

1 International Criminal Court
2 Trial Chamber VI
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Robert Fremr, Judge Kuniko Ozaki and
6 Judge Chang-ho Chung
7 Status Conference - Courtroom 2
8 Wednesday, 31 May 2017
9 (The hearing starts in open session at 2.02 p.m.)
10 THE COURT USHER: [14:02:51] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE FREMR: [14:03:26] Good afternoon, everybody.
14 Court officer, please call the case.
15 THE COURT OFFICER: [14:03:31] Thank you, Mr President.
16 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
17 versus Bosco Ntaganda, case reference ICC-01/04-02/06.
18 We are in open session.
19 PRESIDING JUDGE FREMR: [14:03:46] Thank you, court officer.
20 Now appearances, please, in the usual order.
21 MS SAMSON: [14:03:53] Good afternoon, Mr President, and your Honours. For
22 the Prosecution today are Ms Dianne Luping, Ms Selam Yirgou, and myself,
23 Nicole Samson.
24 PRESIDING JUDGE FREMR: [14:04:03] Thank you, Ms Samson.
25 Defence, please.

1 MR BOURGON: [14:04:08] (Interpretation) Good afternoon, Mr President.

2 Representing Bosco Ntaganda, who is in the courtroom with us this afternoon,

3 Ms Isabelle Martineau and myself, Stéphane Bourgon. Thank you, Mr President.

4 PRESIDING JUDGE FREMR: [14:04:24] Thank you, Mr Bourgon.

5 And now Legal Representatives of Victims, please.

6 MS PELLET: [14:04:31] (Interpretation) Thank you, Mr President. Former child

7 soldiers are represented by Vony Rambolamanana and myself, Sarah Pellet, counsel at

8 the OPCV.

9 MR SUPRUN: [14:04:44] (Interpretation) Good afternoon, Mr President,

10 your Honours. For the victims of the attacks, Anne Grabowski, associate lawyer, and

11 myself, Dmytro Suprun, counsel at the OPCV. Thank you.

12 PRESIDING JUDGE FREMR: [14:04:56] Thank you, Ms Pellet. Thank you,

13 Mr Suprun.

14 We are present this afternoon to hear further submissions from parties and

15 participants in relation to the upcoming testimony of Mr Ntaganda, specifically, on the

16 issues contained in the filings bearing the numbers 1915 and 1924.

17 In order to organise our agenda for today, the Chamber shall first seek submissions on

18 each of the six issues raised in filing 1924, point by point. The Defence will be

19 allowed approximately, I'm saying approximately, five minutes to make submissions

20 on each issue, followed by the Legal Representatives of Victims, if requested, and then

21 a short reply, if necessary, on the part of the Prosecution. The Chamber shall

22 afterwards invite submissions on the issues raised in the other filing number 1915.

23 Now, unless there are any questions in relation to the procedure, we will start with the

24 first issue I mentioned, namely, the Prosecution request for the Chamber to make a

25 finding that the witness preparation protocol applies to Mr Ntaganda as a witness.

1 So I will give floor to Mr Bourgon, if he's ready. Seems to be ready. Should I repeat
2 the issue? Fine. So we will go step by step, so we are starting with the first one.
3 You have the floor, Mr Bourgon.

4 MR BOURGON: [14:06:54] Thank you, Mr President. The first topic in the
5 Prosecution's request refers to the application, of course, of the witness preparation
6 protocol to the accused, and as the Chamber is aware, this request is found in
7 paragraphs 12 to 14 of the Prosecution's request.

8 The Defence's position is that the witness preparation protocol does not apply to the
9 accused and, in any event, does not apply in its entirety to the accused.

10 There are -- the primary reasons supporting the Defence's position are as follows:
11 First, while the Chamber noted that the accused shall, in principle, be subject to the
12 same rules that are applicable to other witnesses, and that was at paragraph 18 of
13 decision 1914, the Chamber, Mr President, also considered in the same decision, at
14 paragraph 15, that Mr Ntaganda may be distinguished from other witnesses
15 appearing before the Chamber on a basis that while the statutory scheme does not
16 address the possibility of an accused giving a sworn statement and testifying under
17 solemn undertaking, he has a right deriving from Article 67 of the Statute.

18 The second reason is of course is that Mr Ntaganda, as the accused person in this case,
19 is well-known to the Prosecution.

20 In our respectful submission, there are two fundamental differences, at least these two,
21 the knowledge of the Prosecution plus, most importantly, the status of Mr Ntaganda
22 as an accused should actually guide the Chamber in ruling on most of the topics that
23 will be addressed today in relation to the Prosecution's request.

24 The first difference regarding the status of the accused: It was well articulated by the
25 Appeals Chamber of the ICTY in the Kvočka appeals judgment. Kvočka is spelled

1 K-V-O-Č-K-A. It's an appeals judgment with the number IT-98-30/1-A - for

2 Alpha - and it's a decision from 28 February 2005, at paragraph 125.

3 In this decision, the relevant paragraph reads as follows:

4 "... the President considered it clear that 'an accused cannot be considered for all
5 purposes as a witness'.

6 The principle enunciated is thus not limited to the facts in the Delalic Decision and can
7 be applied outside of its confines. In its own decision, the Trial Chamber considered
8 that neither the Statute nor the Rules nor the Tribunal's own practice 'treat a witness in
9 the same way as an accused testifying under oath' and that 'an accused enjoys specific
10 protection with regard to respect for the rights of the defence'.

11 The Appeals Chamber can see no fault in this reasoning. Indeed, it confirms that an
12 accused who chooses to testify as a witness is not to be treated qua witness but as an
13 accused testifying qua witness."

14 In other words, Mr President, the primary consideration is the status of Mr Ntaganda,
15 who enjoys specific rights, and the applicability of other rules and regulations to his
16 testimony must be considered in that light.

17 In this regard, the Prosecution's suggestion that pursuant to the protocol, preparation
18 sessions with Mr Ntaganda should be recorded and a witness preparation log and
19 note should be disclosed, we say these suggestions or requests must be disregarded if
20 only because consultations between Mr Ntaganda and counsel are protected by the
21 solicitor-client privilege.

22 While there are, Mr President, exceptional circumstances, albeit very limited, in which
23 the solicitor-client privilege can be lifted, consultations between a person accused who
24 wishes to testify and his counsel is certainly not one of them.

25 There are other paragraphs, Mr President, of the protocol that I could refer to you; for

1 example, paragraph 30 of the protocol, which also cannot apply to an accused.

2 Now, the Prosecution's alternative request is to issue an order specifically prohibiting
3 the conduct described in paragraph 28 and 29 of the witness preparations protocol,
4 that is, of course, during discussions between the witness, the accused and the
5 Defence. We respectfully submit, Mr President, that no such order are required. In
6 this regard, we'd like to refer the Trial Chamber to what the Trial Chamber II held in
7 the Katanga and Ngudjolo case, and that is to be found in filing 3171 of
8 23 September 2011, at paragraph 16.

9 I read, Mr President, it is in French; there is no English version of this decision
10 available. So I switch to French to allow some time for the interpreters to get ready.

11 (Interpretation)

12 "However, it doesn't deem it necessary to control possible contact between each
13 accused person and his or her Defence team, contrary to the assertion by the
14 Prosecutor. It is not so much the conduct of the accused that is questioned here as the
15 professionalism of counsel. In that regard, the Chamber can therefore only assume
16 that it will comply with the principles mentioned above and more generally to their
17 code of professional conduct."

18 (Speaks English) I also note, Mr President, that the Prosecution of course will have an
19 opportunity to cross-examine the accused. So, for all these reasons, we say that the
20 protocol on the preparation of witnesses should not apply per se to the testimony of
21 the accused, although some parts of it may apply, but certainly not the ones
22 highlighted by the Prosecution.

23 As for what the Prosecution can do in cross-examination, this is one of the further
24 topics to be addressed.

25 If you -- unless you have any questions, this concludes my observations on this first

1 point.

2 PRESIDING JUDGE FREMR: [14:15:27] Thank you, Mr Bourgon. I'm fine.

3 Now question to legal representatives, do you ask for the floor?

4 MS PELLET: [14:15:36] (Interpretation) Thank you, Mr President. To be brief, I

5 would only be speaking or addressing this specific point, and my remarks are as

6 follows: I endorse the submissions of the OTP, and that will be about it for now,

7 Mr President. Thank you.

8 PRESIDING JUDGE FREMR: [14:15:58] Very well.

9 MS PELLET: [14:15:02] (Interpretation) Thank you, Mr President, but let me go on

10 to say that the intentions of the child soldiers would be similar to those of the OTP,

11 particularly in relation to the situation of the accused person, who I believe took a very

12 conscious decision to testify under oath after considering all these issues, and this

13 would happen during the five or six weeks of our second evidentiary block. I think

14 this must be a well-taken decision by the witness which then places him in the same

15 situation as any other witness, whether it be a Prosecution or a Defence witness.

