

1 International Criminal Court
2 Trial Chamber X
3 Situation: Republic of Mali
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
5 Mahmoud - ICC-01/12-01/18
6 Single Judge Kimberly Prost
7 Status Conference - Courtroom 1
8 Tuesday, 18 February 2020
9 (The hearing starts in open session at 9.31 a.m.)
10 THE COURT USHER: [9:31:01] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 JUDGE PROST: [9:31:18] Good morning, everyone.
14 Court officer, can you please call the case.
15 THE COURT OFFICER: [9:31:38] Good morning, Madam President.
16 Situation in the Republic of Mali, in the case of The Prosecutor versus Al Hassan Ag
17 Abdoul Aziz Ag Mohamed Ag Mahmoud, case reference ICC-01/12-01/18.
18 And for the record, we are in open session.
19 JUDGE PROST: [9:31:57] Thank you.
20 Can those present please introduce themselves for the record, starting with the
21 Prosecution.
22 MR DUTERTRE: [9:32:07](Interpretation) Good morning, your Honour. I'd like to
23 introduce Dianne Luping, to my left; Hesham Mourad, to my right; behind me you
24 will see Elena Martin Salgado; Marie-Jeanne Sardachti and Nelly Corbin. And in the
25 final row, we have Mousa Allafi, Yayoi Yamaguchi and Florie Huck, and myself,

1 Gilles Dutertre.

2 Thank you.

3 JUDGE PROST: [9:33:03](Interpretation) Thank you very much.

4 Defence.

5 MS TAYLOR: [9:33:07] Good morning, your Honour, and good morning to my
6 colleagues in the courtroom. My name is Melinda Taylor. I'm appearing on behalf
7 of Mr Al Hassan today with, on my right, Madam Marie-Hélène Proulx, Ms Sarah
8 Bafadhel, Mr Gyo Suzuki, Mr Mohamed Youssef, Ms Sarah Marinier-Doucet,
9 Ms Dolly Chahla. And Mr Al Hassan is himself appearing today.

10 Thank you very much.

11 JUDGE PROST: [9:33:36] Thank you, Ms Taylor.

12 I now turn to the representatives for the victims. Yes.

13 MR LUVENGIKA: [9:33:50](Interpretation) Mayombo Kassongo, and behind me
14 to the left, Madam Claire Laplace and Madam Prisque Biyéké.

15 Thank you.

16 JUDGE PROST: [9:34:17](Interpretation) Thank you very much.

17 (Speaks English) And the Registry, Mr Dubuisson.

18 MR DUBUISSON: [9:34:22](Interpretation) Thank you, Madam President.

19 With me today we have Marie Mathiaud, legal officer; Jamila Zoubir-Afifi, legal
20 officer and coordinator; and Esteban Peralta, Chief Counsel Support Section. And as
21 for myself, Marc Dubuisson, Director, Division of Judicial Services, appearing on
22 behalf of the Registrar, Peter Lewis.

23 JUDGE PROST: [9:34:55](Interpretation) Thank you very much.

24 (Speaks English) So today's status conference is held to discuss the matters listed on
25 the agenda of 13 February, that is filing number 587. I would like to hear from the

1 Prosecution, the Defence and the LRVs and, of course, the Registry, as necessary -- as
2 appropriate, on the various questions, and I will also have some questions to raise.

3 We are going to sit for two sessions, if needed. We expect we will need it, the first
4 one running till 11 o'clock and the second from 11.30 till 1 p.m.

5 In principle, I would like the status conference to be held in public. Obviously, the
6 parties and the participants, however, should advise if there is a need at any time to
7 go into private session. But I do express my wish that we remain in public session as
8 much as possible.

9 And we will run through the agenda in chronological order.

10 So I would like to begin with the first item, which is the update on the Prosecution
11 request to amend the charges, and I would like to hear from the Prosecution on that
12 matter.

13 Mr Dutertre.

14 MR DUTERTRE: [9:36:09](Interpretation) Thank you, your Honour.

15 Now, on the issue of the application for changes, amendments to the charges, now we
16 did make our filing with a view to corrections and changes to the DCC on 31 of
17 January 2020, and that was filing 158 --

18 THE INTERPRETER: 567, correction from the booth.

19 MR DUTERTRE: (Interpretation) This application had four annexes and the annexes
20 contained the evidence supporting the application and, in particular, statements from
21 four witnesses, P-154, P-606 -- 636, 0639 and P-641.

22 On 5 February 2020, the Defence made an application requesting clarifications
23 concerning this matter and the Defence asked for two things in particular:

24 That Pre-Trial Chamber I push back the deadline at the time of the -- at the time of the
25 filing of the Arabic version of the OTP filing.

1 And the Defence also asked for suspension of any deadline with a view to responding
2 to the said application.

3 Subsequently, on 7 February, Madam President, the Pre-Trial Chamber I granted the
4 application from the Defence for suspension of the deadline and the Pre-Trial
5 Chamber specified that they would set a deadline for responses from the LRVs and
6 the Defence in response to this application from the Prosecutor in a later decision.

7 On 14 January 2020, the Prosecution filed a number of observations and the
8 Prosecution made some points regarding the commencement date and the various
9 assorted -- associated deadlines.

10 Yesterday, on 17 February 2020, the Registry services were expected to file an Arabic
11 translation of the application in question.

12 THE INTERPRETER: Message from the interpreters: Prosecution is reading from
13 a prepared text which the interpreter does not have.

14 MR DUTERTRE: [9:40:22](Interpretation) The Registry services were expected to file
15 this document.

16 The Registry services very kindly agreed to take on this work, but I have not seen any
17 notification. But I am sure it will be on its way and we should be receiving it today.

18 Now, yesterday, on 17 February, the Prosecution disclosed a pre-confirmation
19 INCRIM package 52, containing the redacted translations in Arabic of statements
20 taken from four witnesses. And I provided those witness numbers earlier: P-524,
21 P-639, P-641 and P-636.

22 Furthermore, yesterday the Prosecution filed a public redacted version of its
23 application with a view to amendments and corrections of the DCC as requested by
24 Pre-Trial Chamber I.

25 Now, to conclude, it is now in the hands of Pre-Trial Chamber I, your Honour. The

1 statements were disclosed in Arabic. The translation of the Prosecution application
2 should be coming soon, and perhaps Mr Dubuisson will be in a position to confirm.
3 And thus, now the Chamber is in a position to set a number of deadlines for
4 responses and we stressed in our application that it was necessary to proceed rapidly
5 because of the upcoming commencement of trial, 14 July of this year.

6 So this is the information that I wanted to provide to the Chamber.

7 JUDGE PROST: [9:43:28](Interpretation) Thank you very much.

8 And before I ask for the Defence to respond, Mr Dubuisson, (Speaks English) could
9 you advise us if you have any indication on the status of the translation?

10 MR DUBUISSON: [9:43:46](Interpretation) Right now I'm not in a position to
11 respond, but I am gathering that information.

12 JUDGE PROST: [9:43:56](Overlapping speakers) If you have any information to
13 provide, if you can just indicate and we'll give you the floor. Thank you.

14 Ms Taylor. Oh, Ms Proulx.

15 MS PROULX: [9:44:10](Interpretation) Thank you, your Honour.

16 At this particular stage of the proceedings, and since the request for amendments to
17 the charges is before the Pre-Trial Chamber, we will just make a few preliminary
18 observations.

19 First of all, this was filed rather late in the proceedings. Between four to six months
20 after the gathering of statements from these new witnesses and after, after the
21 Chamber set the commencement date for 14 July. Now, furthermore, the application
22 was filed without an Arabic version of the application or the statements being
23 provided to the Defence. The documents were just received yesterday.
24 Now we did receive the translation of -- into Arabic of the Prosecution's application,
25 but it was more than two weeks after the application had been filed. So given that

1 context, it would not be suitable to put the blame of the delay upon the shoulders of
2 the Defence because the application for amendments to the charge is not some minor
3 filing.

4 Secondly, the Defence is entitled to benefit from not only relevant material in the
5 Arabic language, but also from the necessary time to consult Mr Al Hassan and to
6 prepare a detailed response concerning the fresh allegations from the OTP.

7 I would like to focus on one point raised by Mr Dutertre. We did not ask for an
8 additional extension as he said in his filing, but rather we asked for clarifications and
9 asked for -- we asked for the fundamental rights of Mr Al Hassan to be respected.

10 Furthermore, the situation is entirely in the hands of the Pre-Trial Chamber and at
11 this point the Pre-Trial Chamber has not made any particular decision in this regard.

12 The Defence wishes to stress that even though the Pre-Trial Chamber has been seized
13 of the application, it would not be a good idea for your Chamber and that Chamber to
14 be seized of similar matters at the same time because only the Trial Chamber is in
15 a position to make decisions on the proceedings underway.

16 The Defence approached the OTP to understand whether the Pre-Trial Chamber was
17 also seized of these matters at the same time, but we did not receive any clear
18 response to our queries.

19 To conclude, the Defence has already said - and reiterates today - that under no
20 conditions do we want to see the trial delayed. We do not want to see any changes
21 to the deadline -- the commencement date set by the Single Judge. Mr Al Hassan has
22 been in detention for more than three years. The Defence wishes to advance its
23 arguments before the Pre-Trial Chamber and shall await the decision there -- from
24 that Chamber.

25 Thank you.

1 JUDGE PROST: [9:47:50](Interpretation) Thank you.
2 (Speaks English) I believe the positions on this matter are now noted on the record. I
3 would note that this is a matter before the Pre-Trial Chamber; so this was an
4 information item we now have -- I think the information necessary for the
5 Trial Chamber to be aware of.
6 So I would suggest that that's sufficient for this agenda item; unless anyone feels
7 a strong need to provide any additional comments.
8 I don't see anyone motioning accordingly.
9 So let's move to the next item on the agenda, which is the status of ex parte filings on
10 the pretrial record. Now this was a matter which was placed on the agenda by the
11 Defence, indicating there are 30 such ex parte documents, and so I would like to hear
12 from the Defence on this particular item.
13 Ms Taylor.
14 MS TAYLOR: [9:48:56] Thank you very much, your Honour.
15 This issue can be dealt with quite shortly. We have identified just from missing
16 numbers that there does appear to be a substantial number of ex parte filings. We
17 communicated the number to the Prosecution yesterday. We estimated 25. They
18 have communicated that they believe that three of them are ours, although we can't
19 access those three, but it is entirely possible that was former counsel or the Registry.
20 But even if we are dealing with a number of 22, that is still a significant amount of
21 litigation that remains hidden from the Defence, and we believe that even if it was
22 necessary and proportionate at the pre-confirmation phase, the rationale should be
23 reviewed in light of the advanced stage of the proceedings.
24 And we would like to highlight the potential for prejudice, in particular as concerns
25 an application, which we have mentioned through disclosure correspondence and

1 before the Single Judge, as concerns Mr Al Hassan's interviews and the extent to
2 which those interviews may have been cited in ex parte filings to justify certain
3 measures that were taken at the pre-confirmation phase.

4 So we have a very specific and immediate need to go through this litigation so that we
5 can prepare an application that's pending. So we would ask that the Prosecutor be
6 ordered to review all ex parte filings in the record in order to prepare lesser redacted
7 versions as and where possible.

8 Thank you very much.

9 JUDGE PROST: [9:50:30] Thank you.

10 Can I hear from the Prosecution on this issue.

11 MR DUTERTRE: [9:50:38](Interpretation) Yes, your Honour.

12 Yesterday, at about 6:40, we did receive an email from the Defence listing several
13 filings, more than 15 having to do with all these various filings and only five, five
14 filings are from the Prosecution for which the Defence does not have access. There
15 was a sixth one on the list, but in actual fact they do have access to one version of that
16 particular filing which had to be redacted.

17 So on the one hand, we will review these filings so as to suggest when it is possible to
18 file a confidential redacted version.

19 As for the rest, these are filings that do not come from the Prosecution, but this does
20 lead me to raise a particular point. There are also ex parte Defence filings for which
21 redacted confidential versions are needed as well. Thus, I think it's really up to all
22 the parties to review their filings and to provide such confidential redacted versions.
23 Thank you, your Honour.

24 JUDGE PROST: [9:52:37] Thank you very much.

25 I think we can probably shortcut this issue because I do agree with the last point of

1 the Prosecution. In fact, there are -- from our own examination of the matter, there
2 are filings which are ex parte Registry only as well involved in this -- in this situation.
3 And so I think what might be the best way forward is to ask the Registry or instruct
4 the Registry to put on the record by 26 February, a list of the real ex parte filings;
5 meaning, any filings for which no version is available to either Prosecution or Defence,
6 and in some instances both. And these should then all be reviewed by the relevant
7 parties, be it the Defence or the Prosecution or Registry, with a view to providing
8 redacted versions to the other party or perhaps seeking reclassification. So I think by
9 that way, we can proceed to deal with all of the material that's been raised in
10 a manner I think that should be acceptable to all parties.

11 And I would ask that this process be concluded by 18 March at the latest, but I
12 appreciate the point of the Defence that this is a matter in terms of preparation, so as
13 soon as possible. If those two dates could be adhered to, that would be very helpful.
14 So I think that -- I see Mr Dubuisson nodding in agreement, so I trust that that is an
15 acceptable way forward for everyone.

16 Thank you very much.

17 Now if we could proceed to the issue of the impact of the Al Mahdi reparations
18 proceedings. And again, I believe this was a matter which was raised by the Defence;
19 so I would like to hear from the Defence team on this particular point.

