

1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation Democratic Republic of Congo, case number ICC 01/04-01/06

4 Status Conference

5 Tuesday, 26 September 2006 - Open session

6 The hearing commenced at 2.05 p.m.

7 THE USHER: All rise. The International Criminal Court is now in
8 session.

9 JUDGE JORDA (interpretation): The hearing is now open. Please
10 be seated.

11 I would, first of all, like the court officer to call the case
12 which is on our agenda today.

13 THE REGISTRAR (interpretation): Situation in the Democratic
14 Republic of Congo, the Prosecutor versus Thomas Lubanga Dyilo, number ICC
15 01/04-01/06.

16 JUDGE JORDA (interpretation): Thank you. I would just like to
17 say that I have great pleasure in seeing you all again after my absence.
18 I would straightaway like to ask each of the parties to rise and to
19 present themselves. I will start with the Prosecutor in this case.

20 MR. WITHOPF: Good afternoon, Mr. President. Good afternoon,
21 your Honours. Good afternoon to the learned friends from the Defence, to
22 the legal representatives of the victims, and also to the representatives
23 of the Registry, and I extend my greetings, as always, to everybody in
24 and around the courtroom.

25 For the Prosecution today, Mr. President, your Honours, appears

1 Ms. Julieta Solano, to my left side; behind her, Mr. Michael Lees, he's
2 the head of the OTP's knowledge base unit; and behind me, Ramu Bittaye,
3 our case manager. I'm Ekkehard Withopf, the senior trial attorney.

4 JUDGE JORDA (interpretation): Thank you, Mr. Prosecutor.

5 I will now turn towards the Defence lawyer. But before, I would
6 like Mr. Lubanga to rise and, of course, I'd like to welcome him, and
7 that he says to us if everything is well, if his detention conditions are
8 correct and if everything is going as it should. Please, could you rise
9 and indicate to us how these things are going. I know you're tall, but
10 you can still stand up. Thank you.

11 MR. LUBANGA DYILO (interpretation): Thank you for giving me the
12 floor. I think I can say that --

13 THE INTERPRETER: If you could put the microphone on, because we
14 can't -- if you could speak closer into the microphone because it can't
15 be heard very well.

16 MR. LUBANGA DYILO (interpretation): I would like to thank you
17 for giving me the floor. I can say to you that, where it concerns the
18 detention conditions, I think that I don't have any particular comments
19 to make. There are some small things which perhaps aren't as they should
20 be but which are being discussed and are being resolved quite quickly
21 with those who manage my daily affairs.

22 I think that the major difficulty that I have is that my counsel
23 doesn't -- don't have regular enough talks with -- and so I don't have
24 enough made available to me. And a computer which does cause a problem
25 on regular occasions, and the use of it isn't so easy to be able to

1 identify and to select with ease the different matters which we have --
2 materials which we have need of in relation to the different areas in
3 terms of the indictment and the charges. So there is a type of
4 amalgamation, if you like. We have to carry out a lot of intellectual
5 work to be able to do something with it.

6 I think that alongside that, of course, there is the subject of
7 the hearing today. So that's something --

8 JUDGE JORDA (interpretation): That's something we're going to
9 come back to. I just wanted to know overall how your detention is going
10 about.

11 MR. LUBANGA DYILO (interpretation): Okay, thank you.

12 JUDGE JORDA (interpretation): I would like to thank you. I
13 would now like us to go into an identification of the Defence.

14 MR. FLAMME (interpretation): Thank you, your Honour. As you
15 know, I am counsel Jean Flamme, Mr. Lubanga's counsel, and today I'm
16 assisted by Madam Veronique Pandanzyla, who is the judicial assistant, as
17 well as by my colleague, Professor Edouard Balembo, who is helping us, as
18 you know, as a consultant. Thank you very much.

19 JUDGE JORDA (interpretation): Thank you. I will now turn
20 towards the representative of victims, legal representative of victims.

21 MR. WALLEYN (interpretation): Thank you, your Honour and
22 Honourable Judges. It is the first time we have the honour of
23 participating in the hearing at the Court. And I would like to thank the
24 Court. Victims 0001 to 0003/6 are here represented by myself, and my
25 name is Luc Walleyne - I'm counsel in Brussels - and also by Paolina

1 Massidda, who is Principal Counsel for the Office of Public Counsel for
2 Victims, and she is assisting me today.

3 JUDGE JORDA (interpretation): Thank you very much. Of course
4 we'd like to welcome you. That certainly won't be the last time.

5 So you know that the hearing today is going to be in two
6 different stages, with three different points on the agenda.

7 First of all, we're going to look at the fixing of the date of
8 the confirmation hearing, which was fixed to a certain date, the 28th of
9 September. And for different reasons, the Single Judge have issued, or
10 we, furthermore, have issued a decision postponing the date of the 28th
11 of September. And fixing the date is something that will be done, having
12 heard the different participants on the date which they feel, which you
13 feel, would be the most appropriate for you, bearing in mind that we also
14 have our own point of view to say on that particular matter.

15 In the second place, and the collegial part of the hearing will
16 continue afterwards, we'll speak about this confirmation hearing to be
17 able to know exactly, with regard to Rule 122(1) of the Rules of
18 Procedure and Evidence, to see how we can conceive this hearing to be
19 able to make it as useful as possible and as visible with regard to the
20 international community, who I would like to greet at the same time,
21 everybody who is among the public today.