16 The protocol, therefore, must apply. Contacts between his lawyers and himself must

17 be restricted to ensure that his testimony is conducted under the same context as

18 testimony given by any other witness; otherwise, the very nature of his testimony will

19 be truncated.

20 That briefly is what I have to say on that issue, Mr President. And if any further

21 submissions from the Defence trigger a reaction, I will apply to speak, but for now this

22 is all I have to say. Thank you, Mr President.

23 PRESIDING JUDGE FREMR: [14:17:44] Thank you, Ms Pellet.

24 Mr Suprun.

25 MR SUPRUN: [14:17:50] (Interpretation) Thank you, Mr President. I fully

1 endorse the remarks of my colleague, which have just been made, but let me add that,
2 independently of the distinction that Defence makes between the accused and other
3 witnesses appearing before the Chamber, I think it is important that for the interest of
4 the victims, it is important for their questions to be put to the accused because the
5 Defence has not provided any advance copy of any written statement by the accused,
6 and it is only after his testimony that the Representatives of Victims will have an
7 opportunity to ask permission from the Chamber to put questions regarding the
8 personal interests of their clients.

9 That will be all, Mr President. Thank you.

10 PRESIDING JUDGE FREMR: [14:18:47] Thank you, Mr Suprun.

11 And now Ms Samson.

12 MS SAMSON: [14:18:50] Thank you. Briefly, Mr President, the Defence on this
13 particular issue raises two points, the first point has to do with the Prosecution's
14 knowledge of the accused. Although the Defence didn't develop this particular point
15 significantly, the Prosecution submits that that's an irrelevant consideration.
16 There are a number of witnesses who are Defence witnesses for whom the Prosecution
17 has some knowledge, including persons with whom we've met and taken witness
18 statements, some cases extensive witness statements, but the protocol, the witness
19 preparation protocol will nonetheless apply to them.
20 The second issue that the Defence raised and spent more time on is the unique
21 position of the accused vis-à-vis other witnesses. And the Prosecution recognises that
22 on different issues that we will address during this hearing Chambers have fallen on
23 both sides of that particular question. The accused is different in some respects to
24 witnesses, but he has chosen to testify in this case, he has given up the right to silence,
25 which we'll certainly address later, and a number of very important safeguards and

1 measures must now necessarily apply to him.

2 The underlining rationale for the witness preparation protocol has to do not with in
3 particular the communications as such between counsel and the witness, but rather to
4 safeguard a proceeding that the Chamber has said can take place for the reasons of
5 efficiency, but under very strict conditions. And so the Prosecution seeks to apply
6 that important safeguard to the preparation sessions for the accused.

7 It may, you know, it could be at this time that the accused and the Defence team are
8 preparing for his examination-in-chief and cross-examination, they could spend weeks
9 preparing. To be honest, we do not know. We don't have much information about
10 what he is going to say, and it is incumbent, we say, upon the Chamber to ensure that
11 the procedural safeguards that are in place for other witnesses testifying should
12 remain in place for the accused.

13 In relation to the decision cited by the Defence on the unique nature of an accused
14 versus a witness, having looked at that decision right now very briefly, it appears to
15 relate to a discussion as to whether a prior statement of the accused could be either
16 disclosed, used or admitted, I'm not certain, as opposed to the requirements in relation
17 to prior statements of other witnesses. And the Trial Chamber appear to have
18 determined that a witness -- an accused is differently placed in that scenario and
19 doesn't have to have a prior statement either disclosed or admitted in the same way as
20 another witness may.

21 And that may be the right distinction between a witness and an accused in the context
22 and within the facts of that particular case, but that case certainly did not deal with
23 witness preparation strictly speaking, and what we seek to distinguish that case from
24 the present scenario on the basis that witness preparation is meant to ensure that,
25 while efficiency is maintained by allowing contacts with the accused and witnesses

1 and his counsel, that there be the opportunity for the Prosecution and the Chamber to
2 question what may have taken place and to have a video recording of what took place
3 in that event and also to have proper disclosure of a witness preparation note so that
4 we can look at it and determine whether we need to address the Chamber on any of
5 the issues that were canvassed or discussed with the Defence.

6 And those are the submissions I wish to make on that point.

7 PRESIDING JUDGE FREMR: [14:23:07] Thank you, Ms Samson.

8 Now we can move to the second issue, and I'm just saying that it's pretty possible that
9 we can go step by step. There will be probably some overlappings with the previous
10 issue, so please in such a case try not to be repetitive.

11 Now the second issue, which is the Prosecution request that the Chamber order that
12 Mr Ntaganda and his Defence team are prohibited from communicating for the
13 duration of Mr Ntaganda's testimony.

14 Mr Bourgon.

15 MR BOURGON: [14:23:44] Thank you, Mr President.

16 Before I address this issue, with the Chamber's leave I would just like to say a few
17 words to what was just mentioned by the Prosecution.

18 First, with respect to that decision, the decision was specifically on the issue of, and I
19 will read the title of that decision, 3171, (Interpretation) "Decision on the urgent
20 request of the Prosecutor to prohibit contacts between accused persons Mathieu
21 Ngudjolo and Germain Katanga with their Defence teams during their testimony."

22 (Speaks English) So it is a decision that is specifically on point.

23 I will note and that will be it, Mr President, that the Prosecution has not provided any
24 submission in respect of the two issues that we raised. The difference with the
25 accused is that he has rights. They did not address this.

1 The second issue is the information or the consultation between counsel and the
2 accused are subject to solicitor-client privilege. They did not say anything about that.
3 This makes the whole difference with the applicability of those issues.
4 I move, Mr President, to the Prosecution's second request. Now, the second request is
5 divided into three components. So I will address the first component, which is
6 communications between Mr Ntaganda and his counsel which the Prosecution seeks
7 to have prohibited entirely, that is at paragraph 15 to 27 of the Prosecution request.
8 For the reasons that follow, the Defence of course opposes this request. First, the
9 Defence notes that in its response to the Defence request to modify the first two
10 evidentiary blocks, that was filing 1909 of 16 May, at paragraph 15, the Prosecution
11 did not provide notice that it would request a total ban on communications between
12 accused and counsel during his testimony. In that paragraph they were referring to a
13 ban on substantive consultation.
14 Now they go one step further, maybe hoping that the Chamber will cut the apple in
15 two, by requesting the totality of a full ban on the communications between counsel
16 and his client.
17 Mr President, in this regard, it is important to note again the holding that I'd like to
18 refer to where the Appeals Chamber in the Prlić case of the ICTY holds the following,
19 and that's what they say in exactly the same issue: "The Defence request" -- sorry,
20 that was paragraph 15, sorry, I missed -- I got a problem here. That was the 15 I was
21 referring to in terms of what the Prosecution initially requested.
22 Second observation, Mr President, is that the case law referred to by the Prosecution in
23 its request appears for the most part to be selective and is analysed only from one
24 point of view, again, forgetting the rights of the accused.
25 It is noteworthy, Mr President, that in both cases before this Court in which persons

1 accused decided to testify, communications between counsel and accused were not
2 suspended. I refer to Trial Chamber II's decision, this is the same one I referred to at
3 the beginning, filing 3171, where Trial Chamber II held the following at paragraph 17.

4 Once again, Mr President, I read in French: (Interpretation)

5 "The Chamber, therefore, does not intend to suspend the privileged communication
6 nor adopt any other measures likely to impede the accused from contacting their
7 Defence teams. The Chamber is of the view that the very clear interpretation it has
8 made of the above principles is sufficient. It further notes that the Prosecutor has the
9 possibility to cross-examine the accused and on the same occasion also highlight any
10 instructions or inadequate preparation that may have taken place."

11 (Speaks English) In this decision, Mr President, Trial Chamber II provided the
12 rationale as follows, which is that the goal of any and all measures taken to avoid that
13 the testimony of a witness is subjected to undesirable influence would not justify a
14 disproportionate intrusion in the fundamental rights of the accused.

15 In French the decision goes on to state at paragraph 14: (Interpretation)

16 "The Chamber recalls that some rules that apply to ordinary witnesses do not
17 necessarily apply to the accused, particularly if their application would be
18 incompatible with the rights of the Defence. In the case at hand, the principle of
19 prohibiting contacts between witnesses and parties from the beginning of the
20 familiarisation period, which the Prosecutor has referred to as intended to avoid any
21 practices of influencing witnesses, as well as the principle prohibiting the witness of
22 talking to his -- to anyone whosoever with a view to avoiding any undesirable
23 influences," the Chamber goes on to say "such would not justify a disproportionate
24 intrusion into the fundamental rights of the accused person."

25 (Speaks English) Mr President, this is, moving back to English -- I apologise if I go

1 too quickly. This is probably what prompted the Prosecution to submit case law from
2 other international tribunals and even national systems suggesting a different course
3 of action. But strikingly, Mr President, even the external jurisprudence, if I can use
4 this term, cited by the Prosecution does not support its position.