20 MS TAYLOR: [9:54:44] Thank you very much, your Honour.

21 This is something that has come to our attention through the review of a public
22 redacted implementation plan that was filed by the Trust Fund for Victims in the
23 Al Mahdi case.

24 Now we are not a party to the proceedings in the Al Mahdi case, we don't have
25 standing in that case, but having reviewed some of the public redacted filings in that

1 case, we consider that there may be issues arising from the reparations phase that
2 could impact upon this case. So we wanted to raise them at this juncture of the
3 proceedings so that they could be factored into any disclosure protocols or contact
4 protocols that might be adopted by the Chamber.

5 And there are three possible issues where we see that there could be some form of
6 impact. The first being the contact protocol; the second being disclosure issues as
7 concerns application forms; and the third concerns possible contamination of
8 evidence in this case from some of the projects that have been listed in the
9 implementation plan.

10 Now the first point -- and this might be not necessarily right to bring before the
11 Chamber, but we have seen from some of the filings in the case that the Trust Fund,
12 as is entirely within its mandate, is liaising with a range of community leaders and
13 individuals in Bamako and Timbuktu in connection with the implementation of its
14 plan.

15 And we wanted to highlight the fact that this could have an impact on witness
16 protection or witness issues, if any of the persons who have been identified by the
17 Trust Fund for this purpose are potential Defence witnesses or indeed Prosecution
18 witnesses.

19 So we intend from our end to liaise with VPRS, VWU and the Trust Fund to identify
20 how we can best regulate this.

21 Since we don't have much information on it, it might be premature, as I mentioned, to
22 actually factor it into any contact protocol, but we did want to raise it as it is already
23 apparent to us that it is an issue.

24 The second matter concerns the disclosure of applications for reparations that were
25 submitted in the Al Mahdi case.

1 Now as I mentioned, we are not a party to that case so we don't receive that
2 documentation. There is, however, a clear linkage between the cases in terms of the
3 crime base as concerns the destruction of cultural property and we can see various
4 instances where information in those application forms could be relevant to this case.
5 For example, if an application for reparations is rejected in the Al Mahdi case and that
6 person is a witness in this case, then the fact of that rejection might be relevant
7 depending on the reasons for rejection.
8 For example, if they are rejected in connection with the details that they gave
9 concerning the destruction of cultural property or due to problems with identification
10 documents. It might be relevant as well if they are applying for reparations in this
11 case, again, depending on whether they are applying for exactly the same reason for
12 which they were rejected in the other case.
13 It's also possible the Prosecution witnesses might have applied for reparations and
14 received individual reparations in the Al Mahdi case but not applied for them in this
15 case. So even though they are effectively dual status, we wouldn't know of the dual
16 status.
17 And we would submit for -- again, this goes to the modalities of participation, which
18 haven't been resolved yet, but depending on those modalities for actively
19 participating victims, those who might testify in person, we would consider it
20 relevant to receive a copy of any reparation forms submitted in the Al Mahdi case and
21 information as to whether they received reparations in that case.
22 Now we understand that the Prosecution is somewhat in the same boat as us, that
23 they are not a party to the reparations proceedings. But there might be a simple
24 procedure that could be implemented; for example, for Prosecution witnesses,
25 perhaps the Prosecution could liaise with VPRS, who could identify whether these

1 witnesses have been granted the right to participate or granted any form of
2 reparations in the Al Mahdi case. And if that were to be the case, then in the same
3 way that we propose that unredacted applications go to the Prosecution in this case,
4 we would submit that the Prosecution should also receive the unredacted
5 applications from the Al Mahdi case.

6 Now in terms of the third point, which is an issue of possible contamination, we have
7 identified from the public redacted version of the Trust Fund plan that one of the
8 proposed projects was to create a safe space for women to come together and speak
9 about the Al Mahdi crimes and forms of discrimination that related to those crimes.
10 And that this would be conducted under the auspices of a particular psychologist,
11 and it would seem that from some of the filings, a particular NGO whose identity was
12 redacted might be involved. Since we are not a party, we don't know the specific
13 details of this proposed plan.

14 Now of course this is a very admirable plan. But if these groups are to involve
15 witnesses in this case, if the project is to involve NGOs who might be actively
16 participating through some of the witnesses or the victims who have applied to
17 participate in this case, then that may raise issues.

18 Now this Chamber doesn't have standing over the reparations phase in the other case,
19 but it does have the power to take such steps as are necessary to protect Mr Al
20 Hassan's rights. So at this point in time, we will endeavour do find out as much
21 information about this project in particular as to whether it's already started or
22 whether it can possibly be deferred for the duration of this trial. And then when we
23 have that information, we wanted to signal to the Chamber that we may need to come
24 to the Chamber to seek appropriate measures, whether it be disclosure or other forms
25 of remedies.

1 Thank you very much.

2 JUDGE PROST: [10:02:00] Thank you very much, Ms Taylor, for -- and the Chamber
3 certainly appreciates you bringing the issue onto the record at this stage so that the
4 Chamber is aware of the potential issues.

5 Does the Prosecution have any comments on this particular issue?

6 MR DUTERTRE: [10:02:23](Interpretation) Generally with regards to the issue,
7 explained by Madam Taylor, yes, your Honour.

8 I would just like to start by saying, and I'm going to quote the Chamber VIII in this
9 point in its order 01/12-01/15-172, footnote 3, the Chamber, the Pre-Trial Chamber
10 stated that the parties for the question of reparations are understood as being the
11 Defence and the Legal Representatives of Victims. As such, the Prosecution is not
12 a party to this reparations process. Several points have been raised by the Defence,
13 and particularly concerning Prosecution witnesses which could be concerned by the
14 reparations issue.

15 Now I would like to refer to the Pre-Trial Chamber VIII once again, and here I quote,
16 Chamber VIII indicates that individuals who are legitimately asking for reparations
17 are limited, limited to those (Speaks English) "whose livelihoods exclusively
18 dependent on protected buildings."

19 (Interpretation) And also to those (Speaks English) "whose ancestral burial sites were
20 damaged in the attack."

21 (Interpretation) So, as such, among the Prosecution witnesses, at first sight it is hardly
22 probable there are individuals that would fall within this category.

23 Now, indeed, we do have witnesses who did testify in the Al Mahdi case, but those
24 were expert witnesses who don't fall within that category.

25 Having said that, I think that we could go close to the interpretation of Chamber VIII

1 to propose the following system. To give VPRS the list of our witnesses, such that
2 VPRS can verify whether among those victims -- among those witnesses, whether
3 there were applications that were rejected, applications for reparations, or whether
4 they obtained something within the reparations process or will be obtaining
5 something in the coming time. I think that's one way of clarifying matters, and to
6 have a very clear table which shows this precisely.

7 Now where it concerns the issue of contamination, that's obviously something that
8 the Defence is going to bring up in cross-examination, but let's talk about healing
9 rather than preventing.

10 So here what we are looking at, well, it's not up to the Prosecution, we're not linked to
11 the activities of the Trust Fund. But if measures are taken to ensure that there is no
12 such contamination, obviously that would be in the interest of all parties in the
13 courtroom and indeed with a view to finding the truth.

14 But there, of course, it is incumbent upon the Defence to seize Chamber VIII in this
15 regard or to make observations thereon.

16 Thank you, your Honour.

17 JUDGE PROST: [10:07:40](Interpretation) Thank you. (Speaks English) The
18 representatives of the victims, would you wish to make any comments on this issue?

19 MR KASSONGO: [10:07:53](Interpretation) Yes, your Honour. Thank you.

20 Where it concerns the concerns that were raised by the Defence, it's very premature at
21 this stage to raise a certain number of points at this stage of the proceedings. I
22 would prefer to point out that there is jurisprudence from the Appeals Chamber
23 which does guide the Al Mahdi process where it concerns confidentiality and
24 evidence and access to that evidence. I would -- I do not wish to spend too much
25 time on that, the jurisprudence is accessible.

1 Now where it concerns the points raised at the reparations stage, I would prefer to
2 point out that the reparations process is under way and, for the moment, there is
3 a procedure under way of identifying applicants and no individual reparations have
4 been allocated as yet.

5 So if we talk about rejecting reparations for victims on an individual basis at this stage
6 of the proceedings would lead to confusion. I would be prudent and not put
7 forward the solution as a rejection, but rather wait for reparations to come to an end
8 in the Al Mahdi trial and so that the witnesses who are present there can speak about
9 that.

10 I would also like to mention the fact that the Defence has raised elements of the
11 redacted -- and which notes the presence of the NGOs which is envisaged for a form
12 of collective reparations, but with an individual connotation. That hasn't taken place
13 yet and the Fund hasn't yet spoken on that issue. It would once again be premature
14 to speak about it in terms of a solution; whereas, the process itself is not yet under
15 way. And what is true is that the Fund will proceed with this form of reparations for
16 this type of victims, but we are not at that stage yet.

17 I would like to finish by making a clarification that the organs in the Al Mahdi
18 proceedings are ensuring that contagion or contamination cannot happen with
19 regards to the Al Hassan proceedings.

20 Thank you.

21 MR LUVENGIKA: [10:11:44](Interpretation) Yes, thank you, Madam, for giving me
22 the floor.

23 Your Honour, I just wanted to add to the intervention of my colleague by going down
24 a particular avenue. I certainly understand the concerns expressed by the Defence,
25 which are very relevant, where it concerns overlap of the cases, the charges. Al

1 Mahdi and Al Hassan, they're not exactly the same as has already been mentioned by
2 the Prosecution, but there is grounds to raise a question about certain aspects when
3 we are raising issues of protocols on confidentiality, taking into account that there are
4 victims in Al Mahdi who are also participating in Al Hassan, even under other
5 charges in the first case.

6 And where it concerns Al Mahdi, currently there are several actors that are
7 intervening. They are in contact with the victims. There's VPRS, VWU, the Fund,
8 the Trust Fund for Victims. And, at this stage, guaranteeing confidentiality and the
9 mechanism for contact with these victims does risk being complicated and difficult.

10 And I also wanted to make a suggestion in this regard. Outside of this courtroom,
11 if -- well, you have different actors who are concerned. If they could come together
12 and if they could try and find a path to sort out where these problems can be resolved.

13 We can't penalise the Al Mahdi case, suspending it, while we await Al Hassan to
14 make progress at a certain level to see if it's possible to let the Al Mahdi case continue.

15 And so what I would suggest is, outside of this courtroom, is, if we could have
16 working meetings with the Defence - obviously to try and really find exactly where
17 the problems are - with VPRS, with the Trust Fund, with VWU and the Legal
18 Representatives of Victims, and at the end of these discussions to seize Chamber VIII
19 to come -- or, come back before your Chamber in order to present exactly what the
20 problems are or what risks there might be for victims participating in Al Mahdi and
21 Al Hassan. And if there would be any type of obstacle with regards to the work of
22 either the Prosecution, the Defence or the Legal Representatives of Victims.

23 Thank you.

24 JUDGE PROST: [10:15:04](Interpretation) Thank you very much.

25 (Speaks English) Mr Dubuisson, does the Registry have any comments at this stage?

1 This is obviously a preliminary discussion of this issue.

2 MR DUBUISSON: [10:15:14](Interpretation) Well, yes, very briefly, your Honour.

3 So indeed, we have before us four different parameters that have to be taken into

4 account, and it is clear that there are similarities between the two cases. It's therefore

5 the applicants for participation as well as for reparations now in the Al Mahdi case

6 who could be the same.

7 So indeed it's relatively important, at least when we think about the third parameter,

8 and what's that? That is the dual status that we have. There's a need for clarity on

9 the second point, which is indeed to be able to identify who has what role.

10 Now there is a fourth parameter, which hasn't been mentioned here, everybody

11 speaks about at this stage in the proceedings, but it's extremely important, however,

12 that we are clear with regards to the Statute. At the time when you have -- a dual

13 status appears, when you have somebody physically embodying that dual status by

14 appearing in the courtroom - perhaps that will happen in October, November or in

15 2021 - at the time that reparations have largely progressed. And there, there will

16 indeed be potentially a problem, a problem that some have called contamination here.

17 Now, the Fund normally, if there hadn't been the Al Mahdi case, it would have

18 potentially had the -- or, the second mandate that it would have exercised and, when

19 that is done, the Trust Fund would not have an -- or would not want to know what

20 the status of the victims is where they intervene or take action.

21 And the case is, when the second mandate isn't being exercised in the Al Hassan case,

22 there's reparations in the Al Mahdi case where, there, when we speak about collective

23 or individual reparations, the names of persons are known.

24 Now, the names of people who come to the courtroom, if indeed they are receiving

25 a form of reparations of any type whatsoever, that will be known before these people

1 come to testify. So it will be necessary indeed, I think, to be able to identify what
2 exactly the status of this victim is, who could also be a witness, who could also be in
3 both cases, and I think that it's important to be able to identify them. Not to transmit
4 it to the Fund because they don't want to know that, but to be able to manage them in
5 terms of the credibility of the witness in the case.

6 The Registry is a neutral organ. We have a lot of information, both from the VPU,
7 which calls the witnesses, and with the Prosecutor, but also the Defence later. And
8 the Legal Representatives of Victims as well, they can also call witnesses. So there's
9 information there.

10 The unit for the participation in reparations, VPRS, also has this type of information,
11 but we protect this information. We make sure there is no exchange of information
12 and when we don't have a legal key in order to do so.

13 Now, there is an additional argument here, which is namely that the decision that is
14 taken in the Al Mahdi case, these are decisions that are also taken at legal level by a
15 Chamber, by Judges, and as such it is essential for us also to be able to turn towards
16 the Chamber responsible for reparations in order to have the authorisation or leave to
17 have access to certain information.

