

1 International Criminal Court
2 Pre-Trial Chamber I
3 Situation ICC 01/04 -- Democratic Republic of Congo
4 Underseal transcript and Procedural matters hearing -- *EX parte* exclusively
5 destined to the Prosecutor
6 Thursday 2nd February 2006 -- Closed session
7 The hearing starts at 10.15 am.
8 THE USHER: All rise. The International Criminal Court is
9 now in session.
10 PRESIDING JUDGE JORDA (interpretation): We are ready now to
11 open the hearing, having made the mandatory technical
12 checks. I would now like to invite the Office of the
13 Prosecutor to introduce itself.
14 MR WITHOPF: I extend my greetings to everybody in and
15 around the courtroom.
16 For the Prosecution appear Olivia Struyven from the
17 Trial Team. She is an Associate Trial Lawyer sitting
18 behind me. Julieta Solano, also an Associate Trial
19 Lawyer, is sitting next to me. The team is complemented
20 by the team leader of the DRC investigation team,
21 Mr Bernard Lavigne, sitting behind Ms Struyven.
22 The further members of the team form part of the
23 OTP's jurisdiction complementarity and co-operation
24 division, and they are Pascal Turlan, assistant
25 situation analyst, sitting to my far left; Miriam

1 Spittler, judicial assistance advisor sitting next to
2 Ms Struyven; Mr Paul Seils, he is a senior analyst
3 within JCCD, sitting next to Miss Spittler; and
4 I, Ekkehard Withopf, the Senior Trial Attorney.
5 PRESIDING JUDGE JORDA (interpretation): Thank you very
6 much, Mr Withopf. We are meeting today to deal with the
7 application which you have submitted to our Chamber, our
8 Chamber being made up of Judge Akua Kuenyehia, Judge
9 Sylvia Steiner, and myself, Judge Claude Jorda, the
10 Presiding Judge of Pre-Trial Chamber 1, which has been
11 seized of the matter of the Democratic Republic of the
12 Congo.
13 Now, you have filed an application for the issue of
14 warrants of arrest under Article 58 of our Statute, and
15 you filed that document on 13th January 2006.
16 On 20th January our Chamber invited you to provide
17 supporting materials in order to assist us in making our
18 decision. Despite the materials which you provided with
19 your application, including the video, we recognised
20 that you might have difficulties of timescale, so we set
21 you two deadlines, 25th January and 30th January, to
22 provide us with additional materials in support of your
23 application, materials relating to your internal
24 investigation, and 30th January for more factual
25 information. You have provided us with that information

1 on 25th and 30th January, and, following receipt of that
2 information, we decided to convene this hearing, and to
3 do so expeditiously.

4 As we are all aware that the arrest warrants are
5 requested for rapid issuance, particularly in the case
6 of one of the individuals, the Chamber would like to
7 thank you for your expeditious work. However, there are
8 still certain items of information that we would like to
9 obtain from you, and therefore we have convened this
10 closed session hearing in order to hear from you with
11 a view to taking a prompt decision on your application
12 thereafter.

13 Now, we have a number of questions to put to you.
14 Perhaps you will not be in a position to answer all of
15 them, but we would ask you to give us as much
16 information as possible so that we can take a prompt
17 decision on your application.

18 I would like to invite Judge Kuenyehia to put the
19 first series of questions. Judge Kuenyehia, if you
20 wish, you may take the floor.

21 JUDGE KUENYEHIA: Thank you very much, Mr President.

22 I would like to start the questions by asking the
23 Prosecution to kindly enlighten us as to how the case
24 against Mr Lubanga and Mr Ntaganda fulfils the
25 prerequisites for them to fall within the jurisdiction

1 of the Court, please.

2 MR WITHOPF: Your Honour, Judge Kuenyehia, to briefly answer
3 your question, it is the opinion of the Prosecution that
4 the cases against Thomas Lubanga Dyilo and Bosco
5 Ntaganda fall within the jurisdiction of the Court
6 because all preconditions are met.

7 In some more detail, the DRC signed the Rome Statute
8 on 8th April 2000, and it ratified it on
9 11th April 2002, meaning that this Court has
10 jurisdiction with respect to crimes committed on the
11 territory of the DRC, or by DRC nationals, since the
12 entry into force of the Rome Statute on 1st July 2002.

13 In respect to the jurisdiction *ratione materiae*, the
14 subject matter jurisdiction, we think that all crimes --
15 and I think it is clear from our 12th January
16 application -- for which, in the opinion of the
17 Prosecution, there are reasonable grounds to believe
18 that they have been committed by Thomas Lubanga Dyilo
19 and Bosco Ntaganda fall under Article 8, war crimes, of
20 the Rome Statute.

21 In respect to the jurisdiction *ratione temporis*, the
22 temporary jurisdiction, we submit -- and I think it is
23 also clear from our application -- that the criminal
24 conduct in question occurred between July 2002 and the
25 end of 2003, thus within the jurisdiction of the Court.

1 In relation to the jurisdiction *ratione loci*, the
2 territorial jurisdiction, we submit that all crimes, as
3 detailed in the application for the issuance of arrest
4 warrants, have been committed in the territory of the
5 DRC, more concretely in Ituri, which forms part of the
6 province Oriental of the DRC.

7 Finally, if I may please add, the Court's exercise
8 of the jurisdiction was triggered by the 3rd March 2004
9 letter of referral from the DRC Government. That letter
10 of referral includes crimes within the jurisdiction of
11 the Court committed on the territory of the DRC from
12 1st July 2002 onwards.

13 JUDGE KUENYEHIA: Thank you very much, Mr Withopf. If you
14 look at the agenda that we provided to the Prosecution,
15 agenda item 2A, could you give us a little more
16 information on agenda item 2A?

17 MR WITHOPF: Certainly I can, Mr President and your Honour
18 Judge Kuenyehia. If I may elaborate, please, first on
19 Thomas Lubanga Dyilo in respect of the DRC
20 investigations. I will do so by first making reference
21 to paragraph 184 of our 12th January application, the
22 arrest warrants against Thomas Lubanga Dyilo and his
23 detention file, the "note synoptique" of 10th August
24 2005, and our submissions in the 25th January 2006
25 filing.

1 To go into some more detail, Thomas Lubanga Dyilo is
2 currently in pre-trial detention based on two arrest
3 warrants issued by the DRC authorities. The first one
4 contains charges of genocide and crimes against
5 humanity, pursuant to the respective articles of the DRC
6 Military Criminal Court, and is based on allegations as
7 they are detailed in the note synoptique of
8 10th August 2005. The second one details charges of
9 murder, illegal detention and torture.

10 At least the charges forming the basis for the first
11 arrest warrant appear to fall within the jurisdiction of
12 this Court. The DRC authorities, however, as we have
13 touched upon in our 25th January submission, (Expunged)
14 (Expunged). This fact has been confirmed recently on
15 13th January 2006, confirmed along the lines that (Expunged)
16 (Expunged).

17 If I may please continue with the submissions in
18 respect to Bosco Ntaganda, in that respect I wish to
19 inform the Pre-Trial Chamber, your Honours, that during
20 a mission last week the Prosecution has received one
21 additional arrest warrant concerning Mr Bosco Ntaganda.
22 And if I may, please, I would like to submit these
23 arrest warrants as an exhibit. I have sufficient copies
24 for all members of the Pre-Trial Chamber and also for
25 the Registry. (Handed).

1 While this arrest warrant is being distributed,
2 Mr President, your Honours, I may go into some
3 explanation. The additional arrest warrant includes
4 crimes against humanity, and it was issued by the
5 Prosecutor of the "Tribunal de Grande Instance" of
6 Bunia.

7 From the limited information the Prosecution has in
8 its possession in respect to that second arrest warrant,
9 it appears that it concerns crimes that were committed
10 prior to 1st July 2002, therefore not falling within the
11 jurisdiction of this Court.

12 Whatever the case may be, however, the fact remains,
13 as in relation to Thomas Lubanga Dyilo, (Expunged)
14 (Expunged)
15 (Expunged).

16 The arrest warrants were issued in March and
17 in April last year, to the information of the
18 Prosecution, based on (Expunged).
19 And it has been confirmed a number of times that (Expunged)
20 (Expunged)
21 (Expunged)
22 (Expunged). We are have the same situation as in
23 respect to Thomas Lubanga Dyilo: (Expunged)
24 (Expunged)
25 (Expunged).

1 JUDGE KUENYEHIA: Thank you very much. Even though the DRC
2 authorities are not investigating, at least to your
3 knowledge, any of these crimes, is it possible to let us
4 have at least a sketch of what the elements of the
5 crimes against humanity in the DRC are, just a few
6 elements of what the crimes against humanity are? And
7 also illegal detention.

8 MR WITHOPF: In that respect, your Honour Judge Kuenyehia,
9 I make reference to the content of the note synoptic.
10 It appears that the elements concern allegations of
11 crimes allegedly committed by troops under the command
12 of Thomas Lubanga Dyilo in May 2003, in Bunia, in Ituri.
13 And in the note synoptique there are a number of further
14 allegations of crimes committed by the same troops
15 after May 2003. The Prosecution wishes to inform the
16 Pre-Trial Chamber that at this stage it does not focus
17 investigations on the crimes which form part of the note
18 synoptique.

19 JUDGE KUENYEHIA: Thank you. Does the Prosecution know
20 whether it is a crime under the laws of the Democratic
21 Republic of the Congo to conscript children under the
22 age of 15 into an armed group, or engage in their
23 conscription into armed groups, or to use such persons
24 to participate actively in hostilities?

25 MR WITHOPF: If I understand you correctly, your Honour, you

1 are asking whether there is any law in the Democratic
2 Republic of the Congo that covers and prohibits such
3 crimes. To the knowledge of the Prosecution, there is
4 such law. If the Pre-Trial Chamber wishes to get more
5 information, I can provide additional information. It
6 starts with Article 184 of the Constitution. Of the
7 transition we have the "Décret-Loi 66" of 9th June 2000.
8 These are at least two laws covering the very same
9 aspects as are detailed in our application obviously
10 covering the same aspects, only in legal terms.
11 JUDGE KUENYEHIA: Thank you. Is it the assumption of the
12 Prosecution that no other country, including Rwanda
13 and/or Uganda, is investigating the alleged criminal
14 responsibility of the two people Thomas Lubanga Dyilo
15 and Bosco Ntaganda for the crimes referred to in the
16 Prosecutor's application?
17 MR WITHOPF: I can answer this question in the affirmative:
18 yes, it is the assumption of the Prosecution that there
19 is no investigation by any of the states you mentioned,
20 or any other state. In respect of Rwanda, I wish to
21 draw the attention of the Pre-Trial Chamber to the fact
22 that after the Prosecution had notified Rwanda, pursuant
23 to Article 18.1 of the Rome Statute, Rwanda has
24 responded by a letter of 21st July 2004. (Expunged)
25 (Expunged)

1 (Expunged)
2 PRESIDING JUDGE JORDA (interpretation): I would just like
3 to point out that the transcript has stopped.
4 Apparently we need to take a five-minute break for
5 technical reasons. Therefore we shall take
6 a five-minute break. I hope that this is not going to
7 happen every half an hour, otherwise this hearing is
8 likely to run for quite some time. I imagine the
9 technical staff are doing all that they can, so
10 I suggest that we adjourn for at least five minutes.
11 Thank you.
12 THE USHER: All rise.
13 (10.38 am)
14 (A short break)
15 (10.51 am)
16 THE USHER: All rise.
17 PRESIDING JUDGE JORDA (interpretation): We resume the
18 hearing. Mr Registrar, the exhibit which was given to
19 you has to be under seal.
20 THE REGISTRAR (interpretation): Thank you Mr President.
21 This exhibit which has been submitted by the Office of
22 the Prosecutor will be filed in the record in the
23 situation of the Democratic Republic of the Congo under
24 number HNE04, and it will be under seal. Thank you very
25 much.

