughout their testimony, have their previous
15 interviews as documents with them on the table in front of them?

16 MR KETA: (Interpretation) Yes, indeed, Mr President. With regard to the two
17 children I would hope that they could have the documents before them. However, one of
18 them is an adult and I believe that that individual might not require such a document.
19 So amongst the three witnesses, victims, there are two who are children and I believe
20 that they should have the document before them and, I repeat, the adult does not need
21 to have it.

22 PRESIDING JUDGE FULFORD: That is helpful. The position really then is for two
23 who are children, as I understand your submission, you're saying it would assist them,
24 as children, in giving evidence if they have the documents with them but you're not pressing
25 for that in relation to the adult; is that a fair summary?

1 MR KETA: (Interpretation) That is precisely what I said, Mr President. Unless,
2 of course, the adult does request access to the document. I will put the question to
3 him.

4 PRESIDING JUDGE FULFORD: All right. Well, let's focus on the children for the
5 moment.

6 Mr Sachdeva.

7 MR SACHDEVA: Thank you, Mr President. If indeed it assists for the children
8 to provide testimony, then we would not oppose that request.

9 PRESIDING JUDGE FULFORD: Maître Mabilille.

10 MS MABILLE: (Interpretation) We are opposed to this. We have established a
11 number of rules since the outset, and we do not see why these witnesses who are, as Mr
12 Desalliers says, who are -- who require having the document before them. And I would
13 make the most of this opportunity to say to the Chamber that the idea that they be housed
14 all together whilst two of these witnesses have very intermingled or intermeshed testimony
15 does not seem to us to be a very good idea. I believe that when they start testifying
16 there should be no contact between them. This has also been a rule that we established
17 when there were connections between the various witnesses.

18 PRESIDING JUDGE FULFORD: Anything finally from the victims on this?

19 MR KETA: (Interpretation) We do not have much to add. We do not see that it
20 be a problem that we separate them when they come to testify.

21 PRESIDING JUDGE FULFORD: So you would not be opposed to them being housed
22 separately in The Hague?

23 MR KETA: (Interpretation) No.

24 PRESIDING JUDGE FULFORD: In light of Mr Keta's submission that he doesn't
25 anticipate any difficulty in the victims being accommodated separately in The Hague,

1 in our view it is probably safer and more desirable if they travel separately and are
2 accommodated separately in this country. As regards whether or not two of them in particular
3 should have their interviews with them when they give evidence, we will consider that
4 issue once they have been through the familiarisation process and once we're in a better
5 position to assess what will be the most useful circumstances for them to give their
6 evidence. We consider it's premature to deal with that at this stage.

7 Now, we've also been asked to give an assessment of the length of time which
8 various things are going to take during the course of the trial once it recommences in
9 January. We've given some guidance in relation to the two experts. We would hope that
10 their testimony will be completed either in the week which includes the 7th of January
11 or, at the latest, on Monday, the 11th. We would anticipate that the participating victims
12 should have concluded their testimony during the course of that week of 11 January and
13 then that means that the Defence evidence will commence approximately at the beginning
14 of the next week. From that point on, I'm afraid this is a matter of liaison between
15 the Victims and Witnesses Unit and the Defence because only the Defence can know approximately
16 how long each witness is going to take, and so there must be discussions outside of court
17 on that issue.

18 Now, are there any other matters prior to delivery of the oral decisions which
19 anybody wishes to raise? I think you had a point, Ms Samson, didn't you?

20 MS SAMSON: Yes, thank you, Mr President. The Prosecution is advising alerting
21 the Chamber to the fact that the Defence teams in the Katanga and Ngudjolo case have
22 made a request for access to not only the closed session transcripts for the four common
23 witnesses to which the Chamber is already aware and has dealt with, but also for the
24 attendant exhibits that were introduced during those closed session hearings. At present
25 the request of this Chamber and to Trial Chamber II has been to deal with the closed

1 session transcripts only. By natural extension, the request should include the exhibits
2 as well that were discussed during those sessions.

3 The Prosecution has no difficulty releasing such information, the exhibits,
4 to the Defence teams under the precise conditions that have been articulated and ordered
5 by the Trial Chamber in this case which are, of course, that the material would not be
6 disclosed or used in any manner other than in private or closed session.

7 What the Prosecution is suggesting is that the Trial Chamber II be also notified
8 and that the request, it be asked that the request extend to the exhibits. Once that
9 confirmation is received, then we can revert to this Chamber and ensure that all conditions
10 are met to release the exhibits as well.

11 PRESIDING JUDGE FULFORD: Do I understand you therefore to be saying, Ms Samson,
12 that you want orders from both chambers that the exhibits of the four common witnesses
13 can be exchanged between the Chambers but under conditions of strict confidentiality?

14 MS SAMSON: That's correct, your Honour.

15 PRESIDING JUDGE FULFORD: Does anyone oppose this application? No.

16 Ms Samson, was that a written decision of ours in which we indicated the precise
17 terms of confidentiality that should continue, that should attach to the transcripts?

18 MS SAMSON: No, your Honour, it wasn't. Initially, the Prosecution in this case
19 raised the matter with your Honours in May of 2009 and the Chamber's oral direction at
20 the time was that we first confirm and have approved conditions by the Trial Chamber
21 II, and once that was in place then we revert to this Chamber for release of the transcripts.
22 There is a written decision of Trial Chamber II, the reference of which I can give you,
23 and following which the Prosecution, by way of email, confirmed the conditions to your
24 Honours and by way of responding email your Honours released the closed session transcripts
25 to the Defence teams.