18 And indeed, we can collect this type of information, we can communicate it, transmit
19 it to the Chamber, to yourself, but indeed, we have to see when these reparations will
20 eventually take place, and I think that they could take place at the time of testimony.

21 And I perfectly understand that it is essential within the framework of a fair trial and
22 an expeditious trial that we have clarity on this specific information.

23 Thank you.

24 JUDGE PROST: [10:20:03](Interpretation) Thank you for that, Mr Dubuisson.

25 (Speaks English) Well, again I thank the Defence for raising the issue. I believe we

1 have had a full discussion from the different perspectives. Obviously, this is an
2 example of the complicated structure of the Rome Statute in the fact that we have
3 various players in place, including the Trust Fund for Victims, which is an
4 independent body and in the context of two cases; so it is a complex situation.

5 I believe that -- as all of the interventions have identified, I think at this stage what is
6 very important is that there is liaison with -- amongst the parties and also with VPRS
7 and with the Trust Fund for Victims to try and at least bring some clarity to where the
8 particular intersection points might be. As suggested as well to try and identify very
9 clearly where we might have very specific issues with witnesses or dual-status
10 individuals.

11 So I would encourage all of the parties, participants and the other bodies to carry out
12 those kinds of consultations to try and advance this issue and then we can come back
13 to the issue in front of the Chamber once we have more clarity.

14 And the idea suggested by the Prosecution I think is a good one of trying to identify
15 at this stage using the information that is available where there may be specific issues
16 already.

17 So I would simply encourage that discussion to take place. I think this is an
18 important issue to keep mindful of.

19 I would also note it's not the first time that we've had an intersection of cases. We
20 had an instance with Lubanga and Ntaganda, so we do have some precedent to look
21 at at how things were managed as well as the Appeals Chamber's decision can be
22 looked at and examined too for guidance.

23 So with all of those parameters in place, I trust that all of the parties and participants
24 can work on advancing this issue. And again, thank you for bringing it to the
25 Chamber's attention. Certainly, I will discuss it with my colleagues as well so that

1 we are well aware of these issues.

2 We can move then, I believe to the next issue, which is once again a Defence issue,
3 and that is the logistical issues related to Defence investigations. I believe this may
4 be related to Defence filing on 31 January and the decision I issued on 3 February,
5 both of which were filed in public redacted form from last Friday.

6 So Ms Taylor.

7 MS TAYLOR: [10:23:07] Thank you very much, your Honour.

8 I would wish to preface my submissions by the point that although I'll primarily be
9 focusing on the role of the Defence in conducting investigations, the concerns that I'm
10 raising are equally applicable to the Legal Representatives for Victims, and for this
11 reason they may wish to make submissions as well on these points.

12 It is not disputed for the purposes of this case that Mr Al Hassan is indigent. He has
13 a right to legal assistance. And under Article 83, this encompasses all costs that are
14 necessary and reasonable for the conduct of an effective defence and that
15 encompasses effective investigations.

16 Now we are obviously not staff, but the particular administrative label that's put on
17 our heads shouldn't impact on our ability to conduct safe and secure investigations.

18 And this is a principle that's been recognised by the Assembly of State Parties, by the
19 bureau in cooperation in its report, which is in our table of authorities.

20 Paragraph 102 of that report says there is no fair trial without providing the Defence
21 with adequate facilities to prepare its case, in particular, as concerns the investigation
22 and collection of evidence.

23 And at paragraph 104, the bureau went on to state:

24 In this respect, Defence counsel and their teams receive the same security, logistical
25 and administrative assistance as Court staff. Such assistance is primarily provided

1 by the Court's field offices, but also by the United Nations offices and States.

2 The same. Not almost the same or roughly the same, but this report commits the
3 Court to providing the Defence with the same security.

4 This principle that we have the right to the same security, logistical, administrative
5 assistance as court staff is of crucial importance to the right to a fair trial and the
6 specific right to call witnesses under the same conditions as the Prosecution. Our
7 lives and those of the persons we interact with are not worth less just because we are
8 on the other side of the courtroom.

9 And if the Court has a duty of care when it approves Prosecution missions, then it has
10 the same duty as concerns Defence missions which are approved and funded under
11 the Court's legal aid scheme.

12 And this was something that the Registry explicitly confirmed at a legal aid
13 consultation meeting in 2018. Again, this is in our table of authorities. And in
14 response to concerns raised by the head of the Office of Public Counsel for Victims
15 concerning the difficulties in obtaining insurance, particularly when travelling to
16 high-risk areas, the director of judicial services stated:

17 Now when it comes to medical evacuation, emergencies and what have you, the
18 Court's medevac system would address those issues. The Court's. Not the
19 Defence.

20 It is also notable that in the 2014 guidelines on intermediaries, the Court specified in
21 principle 5 that the Court has a duty to prevent or manage security risks to
22 intermediaries when those risks result in the intermediaries' interaction with the
23 Court and the fulfilment of the intermediaries' functions on behalf of the Court.

24 Now if that duty extends to intermediaries, intermediaries in the largest sense of the
25 word, then surely it extends at the very least to the Defence who are appointed and

1 travel with the authorisation of the Court.

2 But these principles, these commitments in our view have not been applied in this
3 particular case. We have not been afforded the same logistical, administrative and
4 security assistance that the Court committed to. These promises that we could
5 benefit from the Court's medevac system have been resiled from at the last minute.
6 Now we have stated quite clearly for the record that in order to fulfil our duty to
7 Mr Al Hassan and to investigate this case effectively, we need to travel to certain
8 areas, whether it be to meet witnesses or to do a site visit, and that includes
9 Timbuktu.

10 For this reason we asked the Registry on 22 August last year to conduct a feasibility
11 assessment. We submitted a detailed security and mission plan at the beginning of
12 December and on 3 December we asked for clarification as to what would happen if
13 we needed to be evacuated or if a security issue arose.

14 And that day, for the very first time, the Registry posted on the intranet its stance.

15 That we had to try and obtain personal insurance for this, insurance not just for our
16 lives in The Hague, but insurance from evacuation from a high-security area.

17 This isn't a position that had appeared in previous legal texts and it flies in the face of
18 the commitments that I just mentioned, that we would benefit from the same services
19 as the Prosecution, including in UN field offices.

20 This circular had no information or details as concerns the type of insurance
21 providers who would provide us with this very specific form of insurance; although,
22 we had heard from the ICCBA that this was an issue that they were liaising with the
23 Registry on.

24 We therefore carried on with our planning. This included a meeting at the end of
25 December where we were told that in order to board a UN plane, we would have to

1 sign a waiver of liability. And what this waiver would mean, that if the plane
2 crashed through an accident or negligence, we would have no recourse against the
3 United Nations.

4 Now if you are an ICC staff member, a contractor or a consultant, a Prosecution
5 intermediary or an interpreter, that's fine, because the Court indemnifies you for any
6 service-related death, injury or damage that occurs on official mission.

7 But so far, the Registry has refused to close the gap and confirm that we would have
8 an equivalent form of protection if we sign that waiver and it turns out that our
9 personal insurance doesn't cover us.

10 And after this shocking reveal, we were also told that if the United Nations decides to
11 charge the Court for any of the services that it provides to an ICC mission, the
12 Registry might turn around and bill us in our personal capacity for these services, not
13 from the legal aid budget, but from our own pockets as if we were travelling to Mali
14 on a holiday.

15 Now this is a completely arbitrary and unacceptable form of discrimination. There
16 was no written policy to this effect that we can be personally liable for these costs.

17 This notion was pulled out of thin air. And I can't see any legal basis for
18 discriminating between the Prosecution and the Defence, given that the agreement
19 between the ICC and MINUSMA on this point is exactly the same as the agreement
20 that's used for the Prosecution, it's exactly the same as the agreement that has been
21 used between the ICC and other UN field offices.

22 And I have consulted with other Defence teams that travel to Congo and the CAR,
23 and no other Defence team has ever been told that they would be personally liable for
24 such costs. We are the first and only team that has been told that we are personally
25 liable for costs that the UN might pass on to the ICC, pursuant to an agreement

1 between the UN and the ICC.

2 Now we can't be placed in a situation where we have no clarity as concerns what
3 would happen if we go on mission. We can't cross our fingers and hope that nothing
4 happens to us and that we won't receive a big fat bill in our email. And we would
5 submit that this absurd situation is not consistent with the Registry's duty under Rule
6 20 of the Rules to provide all necessary and reasonable assistance so we can perform
7 our investigations in an effective and independent manner.

8 If the Registry approves a mission under the legal aid scheme, then it's the legal aid
9 scheme, not our personal pockets that should fund the costs and expenses arising
10 from the approved mission.

11 And if the Court asks us to sign a waiver of liability as a necessary component of that
12 mission, then the Court has a corollary obligation to ensure that we have some form
13 of protection as concerns consequences that could stem from signing this waiver of
14 liability.

15 And I would like to underscore that what we are asking for is not exceptional. It's
16 not unique. It's a right that the ICC has extended to non-staff, including contractors
17 and consultants.

18 It's a right that exists under basic principles of law that apply to international
19 governments or organisations. And in terms of the basic principle underlining this
20 right, I would like to refer to a 2017 interim report of a UN high-level working group
21 on duty of care - and, again, that's in our table of authorities - and it says that this
22 basic duty of care for non-staff falls or derives from general principles of the law of
23 responsibility, whether it be tort law under the common law system, the law of
24 responsibility under the civil law system. It also derives from the jurisprudence of
25 the UN Administrative Tribunal and it falls and is considered to be a general

1 principle of law that would apply to all UN personnel in a direct contractual
2 relationship with the UN. If it's a general principle of law, then it's equally
3 applicable to the ICC as an international organisation.

4 A 2019 report from the same committee then identified five pillars concerning the
5 duty of care to non-staff when they travel on official mission. And again, I'd like to
6 emphasise, this isn't applying to The Hague, it only applies when we are travelling on
7 official mission. And these pillars can be summarised into three essential duties:
8 Pre-deployment, that non-staff have access to appropriate medical services and
9 insurance covering.

10 During deployment, that we are included in any evacuation and security scheme.

11 And post-deployment, that there is a follow-up mechanism and compensation in case
12 of lasting damage or injury.

13 There is a duty to ensure that we are covered by an appropriate form of protection.

14 It isn't discharged by sending us links to insurance companies without any form of
15 effective verification as to whether they would provide us with effective protection in
16 our unique circumstances.

17 And it isn't that we haven't tried. We contacted the providers, only to be given the
18 runaround and to receive the eventual answers that we have appended in today's
19 filing saying, "Sorry, we can't help you."

20 It's also a matter of basic common sense that an insurer isn't going to reimburse us for
21 unknown and unspecified costs that the Registry may or may not pass on to us in
22 unknown circumstances based on unknown criteria.

23 Even the high-risk travel company wouldn't cover travel to a country which is
24 experiencing political unrest before the date of travel. It would also only reimburse
25 costs if we relied upon their pre-approved providers, that is, not the United Nations,

1 so it wouldn't cover any expenses incurred by the UN.

2 If you look through the exclusions that we've attached today's filing, it wouldn't
3 cover a range of circumstances, including if Mali were to accuse us of violating
4 national law for associating with alleged terrorists.

5 So we're very much left in the limbo there. And, importantly, it wouldn't cover our
6 resource person if he were to travel within Mali or use a UN plane.

7 We submit that risk management means avoiding pre-empting risks, not hoping it
8 will be all right. Our missions to high-risk areas are stressful enough without having
9 to engage in litigation concerning basic rights mid-deployment.

10 The right to a fair and speedy trial also means we need to have an immediate solution
11 for this issue. We appreciate the Registry's efforts in this regard, but we can't wait
12 for working groups to hash out a solution. Given that the Court publicly committed
13 to providing us the same security, logistical, administrative facilities as the
14 Prosecution, we should have the right to benefit from that assistance now and to have
15 that applied to this case.

16 So we're willing to do all we can to try to continue to identify an insurer, but we need
17 to know that we have a legal safety net, if and when there's holes or cracks in these
18 policies and we are left out there with no effective protection but this Court.

19 We would like to know in advance that the Court will be there to provide us that
20 protection so that we can go ahead and conduct these missions in a fair, effective and
21 secure manner.

22 Thank you.

23 JUDGE PROST: [10:38:44] Thank you, Ms Taylor.

24 I am going to, at this point, give the floor to the Registry, given the nature of your
25 comments, for any comments you might wish to make, Mr Dubuisson. I do so

1 noting that there is already the decision which was taken by the Single Judge on the
2 matter, you can bear that in mind, but in light of the representations, I assume you
3 would like to make some comments at this stage.

4 MR DUBUISSON: [10:39:14](Interpretation) Yes, thank you, Madam President.
5 I think I will take about 10 minutes.

6 To begin with, I would like to point out that us, the Registrar, we never allow
7 a person -- and we will never allow any person anywhere without assistance. We
8 have even taken risks to possibly assist people.

9 So the Registrar has a purpose to provide assistance to all Defence counsel under Rule
10 20 -- Article (sic) 20 of the Rules of Procedure and Evidence; so it is important for us to
11 be very precise on the scope of application of certain rules that may be confusing and
12 give the impression that we are not acting correctly.

13 So given the framework of a mission, everything was in place for the recent mission
14 of the counsel. The obstacle came about because the Defence refused to sign
15 a waiver which applies to everyone benefiting from the services of the UN, without
16 distinction, whether they are Court employers or not.

17 For more than two months, the Registrar was communicating with the UN
18 services - and, I would like to thank them for all their assistance, specifically - not only
19 on the ground or in the field, but in New York, because there's a lot of diplomatic
20 activities that have to go on to arrange these -- situation. However, the Registrar
21 does not control the conditions and requirements of the UN, particularly the signing
22 of a waiver under certain circumstances.