22 So the third point of the agenda is that which, after the break
23 in the hearing, will make it possible for you, those of you who are on
24 the bench of the Prosecutor and Defence to be with my eminent colleague,
25 Single Judge Sylvia Steiner, and that will be to make a progress report

1 on the disclosure process which has given light to a lot of constructive
2 exchanges between all of you.

3 So I would propose that we immediately go over to the first point
4 on the agenda which is the date, bearing in mind the current situation of
5 the proceedings, the date which would appear to be the most appropriate
6 to set as the date for the confirmation hearing.

7 So I will give the floor straight away to Mr. Withopf, the
8 representative of the Prosecution, to give us his point of view
9 concerning the latest evidence which has been provided, notably the
10 summaries which have been provided recently to us. So I think that we
11 can start. We are listening to you.

12 MR. WITHOPF: Thank you very much, Mr. President, your Honours.

13 As your Honour, Mr. President, and your Honours do know, we, last
14 week, on 20th September 2006, have provided our views on this matter, the
15 new starting date of the confirmation hearing and the timetable leading
16 up to it, in great detail. Therefore, at this occasion, we will only
17 summarise our submission, but we will also elaborate on a number of
18 elements we have put to you, Mr. President, your Honours.

19 The Statute and the rules, though sometimes vague, in the present
20 context, Mr. President, your Honours, in the present context, provide
21 through Article 61(3) and Rule 121 sufficient clarity on the issue we
22 need to discuss today, and these rules and regulations set the frame work
23 for the decision.

24 Article 61(3) and Rule 121 are clear. They provide very clear
25 guidance in addressing in detail the timetable leading up to the

1 confirmation hearing and how the date of the confirmation hearing depends
2 on that timetable.

3 In the view of the Prosecution, Mr. President and your Honours,
4 the purpose of these regulations is equally clear. The purpose of the
5 regulation is to protect the rights of the parties, in the present
6 context in particular, to enable the parties to adequately prepare for
7 the confirmation hearing.

8 Mr. President, your Honours, with your permission, I'd go into
9 some more detail.

10 First is the 30-day time limit pursuant to Rule 121(3), which
11 states that "the Defence," and I'm quoting the law, "no later than 30
12 days before the date of the confirmation hearing, shall be provided with
13 a document containing the charges and the Prosecution's list of
14 evidence."

15 In our view, Mr. President, your Honours, Rule 121(3) specifies
16 the notion of reasonable time as it is contained in Article 61(3) of the
17 Rome Statute.

18 A combined reading of these provisions makes it clear that the
19 30-day time line is only meaningful if it includes the provision not only
20 of the list of evidence to the Defence, which has been provided, as we
21 all know, on the 28th of August, but the evidence itself. In our view,
22 Mr. President, your Honours, this flows from the fact that the reasonable
23 time in Article 61(3) of the Rome Statute refers to, and I quote again,
24 "the evidence on which the Prosecutor intends to rely at the hearing."

25 This is the 30-day time line. We are now going to address,

1 Mr. President, your Honours, with your permission, the second time line,
2 namely, the 15-day time line as set in Rule 121(6).

3 That rule equally clearly states that between the provision of
4 the Defence list of evidence and the date of the confirmation hearing, 15
5 days must elapse. I quote: "If the person," in our context, Mr. Thomas
6 Lubanga Dyilo, "intends to present evidence under Article 61(6), he shall
7 provide a list of evidence to the Pre-Trial Chamber no later than 15 days
8 prior to the confirmation hearing."

9 And now, Mr. President, your Honours, comes the important
10 portion, and I quote again: "The Pre-Trial Chamber shall transmit the
11 list of evidence of the Defence to the Prosecution without delay."

12 This last portion re-emphasises, Mr. President, your Honours,
13 what we said at the very beginning. The timetable has been spelled out
14 in such detail in order to protect the rights of the parties in the
15 context of the 15-day time line, obviously, of the Prosecution to
16 properly prepare for the confirmation hearing.

17 This is the background, Mr. President, your Honours, against
18 which we, today, have to ask the question: Where are we today? The
19 answer, in the Prosecution's view, is clear, and it is as such: Not even
20 the 30-day time line has started to run. Why? Why hasn't it started to
21 run yet? There's a pretty straight answer to it. The Defence has not
22 yet received all evidentiary materials, incriminatory evidence,
23 including, in this case, potentially key evidentiary materials the
24 Prosecution intends to rely on at the confirmation material.

25 In this context, we are talking about not only hundreds but

1 thousands of pages of witness statements and transcripts of witness
2 statements or, in light of the recent decision of the Single Judge, their
3 summaries. And against this background, the Defence is accordingly not
4 yet in a position to analyse such materials which, in our view,
5 Mr. President, your Honours, is a precondition for the Defence to
6 determine the evidential value of the materials of the Prosecution.

7 Mr. President, you have touched upon this in the context of your
8 introductory remarks. As it stands now, these materials will not be
9 available to the Defence prior to mid or to the end of next week, and I
10 add "the earliest," and I add this is already a very optimistic view
11 taking into account the e-court protocol procedure imposed on the
12 parties. Based on this time line, the Prosecution can realistically not
13 anticipate that prior to about 5th or 6th of October, these materials
14 will be made available to the Defence. And, again, I emphasise, this is
15 already a fairly optimistic assessment.