1 PRESIDING JUDGE FULFORD: Well, under identical circumstances and conditions,
2 the exhibits relevant to those witnesses can be released to Trial Chamber II.

3 MS SAMSON: Thank you very much, Mr President.

4 One further and related request is for the closed session transcripts of a witness
5 who is not common to both trials. It is Prosecution Witness 46, for whom the Defence
6 in the Katanga and Ngudjolo case have requested access to her closed session transcripts
7 in preparation for another Prosecution witness who is related to Ms Peduto, not by family
8 but by way of substance of her testimony, and the request will be the same.

9 The Prosecution has gone back to the United Nations to ensure that it has no
10 difficulties with the disclosure. The United Nations has come back to the Prosecution
11 and has indicated that in the main it has no difficulty but for two discrete areas of
12 her evidence which were elicited in closed session for which they do not agree to access
13 being granted to the Defence teams in Katanga. The Prosecution intends to provide this
14 Chamber with those details in an appropriate form so that it can be more easily digested.
15 The UN has requested that its conditions be given effect by Trial Chamber II and then,
16 once that happens, that the application can be made to your Honours to then release the
17 closed session transcripts and related exhibits of Witness 46's testimony to the Defence
18 team in the Katanga and Ngudjolo case.

19 PRESIDING JUDGE FULFORD: Now, what's of the time frame for this? I would imagine
20 the Defence in the Katanga case are going to want that material before the Christmas
21 break, aren't they?

22 MS SAMSON: To our understanding, your Honours, the request is for the information
23 to be provided as soon as possible. We note that the Prosecution witness in the Katanga
24 case to whom Witness 46's evidence relates is not intended to reappear for some time.
25 As that trial is set to resume on 26 January it's not likely that we will reach that

1 witness before at least some point in February.

2 PRESIDING JUDGE FULFORD: Because obviously we can't give a final answer to
3 this until we've seen the precise suggestions that are made. Well, Ms Samson, thank you
4 for alerting us to it. Provide us with the information as quickly as you can, but be
5 aware that in effect, as of close of play tomorrow, it is going to be difficult for this
6 Chamber to issue that kind of decision until we reconvene in January.

7 MS SAMSON: It's fully understood. Thank you very much.

8 PRESIDING JUDGE FULFORD: Thank you. Mr. Sachdeva.

9 MR SACHDEVA: Thank you, Mr President. Very briefly, the Defence have put in
10 an application for one of their witnesses to testify by video link and the Prosecution
11 would like to inform the Chamber that it does not oppose the application. We would have
12 liked to have seen more justification. However, given the unique and exceptional basis
13 of this application we do not oppose but we of course retain our right to respond to
14 other applications if they are made.

15 PRESIDING JUDGE FULFORD: That's extremely helpful, Mr Sachdeva. I imagine the
16 participating victims have got no observations on this. No.

17 Well, Maître Mabilille, it may be then if this application is unopposed, we will
18 be able to include it very shortly with the matters to be dealt with after lunch. So
19 we'll think about that over the luncheon adjournment and at least indicate whether or
20 not we're going to be able to deal with it this afternoon.

21 What we will do therefore is, given that it is now nearly 1 o'clock, I'm afraid
22 that we haven't sat for very long in public this morning but we have two substantive
23 oral decisions which will take a little bit of time to deliver, so we will do that. We
24 will deliver those at half past 2. Just before we rise, I want to indicate one or two
25 matters, if I can.

1 First of all, as I've just indicated to Ms Samson, there is a problem with
2 contacting the Bench for anything other than emergencies on Friday of this week because
3 there is a very substantial movement of offices that's planned for Friday, Saturday and
4 Sunday with our Chamber in part moving floors, which means that the judges have been
5 banned from the building, in effect. So emergencies, yes. Anything other than emergencies,
6 I'm afraid no.

7 In a similar vein, during the course of the vacation, of course the Judges will
8 deal with all matters of real urgency, but we wish to make it clear that we do intend
9 to take a vacation, and there is no point in the parties and the participants putting
10 in filings expecting early responses to matters which are essentially routine. I'm afraid
11 if you do that, you are going to be disappointed.

12 Finally, during the course of its investigations, we've been told that the
13 Prosecution's investigators have sometimes referred to witnesses as being either
14 Prosecution or Defence witnesses. We don't wish now to investigate whether or not that
15 in fact has happened. If it's happened, we would encourage within the DRC for that not
16 to happen, for witnesses simply to be referred to as witnesses of the Court rather than
17 this Prosecution and Defence.

18 Mid-sentence, it now occurs to me that in fact this may not have been the Prosecution
19 who was doing this, it may have been the Registry, when making arrangements for witnesses
20 to come to the Court. But if anyone, be it Registry, Prosecution, or Defence, please
21 avoid if possible indicating to anyone within the DRC as to whether someone is a Prosecution
22 or a Defence witness. It is much better if they are simply known as witnesses of the
23 Court for obvious security reasons.

24 Thank you all very much. We will sit again to deliver our -- ah, yes, Mr Walley.

25 MR WALLEYN: (Interpretation) Just a practical point, Mr President. We are going

1 to submit an observation on Friday, but I wonder whether it would not be in the interests
2 of fair justice that the possible responses to those observations should be made before
3 the resumption of proceedings in January and not following the normal time limits prescribed.
4 Just a suggestion.

5 (Trial Chamber confers)

6 PRESIDING JUDGE FULFORD: Mr Sachdeva, I can see real problems with this because
7 we have given -- no, Mr Sachdeva, we've given until Friday of next week, which is the
8 18th. The judicial vacation commences on the 14th. Are you going to be wanting to put
9 in your response by 4 p.m. on Friday, 25 December?