1 JUDGE KUENYEHIA: (Expunged)

2 (Expunged)

3 (Expunged)

4 (Expunged)

5 MR WITHOPF: That is correct, your Honour. And if I may

6 please continue, (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Expunged)

21 (Expunged)

22 (Expunged)

23 (Expunged)

24 (Expunged)

25 (Expunged)

1 I am going, as announced, to hand over this letter
2 as a further exhibit. (Expunged)
3 (Expunged)
4 (Expunged).
5 PRESIDING JUDGE JORDA (interpretation): Mr Registrar, would
6 you please give us the reference number for this exhibit
7 (Expunged)
8 THE REGISTRAR (interpretation): Thank you, Mr President.
9 The number will be HNE05, with its confidentiality level
10 set at "Under seal". Thank you.
11 PRESIDING JUDGE JORDA (interpretation): Judge Kuenyehia?
12 JUDGE KUENYEHIA: Thank you, Mr Withopf. Would you kindly
13 give us your view of the gravity threshold as you have
14 elaborated in agenda item 3 and Article 17.1D?
15 MR WITHOPF: I will do so, Judge Kuenyehia. Prior to doing
16 so, however, I wish to clarify one aspect of my previous
17 submission that relates the arrest --
18 PRESIDING JUDGE JORDA (interpretation): Sorry to interrupt
19 you but apparently we have again gone into problems with
20 the transcript. I will deliberate at the bench with my
21 colleagues about this issue.
22 Apparently if we continue, the transcript will be
23 prepared a little bit later. That is not really
24 satisfactory, but the judges now turn to you out of
25 a spirit of good co-operation with the Office the

1 Prosecutor. Do you agree to our continuing without the
2 transcript in real time?

3 MR WITHOPF: Certainly, Mr President and your Honours, we
4 are prepared to continue.

5 PRESIDING JUDGE JORDA: Very well. I would like the
6 Registrar to take note of this: if there is no
7 transcript, to express the dissatisfaction of the
8 Chamber. But please report this to the proper
9 authorities.

10 All right, we will continue with the hearing. Now
11 excuse me, Judge Kuenyehia; please continue.

12 MR WITHOPF: Thank you again. I was just about to make
13 a clarification in respect of the arrest warrants
14 against Bosco Ntaganda. From the exhibit that has been
15 submitted today, your Honours will see that it contains
16 actually two arrest warrants. There is one of 26th
17 March 2005, and at the bottom there is a two-line arrest
18 warrant dated 5th April 2005. I wish to clarify that
19 the 5th April 2005 arrest warrant is the predecessor of
20 the 12th April 2005 arrest warrant.

21 Technically there are three arrest warrants. In
22 terms of substance there are only two, namely the 26th
23 March 2005 one and the 5th/12th April 2005 one.

24 If I may, with the permission of the Pre-Trial
25 Chamber address the agenda item No.3, dealing with the

1 gravity threshold under Article 17, paragraph 1D of the
2 Rome Statute. The Prosecution submits that any cases
3 within the jurisdiction of the Court can be called
4 "serious" in one sense, but Article 17.1D of the Rome
5 Statute makes it clear that being within the
6 jurisdiction of the Court is only a necessary, however
7 not a sufficient condition of admissibility. It is the
8 view of the Prosecution that genocide and crimes against
9 humanity are per se of sufficient gravity because of the
10 criminal conduct that forms the basis of this legal
11 qualification.

12 It is different in relation to Article 8, war
13 crimes, and Article 8 is our situation here. Article 8
14 provides strong guidance that the Court should focus on
15 war crimes committed as a part of a plan, or a policy,
16 or as part of a large-scale commission of such crimes.
17 In the case which is the subject of the Prosecution's
18 application, there was a policy to recruit and to use
19 children to participate actively in hostilities. This
20 policy is in all detail described in paragraphs 71 to 82
21 of the Prosecution's application. Many hundreds, if not
22 to say thousands of children were the victims of that
23 policy, the policy designed by the UPC and implemented
24 into practice by the FPLC.

25 We wish to emphasise that children constitute

1 a particularly vulnerable group at the point of their
2 recruitment, due to the economic desperation of their
3 circumstances; and, in particular, at the point of their
4 deployment, due to their lack of experience.

5 In addition, we wish to make reference to
6 paragraphs 180 to 183 of our application, detailing the
7 impact on the children's lives, and showing that the
8 impact is devastating, not only on the children's lives
9 but also on the society these children are living in.

10 We also want to draw the attention of the Pre-Trial
11 Chamber to the fact that, whilst the crime of
12 recruitment and using children to participate actively
13 in hostilities is obviously not a crime of killing, we
14 think, however, it would be very artificial to deny that
15 the practice of child recruitment leads to massive death
16 of children who, had the initial crime not being
17 committed, need not have died.

18 One final point we wish to make in that context, if
19 you can permit, Mr President and your Honours: we put
20 additional emphasis on the fact that many groups in the
21 Democratic Republic of the Congo, including the UPC in
22 Ituri, continue with the practice of child recruitment,
23 and using them to participate actively in hostilities.
24 The Prosecution is of the view that by focusing on the
25 leadership of an armed group practising child

1 recruitment, a very strong message can be sent out to
2 leaders of other armed groups, a positive and very
3 direct contribution can be made of dissuading leaders of
4 armed groups to recruit children and to indicate the
5 consequences if they do not. The lives of children can
6 be saved and the power of armed groups can be
7 considerably reduced.

8 Mr President, your Honours, these are our
9 submissions in respect of Article 17, paragraph 1D of
10 the Rome Statute, and we are of course prepared to
11 answer further questions.

12 JUDGE KUENYEHIA: Thank you very much, Mr Withopf. One last
13 question. Could you be kind enough to tell us a little
14 bit about agenda item 4.

15 MR WITHOPF: Your Honour Judge Kuenyehia, of course I can
16 do. I think a "little bit" is exactly the right
17 description of what I am going to say. The question is
18 how Thomas Lubanga Dyilo, currently under detention, is
19 in a position to obstruct or endanger the investigation
20 of the Court proceedings. Again I make reference to the
21 application in this case, to paragraphs 195 to 199, and
22 wish to emphasise that, because of the role of Thomas
23 Lubanga Dyilo, Thomas Lubanga Dyilo still being the
24 president of the UPC and still enjoying the advantages
25 of his network of contacts to people in Ituri, outside

1 Ituri, all over the DRC, and of having contact to his
2 supporters, Thomas Lubanga Dyilo is still in
3 a position -- and it is very practical -- to exert
4 influence on victims and witnesses.

5 I am making this statement against the background
6 that the Prosecution has information at its disposal
7 that, at least up until recent times, Thomas Lubanga
8 Dyilo was in a position, and had the ability to
9 communicate with his supporters by way of phone calls,
10 by way of uncontrolled phone calls from his detention
11 cell in the Micala prison in Kinshasa.

12 JUDGE KUENYEHIA: Thank you very much. Mr President, this
13 is the end of my questions for the time being.

14 PRESIDING JUDGE JORDA (interpretation): Before taking the
15 floor, Judge Steiner, would you like to intervene? You
16 have one question? Two if you like.

17 JUDGE STEINER: Yes, just to anticipate one of the questions
18 I wanted to put, and it is a consequence of your last
19 statement. Given that Mr Lubanga is currently in
20 prison, and in case the Chamber decides to issue the
21 warrant of arrest against him, could the Prosecution
22 elaborate on how the difficulties to arrest and
23 surrender Mr Ntaganda may affect the future proceedings
24 against Mr Lubanga?

25 MR WITHOPF: Sorry, your Honour, Judge Steiner, I did not

1 quite he get a few words of your question.

2 JUDGE STEINER: Mr Lubanga is in prison, but you also

3 request the arrest of Mr Ntaganda, who is at large.

4 I would like you to elaborate how the difficulties could

5 be, in case Mr Lubanga comes to the Hague while

6 Mr Ntaganda is still at large; if you have foreseen the

7 difficulties for the proceedings against Mr Lubanga.

8 MR WITHOPF: Thank you very much, Judge Steiner. The

9 inter-relation between the arrest for this Court and the

10 surrender of Mr Thomas Lubanga Dyilo to this Court, and

11 the arrest effort of the Prosecution in respect of Bosco

12 Ntaganda is certainly a very difficult one.

13 Bosco Ntaganda remains at large. The Prosecution,

14 as indicated in our written submissions, is luckily in

15 a position to monitor, to a certain extent, the

16 movements of Bosco Ntaganda.

17 The Prosecution anticipates that at the time the

18 arrest and surrender of Mr Thomas Lubanga Dyilo becomes

19 publicly known, it can be anticipated that Bosco

20 Ntaganda presumably anticipates or believes that he also

21 forms part of an arrest warrant application of the

22 Prosecution, and he may also believe that this Pre-Trial

23 Chamber may have issued an arrest warrant against him.

24 For that reason the Prosecution would certainly make an

25 effort in respect of the timing of the execution,

1 provided that the arrest warrants will be issued by this
2 Pre-Trial Chamber, in respect of the timing of the
3 execution of both arrest warrants, since I agree with
4 you, Judge Steiner, your Honour, that there is a certain
5 aspect that the Prosecution cannot control if Bosco
6 Ntaganda believes -- and rightly so -- that he is under
7 an arrest warrant of this Court.

8 I have the feeling, Judge Steiner, that I may not
9 have been in a position to fully answer your questions,
10 but that is what I can say at this juncture, being very
11 well aware of the inter-relation of these two issues.