5 I believe, Mr President, that the most important decision in this regard is the one I
6 referred to a little earlier, and that was in the Prlić et al, case. Prlić is spelt P-R-L-I-C.
7 It is a decision from 5 September 2008. It is a decision rendered by way of
8 interlocutory appeal where the Appeals Chamber confirmed the decision of the Trial
9 Chamber to allow contacts between -- "contacts" is probably the wrong word -- to
10 allow consultations between the accused and his counsel at every stage of his
11 testimony.

12 A couple of paragraphs need to be read into the record. Paragraph 12:

13 "In the impugned decision, the Trial Chamber held that the general prohibition of
14 contact between a witness and the parties does not, per se, bar communications
15 between an accused testifying in his own defence and counsel. The Appeals
16 Chamber agrees."

17 Paragraph 14:

18 "Thus, it is a fundamental right of an accused to have access to counsel at any stage of
19 the proceedings."

20 Prlić has pointed out that 21(4)(b) of the Statute, which is kind of equivalent to
21 components of Article 77 of our statute, grants an explicit right precisely defined
22 without any lists of caveats or compromises. Indeed, the formulation of the right to
23 communicate with Defence counsel of one's own choosing reflects straightforwardly
24 the guiding principle.

25 Paragraph 16 is very interesting because it addresses the specific nature of

1 international criminal law trials. Here the Appeals Chamber of the ICTY says the
2 following:

3 "When considering this, the Appeals Chamber has to take into account the magnitude,
4 the complexity and length of trials before this international tribunal. As an accused
5 must often consult with his counsel during the trial on the appropriate defence
6 strategy or the significance of what is happening in the courtroom, to take away this
7 right for an extended period of time could potentially undermine one of the most basic
8 rights of an accused and endanger the integrity and fairness of the proceedings as a
9 whole. The Appeals Chamber in this context notes that in the present case the
10 accused Prlić and Petković are scheduled to testify for 36 hours and 12 hours
11 respectively over the course of several days. However, the Appeals Chamber also
12 considers that pursuant to Rule 90(f) of the Rules, the Trial Chamber controls the
13 mode and order of interrogating witnesses."

14 Those are the three paragraphs that are the most important of this decision.

15 However, in response to the Prosecution's argument, paragraph 17 is also very
16 important.

17 "The Appeals Chamber is not persuaded that the reliability of an accused's testimony
18 can only be preserved by prohibiting contact between counsel and the accused during
19 the latter's testimony. If the Prosecution fears that counsel would subsequently coach
20 the accused in order to tailor the testimony, then it is reminded that under the system
21 in place before this international tribunal it has the opportunity to carefully
22 cross-examine the accused. Accordingly, the Prosecution might well establish that
23 the accused's reliability and/or credibility is in doubt or even destroyed because it
24 appears from his testimony that during the course of his examination he was
25 improperly coached by counsel on how to respond to certain questions. The final

1 assessment of the probative value of testimony given under these specific
2 circumstances lies as usual with the Chamber having heard the witness. Indeed, the
3 Trial Chamber in the impugned decision correctly took these concerns into account
4 when holding that the weight to be assigned to the evidence is determined when
5 deliberating the overall first instance case file and that consequently the probative
6 value of a testimony may not be determined in advance according to the mode by
7 which it is presented."

8 In that case, Mr President, communications between counsel and accused were
9 maintained throughout the testimony of the accused, including examination-in-chief,
10 cross-examination and re-examination.

11 Now, pursuant to this decision, the Trial Chamber had to clarify its position and,
12 based on that decision, which is on 11 June 2009, and that was a decision under the
13 number, the case number IT-04-74-T - for trial - order clarifying the relationship
14 between counsel and accused testifying within the meaning of Rule 85(c) of the Rules.
15 And there the Trial Chamber said that even lists of documents can be made available
16 to the accused during his testimony.

17 Now, the Trial Chamber in a subsequent case, in the Popović case before the ICTY,
18 followed the Appeals Chamber ruling with the exception of the nature of consultation
19 during cross-examination and re-examination. The Trial Chamber held in this
20 regard, this is the Popović et al, case, this is case number IT-0588-T. It is a transcript
21 on page 30637 of 26 January 2009.

22 In the Prlić et al, case, the Appeals Chamber in its decision of 5 September stated, inter
23 alia, that it is a fundamental right of an accused, and I am quoting, "to have access to
24 counsel at any stage of the proceedings." At the same time, the Appeals Chamber
25 noted that a decision on the extent of contact between an accused who chooses to

1 testify and his counsel is vested in the Trial Chamber and is, therefore, discretionary.
2 Applying these principles and bearing in mind the legal standards set forth by the
3 Appeals Chamber in its decision, standards and principles meant to guide the exercise
4 of this discretion, the Trial Chamber comes to the following conclusion and decides as
5 follows: Accused Pandurević shall have unrestricted access" to counsel -- "to his
6 counsel" sorry "throughout the course of his testimony. We trust that such access will
7 be carried out in an appropriate manner. However, considering the specific
8 circumstances of this complex multi-accused case and the importance of
9 cross-examination for all parties with regard to the substance of communication
10 during such access, the Trial Chamber considers it necessary to impose some
11 restrictions during cross-examination and re-direct. In that regard, the
12 communications between counsel and accused during those stages", that is
13 cross-examination and re-direct, "shall not include a discussion of the substance of his
14 testimony."

15 So contacts throughout the testimony and no substantive contacts during
16 cross-examination and re-exam.

17 But the Chamber went on to highlight two exceptions to this restriction. I won't read
18 the decision to try and save some time, but the first exception is that if counsel for the
19 accused may apply to the Chamber, ex parte, if he wants, to seek leave to discuss a
20 substantial issue with his client and he may communicate that to the Chamber. The
21 accused can do the same, if he wants to consult with his client on a substantive issue,
22 then he might pass on this request to his counsel, who will then pass it on to the
23 Chamber.

24 The other exception, of course, is that, the second one, at all times counsel is free to
25 communicate any filings, including exhibit lists to his client, Mr Pandurević.

1 "Finally, the Trial Chamber wishes to make it clear access and restrictions on
2 communications apply to the entire Defence team."

3 Now, why did the Popović Trial Chamber feel the need to depart from this, from the
4 guiding principles of the Prlić? Well, they say so, they say it is because of the specific
5 circumstances of this multi-accused case.

6 And for the record, Mr President, I was present during that case, I was one of the
7 counsel involved, and there were specific circumstances, because out of seven accused
8 there were fundamentally opposed Defence theories. That is why it made it so
9 important to impose this issue.

10 So in conclusion and in light of these precedence, we request, Mr President and the
11 Chamber, to authorise consultation between the accused and his Defence team during
12 all phases of his testimony, including cross-examination and re-examination.

13 We submit that the limitation on substantive consultations between counsel and
14 accused during cross-examination, that is the Popović model, is not warranted in this
15 case, in particular, in the event the Prosecution is authorised to use any of
16 Mr Ntaganda's non-privileged conversations during his cross-examination.

17 Mr President, that concludes on the communications, per se. There are two other
18 topics under this heading, cross-examination items not to be discussed with
19 Mr Ntaganda, and the third one being the issue of - what is it? - the cross-examination
20 of the Prosecution on discussion of the Defence team.

21 Do you wish me, Mr President, to read these issues briefly at this point?

22 PRESIDING JUDGE FREMR: [14:45:27] But please absolutely briefly because, you
23 know, I said originally five minutes, so you get even more. I agree that those issues
24 are really substantive, so it's fine with me, but please now try to be briefer.

25 MR BOURGON: [14:45:39] Thank you, Mr President. Regarding the

1 cross-examination items, no such limitations were imposed on the accused in the Prlić
2 case as mentioned previously. And there were -- but we, ourselves, kind of agree
3 with this request, not to give the accused lists of cross-examination items. So that
4 part of the request is not a difficulty. However, our position is based on two very
5 important caveats. First one, Mr President, is the Prosecution disclosure obligations.
6 If the Prosecution has in its possession any documents, whether incriminating or
7 exculpatory, whether in the form of statements, documents or other forms of real
8 evidence related to the charges laid against Mr Ntaganda, then these documents
9 should have been disclosed by now. This includes, of course, any documents in the
10 possession of the Prosecution related to either to the actus reus or the mens rea of the
11 charges but as well as to the character of the accused.
12 So unless Mr Ntaganda has omitted to review some of this material, then he will not
13 be taken by surprise, so we have no problems with not communicating the list because
14 there is no element of surprise.
15 Should, however, the Prosecution come forward on its list of documents with
16 documents that should have been disclosed, then we will definitely come to the Trial
17 Chamber and seek permission to consult on these documents with him prior to
18 cross-examination.
19 Now, very importantly, Mr President, this includes documents which are in the
20 possession of the Prosecution related to Mr Ntaganda's character at all times. Since
21 the beginning of this case, the Prosecution has constantly been trying to challenge and
22 undermine Mr Ntaganda's character, including, even though we tried to object, the
23 use of information, evidence and documents going beyond the temporal scope of this
24 case. Consequently, any such documents in the possession of the Prosecution going
25 to the character of Mr Ntaganda should by now have been disclosed, regardless of the

1 date of these documents.