10 MR SACHDEVA: Mr President, we would prefer not to, but if we have to then we
11 would accommodate the scheduling.

12 PRESIDING JUDGE FULFORD: Yes. I mean the difficulty is I don't know what
13 Mr Walleyne has in mind but, if it is a complex and subtle suggestion arising out of the
14 Appeals Chamber's decision, it may require more than a hasty written on the back of a
15 postage stamp response and I imagine the Defence will not be very enthusiastic about
16 having to make their response in two or three days.

17 MR BIJU-DUVAL: (Interpretation) Yes, Mr President, we know that the issues
18 in the decision of the Appeals Court will have an impact on the conduct of the trial.
19 Mr Walleyne wants to submit observations on the consequences of yesterday's decision.
20 It seems to us normal that the issues related to this problem should be settled as soon
21 as possible.

22 What we would suggest is that the deadline within which Mr Walleyne is supposed
23 to make this submission should be reduced drastically so that he should be asked to submit
24 those observations on Friday; that is in a few days' time. This is an urgent matter and
25 the Defence will be in a position to respond very quickly. We are going to do that, but

1 on condition of course that the deadlines be reduced drastically in particular for the
2 application of Mr Walley. n.

3 PRESIDING JUDGE FULFORD: Right, Mr Walley. n. I'm going to say your submissions,
4 please, by 4 p.m. on Tuesday, 15 December, with Prosecution and Defence joint submissions
5 by 4 p.m. on Tuesday, 22 December. And we will not be expecting a reply thereafter from
6 the participating victims, so you must get across all your points, Mr Walley. n, by the
7 time that I've just designated.

8 Yes, madam.

9 MS YAZJI: Your Honour, on behalf of Paolina Massidda, the principal counsel
10 is not here at the seat of the Court and she advised us to inform the Court that, in
11 the event that this would happen, the earliest she could have a written filing would
12 be 18 December.

13 PRESIDING JUDGE FULFORD: I'm sorry, the OPCV is going to have to make alternative
14 arrangements in order to deal with this so that the trial date is not unnecessarily disturbed.
15 I'm afraid somebody other than Ms Massidda is going to have to provide the response by
16 the date we've given, but thank you for the intervention and we understand your concern.

17 MR WALLEYN: (Interpretation) Thursday, not the 21st? Did you say Thursday 22nd?
18 I think Thursday is not the 22nd.

19 PRESIDING JUDGE FULFORD: No, I said Tuesday the 22nd.

20 MR WALLEYN: (Interpretation) Tuesday. That was an incorrect translation.

21 MR SACHDEVA: I'm sorry, Mr President.

22 PRESIDING JUDGE FULFORD: You're not going to let us go, Mr Sachdeva, are you?

23 MR SACHDEVA: Mr President, I'm sorry, and I hope it's not too trivial, but
24 during the Defence case do we still observe the same timetable for the Court sittings?
25 In other words, do we not sit on Monday and start on Tuesday?

1 PRESIDING JUDGE FULFORD: In all probability, the only variation on this is
2 that by the time we reach the end of January there is going to be some court sharing.
3 The final arrangements for that haven't yet been worked out, but the likelihood is that
4 we will sit -- we will attempt to sit the same days that we sat during the Prosecution
5 case, yes.

6 MR SACHDEVA: Thank you, Mr President.

7 PRESIDING JUDGE FULFORD: Good. Right, we sit again at 2.35.

8 THE COURT USHER: All rise.

9 (Luncheon recess taken at 1.07 p.m.)

10 (Upon resuming at 2.37 p.m.)

11 THE COURT USHER: All rise. The International Criminal Court is now in session.
12 Please be seated.

13 PRESIDING JUDGE FULFORD: This oral decision relates to two linked issues: First,
14 the request by the legal representative of four victims to access certain documents within
15 the possession of the Prosecution (document 2191 with addendum 2194); and second, the
16 notification of the Defence list of witness and summaries of evidence to the OPCV and
17 the legal representatives.

18 Addressing the request by four victims first, these four applicants are
19 represented by the Office of Public Counsel for victims ("OPCV"). Their joint application
20 has been filed ex parte, available only to the OPCV and the Prosecution because it is
21 suggested "it concerns specific confidential information exchanged between the two offices
22 in relation to victims enjoying the dual status who have been admitted within the ICCPP"
23 (paragraph 3 of 2191; paragraph 4 of 2194).

24 The Prosecution, in an email sent on 2 December 2009 in response to an enquiry
25 to Chambers about whether documents 2191, 2194 and 2195 can be notified to the Defence,

1 have indicated that they wish to maintain their ex parte classification since they
2 demonstrate that the Prosecution has met with two witnesses who are part of the underlying
3 subject matter of this application.

4 The Chamber understands by this response that the Prosecution does not wish
5 to reveal its tactics to the Defence; indeed, during a later communication the Prosecution
6 clarified that they do not wish to reveal that they are interviewing members of the families
7 of the victims and witnesses. However, the Prosecution agrees that the Defence should
8 be informed of the issue in a general way - for instance by notification to the Defence
9 of redacted versions of the filings - without revealing this particular tactical
10 information.

11 For its part, the OPCV has stated that it does not object to notification to
12 the Defence. The legitimacy of this stance by the Prosecution is an issue to which we
13 will briefly return at the end of this decision.

14 Turning to the substantive issue, recent discussions between the two offices
15 have focussed on two dual status individuals and it has been revealed that the Prosecution
16 is in possession of recordings of interviews with several family members of victims
17 represented by the OPCV, which are being transcribed.