12 PRESIDING JUDGE JORDA (interpretation): Thank you,
13 Mr Withopf. We are now going to go back to the issue of
14 Mr Ntaganda in order to summarise the sense of the
15 questions that I want to ask you. Let me go back to
16 a point of the answers to my colleague. It has to do
17 with the threshold of gravity.

18 You very correctly said that at the point where we
19 get into the gravity threshold, which calls in the
20 jurisdiction of the Court -- I am referring to the
21 policy, the plans which will be necessary. Let me go
22 back to that point. Do you feel that, having chosen
23 82E7, that you yourself are responding to that notion,
24 that concept of a plan in respect of Mr Thomas Lubanga?

25 Do you have any evidence on that very specific

1 point? And, if so, could you give that to the Court?

2 MR WITHOPF: The Prosecution is in possession of evidence
3 and additional information that makes the Prosecution
4 conclude that there was a plan and there was a policy,
5 a plan and a policy made by the UPC.

6 PRESIDING JUDGE JORDA: On what elements are you basing
7 that? Do you have any specific elements, concrete
8 elements?

9 MR WITHOPF: The evidence is mainly based on statements of
10 witnesses, including of insider type of witnesses. The
11 Prosecution has interviewed a number of (Expunged) insider type
12 of witnesses, and the Prosecution has also interviewed
13 a limited number of (Expunged) insider type of witnesses.
14 This, combined with a number of documents, in the view
15 of the Prosecution, is sufficient evidence to meet the
16 threshold of Article 238(1), reasonable grounds to
17 believe.

18 The plan is based on a policy of the UPC to promote
19 the interests of the Hema ethnic group in the region of
20 Bunia and the wider Ituri. The policy, based on the
21 evidence the Prosecution has in its possession, was
22 executed by the FPLC, which is the military wing of the
23 UPC.

24 I also want to put additional emphasis on the
25 pre-condition of large-scale commission. As you,

1 Mr President, and as your Honours can see from the
2 application, and from the annexes we put forward in our
3 application of 12th January, there was a systematic
4 recruitment. There was, in particular, military
5 training in a very systematic way. And I think, your
6 Honours, that the contents of the statements of the (Expunged)
7 former child soldiers very much underline the statement
8 of the Prosecution that there was a plan, a policy and
9 a large-scale commission.

10 There were a variety of training camps, all of them
11 very close to Bunia, the headquarters of the FPLC, and
12 simultaneously the headquarters of the UPC. These
13 training camps were run by high-ranking FPLC military
14 officers. The training camps were repeatedly visited by
15 Thomas Lubanga Dyilo and Bosco Ntaganda; in brackets,
16 Bosco Ntaganda playing a substantial role in providing
17 training. He himself has provided training. I think
18 that is part of the statements of the child soldiers.

19 The Prosecution has additional evidence in that respect.

20 Thomas Lubanga Dyilo was instrumental in providing
21 arms, weapons, ammunition, uniforms. He was the one who
22 set the framework for the other co-perpetrators of the
23 crime under Article 8 of the Rome Statute. I think the
24 combination of all this evidence is sufficient to show
25 that there are reasonable grounds to believe that both

1 Thomas Lubanga Dyilo and Bosco Ntaganda meet the
2 threshold of Article 58.1.

3 One further aspect I want to mention: Bosco Ntaganda
4 was the one who repeatedly himself sent children into
5 combat to make them part of serious military operations
6 of the FPLC. He himself quite often participated in his
7 function as the commander in such military operations,
8 using the children, having seen the children being
9 deployed. And these military operations obviously were
10 all triggered by the Folk's commander-in-chief, Thomas
11 Lubanga Dyilo. Again, the Prosecution relies in that
12 respect mainly on insider type of statements and, in
13 addition, on a number of documents.

14 PRESIDING JUDGE JORDA (interpretation): Thank you very
15 much. I have another few questions on Thomas Lubanga.
16 Is he still the President of the UPC to your knowledge?

17 MR WITHOPF: To my knowledge he is still the President of
18 the UPC, and the UPC is still an active political party
19 in the DRC.

20 PRESIDING JUDGE JORDA (interpretation): It seems that he
21 was freed in late August 2002. Why was that? Do you
22 know? He had been arrested on four very serious crimes.

23 MR WITHOPF: The Prosecution has information, however
24 limited information, in respect to both the fact that he
25 was detained for a limited period of time in summer

1 2002, and the Prosecution has also limited information
2 in respect to the reasons why he was released.

3 The Prosecution in this context, however, wishes to
4 emphasise that, as the situation is now, during the time
5 of his detention in summer 2002, Thomas Lubanga Dyilo
6 was in a position to communicate with both high level
7 members of the UPC and high level officers of the FPLC.

8 PRESIDING JUDGE JORDA (interpretation): Fine. So we do not
9 know the reasons for the freeing of Mr Lubanga at that
10 time. Could we have a copy of the statute of the UPC?
11 Perhaps not today, but do you have available to you the
12 statute of the UPC?

13 MR WITHOPF: Mr President, your Honours, yes, we have the
14 statute available, and I am prepared to provide a copy
15 of that statute.

16 PRESIDING JUDGE JORDA (interpretation): We are still
17 looking for reasonable grounds to believe. You do have
18 reasonable grounds to believe, but you need to convince
19 the Chamber of these reasonable grounds.

20 We would be interested to know whether he has always
21 discharged the duty of President, and been the leader,
22 so to speak. Has he always had that role? Or have
23 there been internal quarrels, conflicts within the
24 organisation? Has he always been the incontestable
25 leader of this political party?

1 MR WITHOPF: Mr President, your Honours, this question I am
2 certainly very much prepared to answer in the
3 affirmative. Mr Thomas Lubanga, he was the No.1 in both
4 the UPC and the FPLC. He was the creator of the UPC.
5 He was its President from the first day onwards, and he
6 was not only the President on paper: he assumed his role
7 as President, he was a hands-on president.

8 He was the person -- to use a very conversational
9 term, he was the man who ran the show within the UPC.
10 And he certainly exercised his command functions as the
11 supreme commander, the commander-in-chief of the FPLC.

12 This evidence, if I may continue, Mr President, is
13 based on a whole series of insider type of witness
14 statements. These insiders have anonymously confirmed
15 the extraordinary role Mr Thomas Lubanga played within
16 the UPC.

17 PRESIDING JUDGE JORDA (interpretation): Thank you. From
18 your video, it seems that Mr Lubanga's political
19 discourse focuses very much on the unity of the
20 Congolese people. Do you have the impression that
21 Mr Lubanga has a political plan, starting with Ituri,
22 but for the rest of the Democratic Republic of the
23 Congo; or that his focus is much more local on Ituri and
24 thereabouts? In other words, what is the more or less
25 long-term objective of the UPC and FPLC?

1 MR WITHOPF: Mr President, your Honours, this is a question
2 a bit more difficult to answer since, based on the
3 facts, and since he is detained, one cannot say what his
4 long-term ambitions have been. There is information,
5 and the information stems from witness interviews, that
6 he was having personal ambitions on the national level.
7 The facts, however, show that his influence was mainly
8 in the region of Ituri.

9 You were mentioning, Mr President, the concept of
10 unity, and you will certainly, in the copy of the
11 statute to be submitted, find that concept mirrored in
12 the statute. The Prosecution wishes to emphasise, as it
13 has done in its application, that there is a significant
14 discrepancy between materials that were made public, and
15 public speeches, and the reality on the ground.

16 If one thinks in terms of incriminatory and
17 exculpatory materials, on its face quite a number of
18 such materials look like being of exculpatory nature.
19 The moment one talks to insiders -- and the Prosecution
20 has done so repeatedly -- one gets to know, and one gets
21 to see that public announcement is one side of the coin,
22 the realities on the ground is the other one. And the
23 realities on the ground were as such, as described in
24 the Prosecution's application.

25 You have addressed, Mr President, the video, and the

1 Prosecution has admitted the transcript of that video.
2 And I am very sure that your Honours and Mr President
3 have, in the transcript, seen portions which appear to
4 be of exculpatory nature, since again we have this
5 concept of unity being expressed by Thomas Lubanga
6 whilst he was visiting the Rwampara military training
7 camp of the FPLC in February 2003.

8 It must be said, however, that (Expunged)
9 (Expunged) professional photographers, cameramen, who quite
10 often were deliberately allowed -- and took the
11 opportunity -- to take videos. And the videos were used
12 by the UPC. And this is a perfect example, this
13 transcript. It emphasises the concept of unity. In
14 reality it was very different. The Prosecution is of
15 the view that there was a conflict along ethnic lines in
16 Ituri, and the ethnic lines include the Hema Gegere on
17 the one side, and the Lendu on the other side.

18 PRESIDING JUDGE JORDA (interpretation): First of all, you
19 have some of these witness statements; you have spoken
20 on a number of instances of insider witnesses. If you
21 have transcriptions of insider witness testimony we
22 would be interested in seeing it, but quite rapidly
23 I think now. Such testimony would be of interest to the
24 judges of the Chamber. I presume you have taken note of
25 that, of our request.

1 MR WITHOPF: I have taken note of that, Mr President. But
2 I wish to draw the attention of the Pre-Trial Chamber to
3 the submissions of 27th January in respect to supporting
4 materials. Whilst I was announcing that we are prepared
5 to submit a copy of the statute, for the time being the
6 submission of further supporting materials does not fall
7 within the range of possibilities at the disposal of the
8 trial team. I will come back to you after having
9 convened on this matter with the Chief Prosecutor.

10 PRESIDING JUDGE JORDA (interpretation): Is it a technical
11 matter, a practical issue? Or is it a matter of the
12 policy of the Prosecutor? If it is a policy matter,
13 I would remind you that you are the applicant for the
14 issuance of arrest warrants, and in interpreting
15 Article 58 -- and you do not have to be a top-level
16 lawyer to do so -- we must have reasonable grounds to
17 believe. You have reasonable grounds to believe, but it
18 is important that the Chamber has reasonable grounds to
19 believe. And I do not think that in any legal system in
20 the world, be it common law or civil law, that any
21 Chamber can issue arrest warrants without a certain
22 minimum amount of information, evidence to ensure that
23 there is a reasonable basis to believe.

24 It is important that you support your application,
25 and that is indeed the objective of this hearing. So

1 during the deliberations, please reflect on the best way
2 in which you can respond to Article 58.1. Very good.

3 I would now like to move onto the judicial policy of
4 the Office of the Prosecutor. The Chamber notes that
5 the arrest warrants which you request concern a group of
6 regional militiamen. We would like to broach with you
7 the nature of the conflict concerned. To that end we
8 are particularly interested in seeing the statute of the
9 UPC and the FPLC.