2 The second caveat, Mr President, has to do with the non-privileged conversations.

3 Prosecution argues that discussions of any of these conversations should not be

4 authorised, should not be -- take place with the accused. Well, Mr President, we take

5 the complete opposite view. If the Chamber -- should the Chamber authorise the

6 Prosecution to use any of these conversations during cross-examination, then we say

7 they should be an exception to the rule of not discussing documents or substantive

8 issues with Mr Ntaganda. And there are many reasons for this, including the

9 difficulties associated with the reliability, transcriptions, translations of any

10 conversations the Prosecution might be authorised to use, the context in which these

11 conversations were obtained, the selection done by the Prosecution of an amount of

12 conversations taken from a huge, vast amount of conversations, which the accused did

13 not have the opportunity to review and analyse entirely, the undue advantage gained

14 by the Prosecution by having to access conversations which included both personal

15 information and, more importantly, Defence information.

16 In this context, should the Prosecution be authorised to use any conversations, it is

17 essential for the accused to have the opportunity to consult with counsel on these

18 conversations.

19 As far as the Prosecution request to have the freedom to cross-examine the accused on

20 any consultation, that's not a problem. We agree. This is the norm. This is

21 cross-examination. And the accused is aware of this.

22 However, there is one, again, one caveat is, of course, questions seeking to elicit

23 information which is protected by the solicitor-client privilege should not be allowed,

24 but I don't think that will be a problem.

25 This concludes my observations for the second Prosecution request. Thank you.

1 PRESIDING JUDGE FREMR: [14:51:01] Thank you, Mr Bourgon.

2 LRVs, any request for the floor? No.

3 Ms Samson, please.

4 MS SAMSON: [14:51:08] Yes, thank you, Mr President.

5 The very first point I wish to make is related to the last series of submissions, simply to
6 clarify that the decision I referred to and tried to distinguish for the Chamber was not
7 an ICC decision, it was not the Katanga decision, it was the Kvočka decision which the
8 Defence had referred to initially.

9 On this particular issue, which is the extent of communications between the accused
10 and counsel during the testimony of the accused, the Prosecution set out as fairly as
11 possible, in my submission, what various Chambers have done.

12 The Prlić decision, which we cite at paragraph 24, indeed sets out very clearly that this
13 particular issue falls entirely within the discretion of a Trial Chamber. And so this
14 Chamber has the authority to either preclude communications on substance or to
15 allow them, with whichever conditions it seeks forth.

16 The Prosecution did not seek to hide decisions that did not restrict communications
17 between counsel and the accused.

18 In paragraph 23, we refer to the Katanga decision. In paragraph 24, we refer to also
19 the Popović decision where indeed some restrictions were put in place to restrict
20 communications of substance during cross-examination and re-examination of an
21 accused. So we have indeed referred to all of the jurisprudence that Defence counsel
22 referred to, but there were five very important decisions, we say, and cited, where
23 Chambers used their discretion to prohibit contacts between an accused and his
24 counsel for reasons that we say are legitimate, sound, and ensure the integrity of the
25 proceedings. And it is those decisions that we wish this Chamber to follow.

1 And I note in particular that the accused's right to his counsel is not unfettered, as was
2 found in those decisions, and in particular in Krajišnik, the Chamber ordered the
3 detention centre to disconnect the accused's privileged telephone communication line.
4 So it is certainly not correct that in every instance the accused's right to counsel is the
5 most important right that a Chamber has to consider in the context of hearing an
6 accused's testimony.

7 And so we have indeed opted for safeguards that we believe to be the most stringent
8 and the ones that will best safeguard the integrity of these proceedings, which is a
9 complete ban on discussions between counsel and the accused during his testimony,
10 except with leave of the Chamber, after consultation with the Prosecution, on issues
11 that the accused and the Defence counsel may necessarily need to discuss but that will
12 not deal with substantive testimony issues.

13 And if I may, I would refer even to the Katanga decision in which indeed some
14 communication was permitted between counsel, but I note in paragraph 15 of that
15 decision, which has been cited by the Defence, it's decision 3171, Trial Chamber
16 recalled - it is a French decision but I will translate it, it is from paragraph 15 - that
17 counsel is prohibited, counsel of accused is prohibited when that accused testifies to
18 recommend the manner in which the accused should respond to questions that are
19 asked of him or more generally prohibited from discussing his testimony with him
20 during the course of his testimony.

21 So although that Chamber did not restrict communications entirely, they do in
22 paragraph 15 recall that it's prohibited for counsel, where an accused is testifying, to
23 discuss his testimony with him in the course of the testimony.

24 And this is what we are seeking to ensure is respected because we've also cited, we
25 think, powerful language from Trial Chambers that say that even when there's no ill

1 will on the part of counsel or on the part of the accused who's testifying, the effect of
2 having discussions during the course of testimony undermines aspects of
3 cross-examination in the -- in the way in which we conduct it here and does affect
4 spontaneity, and that accused persons who testify with the benefit of counsel during
5 breaks and between examination sessions is different and can impact on the
6 Chamber's ability to assess the truthfulness of the account. And that's not even with
7 any instances or allegations of coaching or other inappropriate behaviour, it is just
8 what happens when you have counsel and accused's or any witness's discussion on
9 the substance of testimony. And that is why in many jurisdictions, including this one,
10 discussions between witnesses and the calling party are prohibited during the course
11 of testimony.

12 And on the Popović point that the Defence mentioned and sought to distinguish
13 because it was a complex case and of multi-accused persons with differing defences,
14 we submit that this case is also a complex one and that for reasons the Chamber is
15 fully aware, with allegations that we've put forward of interference, that it is
16 incumbent on the Chamber to ensure the strictest of protections are in place for the
17 integrity of the proceedings, including during the accused's testimony.

18 And lastly, I'll note that in the Prlić Appeals Chamber decision, while they upheld the
19 discretionary nature of the Chamber's powers to decide these issues, they placed
20 particular emphasis in paragraph 16 on the Chamber's ability to determine the truth
21 and in the way it should balance its discretion.

22 And then very quickly on the other sub-issues that were addressed, or connected
23 issues that were addressed by the Defence, the fact that the Prosecution may be
24 permitted to use non-privileged communications from the Detention Centre, in our
25 submission, is irrelevant to a determination as to the contacts between an accused and

1 his counsel during his testimony and it's also irrelevant to issues of discussions of
2 documents that we wish to put on our list.

3 In relation to discussions between the accused and his counsel on his conversations,
4 the Prosecution maintains, for the reasons it set out in its filing, its request that those
5 discussions not take place. And the accused, in our submission, will always be best
6 placed to provide evidence on what he said or did not say in the conversations, and
7 short of advising the accused to strictly tell the truth in terms of what happened, in
8 our submission, discussions between the accused and his counsel on those
9 conversations will not be of any further assistance, and that can happen during a
10 witness preparation session duly recorded in advance of his testimony.

11 And those are the submissions I wish to make. Thank you.

12 PRESIDING JUDGE FREMR: [14:59:10] Thank you, Ms Samson.

13 Before we will continue with the third issue, I would like to remind all of you that
14 time allotted to this discussion is two hours and at the moment we exhausted one
15 hour. So please have it in mind in making your further submissions.

16 Moreover, as I said, in my view that the first two was really substantive, like the others
17 are in my view a bit less substantive, so I believe that you will accommodate your,
18 especially the duration of your oral submissions to that fact.

19 The third issue is the Prosecution request that the Chamber order that Mr Ntaganda be
20 prohibited from discussing his testimony with any non-privileged contacts at any time
21 during his testimony.

22 Mr Bourgon, please.

23 MR BOURGON: [15:00:01] Thank you, Mr President. Just one quick point. My
24 colleague just raised an issue that is very important that because of allegations of
25 whatever it is, coaching scheme, that this should be a reason to prohibit consultations

1 between counsel and accused.

2 If the Prosecution has any allegations that counsel is involved into such scheme, they
3 should bring those allegations forward immediately. I don't think this has an impact
4 on whether the counsel should consult with the accused.

5 Mr President, briefly on the third issue, we agree with this request. It's not -- not
6 too -- not too problematic. However, we deem important to underscore one thing, is
7 that the Prosecution spend paragraphs arguing that the Chamber's recent decision
8 easing the conditions, the restrictions, imposed on Mr Ntaganda would
9 change -- would change the situation or make it more likely or more possible for
10 Mr Ntaganda to continue in any scheme that is alleged. Well, that is incorrect,
11 Mr President. According to that decision, the accused is still subject to active
12 monitoring. And all of these conversations are given to the Prosecution after they
13 have been recorded, so there is absolutely no possibility for the accused to have any
14 contacts with non-privileged persons. And we agree that he should not, and he will
15 not, I can assure you of this, Mr President. Thank you.