16 Only then, only then the 30-day time line starts to run, which
17 automatically triggers the 15-day time line for the presentation of the
18 Defence list of evidence.

19 Accordingly, Mr. President, your Honours, in the Prosecution's
20 view, the confirmation hearing cannot - cannot - take place prior to mid
21 November or, what we believe, Mr. President and your Honours,
22 realistically, not prior to end of November, the earliest.

23 And finally, as already touched upon in our filing, as mentioned
24 at the beginning, finally but very importantly, Mr. President, your
25 Honours, there are a number of matters that are pending decision of the

1 Honourable Pre-Trial Chamber that, in the Prosecution's view, have an
2 immediate impact on the scheduling of the date of the confirmation
3 hearing, and I'm going to outline the most important ones.

4 Most important is, obviously, the Defence request for release, as
5 the Defence has filed it on the 23rd of May of this year. Mr. President,
6 your Honours, the Pre-Trial Chamber has qualified this request for
7 release as a challenge to jurisdiction and admissibility in line with the
8 Prosecution's respective suggestion and has dealt with it accordingly.

9 In our view, thus the Article 19 and Rule 58 proceedings do
10 apply, meaning, pursuant to Article 19(2), that challenge has to be
11 decided upon first. Your Honour has explicitly -- your Honours have
12 explicitly acknowledged this order in one of the recent decisions, I'm
13 quoting the 28th August 2006 decision on the Defence request to file a
14 reply by outlining, and now comes the quote "that the decision of the
15 Chamber on the challenge of the jurisdiction of the Court must be issued
16 before the beginning of such a hearing." That's the end of the quote.
17 It meant obviously the confirmation hearing.

18 Furthermore, pending is also the Prosecution's request to
19 segregate the Pre-Trial Chamber's senior legal advisor from working on
20 inter alia the Lubanga case. In the Prosecution's view, Mr. President,
21 your Honours, because of its potentially far-reaching implications as
22 detailed in the Prosecution's request on the present proceedings and
23 possibly in the event the Honourable Pre-Trial Chamber confirms the
24 document containing the charges on the future trial proceeding, in our
25 view, needs to be decided on prior to the date of the confirmation

1 hearing.

2 And finally, on top of it comes the request, the Rule 103(1)
3 request, of the Women's Initiatives for Gender Justice to participate as
4 amicus curiae in the Article 61 confirmation proceedings. This matter,
5 in the Prosecution's view, needs also to be dealt with prior to the start
6 of the confirmation hearing, and as you, Mr. President, your Honours, are
7 very well aware of, both parties have recently filed their observations
8 to this request.

9 Mr. President, your Honours, I am coming to the end of my
10 submissions, but prior to finishing the submissions, your Honours, in
11 light of the experience in the past, in light of such experiences, we
12 would strongly advise to only set the new date for the confirmation
13 hearing once the Defence has provided its list of evidence, since only
14 then, in our view, Mr. President, your Honours, only then there is a
15 basis and a basis solid enough to allow for such a determination.

16 We say this in particular, taking into account the many
17 logistical problems the Defence has faced in the past that may or may not
18 - hopefully not - have an impact on their ability to provide their list
19 of evidence in time.

20 Mr. President, your Honours, this is my concluding remark on this
21 subject matter. Thank you very much.

22 JUDGE JORDA (interpretation): Thank you very much, Prosecutor.
23 Before handing the floor to the Defence, I would just like to make an
24 observation myself which represents my own views only. You have defended
25 the Defence quite well. I'm sure Mr. Flamme will be delighted with that.

1 You have raised a number of issues of which I was mindful. You have not
2 spoken of disqualification of the Judges, but you did speak about the
3 segregation of the legal advisor, but perhaps the Prosecution should
4 adapt its position on that.

5 And secondly, I take it you're not in a great hurry to see this
6 confirmation hearing take place. I touch upon that because the Single
7 Judge has had to deal with this. You have filed thousands pages in
8 recent days, or at least in recent weeks, and it is in the wake of that
9 that we have had to use the provision in the texts for summaries.

10 Now, I can quite imagine that the Defence, who you are assisting
11 here, does not find itself or does not feel that it is in an equitable or
12 fair position. As regards the date, we will return to that issue when we
13 have heard from Mr. Flamme or his colleagues. But for the time being, I
14 would myself express quite distinct reservations as regards the date.

15 Mr. Flamme.

16 MR. FLAMME (interpretation): Thank you, your Honour. First of
17 all, I would like to start by saying this confirmation hearing which, in
18 the system of the International Criminal Court, is innovative, to my mind
19 at least it is innovative, in that this is a hearing which will certainly
20 take longer than a day. It will not be a hearing of one day but will
21 undoubtedly consist of a series of hearings at which both the Prosecutor
22 and the Defence may present evidence to the Chamber and may also either
23 support the confirmation of charges by putting forward submissions and
24 arguing points of law, or, in the case of the Defence, to challenge them.
25 This cannot be achieved in a day. That is my first comment.