18 Originally, on 19 November 2009 (document 2191) the OPCV maintained that these
19 recordings had been disclosed by the Defence to the Prosecution, but in an addendum to
20 the request dated 23 November 2009 (document 2194), the OPCV set out that it had been
21 informed that the relevant material entirely originates from the Prosecution and that
22 it has not been disclosed or otherwise provided by the Defence. Instead, this material
23 has come into existence as part of the Prosecution's further investigations following
24 certain Defence disclosure.

25 The Prosecution on 26 November 2009 (document 2195) explained that it had carried

1 out investigations in anticipation of the evidence to be called by the Defence and it
2 had recorded (audio-only) certain interviews with witnesses. The transcripts of those
3 interviews will be completed by mid-December 2009.

4 However, on 10 November 2009, the OPCV (by email communication to the Prosecution)
5 requested disclosure of the recordings and copies of the transcripts as and when they
6 become available.

7 The OPCV suggests that the Prosecution is obliged by the Chamber's decision
8 on victims' participation (document 1119) on 18 January 2008 at paragraph 111 to make
9 disclosure to the legal representatives of victims of any material affecting the personal
10 interest of relevant victims irrespective of how the material came into the Prosecution's
11 possession. Paragraph 11 contains the following:

12
13 111. Turning to inspection, the Trial Chamber agrees with the prosecution that
14 inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution
15 and the defence. However, as a matter of general principle, and in order to give effect
16 to the rights accorded to victims under Article 68(3) of the Statute, the prosecution
17 shall, upon request by the victims' legal representatives, provide individual victims
18 who have been granted the right to participate with any materials within the possession
19 of the prosecution that are relevant to the personal interests of victims which the Chamber
20 has permitted to be investigated during the proceedings, and which have been identified
21 with precision by the victims in writing. The participating victims should also be provided
22 with the public evidence listed in the prosecution's annexes 1 and 2 to its "summary
23 of presentation of evidence" subject to a demonstration of relevance to their personal
24 interests as stated above. If part of a document in this context is confidential, the
25 document should be made available in a suitably redacted form.

1 The OPCV also relies on the Chamber's decision on 21 January 2009, in which
2 it set out its approach to the issue of disclosure of victims' applications to participate
3 to the Defence:

4 "11. The critical tension revealed by this application is between the right
5 of victims to appropriate prospective measures and the right of the accused to a fair
6 trial and, in the particular context of this application, to the exculpatory material
7 in the possession of the Prosecution and the VPRS. Whilst the Chamber will ensure that
8 Thomas Lubanga Dyilo's fair-trial rights are fully protected, establishing the most
9 appropriate means of implementing those rights must take into account the position and
10 rights of the participating victims who are also witnesses.

11 12. In all the circumstances, balancing and applying these ... principles,
12 the regime established by this Chamber and the Appeals Chamber to effect disclosure and
13 resolve related issues must be followed for those individuals who have dual status. The
14 Prosecution has indicated that it treats this group of witnesses in the same way as all
15 other witnesses in the case, particularly as it has in its possession the non-redacted
16 versions of the application forms, together with - it is to be inferred - any supporting
17 documents. It has further indicated that these applications, in its view, should be
18 considered in the same way as statements of the witnesses, and that they are covered
19 by Rule 76(1) of the Rules. Therefore, the Prosecution is in a position to disclose all
20 exculpatory material relevant to this application and it is the body which is subject
21 to positive disclosure obligations.

22 13. Accordingly, in the view of the Chamber, the Prosecution must apply the
23 same approach to this material as it does to any other exculpatory material in its possession.
24 The only caveat is that prior to disclosure of information relevant to these particular
25 witnesses who hold dual status, the views of their individual representatives must be

1 sought, and if objections to disclosure are raised, the matter should be brought immediately
2 to the attention of the Chamber by way of a filing, for determination. It is inappropriate
3 to order the Registry to re-classify the applications of the victims as described in
4 paragraph 8 above. For the reasons set out hitherto, this issue is properly resolved
5 by applying the approach to disclosure which has been outlined in this decision."

6 The Prosecution's position is that it is prepared in principle to disclose the
7 interview records to the OPCV or the legal representatives, whenever their clients' personal
8 interests are engaged by the interviews. The Prosecution's sole concern is that of timing
9 because at present the Defence has not disclosed its witness list and the witness summaries
10 to the OPCV or the legal representatives, which formed the basis of the investigations
11 and the interviews. The Prosecution does not wish to pre-empt the outcome of the Chamber's
12 pending decision on the extent to which the Defence should disclose its witness list
13 and the summaries, and it is concerned that disclosure of this specific information at
14 this stage would trespass on a matter that the Chamber has yet to resolve.

15 It follows, therefore, that in reality this is not a contentious issue, and
16 disclosure depends on the Chamber's decision on notification of the Defence list of witnesses
17 and summaries of evidence to the OPCV and the legal representatives, to which the Chamber
18 now turns.

19 On 17 September 2009 during a status conference the legal representatives of
20 victims raised the issue that they had not been given notice of the evidence to be introduced
21 by the Defence, and in particular the list of the witnesses and summaries of their evidence,
22 already communicated to the Chamber and the Prosecution (T-120).

23 The Chamber asked the Defence and the legal representatives of victims to attempt
24 to resolve the issue *inter partes*, but failing agreement to file submissions by 25 September
25 2009. On 24 September 2009 the legal representatives of victims sent a joint email to

1 the Chamber requesting an extension to 2 October 2009, which the Chamber granted. However,
 2 on that date the legal representatives revealed that agreement could not be reached and
 3 on 5 October 2009 the Chamber set a deadline of 9 October 2009 for their submissions.