16 PRESIDING JUDGE FREMR: [15:01:47] Thank you very much, Mr Bourgon.

17 Legal Representatives? No. Fine.

18 Ms Samson? No comment?

19 MS SAMSON: [15:01:54] No, nothing further.

20 PRESIDING JUDGE FREMR: [15:01:56] All right.

21 Then we can move to the fourth issue, which is the Prosecution request that the
22 Chamber ordered that Rule 74 assurances are inapplicable to Mr Ntaganda and that he
23 must answer all questions put to him once he commences his testimony.

24 Mr Bourgon, please.

25 MR BOURGON: [15:02:19] Mr President, we agree with this, with this issue or this

1 matter. The accused, having waived his right to remain silent by testifying in his
2 own defence, that's where his right has been waived and then he's in the same position
3 as other witnesses in this regard.

4 Mr Ntaganda understands that any and all of his answers will be taken into
5 consideration by the Chamber during its deliberations related to the charges. Thank
6 you.

7 PRESIDING JUDGE FREMR: [15:02:50] Thank you.

8 So I will move directly to Ms Samson. If legal representatives would like to say
9 something, please let me know.

10 So now, Ms Samson, please.

11 MS SAMSON: [15:03:00] I have nothing further to add. Thank you.

12 PRESIDING JUDGE FREMR: [15:03:02] Very well.

13 So the next issue is the fifth one. The Prosecution requests that the Chamber order
14 the Defence to provide the list of items that it intends to use with Mr Ntaganda during
15 its examination-in-chief ten days before the start of Mr Ntaganda's testimony.

16 Mr Bourgon.

17 MR BOURGON: [15:03:25] Thank you, Mr President. Mr President, I will be a
18 little longer on this one. The Defence submits that there is no justification to depart
19 from the decision on the conduct of proceedings in this manner.

20 We also deem appropriate in response to this issue to address the Prosecution's
21 erroneous submissions at paragraph 11 of its filing regarding the Defence compliance
22 with its disclosure obligation, because that's basically the rationale for the
23 Prosecution's request.

24 This issue, Mr President, was addressed in the Defence submission, that is filing 1920,
25 of 24 May. I'm not going to repeat what is in this filing. However, we wish to

1 underscore, first, that the summary provided in this submission, that is the summary
2 of Mr Ntaganda's testimony, meets all the requirements identified by the Chamber in
3 respect of witness summaries. Moreover, the Defence underscores that the
4 Chamber's holding that the Prosecution knows the accused very well.

5 The Prosecution knows the Defence case probably better than I am because they have
6 been listening to thousands of conversations in which Mr Ntaganda has been
7 describing his defence and thereby gaining an undue advantage.

8 The Prosecution refers to maps that have been undisclosed. Mr President, these are
9 maps that are already in evidence. We just took nine maps and we made one and we
10 gave it to the Prosecution. It's much more of a courtesy than anything else so that
11 there is -- they can prepare with the same map that we are preparing with.

12 The series of photographs. That has been explained previously and the Chamber has
13 already ruled on the aspects of photograph. We explained why they were not
14 available previously and they have now been disclosed.

15 The satellite images. That's public information available. We told them exactly what
16 images we would be using, from what area, and what features we would be referring
17 to.

18 The only really -- the only two issues, really, is the issue of the organisational charts,
19 and that is simply to make the witness of the test -- sorry, the testimony of the witness
20 to more streamline by having him prepare organisational charts beforehand, and then
21 to disclose that to the Prosecution along with a statement by the accused saying, "I'm
22 the one who made these charts", and then during his examination and
23 cross-examination he can be asked questions on these charts. We can save a lot of
24 time by acting this way.

25 The issue of the translation and transcriptions of video is an issue of resources. We

1 have -- the videos are in the Prosecution's possession. They have these videos. They
2 have the resources to understand everything that is on those videos, and we will
3 produce the translation and the transcription of those select part that we will use with
4 Mr Ntaganda's testimony. There is no non-compliance by the Defence.

5 As for the UN documents, we don't even know if we will get such documents, but we
6 always keep our fingers crossed that at some point the United Nations will give us
7 those documents because we believe they can be helpful.

8 So for all these reasons, Mr President, there's no reason to provide the Prosecution ten
9 days in advance the list of items. They will get the list five days before and then they
10 can prepare. The examination-in-chief of the witness will be quite long, and during
11 that time they have a lot of time to address these exhibits. So there's no reason to give
12 those earlier than -- or earlier than five days prior to the beginning of the testimony.

13 This concludes my observation, Mr President, on this issue.

14 PRESIDING JUDGE FREMR: [15:07:55] Thank you, Mr Bourgon.

15 One question from my part: If there is no legal justification, as you said, isn't it then
16 feasible to provide those materials ten days before as an act of courtesy to the
17 counter-party?

18 MR BOURGON: [15:08:14] Mr President, these -- the photographs have already
19 been given, and the other material we are trying to produce it, and so it's an ongoing
20 work. As soon as we have something, we give it to the Prosecution. But again these
21 are documents that they have already, so there is no -- no -- we're not impeding on the
22 Prosecution's preparation. Ten years of investigation, they must know where they're
23 going with Mr Ntaganda.

24 PRESIDING JUDGE FREMR: [15:08:43] All right. That's enough. Thank you.

25 MR BOURGON: [15:08:45] Thank you.

1 PRESIDING JUDGE FREMR: [15:08:47] Mr Suprun.

2 MR SUPRUN: [15:08:48] (Interpretation) Thank you, Mr President. Just one

3 comment: I joined the Prosecutor's request for the Defence documents to be

4 disclosed as quickly as possible. And since my colleague from Defence has several

5 times raised the argument that the Prosecutor is very familiar with this case because

6 he has conducted investigations over ten years, may I just say that this is not the case

7 for the Legal Representatives because we only received this information from the

8 parties.

9 For that reason, in order to enable us to prepare adequately for the testimony of the

10 accused person, we would like to have the list of materials as early as possible. And

11 that's why I join the Prosecutor in their request for the documents or the list to be

12 submitted ten days before. Thank you.

13 PRESIDING JUDGE FREMR: [15:09:44] Thank you, Mr Suprun.

14 Ms Samson.

15 MS SAMSON: [15:09:46] Very briefly, your Honour. The underpinning rationale

16 for this request was not the Defence's late disclosure of items in relation to the

17 accused's testimony. That doesn't feature in paragraphs 39 or 40, where we set out

18 our request in relation to this issue. We have done so on the basis of efficiency and,

19 in our submission, as we said earlier, the decision to call the accused and to notify the

20 parties was submitted later than is preferable, and any amount of advance assistance

21 that the Defence can provide to the parties, the participants and the Chamber will

22 assist.

23 If the Defence were to -- or the Chamber were to look at the Prosecution's disclosure of

24 its list of documents, in many cases - although I can't say in all cases - we sought to

25 apply a business-day rule to the Chamber's five-day rule, so we -- we ended up giving

1 the document lists sometimes seven days in advance, as quickly as we could.
2 And the accused is going to be an important fundamental witness in the case. He's
3 likely -- the Defence counsel is likely to use a significantly higher number of
4 documents with him than with other witnesses, and we would certainly appreciate, as
5 a courtesy, if the Defence are willing to do it, or by order of the Chamber, having some
6 additional supplementary advance time to prepare the materials.

7 Thank you.

8 PRESIDING JUDGE FREMR: [15:11:22] Mr Bourgon, any final reaction on
9 Ms Samson's submission?

10 MR BOURGON: [15:11:28] Mr President, to the best of my recollection, this
11 five-day calendar rule was always applied, so there's not a business day, but I can
12 verify this.

13 Mr President, the -- the total Defence exhibit list today has a certain number of items.
14 They can all be used with the accused. Should I take my list and give it to the
15 accused and say that's what I intend to use? That will solve the matter if that's what
16 they want. But if they want a more focused list, I say, Mr President, that they can
17 wait five days until prior to and they'll have plenty of time to assess the documents
18 and to raise them in cross-examination.

19 Thank you.

20 PRESIDING JUDGE FREMR: [15:12:07] All right.

21 Let's now move to the final issue arising from filing 1924, which is the Prosecution
22 request that the Chamber order the Defence to instruct Defence witnesses appearing
23 after Mr Ntaganda has testified not to follow his testimony in any manner.

24 Mr Bourgon.

25 MR BOURGON: [15:12:33] Mr President, in the sake of -- to save some time, I think

1 we can address six and seven together. The next issue deals with the use of private
2 sessions.