1 My second comment is that when I hear my learned colleague of the
2 Prosecution refer to the deadlines that are set in the texts, which
3 basically is the 30-day deadline and the 15-day deadline which lead
4 towards the date on which the confirmation hearing would be set, are
5 deadlines which are, well, extreme. They are the limits. They cannot be
6 considered something or dates which are set in stone. What I mean is
7 that when the Prosecutor has completed disclosure of his evidentiary
8 material, then obviously a 30-day period must elapse before the
9 confirmation hearing.

10 Let me be clear. There is a big difference between a case where
11 a prosecutor would communicate a thousand pages of documents and
12 materials and a case such as this, where it is a matter not of a 1.000
13 pages or 2.000 pages, but, based on my calculations and my estimates -
14 and here I am basing myself on information provided by others - already
15 some 5.000 pages have been disclosed and new disclosures totaling around
16 4.000 pages can be expected in the coming weeks, if I have understood the
17 Prosecutor rightly. So if my math is correct, we're look at something
18 close to 10.000 pages.

19 So given these facts, it's hard to imagine a confirmation hearing
20 which is limited in scope. Obviously, when tens of thousands of pages
21 are being disclosed to the Defence, it is not so that the Defence sets
22 them to one side and does not read them. No. The Defence has an
23 obligation to read and to study - to study - all that is provided by the
24 Prosecutor.

25 The Defence clearly would be more at ease if the disclosure

1 process, disclosure by the Prosecutor, had taken place more rapidly and
2 that -- and we were at a point today where the disclosure had been
3 completed; in other words, that we had an idea of what the Prosecutor's
4 dossier consists of at least in terms of volume. Today we do not yet
5 know that.

6 And I would add that the coming disclosures to be made by the
7 Prosecutor, and I believe that these began yesterday, will be the most
8 important disclosure events and therefore the Defence is going to have
9 the most difficult task ahead of it in that it will be dealing with a
10 large number of redacted documents.

11 Now, the Prosecutor says, "Well, you must note that we only
12 redact that which is absolutely necessary - identities, dates, places."
13 Well, I believe that's quite a lot, actually. The Prosecutor should
14 imagine the situation of the Defence who is not familiar with the texts
15 in their unabridged form and which reads sentences which have been broken
16 up. This is the nature of some of the redacted documents. They are very
17 difficult to read. So we will be faced with a number of additional pages
18 which will be exceptionally difficult to read and which will require
19 further intensified efforts on the part of the Defence. This is my first
20 point.

21 As regards my second point, here I concur with the Prosecutor who
22 recognises the difficulties of the Defence in terms of human resources.
23 Just to remind you, for quite some time, the Defence consisted of a
24 counsel; then, after a few weeks, a few weeks after the initial hearing,
25 the Registrar authorised us to appoint a legal assistant. So for some

1 time we were working as a team of two.

2 Now, when I compare this to the Office of the Prosecutor, which
3 is made up with an impressive number of lawyers, lawyers who have
4 expertise in IT - there are some 20 investigators; some 70 missions have
5 been carried out; they have gone to the DRC over an extensive period of
6 time - that office, therefore, benefits from substantial human resources
7 inter alia and therefore I have reiterated that it is difficult for the
8 Defence to ensure that the principles of a fair trial and equality of
9 arms is, indeed, met with such a small team and such few resources.

10 In the interim, the team has been bolstered by interns, and
11 indeed a decision was issued last Friday ensuring that an additional
12 associate legal officer would be appointed to our team.

13 Now, I have said time and again that we are not IT specialists.
14 I believe that the e-court system is certainly admirable, but I must say
15 that it is a work in progress, if you allow me to put it in those terms,
16 which has been developing over a month, and we are beginning to be able
17 to use it as we should.

18 We have been able to employ a case manager. This is somebody who
19 is able to manage the electronic record which has been provided to us and
20 deal with the computerised record. So we now have an associate legal
21 officer, a case manager, a future additional associate legal officer,
22 plus a consultant who, since the end of August, has been able to carry
23 out some investigations in the DRC.

24 Now, this morning we made some calculations, and I'm trying to
25 look ahead and be optimistic, we have calculated that we have available

1 to us four part-time persons, and I will explain why I say "part-time."
2 These persons read materials disclosed by the Prosecutor. They are
3 working at a rate of 20 pages per day -- sorry, 80 pages per day. I
4 spoke at earlier hearings of the mass of documentation, 9.000 pages,
5 10.000 pages in total. So if you make the calculation, given the human
6 resources available to us at this point in time and bearing in mind the
7 situation as regards our interns -- one left us yesterday and that intern
8 will have to be replaced, but the Defence memory will be lost with that
9 intern. We expect a turnover in interns also at the end of this year.
10 But if we do manage to replace human resources that leave the team, we
11 would have to spend 24 weeks reading the documentation disclosed by the
12 Prosecutor.

13 Now, this also presumes that we are able to use translation
14 facilities provided by the Registrar as ordered by the Chamber or based
15 on the decision of the Chamber. A certain amount of documentation is
16 only available in English, and the large majority of the members of the
17 team are French-speakers who do have difficulty reading English. It is
18 not their working language and therefore it does slow down the pace of
19 work.

20 So we're looking at 24 weeks for reading of documentation,
21 therefore, six months. That's the reality. This isn't a naive painting.
22 It would be a grave error on my part to say that we could be ready for a
23 date in November. But that isn't the end of the story.