4 In document 2154, dated 9 October 2009, the legal representatives particularly
 5 relied on the Chamber's decision on victims' participation (18 January 2008, document 1119)
 6 and the subsequent decision of the Appeals Chamber (11 July 2009, document 1432). Notably,
 7 the OPCV relied on paragraph 41 of the decision on disclosure by the Defence (20 March
 8 2008, document 1235) by which the accused shall:

9 "Provide the Chamber, the Prosecution and the participants with any evidence
 10 intended for use by the Defence, other than the oral testimony of a witness, three days
 11 in advance of its presentation." (Paragraph 41(e)).

12 This approach was, in essence, replicated by the Chamber in an oral ruling on
 13 24 June 2009 as regards the documents the Defence intended to use during cross-examination
 14 of the Prosecution witnesses (T-198, page 69, line 8 and following). However, as the
 15 OPCV correctly observes, these decisions did not address the issue of whether or not
 16 the Defence is obliged to communicate its list of witnesses, their statements or summaries
 17 thereof. Counsel reminds the Chamber that by Regulation 54(f) of the regulations of the
 18 Court it may issue any order in the interests of justice for the purposes of the proceedings
 19 on "... the production and disclosure of the statements of the witnesses on which the
 20 participants propose to rely."

21 The OPCV suggests that the Defence has agreed only to communicate, "... certain
 22 information to those legal representatives chosen by it." This offer is limited to those
 23 who have dual status. The OPCV regrets that this will "... *de facto*, deny the right to
 24 participate in the procedure to some of the victims." Counsel suggests that this ignores
 25 the general issues concerning the wider group of participating victims that may arise.

1 Additionally, the OPCV submits it is not for the Defence to assess what are the interests
2 of victims.

3 As a side issue, the OPCV complains that the three-day rule for disclosure of
4 Defence information means that they will be unable to comply with the requirement of
5 submitting discrete written applications seven days in advance of their questioning (T-110,
6 page 16, line 23 to page 17, line 13 and T-119, page 1, line 10 to page 2, line 23. See
7 also filing 1659, a joint filing by the legal representatives of victims in which a request
8 was advanced to vary the way in which applications should be made to participate by way
9 of questioning; the request was that this should be seven rather than eight days before
10 the relevant testimony. This was accepted by the Chamber at the status conference on
11 5 February 2009 (T-119).

12 The Defence on 13 October 2009 (document 2158) filed its response. It submits
13 that it should not be subjected to the same disclosure regime as the Prosecution, and
14 it argues that this approach is matched by the Rome Statute framework and the jurisprudence
15 of the Chamber. On 8 April 2009 (T-167), the Court set out the following (page 10, line
16 10):

17 "In our judgment, for those victims who are participating (as regards an area
18 of evidence or an issue), Regulation 52 and the jurisprudence set out above sufficiently
19 caters for their legitimate disclosure requirements. As rehearsed herein, the Prosecution
20 is to provide the Chamber, the Defence, and the participants with "a list of any documents
21 that, as far as the Prosecution is concerned, are going to arise during the course of
22 the evidence of those witnesses together with any documents that the Prosecution is going
23 to introduce at the Bar table" at least seven days before a witness is expected to testify.

24 "The Chamber immediately observes that for victims who are participating as
25 regards a particular piece of evidence or issue, if those victims do not have access

1 to a relevant document, this should be provided to the participant by the Prosecution
2 (subject to any protection, privacy, or confidentiality issues). Furthermore, it is provided
3 that the victims' representatives are to receive advanced notice of the materials on
4 which the Defence intends to rely (three days in advance). [...] It is important, therefore,
5 that victims apply to the Chamber in advance if they wish to participate on a particular
6 issue or area of evidence, and if the application is granted in advance, the Defence
7 will know which of them is entitled to receive the materials that are to be relied on.
8 [...] For victims who have not been granted leave to participate as regards a particular
9 area of evidence or issue, we are unpersuaded that there should be any extension to the
10 basic approach set out above, namely that the parties do not bear a responsibility of
11 disclosure to them. Essentially, when evidence or other material does not engage the
12 interests of victims, they are in the same position as any member of the public who is
13 interested in these proceedings, and they will have access to such part of the court's
14 record as is already in the public domain. It is to be stressed that the materials they
15 will have received already from the Prosecution, as described above, means they are
16 well-placed to decide whether or not they have an interest in the evidence or issue.
17 However, common courtesy should encourage the Prosecution and the Defence to provide
18 non-sensitive information whenever this does not raise any significant security or
19 confidentiality issue and it is not unduly onerous to the lawyers who are in court on
20 a daily basis following these proceedings on behalf of the victims. The Chamber notes
21 that the Prosecution, at paragraph 11 of its submissions set out: "Finally, the Prosecution
22 submits that although the victims' legal representatives have to date been provided with
23 materials listed on the Prosecution's weekly list of documents, this has been done as
24 a courtesy. In the Prosecution's submission, this courtesy is not intended to be interpreted
25 as recognition of a legal right to access the documents nor as establishing a practice

1 that the Prosecution will necessarily follow in other cases."