10 My question to you is: where is the Office of the
11 Prosecutor heading? We are at the beginning of these
12 proceedings and this is a very central issue. Do you
13 intend to prosecute individuals with national-level
14 responsibilities? Or do you intend to limit your action
15 to individuals who are leaders of militias? As you have
16 said in your own submissions, there are many militias.
17 It is an inter-ethnic conflict, as you have just
18 mentioned yourself. So there is a risk that your
19 Prosecutions and investigations may become -- your
20 efforts may become rather diffuse, and result in many
21 requests for arrest warrants from this Chamber. I think
22 it is important that we gain further clarity on this
23 issue at this stage. That is why I put this question.

24 MR WITHOPF: I think there are a number of aspects to be
25 addressed in relation to the question you do have. The

1 first aspect, it appears to me -- but that is my
2 interpretation of the question -- has nothing -- or not
3 that much -- to do, at this stage, with the application
4 to issue arrest warrants against Thomas Lubanga Dyilo
5 and Bosco Ntaganda. The intentions of the Prosecution,
6 mid-term and long-term, in the view of the Prosecution,
7 do not form part of the decision-making process of this
8 Pre-Trial Chamber in respect to the application.

9 Having said that, the UPC and its armed wing, the
10 FPLC, based on analysis the Office of the Prosecutor has
11 made -- and the Prosecution is quite convinced that this
12 is not only appearance but that it is reality -- appears
13 to be the armed group responsible for the gravest crimes
14 committed in Ituri. And compared with other regions of
15 the Democratic Republic of the Congo it is certainly
16 within the top of the armed groups that are allegedly
17 responsible for crimes committed in Ituri.

18 Therefore the Office of the Prosecutor, after having
19 made a very careful analysis of the armed groups in
20 Ituri, and of their alleged criminality, has decided to
21 first focus on the UPC and its military wing, the FPLC.
22 What it does not exclude, and what in fact is happening,
23 is that the DRC investigation team is also investigating
24 into allegations of crimes of other armed groups in the
25 region of Ituri.

1 PRESIDING JUDGE JORDA (interpretation): Very good. First
2 of all I would like to thank you for trying to respond
3 to this concern.

4 I did want to draw your attention to this concern of
5 the Chamber: all international courts face this issue.
6 Obviously it is no direct concern of mine, the Office
7 may do what it wants. But the applications for arrest
8 warrants are addressed to the judges if you prosecute
9 regional militias. You said yourself in your
10 application who these people are, and you refer to other
11 militias, whence my question.

12 And now I will turn to my last question regarding
13 the nature of the armed conflict, whether it be national
14 or international. You are saying that you consider the
15 conflict to be non-international. As you know, the
16 International Court of Justice has issued a decision on
17 this point which implies, or contains implications
18 vis-à-vis Uganda. In your application you speak very
19 clearly of the involvement, at least in practical,
20 material terms, of neighbouring countries. The Chamber
21 therefore asks you why you have directed your
22 application to crimes committed, as you say, in the
23 framework of a national armed conflict.

24 MR WITHOPF: Mr President, your Honours, the Prosecution is
25 very well aware of the recent decision of the

1 International Court of Justice, and it has paid a lot of
2 attention to it prior to making a determination as to
3 whether the Prosecution goes along the lines of
4 a non-international armed conflict or an international
5 armed conflict.

6 I refer to paragraph 42 of the Prosecution's
7 application. This paragraph outlines support of the UPC
8 and the FPLC by the Ugandan and the Rwandan authorities.
9 It also summarises the Prosecution's conclusions that
10 the influence of both Uganda and Rwanda, although
11 significant, did not amount to either of those two
12 states having played a genuine role in the control of
13 the FPLC by organising, co-ordinating or planning its
14 military actions.

15 I will provide you with additional information on
16 that subject matter, and the information will cover both
17 legal aspects and factual aspects. If I may please,
18 I would provide more information on the legal
19 considerations.

20 The ICC law is lacking a definition of
21 "international" or "non-international armed conflict".
22 Therefore the Prosecution has applied the recognised
23 test, namely the ICTY's Tadic Appeals Chamber test
24 of 15th July 1999, which is well-known as the overall
25 control test.

1 As the Pre-Trial Chamber is very well aware, the
2 overall control test defines a conflict as being
3 international in nature if a foreign state exercises
4 overall control over the military forces of one of the
5 parties to the conflict.

6 What is the conflict here? What conflict is
7 addressed by the Prosecution's application? It is the
8 conflict that I mentioned earlier on between the Hema
9 and the Lendu. The question is whether at least one of
10 the armed groups was subjected to overall control by
11 either Rwanda or Uganda, or both of these states.

12 Against this background, these legal parameters, the
13 Prosecution has carefully analysed the available
14 evidence and information comprised of witness
15 statements, including insider statements, documents and
16 publicly-available information.

17 In respect of Uganda -- and I will address Uganda
18 first and Rwanda second -- the analysis has revealed
19 that Uganda supported the creation of the UPC. Uganda
20 supported Thomas Lubanga Dyilo in creating the UPC.
21 Uganda provided arms and ammunition; it provided
22 military advice and military training to the UPC's
23 military wing, the FPLC. Military training was provided
24 in both Uganda and in Ituri, and military training was
25 also provided for children.

1 The Ugandan support significantly declined
2 after October 2002 once Uganda realised that the UPC and
3 the FPLC were drifting towards Rwanda. This has
4 resulted in Uganda stopping its support, according and
5 pursuant to the evidence and information available to
6 the Prosecution, that Uganda stopped its support
7 in January 2003.

8 I am now going to talk about the Rwandan support.
9 The OTP's analysis has revealed that Rwanda's assistance
10 commenced in summer 2002, probably in June 2002; and
11 lasted up until approximately May or June 2003; a peak
12 in January 2003; and there is obviously a time period of
13 overlap with the Ugandan support.

14 The Rwandan support was very similar to the Ugandan
15 support. Rwanda provided arms and ammunition. Arms and
16 ammunition were provided mostly through aerial drops in
17 Ituri. Rwanda provided military advice and military
18 training, again in Ituri and in Rwanda, and such
19 training also included training for children.

20 The Rwandan support, pursuant to our knowledge to
21 date, was provided in exchange for gold, gold to be
22 extracted from the gold mines in the area, mainly from
23 the gold mines in Mongbwalu.

24 To summarise, Mr President and your Honours, the
25 result of the analysis of the materials collected to

1 date -- and I emphasise "to date" -- has shown that
2 neither Uganda nor Rwanda were genuinely in control of
3 the FPLC, but generally directing and helping planning
4 their activities. It was, although significant support,
5 only financing within the limits of training and
6 equipping, but not organising, co-ordinating and
7 planning military actions. Again, the legal framework
8 of this conclusion forms the Tadic Appeal Chamber's
9 decision of 1999.

10 PRESIDING JUDGE JORDA (interpretation): One final question.
11 Mr Lubanga will be in detention for how long?

12 MR WITHOPF: Sorry, I did not quite get the question, and
13 the transcript also did not.

14 PRESIDING JUDGE JORDA (interpretation): The renewal of his
15 detention, Mr Lubanga's detention, how long is that
16 going to be? If you have the information, you could let
17 us know this afternoon. I do not know the criminal
18 procedure in Uganda; I do not know how long he is going
19 to be kept. Perhaps you could tell us this afternoon,
20 I would like to have the information: how much longer he
21 is going to be in prison.

22 MR WITHOPF: Mr President, your Honours, I actually can
23 provide information. The information is summarising our
24 written submissions. He is in prison since
25 mid-March 2005. Every month his detention is renewed by

1 the competent judicial authority in Kinshasa. The law
2 of the DRC provides that after a year a judge gets
3 involved. To date it was the Prosecutor's Office
4 extending the detention. Meaning that by March 2006
5 there will be a (Expunged) judicial oversight.
6 The Prosecution, as outlined in our written submissions,
7 (Expunged)
8 (Expunged)
9 (Expunged)
10 (Expunged)
11 (Expunged)
12 (Expunged)

13 That is the basis for the Prosecution's fear, and it
14 is a very genuine fear that he may be released very soon
15 for that only reason.

16 PRESIDING JUDGE JORDA (interpretation): Are you talking
17 about March or February? Could you give us a more
18 specific date in terms of the extension? Early March is
19 that correct?

20 MR WITHOPF: If I recall correctly he was detained on
21 19th March 2005, meaning that by mid-March 2006 we are
22 reaching that point. The respective law -- and I am
23 grateful for the support of my colleagues -- is
24 Article 209 of the DRC military court.

25 PRESIDING JUDGE JORDA (interpretation): Thank you very much

1 for this information. I have no further questions. Let
2 me turn to my colleague Judge Steiner. We are going to
3 have to stop at 12.00. We have only about ten minutes
4 left.

5 We will suspend the hearing at 12.00 for technical
6 reasons, and other reasons as well, and Judge Steiner
7 will begin her questions by asking at least one. Judge
8 Steiner.

9 JUDGE STEINER: Thank you, Mr President. Maybe I could put
10 in advance some of my concerns and then, when we resume,
11 we could continue that. It is my intention to focus on
12 the participation of Mr Ntaganda, and to understand
13 a little bit more this organisational chart which is
14 part of annex 9, in terms of the position of
15 Mr Ntaganda, his relations with Mr Kisembo and
16 Mr Lubanga Dyilo in terms of hierarchical powers of one
17 over the other, and the relations between Mr Ntaganda
18 and the other Deputy Chief of the General Staff, Mr
19 Dilangu.

20 And maybe more specific questions: if
21 between September and December 2002, was there any other
22 Deputy Chief of Staff, apart from Mr Ntaganda and Mr
23 Dilangu? Which were the functions respectively assigned
24 to Mr Ntaganda and Mr Dilangu? Particularly, who was in
25 charge of the training camps, of directing or conducting

1 military operations?

2 So I would like to ask if you would prefer to say
3 something in advance, or after we resume, because
4 I still have other questions related specifically to
5 Mr Ntaganda.

6 MR WITHOPF: Your Honour, Judge Steiner, I think I am in
7 a position to answer the questions now, if you permit me
8 to continue.

9 As the FPLC organisational chart, September 2002
10 to December 2003, shows, there was a very typical
11 military command structure. On the top of the FPLC we
12 have the Commander-in-chief, Thomas Lubanga Dyilo,
13 Floribert Kisembo being his Chief of the General Staff;
14 and subordinated to Floribert Kisembo and Thomas Lubanga
15 Dyilo, Bosco Ntaganda.

16 In terms of hierarchy, this is a very typical
17 example of military hierarchy. Bosco Ntaganda was the
18 military subordinate to Floribert Kisembo, the Chief of
19 the General Staff; and he was the military subordinate
20 to Thomas Lubanga Dyilo, the Commander-in-chief.