24 Once we have read all of this evidence, we will then be obliged
25 to begin to constitute our own file and our own case. Obviously, it is

1 very difficult to do so until one is familiar with the Prosecutor's case
2 and dossier. One needs first to have studied the information to know
3 whether a document looks credible or not, whether it should be contested
4 or not. It is a substantial task which involves considerable human and
5 other resources.

6 I believe that to work professionally and well - and that is what
7 I want and what my team wants - I believe that to constitute our case, we
8 will need a further three months. And I'm including in those three
9 months, in order for witnesses to be called, we will also need to travel
10 to the field. Our consultant will suggest possible witnesses to us, but
11 travel to the field will be necessary to take care of that part of our
12 work. Currently there are security difficulties, as we have heard. We
13 have been making requests to travel since the beginning of June. We have
14 submitted three such requests, two of which were rejected, one of which
15 was authorised. But, as you know, your Honours, that mission took place
16 in very difficult circumstances. So there you go.

17 If one takes all of these factors into account, the Defence needs
18 nine months. The Prosecutor has taken the responsibility, and this
19 decision is up to him - I cannot speak or act for him - but he has taken
20 the decision to disclose 9.000 pages. Well, we shall all have to live
21 with that.

22 I would also point out that even today we are still not in a
23 position to read all that we should and must read, and I speak also of
24 materials which are very important, and in particular video material. We
25 are not in a position to view this video material. When you click on the

1 icon to view a video, all you see is a photo of a video cassette with a
2 certain date, a certain name, but the film does not start. And we still
3 have this difficulty. We are unable to initiate viewing of videos.

4 So there have been a number of technical problems, and these have
5 been discussed in extenso at various hearings, and we face today, we
6 still face today, substantial technical difficulties. We are trying to
7 resolve them with the Registry, but for the time being some things are
8 not working.

9 One must also remember that the Defence is not connected directly
10 to the central system. I had imagined - perhaps I was naive - but I
11 imagined there was a server, so to speak, a central computer here at the
12 court on which all the Prosecutor's evidence was loaded and later on
13 which the Defence's evidence would be loaded and from which it would be
14 disseminated to various terminals; in the Chambers, at the Office of the
15 Prosecutor, at the Defence, and at the victims office, et cetera.
16 However, this is not the situation today. The Defence is working from a
17 separate system, an external system, so to speak, onto which each item,
18 each piece of material, must be uploaded separately, separately from the
19 central system.

20 There is a third system. The third system is the connection to a
21 computer in the Detention Centre, and material must be uploaded onto that
22 third system also. Any error in loading up information can mean that it
23 is read with greater or lesser success by users of each of the three
24 systems.

25 Now, I must say that I am very surprised that the Defence is not

1 a user of the central system, as I had imagined would be the situation.
2 But I am telling you all this, your Honour, to let he know above all that
3 we are not in a position to read all that we should. We cannot view the
4 videos. When we attempt to open certain documents, the system slows down
5 tremendously, particularly if it's a large document and there is quite a
6 long waiting time before one can begin to read such a document. So we
7 have certainly not overcome all of our technical difficulties and we have
8 certainly not come to the end of the reading stage, let alone begun to
9 constitute our own case.

10 So it is very difficult to suggest a date, given the
11 circumstances I have described.

12 JUDGE JORDA (interpretation): Thank you, Mr. Flamme. I have
13 noted, I understand that you can't suggest a date, let alone a starting
14 time for the hearing, but you spoke of three months and you spoke of nine
15 months. What seems, to you, to be most probable?

16 MR. FLAMME (interpretation): I first spoke of six months. Six
17 months is the time necessary to study the documentation, the evidence
18 provided by the Prosecutor, and an additional three months which would be
19 necessary for travel to speak with possible witnesses to constitute our
20 case. Yes, not everything can be done from an office. One also needs to
21 travel.

22 It's important to remember that, having read a document, one then
23 also has to visit one's client in a detention, hoping that the client has
24 also read the paper and can give a view on it. It is he who knows the
25 truth and it is he who must advise us and understands best the

1 significance of a document.

2 Your Honour, imagine, it has happened to me that I leave the
3 Detention Centre at the wrong time of the day and find myself in traffic,
4 in a tailback, for an hour. It is more hours lost from our working week.

5 JUDGE JORDA (interpretation): Thank you very much. I would also
6 like to invite Mr. Dubuisson to give us some further information
7 regarding the workings of the court. Obviously if we want to have -- we
8 have a very ambitious plan for our court, but clearly there are
9 difficulties.

10 Before we hear from Mr. Dubuisson, I would like to hear from the
11 representative of the victims, Mr. Walley.

12 MR. WALLEYN (interpretation): Thank you, your Honour. The Court
13 took a decision on the 22nd of December. Following on from that, we are
14 facing the same problems encountered by the Defence team, perhaps
15 unfortunately, but I do hope that one day the victims will have greater
16 access to the file, and in particular public documents in the file. We
17 do not yet know what volume of paper or what the volume is of the
18 documents considered public filings, public documents, by the Prosecutor.

19 Now, clearly there may be technical, practical difficulties
20 which arise for lawyers who, after all, are simply lawyers who need to
21 work with the systems that have been put in place.