2 The Chamber also emphasises this is a question of professional courtesy and not in any
3 other sense an obligation to the extent that this practice goes beyond, first, the order
4 made on the 16th of January, 2009 [...] that the Prosecution provides the Court, the Defence,
5 and the participants with "a list of any documents that, as far as the Prosecution is
6 concerned, are going to arise during the course of the evidence of those witnesses together
7 with any documents that the Prosecution is going to introduce at the Bar table" at least
8 seven days before a witness is expected to testify, and second, paragraph 31 of the decision
9 of the 2nd of June, 2008 (document 1368, see above) which obliges the Prosecution to
10 disclose to the participating victims those documents which are relevant to their interests
11 on a given issue or area of evidence. As rehearsed above, the applicants argue that it
12 is only when they have had prior notice of the relevant evidence or other material or
13 non-public filings that they are able to assess whether they engage their interests.
14 Although this submission carries a certain superficial force, on analysis it involves
15 a significant misunderstanding of the basic approach that has been laid down by this
16 Chamber and the Appeals Chamber. It is for the victims to establish their interest in
17 the area of evidence or issue prior to disclosure to them of non-public material and
18 not the other way around. There are profound confidentiality and security considerations
19 that mean that it would be inappropriate to give a potentially unlimited number of victims
20 the right of disclosure of confidential material on a purely speculative basis, namely
21 that it may reveal something in which they are interested.

22 In each instance, there is a proper reason for its non-public designation, and if victims
23 are granted access to material in the possession of either party (regardless of whether
24 it is proposed to use it at trial) for the sole reason of enabling them to decide whether
25 or not it may contain material in which they are interested, it will generally become

1 impossible to control the extent to which confidential material is disseminated. Any
2 victim from a potential pool of hundreds or thousands could suggest that they should
3 receive the non-public information so that they can investigate whether it engages their
4 interests. Accordingly, the essential prerequisite of disclosure of confidential evidence
5 or other material or notification of non-public filings to victims is that the evidence
6 or issue relates to the interests of a particular individual who seeks to participate.
7 With evidence or other material, this approach is correct even if it is proposed to utilise
8 the documentation in due course in court, because, first, it frequently happens that
9 in the event it is not used, and, second, the period between disclosure and use of the
10 material in court can, itself, create material security risks (page 14, line 6).

11 The defence also observes that even participating victims do not have an unfettered
12 right to examine defence witnesses, but that this opportunity is dependent on permission
13 from the Chamber, which involves an assessment of their personal interests and ensuring
14 the rights of the accused. The defence resists an order for defence disclosure to anonymous
15 victims, and it is contended that the personal interests of the victims who wish to participate
16 can only be evaluated if their identities are known.

17 The defence advocates a restrictive or tightly controlled implementation of
18 the opportunity for victims to question Defence witnesses. It argues the concept of
19 "personal interests" should not be broadly interpreted in these circumstances. The
20 personal interests of individual victims must be distinguished from those matters that
21 are simply of common concern, and it warns that there is a real risk that the defence
22 witnesses could face multiple accusers. Accordingly, the judges are urged to exercise
23 great caution in the ambit of questioning by victims.

24 The Defence reminds the Chamber that anonymity may often constitute a bar on
25 participation, and it relies on paragraph 131 of the decision on victims' participation

1 as follows: "However, the Trial Chamber is of the view that extreme care must be exercised
2 before permitting the participation of anonymous victims, particularly in relation to
3 the rights of the accused. While the safety and security of victims is a central
4 responsibility of the Court, their participation in the proceedings cannot be allowed
5 to undermine the fundamental guarantee of a fair trial. The greater the extent and the
6 significance of the proposed participation, the more likely it will be that the Chamber
7 will require the victim to identify himself or herself."

8 Additionally, the defence submits that it is necessary to avoid any unnecessary
9 risk of pressure or threats being applied to its witnesses; and that to assist this objective,
10 the defence should know precisely which individuals are receiving information about its
11 witnesses. It points out that the victims' activities are not monitored and that Defence
12 witnesses do not enjoy protective measures.

13 In all the circumstances, the defence opposes any questioning of Defence witnesses
14 on matters of general concern by victim (which should be undertaken, it suggests, by
15 the prosecution), and the Chamber is reminded of paragraph 96 of its decision on victims'
16 participation (document 1119):

17 "A general interest in the outcome of the case or in the issues or evidence
18 the Chamber will be considering at that stage is likely to be insufficient. These
19 applications will necessarily be examined on a case-by-case basis, since the question
20 of whether 'personal interests' are affected is necessarily fact-dependent. However,
21 involvement in or presence at a particular incident which the Chamber is considering,
22 or if the victim has suffered identifiable harm from that incident, are examples of the
23 factors that the Chamber will be looking for prior to granting the right to participate
24 at any particular stage in the case."

25 On the basis of these arguments, the Defence submits that it is well placed

1 to identify those victims whose interests are affected by the evidence that is to be
2 given, not least as revealed in the applications to participate, and it cites examples
3 of participating victims whose personal interests are engaged by particular defence
4 witnesses.

5 The principles underpinning this issue were largely determined by previous
6 decisions of this Chamber. Although the Chamber has accepted that the Rome Statute framework
7 contains "... important provisions ... which define the obligations that can be imposed
8 on the defence in order to secure a fair and expeditious trial and to assist the Chamber
9 in its determination of the truth" (see Document 1235, paragraph 28), it is of note that
10 the Statute and the Rules of Procedure and Evidence do not expressly provide for disclosure
11 by the Defence to the legal representatives of victims. Any disclosure obligations imposed
12 on the Defence in these circumstances merit a particularly cautious approach.