21 Bosco Ntaganda, as one of the two Deputy Chiefs of
22 the General Staff, was in charge of military operations.
23 Being in charge of military operations in the context of
24 the FPLC -- and this is again very strongly reflecting
25 regular military principles -- means that he, after

1 having convened and after having received orders from
2 Thomas Lubanga Dyilo, decided, on his level, military
3 operations. And he implemented his decisions. And, as
4 I mentioned earlier on, Bosco Ntaganda was a very
5 hands-on commander, meaning he deployed with his
6 subordinate commanders to the field and to parts in
7 a whole variety of military operations of the FPLC.

8 From the organisational chart, one sees that there
9 were four sectors, but I wish to mention that this
10 changed over time. There were times there were only two
11 sectors, and there were times there were four sectors.
12 These sectors were comprised of a variety of military
13 units, and including military units of the size of brigades.

14 Being in charge of military operations in the case
15 of Bosco Ntaganda did also include his responsibility in
16 relation to military training. And again, as a very
17 hands-on commander, he was not only taking part in the
18 training, he was very regularly visiting the military
19 training camps, and he was the person who gave orders to
20 the responsible officers, the responsible officers for
21 the military training camps.

22 At that level, Thomas Lubanga Dyilo, Floribert
23 Kisembo, Bosco Ntaganda, we have a very typical military
24 structure. Your Honour Judge Steiner was also asking
25 questions in relation to Efomie Dilangu. Dilangu

1 was the Deputy Chief of the General Staff in charge of
2 administration and logistics for a very limited period
3 of time in the second half of 2002. Mr Dilangu did not
4 play a role in the context of military operations.
5 Military operations fell within the responsibility and
6 within the powers of Bosco Ntaganda.

7 I hope I have answered your questions. If there is
8 follow-up I can certainly try to further answer.

9 JUDGE STEINER: Just to clarify, were there any other deputy
10 chief, or Mr Ntaganda was the only deputy chief?

11 MR WITHOPF: As the chart shows, up until December 2002
12 there were two Deputy Chiefs of the General Staff,
13 Dilangu and Bosco Ntaganda. There were no other
14 additional Deputy Chiefs of the General Staff.

15 PRESIDING JUDGE JORDA (interpretation): All right, thank
16 you. I think we are going to suspend the hearing.

17 I think we will not be able to begin before 2.30, is
18 that correct? I suggest that we resume at 2 o'clock.

19 That will give everyone enough time to take a proper
20 break. I thank the interpreters. All right, the
21 hearing is suspended.

22 THE USHER: All rise.

23 (11.59)

24 (The short adjournment)

25 (2.08 pm)

1 THE USHER: All rise. Please be seated.
2 PRESIDING JUDGE JORDA (interpretation): Without any further
3 ado, assuming everything is working in proper order,
4 I give the floor to Judge Steiner.
5 JUDGE STEINER: Thank you, Mr President. As I said before,
6 I am trying to focus on the activities of Mr Ntaganda
7 within the framework of the movement, the FPLC and UPC
8 in general. So, Mr Withopf, could you please explain to
9 what extent Mr Lubanga had operational and/or
10 disciplinary powers over Mr Ntaganda?
11 MR WITHOPF: Your Honour Judge Steiner, Thomas Lubanga was
12 the Commander in Chief, Supreme Commander of the FPLC
13 and, as such, he enjoyed all powers a military commander
14 in such a position does have. That implies that he had
15 the operational command, and that also implies that he
16 had the disciplinary power. So he was in a position to
17 initiate investigations against him, to do the
18 investigations and to punish him if necessary.
19 JUDGE STEINER: Could you clarify which were Mr Kisembo's
20 operational and/or disciplinary powers over Mr Ntaganda?
21 MR WITHOPF: The Chief of the General Staff,
22 Floribert Kisembo, it is slightly different. Floribert
23 Kisembo had disciplinary powers over Bosco Ntaganda.
24 The officer in charge of military operations however was
25 Bosco Ntaganda.

1 JUDGE STEINER: Thank you. It is stated in the
2 Prosecution's application, and has been repeated in this
3 hearing, that under Article 17(1)(d) threshold it is the
4 Prosecution's intention to bring to the Court only the
5 senior leaders of the conflict. At the same time you
6 said that the organisational chart of the FPLC shows
7 a very typical and strict military hierarchical
8 structure. So the Chamber would like to know whether
9 you can explain the reasons for, in such a hierarchical
10 structure, choosing the higher rank leader and the third
11 level commander.

12 MR WITHOPF: I can explain that, your Honour Judge Steiner.
13 As explained in the context of the application, this
14 investigation has not yet come to an end. The Office of
15 the Prosecutor is continuing its investigation against
16 the most responsible within the UPC and its military
17 wing, the FPLC. Final determinations as to whom the
18 Prosecutor will seek further warrants of arrest have not
19 yet been made. (Expunged)
20 (Expunged)
21 (Expunged)
22 (Expunged)
23 (Expunged)

24 JUDGE STEINER: Thank you. Could you explain when and under
25 which circumstances Mr Ntaganda replaced Mr Kisembo as

1 UPC Chief of Staff; and which was the impact, if any, of
2 this replacement in relation to the crimes described in
3 the application?

4 MR WITHOPF: Your Honour, I can do, within the limits of
5 information we have at our disposal. Floribert Kisembo
6 in his function as the Chief of the General Staff was
7 replaced by Bosco Ntaganda on 8th December 2003. Based
8 on the evidence and further information we have
9 collected in the course of this investigation, it
10 appears that there has been a fall-out between Floribert
11 Kisembo and Bosco Ntaganda, and it also appears that
12 Floribert Kisembo had certain concerns about the UPC's
13 and the FPLC's policies, and a number of practical
14 matters, what finally led Thomas Lubanga decide that
15 Bosco Ntaganda should replace Floribert Kisembo. I have
16 to add, however, that this is the subject matter of
17 ongoing investigation.

18 JUDGE STEINER: Thank you very much. Back to the
19 organisational chart of annex 9. In the chart we see
20 the sectors, just underneath Mr Ntaganda's position.
21 What exactly are these sectors; and if Mr Ntaganda had
22 direct operational and/or disciplinary powers of these
23 sector commanders?

24 MR WITHOPF: That is exactly what it is. The sectors, the
25 term "sector" describes a military structure at

1 a comparatively high level. A sector was comprised of

2 a number of brigades, and subordinate military units.

3 All sectors, and with the sectors all the other military

4 units, were in a military sense subordinated to Bosco

5 Ntaganda, who has been the chief of military operations.

6 JUDGE STEINER: Thank you. Another point, at paragraph 76

7 of your application it is mentioned that some FPLC

8 commanders fought along with children in some military

9 operations.

10 Just to confirm, did Mr Ntaganda have any

11 disciplinary and/or operational powers over these

12 commanders?

13 MR WITHOPF: He certainly enjoyed operational powers. Based

14 on the information we have to date, he also enjoyed

15 disciplinary powers. Disciplinary powers were obviously

16 also exercised by the Chief of the General Staff,

17 Floribert Kisembo.

18 JUDGE STEINER: Thank you very much. Some of the victims'

19 witnesses statements also refers to the direct

20 participation of Mr Ntaganda in some military

21 operations. For instance, I see annex 1, paragraph 45,

22 page 10: in the Prosecutor's view, it is usual that in

23 Congo conflicts the members of General Staff participate

24 themselves directly in attacks in the frontline?

25 MR WITHOPF: Your Honour Judge Steiner, at this point I can

1 only talk about the practice within the FPLC, and based
2 on the evidence the Office of the Prosecutor has
3 collected, it is a fact that Bosco Ntaganda repeatedly
4 took part in military operations and was commanding
5 them.

6 JUDGE STEINER: Thank you very much. So this leads me to
7 question No.7. I think we could have maybe some
8 clarification in relation to the item No.7, that in many
9 statements there are references to a certain Commander
10 (Expunged) Bosco. First, given the unusual character of
11 calling a high officer by his first name, can the
12 Chamber assume that the references to Commander Bosco in
13 the statements refer to a Commander Bosco other than
14 Bosco Ntaganda? Because sometimes it is clear that it
15 is (Expunged), but many times we saw in the
16 statements only Commander Bosco. So it is a little bit
17 unusual to have the officers called by their first
18 names. So I would like you to clarify a little bit this
19 detail.

20 MR WITHOPF: I am very happy to do so, your Honour Judge
21 Steiner. A general remark first: it is usual in the
22 context of the DRC, and certainly in the context of
23 Ituri, that soldiers, and in particular children, do
24 know the commander only by their first name. This is
25 a very usual situation. Having said that, in light of

1 the Pre-Trial Chamber's question, the Prosecution team
2 has reread very carefully the statements of the (Expunged)
3 victims witnesses. And based on this repeated careful
4 reading, the Prosecution, and in the view of the
5 Prosecution with certainty -- and I am going to explain
6 why -- can say that whenever the children refer to
7 Commander Bosco, they make reference to Bosco Ntaganda.

8 Why are we saying this? We are saying this based on
9 a very detailed look on what the children said.

10 Starting with (Expunged), he is not mentioning at all
11 any Bosco or any (Expunged). (Expunged), she
12 refers to Bosco or Commander Bosco respectively as the
13 Chief of the General Staff. I refer to paragraph 33 of
14 her statement. She refers to Bosco as being "amongst
15 the other very important UPC commanders"; reference is
16 made to paragraph 36 of her statement. And in addition,
17 and I refer to paragraph 41 of her statement, and
18 I quote:

19 "The Chief of the General Staff, Major Bosco handing
20 out uniforms."

21 The Prosecution is of the view that an analysis and
22 the description of Commander Bosco in his functions
23 shows that it can only be Bosco Ntaganda who is made
24 reference to by the witness (Expunged).

25 With the permission of the Pre-Trial Chamber, I am

1 moving to (Expunged). (Expunged), at paragraph 37, refers
2 to Bosco as the Rwandan Chief Bosco. We know from other
3 evidence that Bosco Ntaganda is known as Rwandan,
4 Rwandaphone, of Rwandan origins. If (Expunged) states:
5 "There was a Chief of the General Staff named
6 Kisembo and below him Bosco, who was the chief of my
7 commander, (Expunged) and other commanders", reference is
8 made to paragraph 38 of her statement.

9 She continues to say at paragraph 39 that there
10 were:

11 "Other chiefs like Thomas Lubanga, Kisembo and
12 Bosco."

13 And that "Bosco had a long nose". Reference in that
14 respect is made to paragraph 41. Again, the Prosecution
15 comes to the conclusion based on the details of her
16 statement that there is a clear indication that the
17 Bosco or the Commander Bosco she is referring to can
18 only be Bosco Ntaganda.

19 The same, Mr President, your Honours, applies to the
20 witness (Expunged). The witness (Expunged) refers
21 to Bosco as "Commander Bosco", and "the Chief of
22 Operations Bosco" as follows and I am quoting from
23 paragraph 31:

24 "Directly subordinated to Lubanga was the Chief of
25 Operations, a Rwandan named Bosco."