23 The Registrar fulfilled its commitments for the mission, but which was canceled by
24 the Defence because they did not want to comply with the requirements of the UN.

25 Under Article 20 of the Rules of Procedure and Evidence, the Registrar facilitates

1 missions for all Defence teams and LRVs for the same destinations. I would like to
2 point out that during the period that we are talking about, the legal representative of
3 the victim was in place and followed all the conditions that Maître Taylor -- that Ms
4 Taylor did not want to follow.

5 I would like to point that out. The Trust Fund for Victims is also there. Our experts
6 and the experts of the Fund also went there under the same circumstances.

7 Regarding the particular problem of insurance for non-medical reasons in the case of
8 evacuation, for example, the Defence seems to use this aspect of the organisation of
9 the mission to state that the Court has the same duty of care towards counsel as well
10 as its employees, particularly those in the OTP. However, there is no link. It is not
11 a discussion on the duty of care of the Court, but the scope of application of Article 20
12 of the RPE and to what extent the Registry can facilitate the work of the Defence.

13 However, irrespective of the nature of the evacuation, whether it is medical or
14 security reasons, all Defence staff, apart from local individuals, are evacuated by the
15 UN as long as they fulfil the conditions. And the Court has agreed to benefit from
16 this agreement; that is why the Registry provides assistance to the Defence teams.

17 Now, there is a financial aspect that the UN insists on when they provide services.

18 They may be charged to the Court, automatically or not. So the Court pays the
19 invoice for the services and then they turn to the counsel that would have engaged in
20 an insurance policy before the mission. So there is also sickness and funerals in case
21 of death.

22 This is a different case altogether, which is different from the cost of evacuation. We
23 have to be well aware of what we are talking about. The Court wants to benefit from
24 the scheme of the Court employees, especially OTP employees, using the principle of
25 equality of arms.

1 For employers -- or, employees, who are contractual employees of the Court,
2 consultants and individual consultants, they are covered by a specific programme and
3 they receive compensation for services, for injuries and illness during services.
4 When a counsel is on the roster of the Court list, it is obvious that the system is
5 different because this is different from the people who are outside of the Court who
6 have the obligation to have their own insurance.
7 Counsel are much aware of their obligations, their fees and the professional charges.
8 So we advise the counsel to pay those insurances, and I am talking here of amounts
9 that are not enormous.
10 As the Defence states, the cost of such insurance should -- is to be borne by the
11 counsel. In case of illness, death and so on, there are discussions relating to what
12 should be done, but this is outside of the scope of the session of today.
13 The idea is to change the legal aid policy, as the Defence seems to want to propose, or
14 to change the statute of the counsel so as to benefit from certain advantages.
15 These discussions are ongoing, so the agreement will come. That is why the Registry
16 is envisaging all possible options -- and more realistically, is thinking about
17 cooperating with the Bar, that is, the ICCB, to see whether a collective insurance
18 policy with certain partners might be possible.
19 The contractual relationship is with their clients through the representation mandate
20 and not with the Court. The Court is not the client of the counsel. The Court
21 simply remunerates counsel because of the indigence of the accused. It is not
22 because of that that the Court would automatically have a duty of care.
23 So there is a difference between indigent clients and non-indigent clients, that is what
24 that supposes.
25 But the Court should have the same obligations with all counsel, and that is specified

1 under Article 20 and should not be confused with other aspects relating to the
2 evacuation of counsel in other cases.

3 Thank you.

4 JUDGE PROST: [10:49:57](Interpretation) Thank you, Mr Dubuisson.

5 (Speaks English) I believe the positions have been reflected now on the record on this
6 issue. The position of the Chamber is reflected in the decision of the Single Judge,
7 which I issued on 3 February.

8 The question that is being discussed on which there have been representations is
9 a matter of the application of the policy of the Registrar in relation to legal aid.

10 The Chamber does not have general oversight over the mandate of the Registry.

11 What the Chamber has is a review power for specific decisions. And we have
12 reiterated that position; that if there is a specific decision which merits review by the
13 Chamber within the statutory framework, we are prepared obviously to entertain
14 that.

15 I appreciate the concerns that you have raised, Ms Taylor. But the matter needs to be
16 resolved as between yourself and the Registry through continued consultations. I
17 would urge you to continue to discuss possible solutions for this matter. As
18 Mr Dubuisson has indicated, there are ongoing broader discussions as well, but none
19 of these matters are matters in which the Chamber is going to intervene.

20 So I leave the matter at that point. I don't believe there is a need for any other
21 interventions on the issue, unless someone felt very strongly about it.

22 As indicated, the points are made on the record, but the Chamber's position remains
23 that it is not a matter for the Chamber at this stage.

24 Ms Taylor.

25 MS TAYLOR: [10:51:43] Thank you very much, your Honour.

1 I think it needs to be stated very clearly for the record that we will not conduct
2 investigations unless we have this security. And yes, I refused to sign that waiver.
3 And I can't see any legal principle or obligation for me to make my team conduct
4 investigations, to accept situations where they do not have protection.
5 The fact that other entities have done so is neither here nor there, particularly when
6 the entities that you refer to are, for the most part, covered by the Court.
7 So it might be that this is an issue for the Registry to address, but the issue of Mr Al
8 Hassan's right to speedy investigations is before this Chamber and we cannot, we
9 cannot conduct investigations without protection. That's absolute.
10 As counsel, I will not put my team members in that situation and I cannot see any
11 legal obligation for me to do so when this is an issue that can be solved very easily.
12 The Court extends its insurance programme to witnesses when they travel. There
13 are easy solutions. We should not have to wait for a working group to come up with
14 a solution when this impacts directly on this case.
15 And Ms Madam Proulx and I are both in the ICCBA. We can assure you that we
16 can't see a solution from the ICCBA coming out overnight. So these discussions that
17 are happening, we're not aware of them, and certainly they will not be crystallising in
18 time to assist this case.
19 So what we're asking for at the very least is an interim solution. We have a position
20 from the Registrar. This issue is ripe for judicial determination and we need an
21 interim solution which will allow us to conduct investigations now. Not in August.
22 Not when the Registry submits its new legal aid policy, which has been on the boiler
23 for three years now.
24 This is something that we need to address now and it is a basic principle that, as I said,
25 we will do all we can to find insurance, but if there's cracks in those insurance, if we

1 are evacuated to a country and told we need to have surgery and our insurance won't
2 cover it, then we do need assistance. And we need to go -- we need to know before
3 getting on that plane that that assistance will be forthcoming. Not afterwards.

4 Thank you very much.

5 JUDGE PROST: [10:54:37] Thank you, Ms Taylor.

6 Let me note that to date, this issue has been raised before the Chamber framed on the
7 basis of the application of the legal aid policy essentially, and has been adjudicated on
8 that basis.

9 If you wish to bring an application that is framed on the basis of the Chamber's
10 obligations under Article 67, if it is a fair trial issue you wish to raise, then you are
11 free to bring a motion to that effect. That would be inter partes and it would be
12 litigated with input from all parties, including -- and participants, and the Chamber
13 can litigate it and consider it and adjudicate upon it on that basis.

14 But we will not adjudicate upon it on the basis on which it has been framed to date.

15 If it is reaching a point of a fair trial issue, then of course that is your right to bring
16 that before the Chamber, but you need to do so in a manner that allows for input from
17 the parties, the Prosecution, the Legal Representatives of Victims, obviously the
18 Registry, and the matter can be brought before the Chamber in that manner.

19 But we need to move it forward in that context and if it is affecting investigations, it
20 needs to be dealt with urgently, but in that format.

21 So with that, I will conclude that particular agenda item.

22 I would think that at this juncture it might be a good time - we're five minutes short of
23 the planned 11 o'clock - but I think given the topics which we've been discussing and
24 the temperature in the room, perhaps we can at this point take an adjournment for
25 half an hour and come back at 11.25 and proceed with the remainder of the agenda

1 items.

2 So we are adjourned till 11.25.

3 Thank you.

4 THE COURT USHER: [10:56:30] All rise.

5 (Recess taken at 10.56 a.m.)

6 (Upon resuming in open session at 11.26 a.m.)

7 THE COURT USHER: [11:26:21] All rise.

8 Please be seated.

9 JUDGE PROST: [11:26:45] Thank you everyone.

10 So we will continue with the agenda items.

11 I turn to the issue of the update of the confidentiality protocol and related issues of
12 contacts with witnesses and victims.

13 There's two issues here. One is the discussions on the protocol and --

14 MS TAYLOR: [11:27:07] I apologise for interrupting but Mr Al Hassan is not here.
15 I apologise.

16 JUDGE PROST: [11:27:14] My apologies.

17 (Mr Al Hassan enters the courtroom)

18 JUDGE PROST: [11:27:25] My apologies, we should have waited. I note
19 Mr Al Hassan is now in the courtroom with us.

20 So we're turning to item 5, update on the confidentiality protocol and related issues.

21 There are two discrete issues. One is the general discussions ongoing about the
22 confidentiality protocol and related issues and also there is a very specific proposal
23 from the LRV. I'd like to deal with those issues separately.

24 To begin with, I would like to shortcut the issue on the discussions relating to the
25 confidentiality and dual-status protocols. This is an urgent and important matter. I

1 don't think the most efficient way to deal with it is to have the Chamber reviewing
2 comments and track changes on different documents.

3 I am hopeful and I'm confident that the Prosecution and the Defence - I understand
4 there were discussions again yesterday or at least that's what was mentioned by the
5 Prosecution - I'm hopeful that you can come to agreement or at the very least come
6 with a couple of discrete issues that remain to be resolved.

7 So rather than hearing any submissions today, rather than the Chamber engaging at
8 this stage, I would encourage you to do this and then to come to the Chamber if you
9 have remaining issues - in one document, please - that identifies very clearly what the
10 two positions are, what the issue is and then the Chamber can adjudicate on that.

11 But I think that's a much more efficient way to proceed with the general discussions
12 related to the -- those protocols.

13 So if we could agree to proceed on that basis. I would appreciate if this is dealt with
14 urgently and it would be great if we could have something before us, if there are any
15 issues, by the end of next week. I know this is an urgent matter that affects
16 investigations, so I encourage you to do that as well and as quickly as possible.

17 I'm moving to the issue raised by the Legal Representative of Victims.

18 You have made a proposal for what I understand to be an additional protocol in your
19 email. I don't know if you wish to add anything to that submission today in the
20 status conference or if you wish to simply rest with the particulars, but please feel free
21 to expand upon your proposal.

22 MR LUVENGIKA: [11:30:09](Interpretation) I'd like to thank you, your Honour.

23 I think that we're going to add something in our written submissions quite simply
24 because we can see that in the discussions that are underway, the discussions are

25 much more about witnesses with dual status. And in the meantime, the victims who

1 participate in a general way, they are spoken less of.

2 As such, we would like to refer to the protocol which was signed in the Katanga case
3 where the Chamber largely took into account the participation or at least contacts
4 with victims who participated in a general way, and regulated the contact that the
5 parties had in such cases.

6 But here, what I also wanted to raise was a problem which I had noted having
7 reviewed the protocol in Katanga. The proceedings are obviously a bit different.
8 The parties do not receive the application form for victims, so it's difficult in advance
9 for the Defence or for the Prosecution to know if the person is a victim who is
10 participating or not.

11 As such that raises a problem, all the more so because the identity of the victim at that
12 stage is protected so there is no communication of the identity in the decision or
13 before the decision confirming the charges. The Pre-Trial Chamber had recognised
14 the quality of victims participating for more than 800 applicants, but those are just
15 reference numbers that were communicated to the parties so it's difficult for the
16 parties at that stage to be able to identify if the person who they approach is a
17 participating victim or not and, as such, you have to refer to the Legal Representatives
18 of Victims and organise matters such that we can take up contact with that victim and
19 so on.

20 As such, what we are trying to do is to come back to the Chamber in a written
21 submission in order to try to raise all these different aspects and, of course, to propose
22 solutions or potential solutions for participation of victims.

23 But where it concerns dual-status victims, victim witnesses as it were, discussions are
24 under way and I think that we will be able to come to an agreement or find a solution
25 together. That's what I wish to add with regard to that issue.

1 JUDGE PROST: [11:33:20](Interpretation) Thank you very much for your
2 submission.
3 (Speaks English) I agree. I think that sounds like a very good way forward. So I
4 trust that the parties, in the course of agreeing as much as they can on the
5 confidentiality and contact protocol, will also share that with the Legal
6 Representatives for Victims. And then, knowing what that is and how that is framed,
7 then as you've indicated, you could come forward with submissions regarding
8 anything additional that you think might be needed. But I do appreciate that you've
9 noted the distinction between the cases, the precedent cases and this case, and I think
10 there may be some difficulties in terms of applying similar protocol. But certainly
11 the Chamber will welcome any -- particularly any submissions with solutions, that
12 would be very, very well received.
13 So if we can proceed on that basis, first issue and most important is to reach
14 agreement as far as possible on the confidentiality and contact protocol and then we'll
15 proceed from there with any possible additions or different approaches to be taken
16 with respect to dual status.
17 So I think that, in short order, can address that particular issue on the agenda.
18 If I could then move now to the clarifications related to the Prosecution's provisional
19 list of witnesses. I believe the Defence raised an issue regarding the status of
20 individuals who were not included on the Prosecution's list.
21 Ms Taylor, did you want to add to your submissions on this point?
22 MS TAYLOR: [11:35:10] Thank you very much, your Honour.
23 Although I do note that this is linked to the confidentiality and contact protocol,
24 because essentially this is why we underscored the need to resolve these issues on an
25 urgent basis, it's our position that if an individual is not on the provisional list of

1 witness then they fall outside the definition of a witness for the purposes of the
2 contact protocol and we should therefore have the right to initiate contact with them.
3 So I don't know if this is an issue which we can resolve today or whether we should
4 defer it to the resolution of the contact protocol itself.