13 On 8 April 2009 (T-167), the Chamber determined that disclosure of confidential
14 documents was dependent on an antecedent decision granting leave to participate as regards
15 a particular area of evidence or issue; although, as the Chamber acknowledged in that
16 earlier decision, the victims' argument is that they may be unable to assess whether
17 the evidence engages their interests until they have had prior notice of it. Under the
18 approach laid down by the Chamber and the Appeals Chamber, it is for victims to establish
19 their interest in the area of evidence or issue prior to disclosure to them of non-public
20 material and not the other way round.

21 In the context of non-public prosecution material, the Chamber observed there
22 are profound confidentiality and security considerations that mean it would be inappropriate
23 to give a potentially unlimited number of victims the right of access to confidential
24 material on a purely speculative basis.

25 In the estimation of the Chamber, broadly similar considerations apply to defence

1 evidence, particularly for civilian witnesses from the DRC. The security implications
2 for them if their identities - together with an outline of the content of their
3 evidence - become known are potentially very grave. If disclosure extends beyond the
4 circumscribed and identified group of victims whose personal interests have been
5 demonstrated to be involved, there is a substantially enhanced risk that attempts will
6 be made to interfere with their testimony.

7 Given the present security situation in the relevant parts of the Democratic
8 Republic of the Congo, the Court cannot assume that the witnesses will be adequately
9 protected by the civilian or military authorities; nor is it reasonable or proportionate
10 to put them in the position of being placed under the protection of the ICCPP with the
11 considerable disruption to their lives that may well be involved in that step. Furthermore,
12 even within the protection programme, they will be exposed to an enhanced level of risk.
13 Under these circumstances, disclosure by the Defence may undermine the witnesses' readiness
14 to testify at trial, thereby adversely affecting the Defence right to present evidence
15 in this trial.

16 Therefore, the Chamber is of the view that disclosure of the defence list of
17 witnesses and summaries of their evidence - or their statements - will depend on a decision
18 by the Chamber, first, that the relevant victims' personal interests are affected and,
19 second, that it is appropriate to impose these disclosure obligations against the backdrop
20 of the rights of the accused.

21 In order to ensure that the proceedings do not become bedevilled by applications
22 to adjourn, because it is only revealed when the witnesses are giving evidence that the
23 personal interests of particular victims are involved, the Defence are to consider the
24 position of each of the participating victims and to disclose the relevant material if
25 there is a *prima facie* basis for concluding that any of them may be granted leave to

1 question one or more witnesses. The Chamber will then be in a position to grant or refuse
2 applications to put questions to witnesses and to make any necessary additional disclosure
3 orders.

4 It is unnecessary for the Chamber to rule on a number of matters that have been
5 raised in these applications. First, if it is to be maintained in argument that an
6 interpretation of the expression "personal interests" and the right of participating
7 victims to question witnesses are to be more restrictively interpreted with Defence
8 witnesses than has been the position with Prosecution witnesses, this argument needs
9 to be addressed in a filing by the Defence in order to enable the OPCV and the Prosecution
10 to exercise their right to respond.

11 Second, similarly, if it is to be maintained, the participating victims cannot
12 put any questions of a general nature to Defence witnesses, this also needs to be addressed
13 in a separate filing.

14 Third, there is now no issue over disclosure of the recordings of the interviews
15 with several family members of victims represented by members of the OPCV. None of the
16 material came from the Defence; and although in principle it falls to be disclosed in
17 accordance with the existing approach set out by the Chamber, since the four relevant
18 victims have not demonstrated that their personal interests are engaged by any of the
19 Defence witnesses, they are not entitled to disclosure of the recordings of the interviews.
20 The Defence must keep its proposed evidence and the position of these victims under review
21 to ensure that no material change of circumstances alters this conclusion.

22 Although the Chamber observes that the Prosecution's obligations to effect
23 disclosure under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and
24 Evidence cannot be avoided because its tactics will coincidentally and unavoidably be
25 revealed, in the present circumstances it is otiose to order disclosure to the Defence

1 of filings 2194 and 2195, given the conclusions set out above. This is now a redundant
 2 issue, which was originally raised by the Chamber, as set out at the beginning of this
 3 ruling.

4 Finally, although the OPCV correctly indicates that it may not be able in these
 5 circumstances to comply with the seven-day rule for providing written applications to
 6 question a witness called by a party, this requirement is only engaged at the moment
 7 when counsel has sufficient information to anticipate that an application is necessary.

8 The second oral decision is markedly shorter. This oral decision concerns the
 9 Defence application to admit 15 documents into evidence that were used during questioning
 10 by the Defence (Document 2177).

11 On 28 October 2009, the Defence applied to admit 15 documents into evidence
 12 in their entirety. Their MFI numbers are: 00111 (a video excerpt EVD-OTP-0416,
 13 23.12.00-32.01.00, put to Witness 2); 00112 (a notice that was handwritten by Witness
 14 2 in the course of questioning by the Defence); 00114 (a Statute of the organisation
 15 PUSIC (*Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo*), which was put to
 16 Witness 12); 00115 (a letter written by PUSIC, which was put to Witness 12); 00131 (a
 17 note that was handwritten by Witness 157 in the course of questioning by the Defence);
 18 00132 (a Registry of students, put to Witness 157); 00133 (a list of students of a primary
 19 school, put to Witness 157); 00134 (a Palmares) a list of students with their respective
 20 tests results, put to Witness 157); 00139 (a photograph, put to Witness 89); 00140 (a
 21 photograph, put to Witness 89); 00141 (a photograph, put to Witness 89); 00142 (a photograph,
 22 put to Witness 89); 00143 (a demobilisation card, put to Witness 89); 00144 (an attestation
 23 of demobilisation of a minor from an armed group); and 00145 (a certificate of family
 24 reunion put to Witness 89).