1 And he continues to say that:

2 "The highest ranking ones such as Commanders Bosco
3 and Kisembo had three golden stars on their uniforms."

4 Obviously in line with the conclusions drawn based
5 on the statements of the other children, the Prosecution
6 again considers this being a clear sign that the Bosco,
7 or Commander Bosco referred to in (Expunged)
8 statement can only be Bosco Ntaganda. (Expunged),
9 if I may continue the theme, refers to Commander Bosco
10 as:

11 "... the only high-ranking one whom I have seen was
12 Commander Bosco. I do not know the rank of
13 Commander Bosco but I have seen him often with
14 President Lubanga and with the Chief of the General
15 Staff, Kisembo."

16 Reference is made to paragraph 42 of his statement.

17 Again, the reading of (Expunged) statement is
18 in line with the conclusion we have drawn in respect to
19 the other child soldier statements.

20 I am going to conclude with the statement of
21 (Expunged). (Expunged)
22 (Expunged) who actually talk about a "Commander (Expunged)
23 (Expunged)", and "a Bosco". In paragraph 26, she says that:

24 "Our instructor, who was also the Commander in Chief
25 of the military camp was named (Expunged). There

1 were also three commanders in the same camp, Commander
2 (Expunged), Commander (Expunged) and another one.
3 They were all permanently with entourage and had all
4 their movements guarded by some bodyguards."

5 Your Honour, Judge Steiner, what does this mean?

6 The Commander (Expunged) is the only one the witness
7 (Expunged) has actually seen in the camp. It is
8 a (Expunged) and it is not Bosco Ntaganda. What else
9 does that witness say? At paragraph 32, she states --
10 and I quote again:

11 "In the camp the commanders and the other soldiers
12 repeated permanently that the highest commander of the
13 UPC was Thomas Lubanga. I also recall the names of two
14 other very important commanders such as Kisembo and
15 Bosco. I have never met the latter two ones."

16 She met (Expunged) because he was in the camp, but
17 she never met, as she is saying, the high-ranking
18 Commander Bosco. That again implies that in this
19 context she is referring indeed to Bosco Ntaganda.

20 If I may sum up, Mr President, your Honours, I think
21 a careful analysis of the (Expunged) statements of the child
22 soldiers makes it very clear that whenever the children
23 refer to a Bosco or a Commander Bosco, without adding
24 another name such as (Expunged), they mean Bosco
25 Ntaganda. And I think this analysis is based on a very

1 careful reading of the statements as submitted to the

2 Pre-Trial Chamber.

3 JUDGE STEINER: Thank you very much. I would like now to go

4 a little bit on the other organisational charts, the

5 ones related to the UPC/FPLC in annexes -- I think 7 and

6 8. Could you elaborate on Mr Ntaganda's position within

7 the broader movement, UPC/FPLC, on his position in these

8 two organisations' charts, and on the relationship

9 between Mr Ntaganda and other members of the UPC's

10 Executive Chief Committee, other than Mr Lubanga? Was

11 he subordinated, de jure or the fact to any other

12 members of the UPC?

13 MR WITHOPF: To answer this question, it has a number of

14 aspects that should be, in the view of the Prosecution,

15 distinguished. We have the FPLC, which is a distinct

16 military unit, distinct from the UPC; the UPC, how it is

17 calling itself a political military movement, forming

18 a sort of umbrella for the military wing of the FPLC.

19 Bosco Ntaganda played a role, however, in both

20 organisations. Bosco Ntaganda was the person who,

21 together with others, predominantly Thomas Lubanga

22 Dyilo, was instrumental in creating the UPC. And once

23 created, he played a substantial role within the UPC,

24 and was supporting Thomas Lubanga Dyilo in his position

25 as President.

1 Talking about Bosco Ntaganda's role in a hierarchy,
2 we must distinguish between the military hierarchy in
3 the FPLC, and I have elaborated on his position in that
4 hierarchy -- in the hierarchy of the UPC, he was
5 a person who did not have an official function. We have
6 submitted two charts detailing the individuals which, in
7 line with the Statute which we will provide later on
8 today, played an official role within the UPC. Bosco
9 Ntaganda did not play an official role in the
10 hierarchical sense. However, due to his close
11 co-ordination and co-operation and close relationship to
12 Thomas Lubanga, he played a very important active role
13 in supporting Thomas Lubanga in his function as the
14 President of the UPC.

15 That is how the evidence collected to date displays
16 the role of Bosco Ntaganda.

17 JUDGE STEINER: Thank you very much. So, taking into
18 consideration what you have just said, the position of
19 Mr Ntaganda within the FPLC on the one hand, and the UPC
20 on the other hand, could we consider Mr Ntaganda one of
21 the most prominent military commanders involved in the
22 armed conflict in Ituri as a whole?

23 MR WITHOPF: Your Honour Judge Steiner, I am very much
24 inclined to answer this question in the very
25 affirmative. He played a crucial role in the conflict

1 as a whole.

2 JUDGE STEINER: So going a little bit further, according to
3 the Prosecution application, the crimes were allegedly
4 committed between July 2002 and December 2003. However,
5 the FPLC was only created in September 2002, and the
6 statements received by the Chamber refers to events
7 taking place between September 2002 and June 2003.
8 Could you please elaborate a little bit more on the
9 temporal framework of the alleged policy practice of
10 enlistment into the FPLC conscription, and use of
11 children in operations in this context?

12 MR WITHOPF: Your Honour Judge Steiner, the factual
13 statement you are making is correct. I, however, wish
14 to add that, prior to the official creation of the FPLC
15 in September 2002, there was a Hema militia, and it was
16 a very strong Hema militia, comprised of very many Hema
17 soldiers, obviously. This Hema militia at that time,
18 in September 2002, was transformed into the FPLC.
19 I think it is very important to understand that it was
20 not that in September 2002 an army, or a military
21 structure was created from scratch. It was very
22 different. Pre-existing militias, Hema militias, were
23 transformed in a new military structure now named the
24 FPLC.

25 And to answer the second aspect of your question,

1 the policy to recruit children was already in place
2 prior to September 2002, and it was even in place prior
3 to our temporal jurisdiction. So what had happened was
4 that, with the creation of the FPLC, which is nothing
5 else but naming a pre-existing military structure by
6 a name, FPLC, the pre-existing policy just continued.
7 That is the reason why we have decided to frame the
8 criminal conduct as we did in the application, namely
9 that the criminal conduct started with the beginning of
10 our temporal jurisdiction, and lasted up until the end
11 of 2003.

12 JUDGE STEINER: But in this period, prior to the foundation
13 of the FPLC, what had been the role played by Mr Lubanga
14 and Mr Ntaganda in these policies, between July
15 and September, to be more precise?

16 MR WITHOPF: The role, to be very straight, was exactly the
17 same as after September 2002. The only difference was
18 that from September 2002 the military structure had
19 a name, namely FPLC. Thomas Lubanga Dyilo, as Bosco
20 Ntaganda, were very active in recruiting children, even
21 prior to our temporal jurisdiction. I was mentioning
22 earlier on in the context of the Ugandan support that
23 training was provided by Uganda, and training was
24 provided in Uganda. Amongst the soldiers being trained
25 in Uganda were also children.

1 In this context I am talking about children below
2 15 years and "other children" meaning older than
3 15 years. And Thomas Lubanga played a very crucial role
4 in sending these children to Uganda to receive military
5 training. What I wish to emphasise is the following:
6 the concept of recruiting children was pre-existing, and
7 it was pre-existing very long prior to the September 2002
8 creation of the FPLC. It was a practice based on the
9 policy of the UPC, and the UPC existed very long prior
10 to September 2002.

11 So the policy element has very little to do with the
12 formal creation of the FPLC. I hope I was able to
13 answer your question.

14 JUDGE STEINER: Thank you very much. Mr President, I think

15 I will be back later.

16 PRESIDING JUDGE JORDA (interpretation): Thank you,
17 Judge Steiner. Judge Kuenyehia, do you want to say
18 anything? Before Judge Steiner takes the floor again,
19 I have a few questions I would like to ask also. First,
20 the friction that you were speaking about -- do you hear
21 me? Are you hearing it now? Can you hear us now,
22 Mr Withopf, on channel 1? Do you hear it now? Do you
23 hear me now, sir?

24 I would say in technical terms that the judges in
25 this Chamber would like to view with you the video in

1 order to identify on the video Mr Ntaganda.
2 The technical services have been informed so we can
3 isolate the passage in question. I would like to go
4 back to the organisational chart and the role of Kisembo
5 because I can tell you immediately there is something
6 which I am not satisfied about and that is that
7 Mr Floribert Kisembo was not included in your arrest
8 warrants. You gave an explanation, but I did note in
9 the explanation that you provided that there was
10 friction, political fall-out, if you like, I noticed
11 a fall-out between Mr Ntaganda and Mr Kisembo. And
12 I have a very simple question: that fall-out -- perhaps
13 you cannot answer or perhaps you do not want to answer
14 but I would be interested in either case -- would you
15 say that that fall-out had any kind of role in the fact
16 that you are not asking the Court for a warrant of
17 arrest against Mr Kisembo?
18 MR WITHOPF: Mr President, as I mentioned earlier on, the
19 investigation is continuing. And as I also mentioned
20 earlier on, (Expunged)
21 (Expunged)
22 (Expunged).
23 (Expunged)
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12 PRESIDING JUDGE JORDA (interpretation): First of all,

13 I would like to thank you for the clearness of your

14 answer, the honesty of your answer. I would also ask

15 you a different question about the choice of the

16 charges. I have been thinking about the arrest against

17 Mr Ntaganda and I note that the local authorities had

18 different charges and that is my first sub-question, and

19 you also, you chose crimes -- we are not underestimating

20 the gravity of that crime but perhaps you have other

21 evidence for prosecuting Mr Ntaganda and Mr Lubanga for

22 other crimes because even the local authorities did

23 prosecute him for complicity in murder and torture so

24 did you make a policy choice in terms of criminal policy

25 I cannot judge that for you -- or did you have no other

1 evidence and it would seem that the Congolese
2 authorities had them and you might have less evidence
3 than the local authorities which to my mind would be
4 paradoxical. Could you give several explanations to the
5 Chamber in that respect?