5 JUDGE PROST: [11:35:46] Thank you for that. I mean there could be, as I
6 understood your issue might be about individuals who are not on the list at this time
7 and whether or not whatever the contact protocol ultimately says is applicable. I
8 understood that might be an issue which we could try and discuss. I don't know if
9 the Prosecution has any comments on this point.

10 MR DUTERTRE: [11:36:13](Interpretation) Yes, your Honour.
11 My colleague Dianne Luping is going to give some explanations in this regard. The
12 fact was that the Chamber, Pre-Trial Chamber had indeed indicated that the witnesses
13 approached by the Prosecutor, whether or not on the list of witnesses for the
14 confirmation, it was the protocol that applied in that case and that was good because
15 it was quite a premature stage at that point where Witness 77 could be on the list and
16 there was no need to call all witnesses for the confirmation of charges hearing.
17 Now we had a meeting yesterday with the Defence, and I think that we are quite
18 close on these issues. And perhaps there are four witnesses where there are certain
19 issues about, but I think the positions aren't very far from each other.
20 I would give the floor to my colleague Dianne Luping who will speak further in this
21 regard.

22 MS LUPING: [11:37:12] Thank you, your Honour.
23 Just briefly, because as my colleague Mr Dutertre indicated, we did have a fruitful
24 discussion yesterday and we hope to have one this afternoon. We would have to see,
25 obviously, how that develops.

1 There are two points discrete points, though, that we do think that it would be
2 worthwhile to raise with you at this juncture, even before those discussions, because
3 it does relate to interpretation of the contacts protocol and it is unlikely that the
4 discussions will resolve or change the positions of the parties on this.

5 Just in terms of the issue that the Defence raises, that it considers that any individual
6 who is not on the current provisional list of witnesses is not a witness for the
7 purposes of the contacts protocol, with respect, your Honour, the Prosecution
8 disagrees and I would like to explain why.

9 The Prosecution considers that it's not only those who are stated to be on its
10 provisional list of contacts who are covered under the contacts protocol, but instead
11 any witness whom the Prosecution clearly communicates to the Defence that it
12 intends to use as a witness and from the moment that this is clearly communicated.

13 And this is because of the definition, your Honour, of a witness under the contacts
14 protocol, and I refer to Article 4(f), that a witness is defined as an individual where
15 the intention of the party to call the witness or use the statement has been clearly
16 communicated to the opposing party.

17 So in our submission, your Honour, the Prosecution may give this notice to the
18 Defence of the identities of such witnesses, effectively on a rolling basis, until the final
19 list of witnesses is filed, as ordered, on 14 April. Now at that point, obviously all the
20 witnesses, including additional witnesses, on the final list are subject to the contacts
21 protocol. But even before then, as soon as the Prosecution clearly communicates to
22 the Defence that a person is a Prosecution witness whom it intends to call to testify or
23 rely on their statement, then that person is a witness for the purposes of the protocol.
24 And we just wish to bring to your attention, your Honour, that the Prosecution did
25 yesterday at our meeting on 17 February communicate to the Defence the witness

1 codes of four specific, currently characterised as Rule 77 witnesses that it does intend
2 to call as witnesses. And I would like to inform you of the codes of these witnesses:
3 That is P-0107, P-0555, P-0204, and P-0647.

4 Now this is our current intention. Obviously we will come to a final decision when
5 we file our final list, but this is our current intention, your Honour. So, in our
6 submission, any additional witnesses that the Prosecution does provide a
7 communication of as being individuals that we intend to use as a witness, even if they
8 don't appear on the provisional list of witnesses, are covered as soon as we
9 communicate that status to the Defence.

10 Now we would agree, just to be clear, that we consider that the Defence may at this
11 juncture approach other Rule 77 witnesses whom the Prosecution is not seeking to
12 include as potential witnesses to testify. And we further agree that this contact with
13 other Rule 77 witnesses would not constitute a violation of the contacts protocol. But
14 we would note for the record that we would assume that in compliance with Rule
15 81(4) of the Rules of Procedure and Evidence, Article 68 of the Statute, and the clear
16 terms of the confidentiality protocol, that the fact that any of these individuals have
17 interacted with the Prosecution should not be revealed to third parties to ensure their
18 security and protection as persons at risk due to the activities of the Court. And I
19 refer in particular to paragraphs 6 and 9 of the confidentiality protocol.

20 The second issue, your Honour, that we would like to raise at this point relates to the
21 issue of the implementation of the existing contacts protocol. And this is not an
22 issue that is a matter for discussion as such in terms of the language of the contacts
23 protocol, which is why we are raising it before your Honour now.

24 Now, to be clear, the Prosecution is not suggesting that there has been any deliberate
25 violation of the protocol by the Defence at this stage. However, we do consider that

1 it's important to raise our concerns with the Chamber regarding certain instances
2 where there have apparent, an apparent at least violation of the protocol and where,
3 in our submission, the situations should and could have been avoided.

4 I would like to raise one specific example, but to do so I would ask, with your leave,
5 your Honour, if we could briefly go into private session, it will be brief, just for the
6 purposes of providing this example.

7 JUDGE PROST: [11:43:10] Yes, if we can go into private session, please.

8 (Private session at 11.43 a.m.)

9 THE COURT OFFICER: [11:43:26] We are in private session, Madam President.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

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16 (Redacted)

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19 (Redacted)

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21 (Redacted)

22 (Redacted)

23 (Redacted)

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4 (Redacted)

5 (Open session at 11.45 a.m.)

6 THE COURT OFFICER: [11:45:15] We are back in open session, Madam President.

7 JUDGE PROST: [11:45:22] Counsel, you may continue, but I would like to try and
8 keep the issues confined to general issues as identified in the agenda. So I'll let you
9 finish your point, but if you can come to a conclusion on the specifics quickly that
10 would be good.

11 MS LUPING: [11:45:40] Thank you, your Honour.

12 Our point in relation to this example is simply that, in this case, even if the Defence
13 does not share names of all of its witnesses on the Prosecution's list with its resource
14 persons, that they do need to be asked, in our submission, they could be asked to
15 revert to headquarters before they contact specific persons so that counsel can then
16 confirm whether or not that contact can proceed or not. And this can happen
17 without specifying reasons why they should or should not proceed.

18 We do not consider that it's an excuse or that there is no violation of the protocol if a
19 member of the team is not informed that a person is a Prosecution witness.

20 Otherwise, our concern is that there may be further instances of inadvertent contacts
21 with Prosecution witnesses.

22 Now we think there should be a workable mechanism to avoid this, balancing the
23 interests of the Defence needs of investigation and the Prosecution witnesses' need for
24 protection. And we think that this proposal of a system whereby resource person or
25 intermediary in the field reverts back with the proposed name, achieves that balance.

1 Now in terms of the obligations of those resource persons I would just briefly refer
2 your Honour to paragraph 5 of the protocol, the fact that all the obligations that are
3 incumbent on them as well. And paragraph 27, that the obligations of contacts
4 kick in and arise as soon as we inform the opposing party of the identities of our
5 witnesses.

6 That was all we wanted to raise at this point, your Honour.

7 JUDGE PROST: [11:47:21] Thank you, counsel.

8 Ms Taylor, I can give you the floor too, but I would make it clear I'm not going to
9 decide on anything today with respect to the operation of the protocol or these
10 specific issues of dispute. They have now been highlighted. I am sure on the
11 second issue that you've heard the points raised by the Prosecution and I accept
12 entirely that this is not any kind of deliberate action. So, as I say, I will give you the
13 floor but bear in mind that these are issues that can be resolved in due course. I'm
14 encouraged to hear about the continuing discussions and I think all of these issues can
15 easily be resolved amongst the parties through reasonable discussions and hopefully
16 the Chamber will not have to intervene, but if we do we'll do that at a later stage.
17 But with that caveat you have the floor, Ms Taylor.

18 MS TAYLOR: [11:48:17] Thank you very much.

19 And may I start in private session, just briefly, to address the issue? I will be very
20 brief, but out of an abundance of caution.

21 JUDGE PROST: [11:48:28] If we could go to private session briefly, please.

22 (Private session at 11.48 a.m.)

23 THE COURT OFFICER: [11:48:42] We are in private session, Madam President.

24 (Redacted)

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22 (Open session at 11.50 a.m.)

23 THE COURT OFFICER: [11:50:19] We are back in open session, Madam President.

24 MS TAYLOR: [11:50:26] The second issue concerns the definition of a witness. And
25 we did indeed have constructive discussions with the Prosecution yesterday but they

1 were framed in a different manner. During these discussions the Prosecution, at our
2 request, indicated that there were four individuals who they might call as a witness.
3 They didn't know if they wanted to call them as a witness yet. So under the terms of
4 the contact protocol this falls outside the definition, this is not a clear intention to call
5 this person as a witness.

6 Now of these four individuals, one of them's statement was disclosed as PEXO,
7 exculpatory. We don't have Arabic translations for these individuals. They haven't
8 been put in the Rule 76 bracket. So we would submit that if the Prosecution has
9 formulated a clear intention to call someone as a witness, firstly, they have to move
10 them to the Rule 76 bracket, they need to comply with their translation obligations,
11 and they need to convey this to us in means which aren't equivocal and that can be
12 done, for example, through an amendment to the provisional list of witnesses.

13 That's an easy solution.

14 And what we're asking for here is entirely consistent with the case law of this Court.

15 In Gbagbo, in Ongwen, the definition of a witness has been litigated *ad infinitum*.

16 And in all those cases it was the Prosecution insisting that it had to be defined in a
17 narrow manner, because otherwise it can inveigle the parties in needless discussions
18 concerning irrelevant persons.

19 And indeed at the very beginning of this case it was the Prosecution who requested
20 the Pre-Trial Chamber to adopt the definition of a witness as formulated in the
21 Gbagbo case. And when asked to explain why they had done so, they said because
22 otherwise it is not clear for the investigating or opposing party whether an individual
23 is a witness of a calling party.

24 So that was the Prosecution's own position in this case and we would submit that
25 that's a fair position and it's consistent with a right to a fair and speedy trial. These

1 individuals can't stay in limbo while the Prosecution sits on its heels and makes up its
2 mind whether to call them as a witness. We need to interview perspective witnesses
3 sufficiently in advance of the commencement of the trial so we can formulate a
4 coherent strategy.

5 Now if the Prosecution has already decided that those four persons, intends to call
6 them, then it can -- today it can amend its list, it can put those four individuals on its
7 list and from henceforth we will treat them as Rule 76 witnesses.

8 We will also invite the Chamber to adopt adverse inferences or appropriate measures
9 if they are taken off the list, but what they can't do is put them in limbo and have this
10 very equivocal status where we simply don't know if they will or will not be a witness.

11 So that's our position and we believe it's entirely consistent with the case law of this
12 Court. And if it were not to be adopted as concerns Prosecution witnesses, then
13 obviously the reciprocal would apply to the Defence, that is the Prosecution could not
14 contact individuals irrespective as to whether we put them on a list. So here we
15 need a clear reciprocal obligation and position to guide the trial proceedings.

16 Thank you.

17 JUDGE PROST: [11:53:55] Thank you very much.

18 Well, I don't think we need to discuss this point any further. I believe that parties
19 are quite close together on these issues. A little more discussion, I'm quite satisfied
20 that you can come to an agreement. I don't see any differences in great principle.

21 I think it's a matter of how things are communicated.

22 It is - I do point to the Prosecution - what the Defence mentioned was something I
23 would mention too. It is, of course, you have a final date for your final list, but you
24 can at any time provide an updated list of witnesses, which would bring some clarity.

25 I'm not saying whether that's the only means of communicating, I'm not deciding on

1 those issues. I would just invite you to continue your discussions and hopefully this
2 will not be an issue at all that requires the intervention of the Chamber and that we
3 can proceed accordingly with an agreed protocol in very short order, so I encourage
4 you to continue the discussions. I think all the points have been made on the record
5 and so I would simply want to conclude that agenda item at this point.

6 MS LUPING: [11:55:02] Thank you, your Honour. I won't make any additional
7 submissions on this agenda item, except just to correct the record. I had indeed
8 stated that the resource person was not aware and I have been informed by my
9 colleague that it was incorrectly transcribed. So I am putting that on the record, as
10 requested by Defence, that is indeed what I had stated.

11 Thank you.

12 JUDGE PROST: [11:55:26] Thank you very much.

13 We can move now then to the question of Prosecution disclosure obligations, related
14 issues and updates. I would like to hear from the Prosecution first with a general
15 update on ongoing disclosure and how that's proceeding.

16 Thank you.

17 MR DUTERTRE: [11:55:48](Interpretation) Your Honour, I'm just finding the
18 document.

19 So I'll have a few minutes on this, please excuse me in advance for my explanations
20 with a number of packages, numbers, et cetera, but all the information is there.