3 We disagree with these requests, of course, other than for reassuring the Prosecution
4 that no fact witness will be present in the courtroom during the testimony of
5 Mr Ntaganda, because this is provided for in Rule 140(3). But the Prosecution's
6 request is, first of all, impracticable; to ask us to use resources that are very limited, to
7 start calling 110 witnesses to inform them that they're not allowed to watch the
8 testimony of Mr Ntaganda on the internet, is not a very practical or helpful solution.
9 More importantly, if I call them and I say, "Hey, Mr Ntaganda is testifying next week,
10 but don't watch it", that might produce --

11 PRESIDING JUDGE FREMR: [15:13:33] Mr Bourgon, you know that I always
12 respect your temperament, but please try and refrain a bit from your dramatic
13 gestures. Thank you.

14 MR BOURGON: [15:13:43] That might produce the opposite effect, Mr President, if
15 we start calling the witness and to draw interest that most likely is simply not present
16 at the moment.

17 There's no reason, in our respectful submission, Mr President, to go into private
18 session for the purpose of making the trial non-public. The right to a public trial is a
19 right. To do this just to make the trial non-public, to us is a non-issue. Whether a
20 witness decides on his own to watch a proceeding is entirely up to the witness, as it is
21 entirely up to anyone in the public.

22 As for the possible contamination, the Prosecution, you know, they -- we have two
23 choices. One, we have Mr Ntaganda testifying first and then with the risk that the
24 other accused -- the other witnesses might on their own watch the testimony. The
25 other option is we have the witnesses testify first, then we have Mr Ntaganda testify,

1 having heard all of the testimony.

2 We decided to go for the former and have Mr Ntaganda first, and if the Prosecution
3 has any doubt regarding the contamination of the witness, then they certainly can
4 cross-examine the witnesses and determine, first, did the witness watch the
5 proceedings at any given time, not only during Mr Ntaganda's testimony, but at other
6 times; and, two, did watching, in the case the answer is yes, did watching the
7 proceedings have an impact on their evidence?

8 I don't think, Mr President, that going to private session for this purpose would be
9 appropriate, but we will not invite certainly any witness to watch the proceedings, and
10 we understand that it is better if they don't. But it would not be productive to ask us
11 to take positive steps to ensure this or to go into private session to ensure that certain
12 parts are not seen.

13 I'm not sure if this is the right time, but Mr Ntaganda intends to testify for the most
14 part in public session. I've said this -- I've said this earlier. If we can go into private
15 session, Mr President, because this is an exception to this.

16 PRESIDING JUDGE FREMR: [15:16:13] All right. Court officer, let's move into
17 private session now.

18 (Private session at 3.16 p.m.)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)
2 (Redacted)
3 (Redacted)
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6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Open session at 3.18 p.m.)
20 THE COURT OFFICER: [15:18:34] We are back in open session, Mr President.
21 PRESIDING JUDGE FREMR: [15:18:45] Thank you, court officer.
22 And now, Ms Samson, you have the floor.
23 MS SAMSON: [15:18:50] Thank you, Mr President.
24 On the first issue, which is the Prosecution's request to exclude witnesses from the
25 courtroom and then by extension from otherwise being able to follow the proceedings,

1 the Prosecution based its request in the language of the Rule 140(3) which does seek
2 to, again, ensure the integrity of the proceedings by excluding witnesses who have yet
3 to testify from the proceedings. It's common in national jurisdictions to make such
4 orders at the beginning of trial for sound reasons. Given that this Court of course
5 broadcasts the feed live, then we felt it necessary to go the extra step and see to what
6 extent the Chamber would be able to enforce the spirit of Rule 140(3) by also
7 precluding others from following the live feed if they are yet to testify.

8 We do recognise how difficult it may in practice be to enforce that order, but
9 nonetheless that it is an issue we consider to be an important step in ensuring that in
10 the technical age and the way in which this courtroom operates, that Rule 140(3) has a
11 practical basis and can actually be applied, not only when someone is physically
12 present, but also when they are otherwise capable of following the proceedings.

13 We've raised the issue of the particular circumstances of this case in the filing, we've
14 raised it in a subsequent filing as well, and by that I refer to the possibility that those
15 listening in to the testimony, who we say may have been -- there may have been
16 attempts to interfere with or coach them would be influenced by the account that the
17 accused now gives. And for that reason we indicated in the filing that we may make
18 a request to go into private session for certain core aspects where we feel we're getting
19 into territory that we've analysed Defence witnesses to come will also address. We
20 may make applications to the Chamber to move into private session for those portions
21 of the testimony.

22 It is of course up to the Chamber to order that the totality of the testimony be done in
23 private session should the Chamber feel that that's most appropriate in the
24 circumstances of this case. And of course a subsequent redacted transcript would be
25 available. So the publicity of the proceedings would be maintained in any event.

1 Those are my submissions on that particular issue.

2 I will address the Defence's notice of the two occasions in which it will seek to move

3 into private session.

4 In the Prosecution's submission, (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 So it's likely best having now explained to the public what the Defence intends to do

12 that we in fact in all occasion move into private session when we're addressing the

13 name of an individual.

14 And in relation to further requests that the Defence may make on the accused's

15 testimony (Redacted) --

16 PRESIDING JUDGE FREMR: [15:22:41] Sorry, I think it was this request was made

17 in private session, so please let's talk about one of the first and the second occasion

18 when the Defence would like to conduct --

19 MS SAMSON: [15:22:57] Yes.

20 PRESIDING JUDGE FREMR: [15:22:57] -- proceedings in private session. Don't

21 mention the concrete --

22 MS SAMSON: [15:23:02] Yes.

23 PRESIDING JUDGE FREMR: [15:23:02] -- facts.

24 MS SAMSON: [15:23:03] Well, I don't have any further submission to make in

25 relation to that particular second proposal at this time. We don't immediately see the

1 need, but at the same time we are cognisant that there may be one, and so we reserve
2 the right to make observations at the appropriate moment. Thank you.

3 PRESIDING JUDGE FREMR: [15:23:21] All right. And one question from my part.
4 I think that it is clear that everybody here in the courtroom is interested in
5 non-listening of further witnesses what Mr Ntaganda will testify about, but my
6 concern is don't you think that if, not even Defence, but even Chamber would
7 encourage further witnesses not to do it, that it in parlance could rather attract them to
8 follow by internet our or his testimony and that we, frankly saying, we have no
9 control over that?

10 MS SAMSON: [15:24:02] I think your Honour's point about the lack of ability to
11 implement or enforce the order is a valid one. It is a point that I raised myself. It's
12 very difficult to be able to enforce it in any real way. But that in the technological age
13 in which this Court operates, giving effect to Rule 140(3) is not possible unless there
14 are at least the attempt to ensure that the proceedings are strictly limited to those who
15 have not yet testified. But I do of course recognise the difficulty to enforce.
16 As to whether or not it will attract people to watch it, I don't believe that that would be
17 the case. Of course I can't be certain. I think it is an order that ought to be made at
18 the beginning of every trial for witnesses of Prosecution and Defence frankly, and if it
19 becomes a standard routine order, then I think it's one that just becomes a part of the
20 habit of the Court and, therefore, it's of no greater interest than attending the
21 proceedings.

22 However, we operate as well in situations where they're not in the physical location of
23 the Court, and so the practical ability in a public proceeding, it's very difficult to
24 implement.

25 So I recognise the Chamber has to balance that, but from the Prosecution's submission,

1 such an order really should be part and parcel of an exclusionary order to the extent
2 that it can be done, and then it becomes a very normal way of proceeding within this
3 environment. And unless you have further questions, your Honour, that's my
4 answer.

5 PRESIDING JUDGE FREMR: [15:25:41] Thank you. I will not comment it further
6 because we have to deliberate on that request with my colleagues. But what I can say
7 at the moment is that if hypothetically the Defence would make message on the -- in
8 the opposite way, please, witnesses, follow the testimony, it would be obviously
9 against the code of ethics with probably very important consequences for Defence.

10 Ms Pellet, please.

11 MS PELLET: [15:26:11] (Interpretation) I'm sorry, Mr President, but I just want to
12 hark back to the definition provided by Defence counsel regarding how to proceed in
13 order to go from private session. Well, I think that part of his statement was made in
14 private session, so I will not go into any details, however, some of my clients are
15 concerned by that issue, so I would like to submit that your decisions pertaining to
16 protective measures should be valid throughout the proceedings.

17 But I also want to say that there are other reasons militating against the proposal made
18 previously by Defence, because some of our clients are under the protection
19 programme of the Court, and that's what I wanted to point out to the Chamber, and I
20 will point this out whenever any questions may lead to the disclosure of the names of
21 some of our clients. Thank you, Mr President.

22 PRESIDING JUDGE FREMR: [15:27:36] Thank you, Ms Pellet. I can assure you
23 that we will take it certainly in our consideration.