6 MR WITHOPF: I can certainly assure you, Mr President and
7 your Honours, that the Office of the Prosecutor has far
8 more evidence as it appears to be the case in respect to
9 the local prosecutor and the DRC. To answer your
10 question, whether there is any additional evidence
11 possibly related to any other crimes, the answer is:
12 yes, there is other evidence. But the evidence in the
13 view of the Prosecution, in relation to the other
14 crimes, has not yet reached the threshold of Article 58,
15 meaning that the Prosecutor was not yet in a position to
16 request an arrest warrant based on such additional
17 crimes. The Office of the Prosecutor is continuing its
18 investigation as touched upon in our application, and
19 the scope of the investigation to be continued as
20 indicated in our application is broader, and it is
21 significantly broader. The investigation efforts
22 include under the umbrella of Article 8 of the Rome
23 Statute, allegations of intentionally directing attacks
24 against the civilian population, murders committed
25 during and after these attacks, pillaging towns and

1 places, and ordering the displacement of the civilian
2 population inter alia.

3 The Prosecution in the context of its investigation
4 obviously also in line with its duty to not only collect
5 incriminatory evidence but also exculpatory evidence,
6 has received exculpatory evidence. Such evidence is
7 currently being analysed, the investigation does
8 continue and the Prosecutor anticipates that he will be
9 in a position to make his final determination on
10 a possible amendment of the charges towards the end of
11 the first half of this year.

12 PRESIDING JUDGE JORDA (interpretation): Thank you very
13 much. I do not have any other questions, at least not
14 at this point in time. I will turn now to my
15 colleagues. Perhaps Judge Kuenyehia would like to add
16 to her initial questions?

17 JUDGE KUENYEHIA: Maybe after we identify the
18 Commander Bosco.

19 PRESIDING JUDGE JORDA (interpretation): Do you agree with
20 that? Very good. Well, we would like to identify
21 Mr Bosco Ntaganda. I know that you have already
22 identified him. Perhaps you could assist us. We have
23 made attempts using the most modern technology, to
24 examine the evidence. So perhaps the technical booth,
25 the audiovisual booth, could play the video, and perhaps

1 the Court Officer could indicate the sequences, the
2 minuted sequences that we are to view.
3 COURT OFFICER: Yes, Mr President. We are going to show the
4 first sequence. I would like everybody to select if it
5 is possible the AV feed and then channel 6. The Court
6 Usher will help you with it.
7 (Video played)
8 MR WITHOPF: I think we can already stop here. And can we
9 please go back about 10 to 15 seconds.
10 (Video played)
11 MR WITHOPF: Can we please stop here. Mr President, your
12 Honours, the Prosecution is of the certain opinion that
13 the man in the purple clothes, which in the community
14 are called "bou bou", is Bosco Ntaganda.
15 We will provide you with further reasons why. For
16 the time being I want to draw the Chamber's attention to
17 the annex 3 of the 12th January 2006 application.
18 Annex 3 shows three photographs, displaying Bosco
19 Ntaganda. The photograph with the ERNDRC00002435 stems
20 from MONUC.
21 The Prosecution is of the view that, combined with
22 the other reasons we will provide you with, that the
23 physiognomy of the face of the person in the purple
24 clothes and the physiognomy of the photograph
25 DRC00002435 is the same.

1 The Prosecution, if the Pre-Trial Chamber so
2 permits, would like to show the next sequence of the
3 video tape.

4 PRESIDING JUDGE JORDA (interpretation): For the time being
5 you are not being particularly convincing, Mr Withopf.
6 It is difficult to say that this is the exact same
7 person. But that is a personal opinion of course, I am
8 not speaking for my colleagues. Nonetheless, continue;
9 perhaps you will become more convincing.

10 MR WITHOPF: I have been convinced and I have been convinced
11 by the members of my team, and I think I am probably not
12 that easy to convince, so I hope I will be able to
13 convince the Pre-Trial Chamber.

14 Prior to playing the next portion of the video, and
15 in order to make it more meaningful, I would like to
16 hand over as exhibits to the Pre-Trial Chamber two
17 stills of the next two portions we are going to show.
18 The first one is a still from that video showing the man
19 in purple, who we believe is Bosco Ntaganda, at
20 10 minutes and 49 seconds. And the second one is
21 showing the man in purple clothes, who we believe is
22 Bosco Ntaganda, at 28 minutes, 43 seconds. I submit
23 these stills as exhibits. (Handed).

24 Mr President, your Honours, for the reasons I am
25 going to explain, it would make sense for the next two

1 portions to also have the audio. And if I also may
2 please, prior to playing the video, draw the attention
3 of the Pre-Trial Chamber to the transcript submitted as
4 annex 6 at page 7, since only the combination of the
5 video, the audio and the transcripts will allow the
6 Pre-Trial Chamber to understand what the Prosecution's
7 submission is about.

8 And if I may add, please, to be more concrete: for
9 the sequence starting at 10.49, I draw the attention of
10 the Pre-Trial Chamber to pages 7 and 8 of the
11 transcript, starting at the bottom of page 7.

12 (Video played)

13 MR WITHOPF: Can you please stop here. We have the
14 impression that we are already too far. Can we please
15 start the sequence 10.40. It may even be a little bit
16 earlier, I am advised by my team.

17 (Video played)

18 MR WITHOPF: Can we please stop here. Thank you very much.

19 This is exactly the perfect scene, and I wish to draw
20 the attention of the Pre-Trial Chamber to the
21 transcript. The one who is talking is Thomas Lubanga
22 Dyilo. We know that because he introduces himself at
23 the occasion of the speech as "I am Thomas Lubanga".
24 The transcript reads as follows:

25 "Thomas Lubanga asking the group:

1 "Question: The Chief of Staff Commander Bosco to
2 come and see you, does he come here?

3 "Answer: Yes.

4 "Question: Does he come?

5 "Answer: Yes.

6 "Question: If he does not come, you tell me. Does
7 he come?

8 "Answer: Yes."

9 And the moment he is mentioning Bosco Ntaganda's
10 name, the person whom the Prosecution believes is Bosco
11 Ntaganda starts laughing. He obviously appreciates that
12 Thomas Lubanga is talking about him in what we believe
13 is a positive way. In our submission, the sequence of
14 the scene, combined with the transcript, shows that the
15 person is Bosco Ntaganda, and again I think all
16 submissions of the Prosecution in this context must be
17 seen together. For that reason I would like, please,
18 that the portion starting at 28.30 be shown.

19 The respective related portion in the transcript
20 starts at page 14.

21 (Video played)

22 MR WITHOPF: Thank you very much. I draw the attention of
23 the Pre-Trial Chamber to the respective portion of the
24 transcript. The one who is talking is John Tinanzabo.
25 He is one of the national secretaries of the UPC.

1 He refers to Bosco, points out at him and says:
2 "God will reward us. The world will confirm that we
3 have done honest work. I see you and I do not want to
4 say a lot. Continue with your training. We are
5 listening to you here all, all the time, so we know your
6 problems, we can solve them. You were saying here that
7 the Commander of Operations, Commander Bosco, comes here
8 all the time to see you."
9 And in our view, he is addressing the man in the
10 purple clothes, and we think that is Bosco Ntaganda.
11 I think we are done with the video. Can we please
12 continue to have that still, and I am going to explain
13 why.
14 PRESIDING JUDGE JORDA (interpretation): Could you,
15 Mr Withopf, be more explicit. You say "we believe", "we
16 think" that the man is Commander Bosco. I have not
17 found the connection. Remember, if he is arrested and
18 brought here, he will have defence counsel who have been
19 thinking about that so it is important that you say to
20 us more than "we think that" or "we believe that".
21 There has to be a high level match in terms of what you
22 present.
23 MR WITHOPF: I very much agree with you, Mr President,
24 certainly there must be a very high match. The very
25 high match at the stage of a trial has to be "beyond

1 reasonable doubt", so the match must be high. At this
2 stage it does not be beyond reasonable doubt. We are
3 providing indications and I wish the Pre-Trial Chamber
4 please to understand the notion of belief, meeting the
5 threshold applied in the context of an arrest warrant
6 application. The combination of the physiognomy of the
7 face of the person in the purple clothes, in combination
8 with what has been said by Thomas Lubanga Dyilo, and
9 John Tinanzabo, and the reaction of the person in the
10 purple clothes, and the reaction of the group addressed
11 by Thomas Lubanga Dyilo, and John Tinanzabo makes the
12 Prosecution conclude at this stage that the person is
13 Bosco Ntaganda.

14 And there is one other aspect that I wish to submit
15 if the Pre-Trial Chamber permits me to do so. May the
16 judges of the Pre-Trial Chamber please have a look at
17 the still and may they please have a look at the
18 wristwatch worn by Bosco Ntaganda. And may the judges
19 please have a look at the photographs that form part of
20 annex 3, and in this context I refer to the two
21 photographs DSE00128099 and DSE00128005.

22 The Prosecution thinks that that watch is always the
23 same. It is the same on the photographs and it is the
24 same on the still of the video and there is one
25 additional feature that I wish to draw your attention

1 to, namely that the person that we believe to be Bosco
2 Ntaganda is having the watch on the right hand, which is
3 a very distinguishing feature, as in most areas, at
4 least to my knowledge, also in the area of Ituri,
5 usually wristwatches are on the left-hand side.
6 I think, and taking into account what your Honour, the
7 presiding judge has said, the combination of all the
8 details we have drawn the attention of the Pre-Trial
9 Chamber to in our view shows that the person in the
10 purple clothes is Bosco Ntaganda.
11 PRESIDING JUDGE JORDA (interpretation): Fine. Thank you.
12 I would also like to thank the technicians, who arranged
13 this video viewing. This adds to our appreciation, or
14 our understanding of the consistency of the application
15 of the Prosecutor.
16 Mr Withopf, had you something to add? No, then I
17 will turn to Judge Kuenyehia. Perhaps she would like to
18 put some questions.
19 MR WITHOPF: I wish to add one aspect the team has drawn my
20 attention to. It goes without saying, and to ease the
21 presiding judge's mind, that of course the Office of the
22 Prosecutor will ensure in the event that an arrest
23 warrant will be issued, and Bosco Ntaganda will be
24 arrested, identification of the person being arrested to
25 avoid any problems in a later trial.