21 So since the last status conference we've communicated, between 19 December 2019
22 and 17 February, yesterday, 17 February 2020, nine batches of incriminating evidence,
23 so the pretrial batches, INCRIM 44 to 52;
24 Five batches of evidence under Rule 77, by the pretrial batches from Rule 77,
25 numbers 33 to 37;

1 Four update batches and lifting and update packages of metadata, and I won't give
2 you all the different numbers for these packages;
3 One batch of -- for reclassification of incriminating evidence.
4 In terms of the volume, the INCRIM batches correspondence to 1,936 documents and
5 11,887 pages. That includes large numbers of evidentiary items in which there are
6 redactions to the identity -- or, in which the redactions to the identity of witnesses
7 have been lifted.
8 If I take by way of example the 13 January batch for P-0626, 58 documents, 945 pages
9 without redactions to the identity of the witness.
10 But we also have communicated 77 without redactions, P-65 and others.
11 Now the batch under Rule 77 corresponds to 624 documents and over 3,700 pages.
12 And thereto with lots of witnesses whose identities were communicated to the
13 Defence. So P-65, 77, 572, 73. So various numbers of witnesses. P-0581, 583, 592,
14 P-593, and others.
15 The other batches, that's to say the batches on the metadata, correspond to 3,000, over
16 3,000 documents, 3,980 documents, and in these batches we have lifted redactions
17 concerning the identity of witnesses in the chain of custody but also the identity of
18 investigators. And so we have also added, where necessary, the field related to
19 witnesses and we have filled that in for certain witnesses for which we have the
20 authorisation not to do or we got that authorisation in advance from the Pre-Trial
21 Chamber. So that's a large volume of information which was communicated with
22 the lifting of nonstandard redactions. And the lifting of standard redactions, name
23 of the investigators, names of the interpreters, and B2 and B3 redactions as well, as
24 requested.
25 Now, where it concerns communication of the identity of Prosecution witnesses, I am

1 trying to give a clear view of the situation as to where we are now and I'm basing
2 myself on annex A of the filing which gave the provisional list of witnesses as
3 communicated on 31 January 2020.

4 Now, this list contains 68 witnesses -- 78 witnesses, and among these 68
5 witnesses -- among these 78 witnesses --

6 THE INTERPRETER: Corrects the interpreter.

7 MR DUTERTRE: (Interpretation) -- the Prosecution had already communicated the
8 identity of 60 witnesses to the Defence. I see that's a common work with the
9 interpreter as well. And so 60 witnesses out of the 78 whose identity was already
10 known by the Defence.

11 Now, there are also seven witnesses for whom the identity would be indicated in the
12 earliest possible deadline, by the earliest possible deadline. Now, that would also
13 include -- no, three witnesses who were referred to in the recent decision of the
14 Chamber on rule -- so decision 586 which you issued, your Honour.

15 So that makes a total of 67 witness among 78 for which the Defence would have the
16 identity by the latest on 10 March.

17 That means there are 11 witnesses left. So among the 11, there are 10 for whom we
18 are planning an application for delayed disclosure.

19 And there is a witness mentioned in your decision, that's 586, where the -- it depends
20 on the implementation of protection measures and as such, we will come to that in
21 good -- at the appropriate juncture. If we can also communicate that that would be
22 the 11th witness for delayed disclosure.

23 Just to sum up today, of the 78 people on the list, January list, the Defence has 60, will
24 have 67 names, and between 10 and 15 witnesses will be the subject of an application
25 for deferred disclosure. So I think the situation is clear when it comes to these

1 witnesses.

2 I'll now move to witnesses in the Rule 77 category or PEXO witnesses.

3 There are about 20 names that have been disclosed to the Defence. Some numbers
4 have been given earlier. P-592, for example, 93, 94 and the others are still being
5 reviewed and we were doing that as quickly as possible.

6 Now, some of these people do come under Rule 42, but this is something that we will
7 turn to later on.

8 Allow me to move on to the disclosure of less redacted versions of statements. Now
9 in the case of witnesses whose identities were disclosed recently who had been
10 redacted earlier, the statements are less redacted of course, but not just the identity
11 has been provided, we have also listed A4, B2, B3 redactions.

12 For example, P-582, P-0537, or P-431, that particular statement was disclosed
13 yesterday in response to your earlier instructions --

14 THE INTERPRETER: [12:05:57] Correction --

15 MR DUTERTRE: [12:05:57](Interpretation) -- your ruling of last week.

16 Now, in the case of witnesses whose identity was already known, we have already
17 carried out re-disclosure with less redaction and that is the case for a number of
18 witnesses. P-150, P-0007, P-0125, P-04 --

19 THE INTERPRETER: [12:06:34] Correction --

20 MR DUTERTRE: [12:05:57](Interpretation) -- P-610, P-622, P-623.

21 Now, as for possible new witnesses that might be put on the list, we do not -- we are
22 not considering applications for redaction purposes at this stage.

23 Allow me to move on to the disclosure of Arabic translations under Rule 73 -- 76.

24 Now, in some cases, the witness -- the language understood by the accused person is
25 included in the original of the statement; so that information is accessible. There are

1 less redacted versions that can be disclosed. There are other witnesses for whom the
2 Arabic translation has been disclosed. P-4 ...

3 And the rest is underway, your Honour. We are moving as quickly as we can, but
4 we only have one Arabic-speaking staff member who can carry out the redactions.

5 So the work will be done before the deadline, but it does take time. But the Defence
6 will receive the information.

7 You must realise that at this particular stage of the proceedings, there are only draft
8 translations in Arabic for a number of witnesses owing to resource and financial
9 issues. But we are doing all we can to obtain final versions and we will have to
10 make the necessary redactions to those final versions, B2 redactions, family members
11 possibly.

12 Finally, I'll move on to the participation applications of dual-status victims. We have
13 sent the proposed redactions of the participation applications just at the end of last
14 week to the Legal Representatives of Victims and it relates to three individuals at this
15 particular juncture. So we are waiting for responses from the LRVs.

16 It's quite recent, but we do hope to get answers for them soon and then, in turn, we
17 will be able to disclose to the Defence as quickly as possible.

18 In all, I would say that great efforts have been made to disclose identities and we have
19 re-disclosed some documents with less redactions, and we are continuing our efforts
20 to keep to the deadline in March with a number of applications which will be coming
21 to you for delayed disclosure.

22 Thank you, your Honour.

23 JUDGE PROST: [12:10:32] Counsel, just before I turn the floor over to Ms Taylor,
24 I had a couple of questions just for clarification.

25 I am concerned of course about the potential for 10 or 11 delayed disclosure

1 applications, given the shortness of time in the, in the proposed schedule. So

2 I would like, if you're able to give an indication, are we talking short additional terms?

3 Are we talking rolling disclosure applications should they be granted?

4 This is a very tight time frame in terms of the Defence's ability to prepare for trial.

5 MR DUTERTRE: [12:11:13](Interpretation) It would be up to a few months before
6 the effective date of testimony. Not before the beginning of the trial; so rolling
7 disclosure.

8 JUDGE PROST: [12:11:26] Okay. Thank you for that clarification. We'll take a
9 look at the applications when they are received.

10 And just secondly, on Rule 77 you said others were being reviewed. Any idea?

11 Can you give a rough amount of how many are under review? Just if you're able.

12 MR DUTERTRE: [12:11:49](Interpretation) Well, off the top of my head, no. But
13 there's the Rule 42 ones. Perhaps 7 or 10 -- 7 to 10, I'm speaking off the cuff. As for
14 the others, these are standard things. We shouldn't -- it shouldn't lead to any delays.

15 JUDGE PROST: [12:12:17] (Interpretation) Thank you very much.

16 (Speaks English) Ms Taylor, and I know you had a number of issues on disclosure
17 which obviously you can proceed to address.

18 MS TAYLOR: [12:12:29] Thank you very much, your Honour.

19 After hearing these submissions, we are still concerned that in terms of where we are,
20 we are very far from where we need to be. And we are concerned by the sporadic
21 and piecemeal nature of the disclosure we're receiving and also by the fundamental
22 mutations in the Prosecution's case, in particular as concerns the disclosure of new
23 witnesses and new statements.

24 Now, we received the Prosecution's original witness list and it seems from the list that
25 the Prosecution is relying on 25 new witnesses that were not relied upon at the

1 confirmation stage.

2 Of these 25 new witnesses, four are entirely anonymous. For one of them, no
3 evidence has been disclosed. For 12 of them, the Prosecution either interviewed
4 them for the first time after the confirmation hearing or disclosed evidence for the
5 first time after the confirmation hearing.

6 Now, putting aside disclosures of lesser redacted versions, since the confirmation of
7 charges, the Prosecution has disclosed 1,767 new incriminating items of evidence,
8 totalling 7,268 pages of evidence.

9 At the end of the confirmation stage, the number of items was approximately 9,000.

10 So that means there's been an approximate 20 per cent increase in the last couple of
11 months alone. And we would like to express our concern that rather than preparing
12 this case for trial based on the confirmed charges, the Prosecution appears to be
13 conducting fully-fledged post-confirmation investigations. And in our respectful
14 position, it's doing so in a manner that's not consistent with Article 54(1) of the
15 statute.

16 And if I may briefly go into private session to give a very specific example.

17 JUDGE PROST: [12:14:43] If we could go into private session, please.

18 (Private session at 12.14 p.m.)

19 THE COURT OFFICER: [12:14:55] We are in private session, Madam President.

20 (Redacted)

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17 (Open session at 12.16 p.m.)
18 THE COURT OFFICER: [12:17:00] We are back in open session, Madam President.
19 JUDGE PROST: [12:17:06] Thank you.
20 Please continue, Ms Taylor.
21 MS TAYLOR: [12:17:07] Now we know from open sources that various NGOs and
22 entities have submitted complaints, reports and evidence to the Prosecution
23 concerning alleged crimes committed by armed groups in Timbuktu in 2012. But
24 although we've requested this information repeatedly, we have yet to receive it.
25 And that's a key issue as concerns the identification of perpetrators that goes directly

1 to the charges.

2 The Prosecution has also adopted a piecemeal approach as concerns the disclosure of
3 information concerning certain individuals. And if I can use that phrase without
4 referring to the category of the individuals, I hope that it's clear who I'm referring to.
5 Now we're getting information about these individuals in dribs and drabs and it
6 makes it impossible for us to finalise our analysis or to instruct any experts in relation
7 to these individuals. For example, for particular individuals we might get one
8 medical report and not another one, but obviously we need the entire dossier to be
9 able to instruct an expert.

10 Now as a practical solution in terms of moving forward, we are grateful that the
11 Prosecution is prioritising this, but we would ask that they transmit complete dossiers
12 for each witness, otherwise we have to start and restart as concerns each witness and
13 we can't do effective analysis.

14 In terms of exculpatory information, we've received no exculpatory items in the last
15 two months. The last item we received was the public filing from the Trust Fund for
16 Victims. The Prosecution has also converted PEXO items into INCRIM as concerns
17 P-136. We have also not received lesser redacted versions of these PEXO items. As
18 a result, and here I'm only talking PEXO, for P-107 all we have is a one-paragraph
19 summary with no contact details. For TBT-001 we have a form with no name or
20 contact details. For P-005 we have an investigator's note with two sentences, no
21 names or contact details.

22 So not only are we not receiving more exculpatory information, we still can't use the
23 information that's been given to us. And we submit that Article 54 isn't fulfilled by
24 simply giving us information in circumstances where we can't use it.

25 Now, if we can't contact these individuals for reasons concerning protection or

1 security, then there might be a need for counterbalancing measures. So we would
2 suggest that at this stage, given the advanced nature of the proceedings, it's
3 incumbent on the Prosecution to contact these individuals to see if they will speak to
4 the Defence. If they won't speak to the Defence, if there's no other mechanism, then
5 we need to consider what remedy is available to compensate for the fact that we can't
6 access or use these exculpatory sources of information.

7 In addition to this issue, it would appear that we're not getting many PEXO items
8 because the Prosecution is interpreting its disclosure obligations in an overly narrow
9 manner. And there's two key examples. One concerns information concerning
10 those individuals. Now your Honour has already confirmed the certain categories of
11 information is disclosable to the Defence, that it falls under Rule 77 or Article 67(2),
12 and if the Prosecution has that information, it should disclose it. But the Prosecution
13 is not doing that. Instead, in lieu of giving us the actual materials, it's giving us
14 investigator's notes. Now many of these investigator's notes were drafted in 2019
15 after certain issues started to be litigated. So these aren't contemporaneous notes.
16 They also lack key details. For example, for several of the notes the note might say
17 that the person will say X, but it won't tell us the date when they said that. It won't
18 tell us the location where they said that, which is of crucial importance to our
19 application. We need to know where they were at that point in time.

20 We also have to have the interactions in the original. We need to know how the
21 individuals express themselves, how they express their concerns, what particular
22 language did they use, and what was the response of the Prosecution when these
23 concerns were raised. We need the evidence in its original. An investigator's note
24 is not an adequate solution or an adequate compensation. It also has very little
25 evidential value to us, particularly since the Prosecution won't let us interview their

1 investigators.

2 So it's our position that given that we already have a ruling that this information falls

3 under Rule 77, that it falls under Article 67(2), given that the Appeals Chamber

4 Ntaganda confirmed that even if this information isn't under Rule 76, it's still

5 disclosable if it contains information that falls under Rule 77 or Article 67(2).

6 Given the Ongwen decision that's in our table of authorities, which also confirms that

7 it's the original that needs to be disclosed and not a carbon copy, not an investigator's

8 note which lacks the detail of the original. We submit that it's incumbent on the

9 Prosecution to disclose this information. Since disclosure is the rule and

10 nondisclosure the exception, it's not incumbent us to relitigate matters we've litigated.

11 Given this ruling that it falls within the disclosure bracket, if the Prosecution doesn't

12 want to disclose it, it's incumbent on them to go to the Single Judge, not on us to try to

13 again use our resources to obtain what we should already have.