24 Now, so we exhausted issues connecting with filing 1924, and now we should move to
25 filing number 1915.

1 So please recall that the Chamber has already indicated that with regard to the
2 schedule for the second block, it will accommodate to the extent feasible and
3 appropriate the conditions favoured by the Defence to present the testimony of the
4 accused, but that due to the scheduling issues, the second block is confined to the
5 dates previously indicated by the Chamber.

6 The Chamber has also indicated that Mr Ntaganda will, in principle, testify for
7 approximately four hours per day.

8 We shall now hear any further brief submissions on the issues arising from filing 1915
9 on scheduling. In addition to the responses from the Prosecution and Legal
10 Representatives already on the record, these are filings 1921 and 1922, the Chamber
11 has also received a Defence request for leave to reply and a Prosecution response both
12 sent via email on 24 May 2017. And as indicated on 29 May, the Chamber prefers to
13 hear further submissions on those issues orally in court so all submissions are placed
14 on the record.

15 So we will start with Defence. Mr Bourgon.

16 MR BOURGON: [15:29:20] Thank you, Mr President. I will try to be as brief as
17 possible regarding this request that we filed.

18 This request, Mr President, of course, is found or the rationale of this request is found
19 in its title, allowing Mr Ntaganda to testify in the conditions that will best favour the
20 Chamber's truth-seeking function.

21 The first issue I'd like to address in this regard which has not been touched upon so
22 far, the Chamber held that in its decision regarding the changing of the timing of the
23 blocks, that it would have been preferable for Mr Ntaganda to indicate earlier, at an
24 earlier moment its intention to call Mr Ntaganda.

25 We agree. We would have liked to say that before, Mr President. There are many

1 reasons, however, which justified the timing.

2 PRESIDING JUDGE FREMR: [15:30:20] Mr Bourgon, I said no need to excuse.

3 The Chamber accepted that. Now please focus on the practical matters. We agree
4 that we will -- we approved this order that Mr Ntaganda will testify during the second
5 block, so no need to elaborate on that.

6 MR BOURGON: [15:30:36] Thank you, Mr President.

7 Moving on to the substance of the request, what remains to be addressed in our
8 submission refers first to the duration of Mr Ntaganda's testimony. We argue in this
9 request, and we believe that maybe this has not been quite understood by the
10 Prosecution, that what is important is that the decision of the accused to testify should
11 not be limited to time constraints.

12 Of course we'd like Mr Ntaganda to testify for the shortest period as possible, because
13 we know that any hours we use in-chief will be used in cross-examination. It is in our
14 advantage to make his examination-in-chief as short as possible. What we would like
15 to avoid, Mr President, is being under time pressure to complete the examination
16 in-chief in a fixed number of hours.

17 We have indicated 40 hours and we will do our best to go below 40 hours for his
18 examination-in-chief. But with the days available this might prove difficult. And we
19 don't think that the use of extended sessions with the same witness being on the stand
20 for six weeks is a very good or an appropriate solution in this regard. So this has to
21 do with first the duration.

22 The second issue is the issue of required breaks, required time for Mr Ntaganda to
23 rest. Very few, if any, accused have testified for so long. If I look at 40 hours for
24 chief, 40 hours for cross-examination and then re-examination, it is for anyone who
25 has been in a courtroom or been in business for some time, it is an inhumane exercise

1 for anybody, regardless of the Chamber's adjudication of the case later on.

2 It is brutal to sit in there and to be questioned for hours and hours in a number of
3 consecutive days. We feel it doesn't yield to good condition. It doesn't yield to
4 getting the best possible evidence. And when I say "best possible evidence", I don't
5 necessarily refer to evidence best for the Defence, I'm talking about evidence to which
6 the Trial Chamber will be able to attribute the correct probative value. And that's
7 very important.

8 We do not have any more days in June and July, fine. The -- that brings the issue of
9 what if we need to take a break at some point because Mr Ntaganda is tired. I hope it
10 doesn't happen, but if it does, the Chamber has indicated he will be treated just as any
11 other witnesses would be treated. But if it does happen, it will be very difficult to
12 meet the deadline of 21 July. That is why we address as an alternative request, other
13 than the proposal we made to find some days, if I can use this expression, to have
14 re-examination conducted after the break.

15 There's no need to decide at this point, but there is a need to consider the possibility to
16 avoid being put in a situation where we have to finish the testimony before the end of
17 21 July. And the Prosecution might find itself in the very well same situation if
18 Mr Ntaganda testifies for 40 hours and then they are trying to complete their cross,
19 and they will not appreciate being put under time constraints to cross-examine
20 Mr Ntaganda, despite the fact that this might be of assistance in questioning an
21 accused that is tired. But with the accused the Trial Chamber has said, and also the
22 Prosecution, that he is the most important -- most interested person in the case because
23 he's the accused.

24 I believe, Mr President, that especially in his case we should not rush through his
25 testimony, and take the necessary time. On our side, we will do the best to keep it as

1 short as possible, but we would like to keep in mind the possibility that if things drag
2 on, either because of legal submissions or because of time necessary for him to relax,
3 that we do immediately envisage the possibility of doing re-examination after the
4 break.

5 Mr President, I don't think this will create any prejudice to anyone. As a matter of
6 fact, I need to bring to light the fact that the present schedule, which brings a very long
7 break of about nine days, is in fact prejudicial to the Defence because those days are
8 not resting days. Once you've rested two days, the rest does not address the rest
9 problem, but it does give the opportunity to the Prosecution to study at length what
10 happened during the first three days of examination-in-chief. So it does give a very
11 great advantage to the Prosecution of having a very long break from, I think
12 it's -- from 17 until 27 June.

13 PRESIDING JUDGE FREMR: [15:36:34] Mr Bourgon, but at least it would be rest
14 days for the accused.

15 MR BOURGON: [15:36:39] Oh, it will, Mr President. But we will have to split our
16 presentation --

17 PRESIDING JUDGE FREMR: [15:36:44] Point taken. Point taken.

18 MR BOURGON: [15:36:46] -- of our case in two. And Prosecution has time to study
19 at every single line of what he has said in those first three days. So we're not
20 complaining about this, but we need to highlight this.

21 We have the schedule, we will abide by the schedule and we will do our best, but if
22 need be, we'd like to keep the possibility to do the re-exam after the recess, noting that
23 during the recess no one will see Mr Ntaganda for sure because, and if all goes well,
24 his family will be visiting. So we don't intend on meeting with him during this
25 recess, and we hope that -- and for his sake and for our sake because we need the

1 break, and we will definitely need the break by then, so I don't think there will be any
2 prejudice in considering this at this stage just to avoid operating under difficult time
3 pressure.

4 I think this addresses all of the issues. The -- in terms of the scheduling,
5 Mr President, we propose, as was done in other cases, to keep the same schedule,
6 which is no matter what time the Trial Chamber wants to begin, that's fine with us,
7 whether it's 8 or later, but to proceed with one and a half hour sessions and then the
8 third session can, after one hour maybe, if the presence of the accused is not required,
9 then he can be excused from the courtroom while we do the legal debates, if that's
10 appropriate in the circumstances, and then we continue for --

11 PRESIDING JUDGE FREMR: [15:38:28] Sorry, because maybe I misunderstood,
12 normally, according to your proposal, Mr Ntaganda should testify four hours a day;
13 am I right?

14 MR BOURGON: [15:38:39] That's what I understand from your decision, Mr
15 President.

16 PRESIDING JUDGE FREMR: [15:38:42] Yes, yes. So for, according to you, the first
17 session, 90 minutes, the second session, 90 minutes, which makes together three hours.
18 And the third session?

19 MR BOURGON: [15:38:50] The third session then is a two-hour session, but if after
20 one hour of testimony then we can stop the testimony and address any legal -- any
21 legal issues --

22 PRESIDING JUDGE FREMR: [15:39:00] Now it's clear to me.

23 MR BOURGON: [15:39:02] -- that might arise. So that's what I think is practical. I
24 can speak to my colleague, see if that suits, if she would agree with that, but I think
25 that would be a good proposal.

1 That concludes my observations. Thank you, Mr President.

2 PRESIDING JUDGE FREMR: [15:39:18] And one general question from my part:

3 Are you ready, because you are asking for an extension of time for testimony of your
4 client, are you ready then as a consequence to sacrifice or you will lose probably some
5 time which you could devote to testimony of the other witnesses? But why, on the
6 other hand, it could lead to the fact that you will not be able even to call some
7 witnesses you planned to call. Are you also considering this possible effect?

8 MR BOURGON: [15:39:50] Mr President, the -- whatever time is devoted to the
9 testimony of the accused, it's my understanding that it will be deducted from the
10 maximum the Defence is authorised. But as we indicated in our request, the fact that
11 Mr Ntaganda does take the stand is likely to bring -- bring down the duration of the
12 Defence rather than increase the duration of the Defence. So there might be
13 witnesses who will testify for a shorter period of time or some witnesses who might
14 not be called at all. Of course, this is -- this is speculation at this point in time, but
15 we -- we are confident that Mr Ntaganda will address most of the issues, if not all of
16 the issues, during his testimony and that this will assist everyone in seeing a much
17 clearer picture after his testimony. Thank you, Mr President.