22 As regards the setting of a date in the confirmation hearing,
23 well, it is not incumbent upon us, above others, to make suggestions
24 regarding the date of the hearing. That is rather a matter for the
25 Prosecutor and for the Defence. However, from our point of view and that

1 of our client, for us it is important that the date is not open but that
2 a true date is set. Even if that date must be set and must be realistic,
3 it is important for us that that date be maintained and not be further
4 postponed, or postponed anew, because this is a source of uncertainty for
5 the victims. The expectations of the victims in the field are, of
6 course, great.

7 On another matter, although I am sensitive to the arguments put
8 forward by Mr. Flamme, I think that postponing the confirmation hearing,
9 because we are not yet talking about the opening of a trial, but
10 postponing the confirmation hearing for a further nine months strikes me
11 as not being a good thing. It is important that justice is done, and it
12 is important that justice be seen to be done. And in particular, I
13 believe that it is important that justice be seen to be done in the
14 Congo, and that postponing and drawing out this pre-trial phase of the
15 proceedings over such a long period of time does create much uncertainty
16 for our clients and is poorly accepted, I think, by others.

17 JUDGE JORDA (interpretation): In this connection, I would, of
18 course, like to open the floor to a discussion and hear from my
19 colleagues also, but I would like to remind the Prosecutor and Mr. Flamme
20 that --

21 THE INTERPRETER: Microphone, please.

22 JUDGE JORDA (interpretation): -- we have colleagues in a Trial
23 Chamber also --

24 Can you now hear me? Can you hear me now? Can you hear the
25 interpreters? You can hear me now.

1 I would just like to say that I have the impression, and to put
2 it on the part of the Prosecutor who has been disclosing thousands of
3 pages in recent weeks, and also from Mr. Flamme who is speaking of quite
4 a considerable period before the hearing, do we all realise that this is
5 the pre-trial phase? We are talking about preparation of the
6 confirmation hearing, not the trial as such. I have the impression that
7 there is confusion here on this point.

8 Now, Prosecutor, I believe you have a very heavy responsibility,
9 and you must not deny it. My colleague, the Single Judge, knows well the
10 extent of the documentation available and the detail of the confirmation
11 document itself. Obviously, the charges are substantial and the detailed
12 document is right. The Defence is also asking for a large amount of time
13 to be made available to it. But we must be mindful of the fact that we
14 are speaking about a confirmation hearing. It is true that these
15 proceedings are not summary, but it is also true that this is not the
16 trial.

17 We must remember that Mr. Lubanga Dyilo has been in detention
18 since March, and that if we postpone the confirmation hearing by nine
19 months, then there is the matter of Article 19 and his release. That
20 issue will arise. It's important that the Prosecutor realises that.
21 Must he provide thousands more pages and produce summaries when documents
22 are hundreds of pages in length? Well, yes, the summaries are important.

23 There are difficulties in terms of the computer systems and in
24 terms of the study of the documentation by the Defence, which,
25 nonetheless, speaks a working language of the court.

1 All of these factors must be borne in mind. We, the Judges, are
2 mindful of them, and we are aware of the fact that we have a
3 responsibility to the international community. This is the first case of
4 the court, and it's true that the first case is an important one. The
5 consequences of our working methods, et cetera, are important.

6 Now, I know that my colleagues may wish to intervene before we
7 move on to the second item on the agenda.

8 First of all, my colleagues, would you like to take the floor on
9 this issue of setting a date, in light of what has been said by each of
10 the parties? Judge Kuenyehia? Judge Steiner? Yes.

11 JUDGE KUENYEHIA: Yes. Just to express the same concern that you
12 have expressed. I do realise that it is important for both sides, the
13 Prosecutor and the Defence, to be well prepared. But I have been taken
14 aback by the postponement of nine months for a confirmation hearing.
15 This is a pre-trial phase. If you're going to postpone the confirmation
16 hearing for nine months, how long will the trial take?

17 We do have a responsibility to the accused person who is in
18 custody. He's been in custody since March. Do you want him to stay in
19 custody for another nine months? Then we'll have the issue of release.
20 There are a lot of issues around that.

21 As much as I appreciate the need for a proper preparation and a
22 thorough preparation on both sides, I also do think that we have to be
23 realistic and realise that we are dealing with the pre-trial phase of the
24 proceedings and not the trial itself.

25 Thank you, Mr. President.

1 JUDGE JORDA (interpretation): Prosecutor, I addressed you. I
2 would like you to respond to the various points. You are speaking to the
3 international community. You are the Prosecutor. The texts are
4 absolutely specific on this: You have the obligation to constitute a
5 file which must be submitted to a court of law. That file, that dossier,
6 must provide justification to the Judges of substantial grounds to
7 believe.

8 Now, there has been a preparatory period which has been long,
9 since March, and we see in only the last days an avalanche of documents,
10 and I wonder if this seems to you to be in compliance with the doctrine
11 of the Office of the Prosecutor. That is the question I would put to
12 you. Perhaps you would like to take the floor and add something else.

13 MR. WITHOPF: Mr. President and your Honours, I am actually very
14 grateful that I have the chance to respond to the various statements that
15 have been made. And I'm also very grateful for the remark, and I wish to
16 add, it's for the very first time that the Pre-Trial Chamber has made it
17 very clear that this is a confirmation hearing only and it's not the
18 trial, and I cannot more than agree.