14 A second issue concerns the fact that in many instances when we write to the

15 Prosecution to ask for the disclosure of specific items, we will receive a response

16 stating the Prosecution has fulfilled its disclosure obligations or it's disclosed

17 everything that's disclosable.

18 Now, the problem with this response is that we don't have any clarity as to whether

19 the requested information is indeed in the custody of the Prosecution, and without

20 that clarity it's impossible for us to then seize the Chamber. So we would propose if

21 the Prosecution has the information, at the very least they should confirm that they

22 have it but are not disclosing it because they consider that it doesn't fall within their

23 disclosure obligations. That helps to focus the inquiries. It means that we will only

24 seize you as and when necessary and we won't seize you with hypothetical inquiries

25 because we're trying to parse the words of the Prosecutor to work out what their

1 responses mean.

2 We think that we are fully prepared to engage in inter partes correspondence, but this
3 correspondence needs to be clear and it needs to be geared towards facilitating the
4 disclosure process and not delaying it unnecessarily.

5 Thank you very much.

6 JUDGE PROST: [12:25:09] Thank you, Ms Taylor.

7 Mr Duterte, do you have any specific comments in response? But I would ask you
8 to focus on issues where perhaps we can come to some kind of resolution rather than
9 generalities, and particularly the last points, points that were just raised by counsel on
10 the question of matters falling within the rulings or confirming your having
11 information, what the position of the Prosecution is on those two points would be of
12 particular interest. But I will hear your remarks. But let's focus on moving
13 forward.

14 MR DUTERTRE: [12:25:46](Interpretation) I will endeavour to do so, but I did hear a
15 great many generalities and generalities are always lacking -- well, not particularly
16 informative and indeed at times misleading. But you see, a generality can always
17 give a rather vague idea.

18 Now on the issue I do have a lot of things to say about the points that my colleague
19 raised, but in any event, I'll try to be brief.

20 First of all, yes, we have received many emails from the Defence with specific
21 questions, and it is entirely inaccurate to say that we do not respond specifically. Of
22 the -- over the last two or three weeks I think perhaps 25 emails have been sent in
23 response to queries from the Defence, specific queries. For example, disclosure of a
24 photograph, disclosure of documents having to do with medical assistance, and the
25 list goes on.

1 So it is not accurate -- well, I can say that this is not an accurate portrayal of the
2 correspondence between Prosecution and Defence. At times we do not have the
3 kind of document requested, and I have several emails in mind that show that this is
4 the case. For example, documents having to do with the arrest of a particular person.
5 And then there are documents that we are reviewing currently and we have told the
6 Defence that the review is under way and that we will revert to the Defence with said
7 documents.

8 And I think it would be useful if the Defence could send me the specific requests for
9 which they believe they have not received a response, because they have sent many,
10 and on the basis of that, we will review the list. But I think we have answered most
11 of the requests.

12 As for the issue of notes, let me be very simple and clear. The Defence makes
13 reference to security assessments, NBSQ. Let's call things -- let's call a spade a spade.
14 We extract the disclosable information from the documents that contained a great
15 deal of information about security that cannot be disclosed and the information is
16 compiled into notes and disclosed to the Defence. And that is in keeping with the
17 jurisprudence established by a number of Chambers of this Court, and if the Defence
18 wants to challenge this practice, I would encourage them to submit a filing to the
19 Chamber and we can have a more technical exploration of the matter. I think this
20 was done a while ago and I think it could have been done earlier on, not raised today.
21 As for the dates found in a number of investigators' notes, I have told the Defence that
22 we are going to look at that and revert to them with information, with additional
23 information. So that point has already been raised and we are not in disagreement.
24 We will revisit the matter and we will look at the investigators' notes for which the
25 Defence believes they require more information, particularly dates.

1 If you don't mind, I will just move very quickly to PEXO materials. We have
2 disclosed a great many documents, no matter what category, both INCRIM and
3 Rule 77. And if necessary, when we have *exonératoire* information we have
4 provided -- we have pointed out that information in the disclosure memo. So we
5 have met our obligations in this regard.

6 And there is no mysterious box with PEXO documents that aren't being disclosed
7 somewhere in the OTP. We review what is disclosable and we do so, but sometimes
8 the nature of the document is more incriminating than PEXO.

9 I will conclude on that. I have a lot of other things to say regarding what the
10 Defence has alluded to, but I wanted to be concise, as you requested, your Honour,
11 and just to provide the information that can be very useful.

12 JUDGE PROST: [12:31:50] Thank you very much. And I do appreciate the concise
13 response because I think we can exchange on general points and I think the position
14 of both parties is clearly reflected on the record with the explanation of what has been
15 disclosed with the concerns raised by the Defence, so I think the specifics are quite
16 helpful.

17 In general I would like to -- again on this process once again I believe that a
18 continuing good relationship between the parties continue to discuss these issues
19 when problems arise, as they always do in the context of disclosure, that you continue
20 what is already evidently the practice of discussing those matters amongst yourselves
21 and trying to resolve them. Obviously though if there are specific issues, then those
22 should come to the Chamber.

23 Just let me comment on a few points just in terms of giving some general directions.
24 I understand the point you have raised, Ms Taylor, that obviously when you make
25 specific requests you are hoping that you will receive responses to those, those

1 represent what you have prioritised as being important and urgent. I hear from the
2 Prosecution that they are endeavouring to respond to those specific requests.
3 Obviously I would encourage the Prosecution to continue to prioritise those and to
4 provide as much specifics as you can. If you have the information or you don't and
5 you're able to reveal that, I think it's a reasonable request of the Defence; so as
6 specifically as you can.

7 At the same time, I would encourage the Defence to exercise caution as to the number
8 of specific requests that are transmitted, appreciating you will want to pursue your
9 priorities, but of course the more specific requests which get prioritised it could also
10 have an impact on the ability to deliver more holistic packages, for example, on
11 disclosure because of the resources that have to be diverted. So I think if both parties
12 could exercise prioritisation and consideration in these specific requests, hopefully
13 they can be advanced in a constructive manner.

14 Secondly, I do agree that if -- that we're not talking about -- on the issue you raised
15 about the investigators' notes, we are not talking about a general practice for witness
16 statements, we're talking about a specific issue related to the security assessments, as
17 far as I'm aware. And what I would encourage, this is an issue which is not new, it's
18 come up before, and if there are specific issues, specific instances, one of the practices
19 that I think has been used in other cases is bring those before the Chamber. And if
20 there's a specific question about whether this information has been disclosed as fully
21 as necessary, you can bring that to the Chamber, the Chamber can always review the
22 original documents. So I would encourage you to try and reduce the issue to not
23 generalities or not general practice. There is authority on this issue. But identify
24 where you have specific problems, and if you need to, bring that to the attention of
25 the Chamber, but perhaps it can even be resolved inter partes. So I would encourage

1 you, let's make this about specifics and not general. As I say, there are authorities
2 governing this in a more general instance.

3 I think I'm going to leave it at that. I note that the -- again if there are any specific
4 disclosure issues as you're going along, please bring them to my attention. But
5 I would encourage again discussion because this is obviously very important to the
6 timeline of this trial. No one wants to see this trial delayed. So please bring any
7 issues forward as you need to, but continue to dialogue on this and hopefully it can
8 be advanced.

9 I note the Defence's concerns. I would encourage the Prosecution on the piecemeal
10 issue, I know it's the problem of you want to give the information as soon as possible
11 but at the same time it may not be complete. If you can try, I think there are valid
12 points made that if you get just a name and you don't have contacts, that makes the
13 information less useful. So as holistic as possible, but I think everybody needs to
14 understand that the rolling basis of disclosure sometimes presents those issues.
15 I hope that provides some guidance to the parties and I would again encourage the
16 continue -- which I think is proceeding, noting the concerns of the Defence, but at
17 least I do see that we are making some progress in terms of disclosure and hopefully
18 that will continue, but don't hesitate to bring the issues forward should they arise.

19 I'm going to leave that issue now and move very quickly hopefully through the
20 remaining issues, which I don't think are as full perhaps as others have been.

21 The next issue is the Defence notice under Rules 79 and 80. Prosecution raised this
22 issue.

23 Yes, please, Counsel, proceed.

24 MR MOURAD: [12:37:12] Thank you, your Honour. I'll present my brief
25 submission in approximately 10 minutes if that's okay.

1 JUDGE PROST: [12:37:22] Try and make it as brief as possible.

2 MR MOURAD: [12:37:24] As much as I can I will.

3 JUDGE PROST: Thank you.

4 MR MOURAD: [12:37:25] Your Honours, pursuant Rules 79 and 80 of the Rules of
5 Procedure and Evidence, the Prosecution requests the honourable Judge to set an
6 appropriate timeline before the commencement of trial for the Defence to notify the
7 Chamber, the Prosecution and the participants of:

8 One, any intention to raise the existence of an alibi or any grounds for excluding
9 criminal responsibility under Article 31 of the Statute.

10 Two, the specific crimes that these defences cover.

11 Three, the names of the witnesses and any other evidence upon which it intends to
12 rely in support of these defences.

13 Further, the Prosecution respectfully requests that it be allocated sufficient time after
14 such notification in order to investigate these new defences and be permitted to
15 amend its list of evidence and witnesses accordingly to add the necessary evidence
16 and witnesses in response.

17 Your Honour, I will address briefly the following three points: First, the appropriate
18 time for such notice; second, why the Defence is in a position to give such notice; and
19 giving such notice does not violate the accused's right to remain silent.

20 In our respectful submission this notice should be given prior to the commencement
21 of trial. This is supported by the plain language of the Rules and the case law of the
22 Court.

23 Rule 80(1) specifically states that notice under Article 31(3) should be given, and I
24 quote, "sufficiently in advance of the commencement of the trial". End of quote.

25 Rule 79(2), while it does not expressly use the term "commencement of the trial", it

1 nonetheless requires that notice under 31(1) is given, and I quote, "sufficiently in
2 advance to enable the Prosecution to prepare adequately and to respond". End of
3 quote. Such phrase was consistently interpreted to mean in advance of the
4 commencement of the trial.

5 This interpretation is supported by the jurisprudence of Trial Chamber I, Trial
6 Chamber VII, and Trial Chamber IX. And for the record, reference is made to Trial
7 Chamber I's decision in Lubanga case, ICC-01/04-01/06-1235, corrigendum, annex 1,
8 paragraph 29(a) and (b); and Trial Chamber VII's decision in Bemba et al case,
9 ICC-01/05-01/13-1209, paragraph 8; and Trial Chamber IX's decision in the Ongwen
10 case, ICC-02/04-01/15-460, paragraph 8.

11 For the sake of time, I will only refer briefly to this last paragraph in the Ongwen
12 decision where the Single Judge found that, and I quote, "notification that is
13 'sufficiently in advance to enable the Prosecutor to prepare adequately and to
14 respond' implies notification prior to the commencement of trial. Indeed, the Single
15 Judge notes that both Trial Chambers I and VII, which the Defence" in that case "cites
16 positively in relation to its submission as to the appropriate time of disclosure under
17 Rule 79 of the Rules, mandated disclosure in advance of the trial." End of quote.

18 JUDGE PROST: [12:41:36] Counsel, perhaps if I could -- I'm sorry, I apologise to
19 interrupt you, but I believe the information you're providing is all actually quite
20 useful for the Chamber and this is a very important issue. I'm wondering, though, if
21 it might not be more effective and save us time if this became the subject of a written
22 filing from the Prosecution because that would also then allow the Defence to provide
23 a full response. I appreciate the depth of the information. As I say, it is actually
24 quite useful for the Chamber, but I'm wondering that could also save us a bit of time.
25 And if the Prosecution would accept to do that, certainly all your preparation will go

1 to good use because it could go into the written filing. So if that's acceptable.

2 MR MOURAD: [12:42:27] Of course, your Honour. I'm in your capable hands.

3 Thank you very much.

4 JUDGE PROST: [12:42:30] Thank you very much. And on that basis, Ms Taylor, I

5 would suggest that we simply leave any responses you may have to a written

6 exchange.

7 MS TAYLOR: [12:42:37] Can I just ask one small thing which is related to this?

8 JUDGE PROST: [12:42:42] Yes, please.

9 MS TAYLOR: [12:42:43] It seems that a lot of these issues relate to the conduct of the
10 proceedings and we note that we do have this filing due next Friday and we were
11 wondering if might make sense to collate the issues but at the same time perhaps
12 expand the page limit. Thank you.

13 JUDGE PROST: [12:43:00] Let's see what we can do in terms of the filing. I do
14 appreciate those filings are coming and if you do need an expansion to make sure
15 everything is included, then I think we can simply accommodate that. So that might
16 be an approach if the Prosecution wants to follow that and bring everything together
17 in one, could be convenient and I think we would be open to extension of page limit if
18 necessary.

19 With that, I think we can then move on to the next issue which is an update on the
20 agreed facts under Rule 69 of the Rules.

21 I see someone has arisen from the prosecution team.

22 Please, Counsel, please proceed.

23 MS SARDACHTI: [12:43:53] (Interpretation) Thank you, your Honour. I'll be very
24 briefly on this point.

25 As indicated by Mr Dutertre during the last session, we approached the Defence as

1 early as October 2018 to come up with certain agreements and after some failures, we
2 abandoned. But in the early of -- early part of the year we made proposals on the
3 civil status of Mr Hassan and also points on agreed facts and also points in Timbuktu.
4 Amongst those 14, these were conclusions of the Al Mahdi judgment which is res
5 judicata today. After exchanges, we agreed on four agreements on the -- mainly on
6 the civil status of Mr Hassan.