18 PRESIDING JUDGE FREMR: [15:40:46] Thank you. I am glad that we clarified
19 that we are on the same page on that.

20 Now, legal representatives, no request?

21 Then, Ms Samson, you have the floor.

22 MS SAMSON: [15:40:56] Thank you, Mr President. In relation to the first issue,
23 which is the duration of the testimony, really, the two are very interconnected, the two
24 issues, but the current schedule of 22 court days, sitting from 14 June through to the
25 court recess on 21 July, only allows for 88 hours of court time. And in the

1 Prosecution's submission, as we set out in our filing, it's preferable to conclude the
2 totality of the examination in that period.

3 We've already indicated that leaving a portion of the testimony, the Defence wants it
4 solely to be re-examination after the recess, is not in line with efficient proceedings or
5 with continuity of an examination of a witness. I think if it were a different witness,
6 the Chamber would do its best to ensure that the witness's testimony was complete at
7 the time of the recess so as not to have the continuation some three or four weeks later.

8 And the hours that we have in that period of time which are, by my calculation, 88
9 hours, sitting four hours per day, does not allow an examination-in-chief of 40 hours.

10 And so, in our submission, it is necessary for the Chamber to set the number of hours
11 that the Defence and the Prosecution will have for the examination, 40 hours for the
12 examination-in-chief and 40 hours for the cross-examination, with the inevitable
13 lengthy procedural matters and objections that will have to be dealt with during the
14 testimony and unfortunately may not be able to be postponed until late in the
15 afternoon, mean that that 40 hours will inevitably be expanded. And we have to
16 consider as well questions from the Chamber, questions from the legal representatives,
17 also some, no doubt, some re-examination and potential re-cross examination. And if
18 the Chamber were to confine it to the block that's already been scheduled, for reasons
19 that we say would be very sound and practical, then 40 hours for the
20 examination-in-chief is not realistic, and so that will have to be changed and there will
21 have to be assessments and decisions made as to which areas the Defence seeks to
22 have the witness, the accused, testify about and similarly the Prosecution will have to
23 make selections as well.

24 In terms of the breaks, we in principle have no objection to proceeding in whichever
25 way the Chamber sees best.

1 In terms of the number -- the configuration of the daily schedule, as the Defence has
2 set out, 9.30 to 11, 11.30 to 1 and 2.30 to 3.30 is amenable to us, of course. That's a four
3 hour day.

4 It means the accused finish his testimony at 3.30 each day, which in our estimation,
5 given the breaks that will have preceded, that are actually included in the current
6 schedule, should be sufficient rest period for a man who is otherwise healthy and has
7 no known medical issues and is not vulnerable. And so we -- we submit that it
8 would be better for the Chamber to adjudicate on specific requests for breaks as and
9 when they arise during the testimony rather than schedule them in between, because
10 there are already a number of breaks and four hours a day seems acceptable. At
11 present, there have been no reasons why it wouldn't be sufficient to ensure that the
12 accused is fresh for the following day of testimony.

13 I've said already that re-examination after the break, in our submission, is not a
14 preferable way of proceeding and that the re-examination really ought to be requested
15 once Defence counsel can assess the need for re-examination after cross-examination,
16 that an anticipated 8 hour re-examination is disproportionate to whatever
17 cross-examination time the Prosecution will get. And it should be very confined
18 to -- we've suggested one hour each, if that's -- if the Chamber wishes to make any
19 advance rulings, but the Chamber can make the ruling at the time that it has a better
20 sense as to what concrete issues have arisen and actually need re-examination.

21 Although unlikely, it is not impossible that re-examination will not be necessary at all,
22 and so that cannot be evaluated in advance.

23 I have no further submissions at this moment, your Honour, unless you have
24 questions for me.

25 PRESIDING JUDGE FREMR: [15:46:12] Thank you very much, Ms Samson. I

1 don't have any further questions for you.

2 Mr Bourgon, please.

3 MR BOURGON: [15:46:20] Mr President, I just want to make clear that, one, the
4 issue of breaks is settled and the Chamber will adjudicate the need for breaks as and if
5 and when they arise, so I don't think that's an issue.

6 The main issue is -- here is should the accused be confined to a specific number of
7 hours to testify. We answer in the negative. We answer that Mr Ntaganda should
8 be allowed as part of his Defence to testify as much as he wants to, of course, under
9 the control of the Chamber, that he's not repetitive and that he's not going in issues
10 that are irrelevant. But it is his choice to testify as the first substantive witness. It is
11 his choice to use his defence time to put his evidence forward. And what we want to
12 avoid is any arbitrary number imposed.

13 We suggest 40. We think we can do it a little shorter, but we would -- we want to
14 avoid being pressured or being put into a place where we have to meet a specific
15 number of hours and having to make a request for additional time as it proceeds.
16 Contrary to what my colleague is saying, I believe that 88 hours is sufficient. It's
17 possible that we succeed because if we take -- if we just reduce by two hours, making
18 it 38, that would give 38 for the Defence, 38 for the Prosecution, and leaving three days
19 of four hours for re-exam, Judges' questions and additional questions by the
20 Prosecution.

21 So if Mr Ntaganda is in good shape and if he manages to take rest and he is a healthy
22 man, then it might be possible. It might also not be possible. But, Mr President, just
23 one last comment, as my colleague says it is four hours a day, there is that additional
24 hour, in our view, to make legal submissions at the end of the day. A normal sitting
25 day is five hours. What we understand is that the accused will be limited to four, but

1 there is an additional hour to address legal submissions which can be kept for the end
2 of the day just to allow a streamline testimony.

3 PRESIDING JUDGE FREMR: [15:48:58] I can just confirm that it is our
4 understanding.

5 MR BOURGON: [15:49:02] Mr President, just one last thing is, we will -- to try and
6 minimise or reduce the testimony of Mr Ntaganda, we are considering coming
7 forward with a request regarding audiovisual exhibits in order to have them admitted
8 without looking at all of the video during the accused's testimony, although all of the
9 longer portions are admissible. We'll put our request; no doubt the Prosecution
10 will -- can provide. We think that's a way where we could save some valuable time
11 during the examination-in-chief, by watching certain parts of a video exhibit and then
12 admitting a larger part. We'll come forward with a request in this regard. We are
13 considering this at this time.

14 PRESIDING JUDGE FREMR: [15:49:56] Mr Bourgon, then as concerns the last issue,
15 that would really require some negotiation with the Prosecution because you might
16 remember that especially Defence several times objected to such approach. If there
17 would be a common consensus, that would be no problem, so I would highly
18 recommend it to go this way.

19 MR BOURGON: [15:50:19] We will endeavour to approach the Prosecution, and try
20 to do this in order to shorten and complete the testimony before the summer recess.
21 Thank you, Mr President.

22 PRESIDING JUDGE FREMR: [15:50:28] And one comment from my part: I cannot
23 grant it for 100 percent, but I expect that the Chamber mainly will use rather the
24 chance to put questions during the testimony then to wait for four weeks and then
25 accumulate all those questions, even concerning issues from the beginning of the

1 testimony for the last two, three days. So it is most likely that we will need some
2 extra time at the end of your examination and cross-examination, but we rather would
3 prefer to put questions during the testimony.

4 So if there are no further submissions on that issue, I thank you very much for your
5 submissions, and I have just a last point to mention before we adjourn. I recall that
6 after receiving a first report of the Registry on the security situation in the DRC,
7 Democratic Republic of Congo, on 7 November 2014, the Chamber noted in a status
8 conference held on 2 December 2014 that it would be useful to be regularly apprised of
9 the security situation in the area concerned and instructs the Registry to file such
10 reports regularly.

11 The Registry has filed two further reports on the security situation in the DRC since
12 that time, noting that the last security report on the DRC was filed on 1 May 2015.

13 And in light of the current stage of the proceedings, the Chamber considers it
14 appropriate to receive from the Registry an updated report at this time.

15 The Chamber therefore directs the Registry to file an updated report on the security
16 situation in the DRC by 30 June 2017. The Registry is further directed to provide
17 updated reports should the security situation in the DRC change to such an extent that
18 the Chamber, parties and participants should be made aware of new or additional
19 information until the end of the presentation of evidence by the Defence.

20 So it's all to the last point from my part. I see there are no further requests for the
21 floor. So I thank you again for the efficient proceedings today, for your focused
22 submissions.

23 And we will now adjourn and reconvene on 14 June 2017.

24 THE COURT USHER: [15:53:09] All rise.

25 (The hearing ends in open session at 3.53 p.m.)