25 On 18 November 2009, the prosecution (Document 2188) indicated that it did not

1 oppose the application for 12 of the documents.

2 For the outstanding three items (00132, 00133 and 00134) which are school registers
3 shown to Witness 157 during his evidence, the Prosecution opposes the application. The
4 Prosecution resisted the introduction of this material at the relevant time and indicated
5 at that stage that it would object to any later request to introduce them into evidence.

6 In essence, the Prosecution argues that the witness is unable to verify the
7 authenticity of these registers. It accepts they are *prima facie* relevant to the current
8 proceedings, but only if they reliably record information on the witness's date of birth
9 and schooling. The Prosecution suggests that the witness has not established that they
10 have any probative value: there is no evidence as to who prepared the documents; how
11 they were prepared; who provided the information in them; or where or how they were stored.
12 In the absence of this information, the Prosecution submits it is impossible to evaluate
13 these documents or their reliability. The Prosecution does not accept that the documents
14 are self-evidently what they purport to be, and by way of an example they suggest that
15 in at least one instance they may have been tampered with. In all the circumstances,
16 the Prosecution submits that their potential prejudicial effect outweighs any probative
17 value and that it would be unfair to admit them.

18 On 4 December 2009, the Defence sought leave to reply to the Prosecution's response
19 (document 2200). The Chamber authorised the request on the same day (document 2202).
20 The Defence thereafter submitted in document 2204 on 7 December 2009 that: (i) the documents
21 appear to be reliable given the presence of seals and signatures on 00132, 00133 and
22 00134; (ii) they contain sufficient information to enable a proper investigation of their
23 reliability; and (iii) the Prosecution did not object, on previous occasions, when documents
24 of a like nature were admitted into evidence.

25 These documents are potentially important as assisting on the age of the witness

1 at the relevant time, given certain discrepancies as to his date of birth and his age
2 during relevant events.

3 When this issue arose during the evidence of Witness 157, the Chamber ruled
4 as follows:

5 "In our view, unequivocally, it is right for the Defence, really in accordance
6 with the procedure that's been adopted with other witnesses in like circumstances, to
7 provide ... this witness, with an opportunity of commenting on the apparent appearance
8 of the witness's name in a relevant register for a relevant period. The fact that the
9 witness didn't himself compile the document in our view simply isn't determinative of
10 the issue. It is whether it is a document that may assist us in assessing, as we understand
11 the position to be, whether this witness at a particular date, at a particular place,
12 attended relevant educational establishments." (T-188, page 60).

13 The documents, *prima facie*, appear to be the registers from schools covering
14 at least some of the institutions and the time-periods the Court is concerned with for
15 this witness. Unless they are forgeries, they appear to speak for themselves (i.e. they
16 are records of students who attended at a particular time) and, if genuine, their evidential
17 value is unlikely to be improved if they are produced in court by someone from the relevant
18 school. Given the time that has elapsed since they were compiled, the individuals who
19 originally made the particular entries relied on are unlikely to remember precisely who
20 provided the details recorded in the registers, what was said at the time, whether a
21 mistake may have been made in recording the information, or whether there may have been
22 a reason for providing incorrect details.

23 Whilst it is quite correct for the Prosecution to observe that the Defence has
24 not produced any evidence to date on the history of these documents, beginning with the
25 circumstances in which they were originally compiled through to their use in court, in

1 the view of the Chamber that is a matter of weight rather than admissibility. From their
2 appearance, they are, *prima facie*, school records which contain relevant entries which
3 are potentially probative of the issues the Court is considering. It is open to both
4 parties to call further evidence on this issue, and given the Prosecution has expressed
5 (on 9 June 2009) and maintains its reservations about their authenticity, it may be helpful
6 to the Chamber in its investigation of this area of the case to hear further evidence,
7 if it is possible to resolve with some reasonable level of finality whether or not they
8 are forgeries. In this regard, the Chamber takes note of the obligation of the Prosecution
9 to investigate potentially exonerating circumstances in accordance with Article 58(1)(a)
10 of the Statute.

11 Applying the test established in the decision on the admissibility of four
12 documents (13 June 2009, document 1398), the Chamber considers that these three documents
13 are relevant to the charges; they have potential probative value which outweighs any
14 prejudicial effect, most particularly because the Prosecution has been given a considerable
15 period of time in which to carry out its own investigations into their authenticity.
16 As noted by the Defence, the documents are public records and the individuals who certified
17 their authenticity are clearly indicated. The Chamber will in due course bear in mind
18 that the witness did not make the entries and cannot himself assist the Court on their
19 reliability.

20 Given the Prosecution's concession as to the admissibility of the other 12
21 documents, the Chamber considers it unnecessary to address them further, save to say
22 that in its view they are each plainly admissible.

23 Although the Defence referred to 32 other documents in its application, it does
24 not seek to introduce them into evidence and accordingly the Chamber does not need to
25 consider that part of this application further.

1 That concludes this oral ruling.

2 This is likely to be, before 7 January 2010, the last opportunity that you have
3 to raise any issues with us in person. Anything else, Ms Samson?

4 MS SAMSON: No, your Honour. Thank you very much.

5 PRESIDING JUDGE FULFORD: Maître Biju-Duval?

6 MR BIJU-DUVAL: (Interpretation) No, your Honour.

7 PRESIDING JUDGE FULFORD: Victims?

8 MR WALLEYN: (Interpretation) No, your Honour.

9 PRESIDING JUDGE FULFORD: We wish you all an extremely agreeable break. We will
10 rise.

11 THE COURT USHER: All rise.

12 (The hearing ends at 3.27 p.m.)