19 Yes, this is a confirmation hearing only. And, of course, the
20 Prosecution opposes any attempt of the Defence to further delay the
21 proceedings. Six months, nine months, in the view of the Prosecution,
22 this is outside -- outside the range of possibilities, for the reasons
23 Mr. President, your Honours, have specified a few minutes ago.

24 The Prosecution is very well aware that it has to prepare for the
25 confirmation hearing, and it has done so. As, Mr. President, your

1 Honours, you are very well aware of, the reasons put forward are reasons
2 that are related to the Defence preparation.

3 And if I may, in addition to the explanation we have given
4 yesterday in a public filing on the Rule 81 proceedings, if I may add a
5 few words on this one, to provide for clarity, including for the
6 international community.

7 There is a lot of talk about thousands of pages likely to be
8 disclosed in the very near future. There are two matters I wish to add.

9 Mr. President, your Honours, you are very well aware that a very
10 high percentage of these thousands of pages are the result of transcripts
11 of five individuals that have been interviewed pursuant to Article 55(2)
12 of the Rome Statute, and the Prosecution had to comply with the
13 respective regulations in the Rules of Procedure and Evidence. In the
14 situation of Article 55(2), the Prosecution has to videotape and
15 audiotape these interviews. And, as your Honour, the Presiding Judge, is
16 very well aware of, one day of such an interview, in particular if
17 interpreters are being used, result, on a regular basis, easily, in
18 hundreds of pages of documents, hundreds of pages of transcripts.

19 So I oppose for the Prosecution any allegation that the Office of
20 the Prosecutor is disclosing huge amounts of materials at the very late
21 stage. One must see what these materials are about. That's the first
22 point, Mr. President, your Honours, I wish to make.

23 The second point is related to our yesterday's filing, and I
24 again draw the attention --

25 JUDGE JORDA (interpretation): I'm sorry, just with regard to

1 this last comment, perhaps you could have communicated these documents
2 earlier. You say you're opposed to the statement that the Prosecutor
3 communicated these documents at a late stage. But does that mean that
4 you could have communicated them earlier? Could you respond to that?

5 MR. WITHOPF: Mr. President, this is exactly the point I was
6 about to address.

7 JUDGE JORDA (interpretation): Okay. Perfect. Thank you.
8 You've got the floor.

9 MR. WITHOPF: Thank you very much, your Honour.

10 Rule 81 applications of the Prosecutor have a history. The
11 Office of the Prosecutor have filed its first applications in April, in
12 April 2006, explicitly asking - explicitly asking - the Single Judge for
13 provision of guidance on how the Single Judge or the Pre-Trial Chamber
14 envisage the Prosecution to apply Rule 81(2) and Rule 81(4).

15 The Single Judge then convened a hearing on the 2nd of May, 2006.
16 In that hearing, a whole series of concerns have been raised. And later
17 on in May 2006, the Single Judge has, as requested by the Office of the
18 Prosecutor, provided guidance. Part of the guidance and part of the
19 instructions given to the Office of the Prosecutor was the following:
20 The Office of the Prosecutor, pursuant to these instructions of the
21 Single Judge, had to go to the Registry's Victims and Witnesses Unit and
22 the Registry's Victims and Witnesses Unit had to provide for an
23 assessment of the feasibility and practicabilities of protective
24 measures.

25 As your Honour is very well aware of, the Prosecution has

1 immediately contacted the Victims and Witnesses Unit in order to, with
2 the Victims and Witnesses Unit, discuss the parameters of the information
3 the Victims and Witnesses Unit needed.

4 After this discussion, the Prosecution has put together the
5 materials for the Victims and Witnesses Unit. These materials concern,
6 if I'm not completely wrong, 27 witnesses. The Victims and Witnesses
7 Unit has received this information by the end of June. Obviously, the
8 Victims and Witnesses Unit has taken its task very serious, and rightly
9 so, and has submitted by the 24th of July, Mr. President and your
10 Honours, the 24th of July, its recommendations to the Single Judge. The
11 Victims and Witnesses Unit has filed these recommendations ex parte, not
12 accessible to the Prosecution.

13 The Prosecution therefore, by the end of July, had to request the
14 Single Judge that she provides access to the Office of the Prosecutor to
15 these recommendations which -- and I recall this, were a precondition,
16 and that's exactly the word that has been used recently in one of the
17 decisions of the Single Judge, were a precondition for the Office of the
18 Prosecutor applying for redactions under Article 81(4).

19 The Single Judge has reacted very promptly on the 31st of July -
20 on the 31st of July - has granted to the Office of the Prosecutor access
21 to the recommendations of the Registry. These recommendations are, as
22 your Honour, Mr. President, and your Honours are very well aware, they
23 are very comprehensive recommendations. The Office of the Prosecutor has
24 read them and has very soon, in early August, requested the Single Judge
25 to convene an ex parte hearing on these VWU recommendations.

1 The Single Judge has again very promptly reacted to this request
2 and has scheduled -- has scheduled such a hearing. And if I'm not
3 completely wrong, the hearing took place on the 18th of August, on the
4 18th of August. Up until the 18th of August, the Office of the
5 Prosecutor was legally bound by a decision of the Single Judge. We could
6 not file earlier.

7 The hearing took place. The Office of the Prosecutor and the
8 Victims and Witnesses Unit had different views on the feasibility of
9 protection. These views have been exchanged.