1 PRESIDING JUDGE JORDA (interpretation): You are beginning
2 to calm me. Thank you very much, Mr Withopf.
3 JUDGE KUENYEHIA: Thank you, Mr President. I would like us
4 to now go to agenda item 11.
5 MR WITHOPF: Your Honour Judge Kuenyehia, in respect to
6 agenda item 11, which is further information on witness
7 protection, I wish to inform the Pre-Trial Chamber that
8 the leader of the DRC investigation team,
9 Mr Bernard Lavigne will make the presentation. I will
10 only address the aspect which in the agenda is covered
11 under A. And if the Chamber permits me to do so,
12 I would like to do so prior to the presentation of
13 Mr Lavigne.
14 JUDGE KUENYEHIA: That is perfectly okay. My question is
15 really this: I remember at the status conference of
16 15th March 2005, I believe it was agreed that the
17 Chamber would be informed whenever measures are taken to
18 ensure the safety of victims and witnesses, before these
19 measures were implemented. I have a very simple
20 question: why was the Chamber not informed before the
21 (Expunged)
22 MR WITHOPF: There may be a slight misunderstanding of the
23 interpretation of what has been said in the
24 15th March 2005 status conference. Acknowledging the
25 very important role the Pre-Trial Chamber has to play,

1 and does play in respect to the protection of victims
2 and witnesses, the Prosecution was and is of the view --
3 and I am quoting the law, Article 57(3)(c) -- that
4 whenever necessary the Prosecution would involve the
5 Pre-Trial Chamber. (Expunged)
6 (Expunged)
7 (Expunged)
8 (Expunged) that did not suggest that
9 there is any necessity of the Pre-Trial Chamber to get
10 involved. That is the reason why the Pre-Trial Chamber
11 has not been informed prior to (Expunged)
12 (Expunged).
13 JUDGE KUENYEHIA: Of course I am not going to start arguing
14 with you about whenever it is necessary, because if we
15 go into that we will be here all day.
16 PRESIDING JUDGE JORDA (interpretation): Excuse me for
17 coming in here. I know that is an answer which is not
18 an answer. It is to say we agree that you are involved,
19 but ultimately we are not in agreement, so I hope you
20 understand the limits of your answer.
21 MR WITHOPF: If the Pre-Trial Chamber permits, I would
22 invite my colleague, Mr Bernard Lavigne, to do the
23 presentation on the victims' and witnesses' protection.
24 MR LAVIGNE (interpretation): (Expunged)
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15 JUDGE KUENYEHIA: Thank you. Thank you very much for that

16 comprehensive -- it sort of answers all the questions

17 I had. But I have one small question to ask. In

18 addition to everything you have said, if the Chamber

19 were to issue the arrest warrants requested by the OTP,

20 would it be necessary to put in place further protective

21 measures for these "fragile witnesses", as you refer to

22 them?

23 MR LAVIGNE (interpretation): (Expunged)

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8 PRESIDING JUDGE JORDA (interpretation): Thank you. Another
9 question?

10 JUDGE KUENYEHIA: Shall we move on to agenda item 12 then.

11 Mr Withopf, are you the one going to deal with that
12 item?

13 MR WITHOPF: Yes, your Honour Judge Kuenyehia, yes, I will
14 deal with it. If you will allow me, prior to addressing
15 the issues as detailed in agenda item 12, to hand over,
16 as announced prior to the lunch break, copies of the
17 Statute. (Handed). I have again copies for all judges
18 of the Pre-Trial Chamber, and a copy for the Registry.
19 It is the Statute of the UPC of 15th September 2000.

20 The Prosecution submits the copies of the Statute as
21 exhibits.

22 PRESIDING JUDGE JORDA (interpretation): Court Officer,
23 would you like to give us the reference number for this
24 exhibit?

25 THE REGISTRAR: Yes. The number is HNE06, with

1 a confidentiality level of under seal. Thank you.

2 MR WITHOPF: And if I also may use this opportunity to
3 inform the Pre-Trial Chamber in respect to an issue that
4 has been addressed by the presiding judge earlier on
5 today. That is the issue about the supporting
6 materials. During the lunch break I have convened with
7 the Chief Prosecutor, and the Chief Prosecutor maintains
8 the position of the Prosecution as put forward in the
9 27th January filing. I make reference to paragraphs 14
10 to 23 of that filing.

11 JUDGE KUENYEHIA: I think the issues in agenda item 12 are
12 quite self-explanatory. Could you address them, please?

13 MR WITHOPF: Yes, your Honour, Judge Kuenyehia, that is
14 correct, it is quite self-explanatory and the
15 Prosecution can and will provide you with further
16 information. Under agenda item 12A, the Pre-Trial
17 Chamber has sought for clarification of the specific
18 entities that are the object of the request for
19 authorisation to disclose the existence of an arrest
20 warrant to certain entities.

21 We wish to inform the Pre-Trial Chamber that the
22 specific entities would include, probably inter alia,
23 for Thomas Lubanga Dyilo, the authorities of the
24 Democratic Republic of the Congo, and possibly MONUC,
25 MONUC based on the fact that the DRC authorities may

1 request MONUC to assist.

2 For Bosco Ntaganda, the specific entities would
3 include any other appropriate authorities of those
4 states whose co-operation is essential to the successful
5 execution of the warrant of arrest which would imply,
6 possibly, again the Democratic Republic of the Congo and
7 in addition possibly Uganda, possibly Rwanda, and again
8 MONUC.

9 In addition, and we have mentioned it in our
10 application, the situation on the ground is changing and
11 is literally changing every day. That situation may
12 require that the Prosecution at a later stage has to add
13 further states or entities, possibly including on short,
14 if not to say very short, notice.

15 JUDGE KUENYEHIA: Thank you. Can you address item B?

16 MR WITHOPF: Prior to addressing item B, if the Pre-Trial
17 Chamber so permits, I would like to draw the attention
18 of the Pre-Trial Chamber in relation to item A, to
19 a potential solution that was used by the Uganda
20 Pre-Trial Chamber, which had to deal with the very same
21 issues some months ago. The Uganda Pre-Trial Chamber
22 has found a solution along the lines -- and I am
23 quoting:
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7 This could be a way to go, if I may so suggest, for
8 the Pre-Trial Chamber, for the judges of this Pre-Trial
9 Chamber, to, in addition to the four entities

10 I mentioned, find a solution which is practicable and
11 which would allow the Prosecution to react rapidly if
12 the situation so requires.

13 JUDGE KUENYEHIA: Kuenyehia taken note of that.

14 MR WITHOPF: Thank you. I am now going to address agenda
15 item 12(b):

16 "Reasons for this request, considering the level of
17 confidentiality currently involved in the proceedings
18 relating to the Prosecution's application for the
19 issuance of arrest warrants."

20 There are a number of reasons, and one of the most
21 important ones is the timely execution of the arrest
22 warrants, the time of the execution and security
23 concerns, and security concerns would include, in
24 particular, Thomas Lubanga Dyilo, but also Bosco
25 Ntaganda. The Prosecution would disclose the existence

1 of the arrest warrants for the sole purpose of ensuring
2 that all appropriate steps are taken and are in place,
3 and everything is organised by the competent
4 authorities. The issues, the matters I am talking
5 about, are security, transport, proceedings under
6 Article 59, arrest proceedings in the custodial state,
7 and also and also in order to ensure the required
8 co-operation.

9 JUDGE KUENYEHIA: Thank you very much. Mr President, if my
10 colleagues have any other questions on this issue,
11 otherwise we can move on?

12 Then can we move on to agenda item 13, as we wind
13 our way to the end of the agenda.

14 MR WITHOPF: Certainly we can. This concerns the request
15 for authorisation for the Prosecution to make and to
16 transmit the request for arrest and surrender.

17 In respect to the legal basis for such an
18 authorisation, I wish to make a statement adding to what
19 has been said in the application. This is not a matter
20 of a legal basis for the OTP being the organ of the
21 Court, drafting and transmitting the requests for arrest
22 and surrender. It is more an issue about the legal
23 basis upon which the OTP requests the authorisation from
24 the Pre-Trial Chamber. What was and is meant was that
25 the OTP should be given the responsibility for drafting

1 and transmitting the relevant requests for arrest and
2 surrender. I will, however, address nevertheless the
3 legal basis, and that is the question, aiming for.

4 I refer again to the arguments made in our
5 application; in this context I refer to paragraphs 208
6 to 215. It was always important for the Prosecution in
7 this context to emphasise that the issuance of a warrant
8 of arrest, and making a request for co-operation,
9 seeking arrest and surrender, are two very distinct
10 steps. We have elaborated on this matter in our
11 application.

12 Making of the request for co-operation, seeking
13 arrest and surrender can be made by any organ of the
14 Court pursuant to Article 58(5). The organ of the
15 Court, it is submitted by the Prosecution, to make the
16 request should be the one best placed to ensure the
17 effective execution of the arrest warrants. The
18 Prosecution has furnished the Pre-Trial Chamber with
19 a whole variety of reasons why we believe that OTP is
20 the best-placed organ of the Court to make such
21 a request. Summarising these reasons: experience with
22 the DRC authorities and MONUC, likely to assist in the
23 arrests; very important confidentiality agreements of
24 states, with states, individuals who provide
25 information, organisations who provide information; and

1 the confidentiality agreements are very clear, basically
2 telling the Office of the Prosecutor that only the
3 Office of the Prosecutor is entitled, based on such
4 agreements, to use such information. And again, very
5 important, the timing of the execution in relation to
6 victim and witness security, but also in relation to the
7 security of OTP staff being deployed in the field.

8 I hope, Judge Kuenyehia, this is answering your
9 question in respect to agenda item 13(a).

10 JUDGE KUENYEHIA: I would be grateful if you could address
11 very shortly item 13(b). Very shortly.

12 MR WITHOPF: It appears to be difficult to refer to specific
13 or very specific problem. There is one aspect, however,
14 that should not be underestimated, namely the

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22 JUDGE KUENYEHIA: Thank you very much. I think we will
23 leave it there.

24 PRESIDING JUDGE JORDA (interpretation): Thank you.

25 Judge Steiner?

1 JUDGE STEINER: Yes, just going further on the agenda, if
2 the Prosecution could elaborate a little bit on item 14,
3 if the Prosecution has already monitored or investigated
4 about assets and properties in relation to Mr Lubanga
5 and Mr Ntaganda?

6 MR WITHOPF: Yes, your Honour Judge Steiner, the Prosecution
7 is paying attention to these matters in the course of
8 its investigation and evidence collected but in this
9 context more information indications have revealed a
10 number of aspects that could be important later on.
11 I will provide you with a full set of information that
12 we currently have in our possession but the Prosecution
13 does believes that the information available does not
14 allow or not yet allow measures pursuant to Article
15 57(3)(e).

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12 PRESIDING JUDGE JORDA (interpretation): I think that we

13 have come to the end of our hearing. If there are no

14 further questions, I would simply like to thank those

15 who have taken an active part in this hearing.

16 Mr Withopf, do you have any further questions?

17 MR WITHOPF: The Prosecution has no further questions or any

18 other issues to raise.

19 PRESIDING JUDGE JORDA (interpretation): Very good. Thank

20 you very much for your assistance. Court officer, are

21 there any outstanding issues regarding documents? As

22 you know, the Registry will be questioned about the

23 point which was raised in that connection after this

24 hearing.

25 I would also like to thank the interpreters, and

1 indeed to all of the technical staff, but perhaps
2 a little bit less the transcript, because we had that
3 transcript problem. Nonetheless, thank you to you all
4 and this hearing is adjourned.

5 THE USHER: All rise.

6 The hearing is adjourned at 3.58 pm

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