7 Recently we sent the draft joint document to the Defence last week. Yesterday
8 during a interpreters' meeting the Defence told us that there were difficulties
9 mentioned in a document relating to this agreement, but this was there just for the
10 information of the Chamber. It seems to be a problem for the Chamber so we
11 decided to find a common solution to this point.

12 I would like to raise a last point before giving the floor to my friend. During the last
13 status conference the Defence said that they were possibly ready to agree on other
14 facts, but after reading through the motion for amendment of charges or not and after
15 the disclosure of all incriminating evidence, we think that the Defence can already
16 take a decision on other points that may be agreed upon. To date the majority of the
17 evidence has been disclosed. They have received our provisional list of witnesses,
18 they know the parameters of the case and therefore and can engage with us in matters
19 of evidence. So we are awaiting on 14 April the decision of the Pre-Trial Chamber
20 on that amendment to discuss once again with Defence.

21 After that discussion we do not exclude the possibility of filing a motion for you to
22 take judicial notice of certain conclusions in the Al Mahdi judgment for reasons of
23 harmony and for reasons of the administration of justice.

24 JUDGE PROST: [12:47:24] Thank you very much, counsel.

25 Ms Taylor, do you have any comments? Or anyone on the team wishes to address

1 this particular issue?

2 MS PROULX: [12:47:35](Interpretation) Thank you.

3 Very briefly, relating to the four facts that we agreed, there is a technicality on the
4 source of information. We said we do not accept the admissibility or validity of that
5 source, but that is something that we will discuss further with the Prosecutor. I
6 don't think there are major difficulties there.

7 Now, there are additional facts. We think under the present circumstances it is still
8 premature, we are still receiving a lot of redacted evidence constantly, we really have
9 to review all that and then possibly we can agree on other facts. For the time being
10 I think it is premature, but we remain in contact with the OTP on other facts.

11 Lastly, they said they wanted to file a motion for judicial notice and then they can do
12 that.

13 Thank you.

14 JUDGE PROST: [12:49:09] (Interpretation) Thank you.

15 (Overlapping speakers) Everyone in this courtroom has an interest in this trial
16 proceeding speedily, in particular Mr Al Hassan, and one of the ways that we can
17 achieve that and encourage that is through the use of agreed facts on matters which
18 are simply not in dispute and do not go to the core issues that should be the subject of
19 our time in the courtroom.

20 So I would encourage -- I think there are some facts at this stage which are not, it's not
21 premature to be looking at them. We do have a previous decision. Yes, there can
22 be an application for judicial notice but we do have a previous decision. When it
23 comes to general facts, when it comes to context, when it comes to background, I
24 would encourage the parties both to think broadly about agreed facts so that we can
25 focus our time in the courtroom on issues that go to the core of the case.

1 There is also a significant amount of documentary material in this case, including
2 videos, and it would help advance the case if there could be an examination of
3 potential agreed facts surrounding the technical aspects of those videos, surrounding
4 identifications, surrounding dates, places, times. I would encourage not to think -- I
5 understand the Defence's position that they need to be sure about the existence of
6 proof and I'm not for a moment suggesting you should be agreeing without being
7 satisfied in any way about the nature of the facts, but there are I think a number of
8 areas here that can be explored that will be to the advantage of everyone in advancing
9 the case. So I'm simply encouraging a more aggressive approach, please, on agreed
10 facts and I hope by the next time we meet perhaps there will be more areas of
11 agreements. I think that would, that would be very encouraging, would be very
12 helpful to the Chamber as well in terms of being able to focus our time and resources.
13 So there is my exhortation, which I hope will bear fruit in the next time we meet.
14 That leaves us with, I believe, unless anyone has any comments on that issue, I believe
15 it leaves us with the question of the eCourt protocol. I am making a personal appeal
16 that I hope the issue is not particularly technical, in which case you may lose the
17 attention of the Single Judge. So I would encourage, if it is extremely technical, that
18 the matter perhaps is best dealt with in writing. But if it is very general, then
19 certainly you can proceed to make the representations.

20 MR DUTERTRE: [12:52:05](Interpretation) It is very technical. I don't understand
21 very much myself, so I will give the floor to Sarah Coquillaud on very specific points.
22 And then after that I will make two very brief submissions myself.

23 MS COQUILLAUD: [12:52:36] All right. That's quite a challenge, your Honour. I
24 will try not to be too technical and I will just briefly discuss two series of changes that
25 we are proposing, and should you, the Defence, and the participants be agreeable,

1 then we could implement those changes. It's just with the aim of making everyone's
2 work easier and to maximise the utility and the coherency of the application of the
3 eCourt protocol.

4 The first point is about the numbering regime. It's at paragraph 22, footnote 1 of the
5 page 5 of the annex to the decision ICC-01/12-01/18-31 that reads, and I quote:

6 "The materials already registered by one party, participants, are re-registered if
7 submitted by another party." Unquote.

8 We believe that such materials, if identical, should not be re-registered but, rather,
9 then parties and participants should use the existing ERN. This would help us avoid
10 duplication of work and re-registering the same item multiple times over and over.

11 Rather, such an item should be re-registered only if it has been altered and is
12 therefore no longer identical, for example, if the witness made some annotation on a
13 document.

14 The second point is about the flexibility, to make the system more user friendly and
15 precise. And I have two short points here, but the core idea is to have more freedom
16 or options for the parties to update the data they have provided. Flexibility should
17 allow us to import the information that is not specified in the protocol. And of
18 course we agree that the protocol should define the mandatory metadata and the
19 format in which the evidence should be provided, but this should not mean that we
20 cannot provide additional information that we want the Chamber, and especially the
21 Defence, to have access to.

22 So the first sub-point concern some fields that are already in eCourt but not in the
23 eCourt protocol, and we simply suggest adding those fields. I'm referring here to
24 two fields in particular, one is called "basis of confidentiality" and the other is called
25 "pseudonym". Because eCourt should mirror the eCourt protocol, so we respectfully

1 submit that this should be a given and highlight that this is already mentioned and in
2 line with your decision 31 at paragraph 30 and paragraph 42.

3 The second sub-point concerns fields that are neither in eCourt, nor in the eCourt
4 protocol, but that are highly relevant. This is specifically the case for the
5 so-called - and sorry, it's technical terms - transaction data and path fields. Both
6 fields are highly relevant when it comes to electronic files, such as the audios, the
7 photographs, and the videos that you were previously mentioning, because they give
8 you valuable information on the items, such as when the video was taken, if it was
9 modified at any stage, if it was transferred, and when.

10 So you need to know the creation date of the video, the date when it was modified or
11 accessed, and this does not show yet in the fields in eCourt. And this means that, in
12 practice, we could end having to communicate all of this information for each piece of
13 video via other means, such as emails, which are difficult to track, or they would have
14 to be communicated in a technical or expert report which, when it comes to the
15 metadata, can be quite hard to read. It's just simply easier to have the data already
16 available in front of your eyes whenever you open the actual video.

17 Another example is 3D presentations. We have some 3D virtual reality presentations
18 in this case and they do not fall in any existing category or any format in eCourt.
19 That means, in practice, that they are not properly categorised and they have to fall
20 into another box. We suggested therefore, concretely, to add a new image and data
21 format for this type of evidence, for the 3D evidence. And the concrete suggestion is
22 just to add it already in the protocol under B20G.

23 The point with all this is that the eCourt protocol as it stands is slightly outdated. It
24 was fine back 2005, it had been tailormade, but the suit no longer fits and there is
25 nothing more uncomfortable than wearing a suit that does not fit and that you have to

1 wear for an extended period of time. So the format therefore needs to be adjusted to
2 our needs here. And in a case like this one where there is a high percentage of the
3 Prosecution evidence in such digital form, like the examples I mentioned, this is
4 information that is obviously extremely useful to have firsthand for the Chamber, for
5 the Defence and the participants. So adding such fields will not only reflect the
6 reality of what the evidence is in this case, but it also allows us immediately to
7 provide all of the relevant information that we already have in our possession but
8 doesn't go through because the field has not been implemented.

9 So to sum up the second point, when something is not yet in the eCourt protocol
10 I would just say let's create ad hoc new fields, and that should not be an issue if it's
11 highly relevant to the case, like the ones I mention. And even when it's not explicitly
12 mentioned by the Chamber, such as the case of this mysterious transaction data and
13 path field and the 3D evidence I mentioned, then adding those would allow for
14 significant information relevant to the parties to be easily presented, shared,
15 searchable and retrievable directly by one click.

16 So, in a nutshell, the right to have access to the record of the case, case by the Registry,
17 is now limited by the format in which the evidence is made available to either party.
18 And if that format is not in line with the type of evidence that forms the crux of the
19 case, relevant information can be lost in the way. And no party here should be in an
20 uncomfortable position where the information is not directly or easily accessible
21 simply because a field has not been made available.

22 That was all for the technical aspects.

23 JUDGE PROST: [12:59:28] Thank you very much, counsel. And I do compliment
24 you on making that quite understandable. Thank you very much.

25 I have a proposal for the Defence, which is I followed that submission and much of it

1 seemed quite sensible. Rather than asking for specific comments, of course you can
2 make them if you have them today, I would suggest this may well be a matter that
3 you could discuss together and come to an agreement, unless there is a particular
4 problem. And if there is, you could always revert to the Chamber.

5 But, Ms Taylor, if you have specific comments, but these do seem like reasonable
6 proposals that would be beneficial to everyone.

7 MS TAYLOR: [13:00:09] Thank you very much.

8 I feel like it's an issue we can resolve today, in fact.

9 As concerns the first proposal, we have no objection. I would only wish to clarify
10 that this only applies when it's exactly the same item from eCourt that's being used.

11 So, for example, if you have the same item from different sources, it should be given a
12 different number because the chain of custody will be different. But if it's someone
13 using exactly the same, then of course we completely support that proposal.

14 For the second proposal I did get lost in the details. Our only comment, I
15 understand, is that we would not wish to lose the confidentiality field or the
16 pseudonym field. But apart from that we had absolutely no objection, so I think we
17 can resolve it, unless there is comments from the Registry or the LRV.

18 JUDGE PROST: [13:00:54] That's extremely helpful.

19 I don't know if the Registry has any comments on the issue. I think what we could
20 do is, based on that agreement, I assume the protocol could be revised with those
21 changes and additions and then everyone would see it and could agree to it and it
22 could be sent to the Chamber as an agreed amended protocol, if that way forward is
23 acceptable to everyone.

24 Perhaps the Registry could in fact do that, consult with the parties and come forward
25 with a revised document. If that's acceptable to everyone.

1 MR DUBUISSON: (Overlapping speakers)

2 JUDGE PROST: That seems to be, I see a lot of nodding.

3 And it's also the appointed hour, so I think our timing is impeccable.

4 So unless there is any further issues, Mr Dutertre?

5 MR DUTERTRE: [13:01:49](Interpretation) If you would allow, there are just a
6 couple of quick points that I wanted to raise. The first point, well, we have to file a
7 redacted public version of the filing today, 186, and I would ask for leave from the
8 Chamber to do it after 4 o'clock. We've been quite busy yesterday and today and as
9 such we haven't been able to give all our attention to it thus far. It's your decision,
10 Rule 42 of last week.

11 JUDGE PROST: [13:02:25] I think that's fine.

12 MR DUTERTRE: [13:02:27](Interpretation) Where it concerns the second point that I
13 have, your Honour, that concerns the way of proceeding with Rule 42. Now the
14 Chamber, Pre-Trial Chamber VIII said it didn't have jurisdiction. You are seized of
15 the matter yourself. And what we would like to do is to make a parallel with
16 protection measures ordered by the Pre-Trial Chamber I and to have a system where
17 we could perhaps automatically lift redactions of identity of such and such a witness,
18 given precise conditions, which we would put to you. That is to say that in order to
19 summarise the excellent notes prepared by my colleagues. Within the framework of
20 where a witness agrees with the disclosure of his identity and it is considered that
21 there is no security issue therein, then even under Rule 42, with your agreement, we
22 could automatically lift *proprio motu* the redactions, we will come back to you, only for
23 the witness under 42 who does not consent to the lifting of redactions on his identity
24 or where there is a witness who we are unable to contact or when security issues are
25 such that we do need to go through a decision from you. That will make it possible

1 for us to accelerate the disclosure process and to come back to you only when it's
2 necessary. And to have your general agreement would help respond to revision by
3 your Chamber as envisaged under Rule 42(1).

4 JUDGE PROST: [13:04:34] I think that sounds like a very sensible approach on this
5 issue. I think what might be helpful is simply to confirm the process by way of an
6 email communication to the Chamber and then we can respond and so that we'll have
7 a record and it will be clear on the record, but in principle, I think what you're
8 proposing, particularly where there is the consent of the witness, but if you could just
9 set it out and we can respond accordingly, I think that just helps with having a clear
10 record of what was decided.

11 MR DUTERTRE: [13:05:08](Interpretation) Thank you, your Honour. I'll just take
12 this opportunity to raise the idea that the Arabic version of the Prosecutor's
13 application for corrections was filed yesterday by the Registry, but we had a
14 notification thereof only today.

15 JUDGE PROST: [13:05:25](Interpretation) Thank you for that. (Overlapping speakers)
16 I believe that is all the issues for today. So I would like to thank you all for your
17 coming and your cooperation and your input.

18 I would also like to thank of course, as always, our interpreters for their fine job, the
19 court reporters, and our security officers for their assistance today.

20 And I wish you all a very good afternoon.

21 The session is adjourned.

22 THE COURT USHER: [13:05:54] All rise.

23 (The hearing ends in open session at 1.05 p.m.)