10 Finally, there was a decision of the Single Judge, and that
11 decision, if I'm not completely wrong, was about the 22nd or 23rd of
12 August. Only at that point in time, Mr. President - and I repeat it,
13 only at that point in time - the Office of the Prosecutor was legally
14 able, because it was bound by a decision of the Single Judge, it was
15 bound by such a decision to comply with the decision and to first receive
16 the recommendations and the view of the Registry's Victims and Witnesses
17 Unit. There was no way - there was no way - for the Office of the
18 Prosecutor to file its Rule 81(4) applications prior to the end of
19 August.

20 JUDGE JORDA (interpretation): I would just like to warn you
21 where I can sense the discourse is a bit displeasing. The Chamber, which
22 is collegial, with, of course, a Single Judge, and it has issued
23 decisions which are in accordance with the Statute and with the Rules, in
24 an institution which is always under the control of the Appeals Chamber,
25 if you so wish. So I would like you to be very measured in the way in

1 which you recall the timetable of everything that happened, if you would.
2 Thank you.

3 MR. WITHOPF: Mr. President, I will certainly take into account
4 what you have just said.

5 The Office of the Prosecutor, in this context, is only responding
6 to the statement that has been made that the Office of the Prosecutor has
7 applied at a very late stage. And the Office of the Prosecutor is not in
8 any way - and I wish to emphasise this - is not in any way criticising
9 any decisions that have been taken. The Office of the Prosecutor is very
10 grateful for the seriousness and the accurateness the Single Judge has
11 used and has displayed in dealing with these applications. The
12 Prosecution, however, being confronted with an allegation that it has
13 applied at a very late stage, only wishes to put the facts on the record.
14 This is the only comment I wish to make.

15 There's one further aspect, and in this context, I wish to,
16 again, emphasise that the Office of the Prosecutor very much concurs with
17 the views as expressed by the Single Judge. The thousands of pages of
18 documents, based on the recent decision of the Single Judge, will be
19 diminished, they will be diminished significantly by the Office of the
20 Prosecutor providing for summaries, as requested by your Honour, the
21 Single Judge, and as requested for reasons of security for victims and
22 witnesses, in particular in light of the security situation that has
23 deteriorated recently, unfortunately, in the region of the Democratic
24 Republic of the Congo. So the Defence will not have to deal with
25 thousands of pages of materials because the summaries will reduce, and I

1 got the numbers, 3.430 pages which are the result of transcripts and
2 statements, to some dozens of pages of summaries. So it doesn't look
3 that bad as it may appear at first glance.

4 If your Honour, Mr. President, will allow me to make a --

5 JUDGE JORDA (interpretation): I'd just like to address myself to
6 Maitre Flamme. Is that going to be summarised in dozen of pages? Are
7 there going to be summaries of dozens of pages?

8 MR. WITHOPF: Mr. President and your Honours, there are 18
9 statements the Prosecution was ordered to summarise, and the Prosecution
10 has announced recently that it will do so. It has filed these -- a
11 number of these summaries yesterday and the Prosecution will file the
12 further summaries on Friday, the latest.

13 And, again, I anticipate 18 statements and transcripts being
14 summarised will probably result in some dozens -- it could be 100; it
15 could be 200 pages of summaries. At this stage it's hard to predict.
16 But we're not talking at this stage of thousands of pages the Defence
17 will receive in the very near future.

18 I think this is necessary to make clear.

19 JUDGE JORDA (interpretation): Yes. Have you finished?

20 MR. WITHOPF: Mr. President, your Honours, yes, I'm finished.
21 Thank you.

22 JUDGE JORDA (interpretation): Okay. So we will now state -- and
23 here I will now turn towards Maitre Flamme. Normally we should have a
24 limited number of pages of summaries. So did you hear that,
25 Maitre Flamme, what's been announced? Does it change in any way your

1 statement, which the Court was, of course, very sensitive to?

2 MR. FLAMME (interpretation): Yes, your Honour. If you would
3 allow me to say that, for the moment, it's pretty vague. I don't know
4 how many pages are being talked about. I would like to know that before
5 responding to your question. I know myself that I already have around
6 5.000 pages in one dossier we've started to read since the 17th of
7 September, and I was told that there would be about 4.000 pages. Now I
8 hear that it's going to be summaries. We have to see. I don't know.
9 But these summaries could also cause problems as well. These summaries,
10 will they give Defence sufficient -- I mean, here we're talking about the
11 most important piece of evidence, witness statements, et cetera. You
12 know that there is a problem for the Defence when it comes to summaries.

13 For example, will the Defence be able to take sufficient account
14 of the facts? Perhaps there won't be dates; perhaps there won't be
15 places mentioned. How can the Defence, on the basis of these summaries,
16 be able to note the credibility of a testimony? So there will be
17 requests for further information, et cetera, that need to be made.

18 And here I would like to go back to the key point which I started
19 with and one which you also mentioned as well. I'm very well aware, of
20 course, that here it is a confirmation hearing. But the new element with
21 regard to the ad hoc tribunals in this system is that the accused is
22 given the possibility to seriously contest these charges and to avoid the
23 horror of a trial. We all know that going through a criminal trial, and
24 certainly an international criminal trial, for somebody, is really quite
25 something, and that's really going to really mortgage his future, even if

1 he's acquitted.

2 So when it comes to the confirmation of charges, and the
3 confirmation hearing, as we know very well in our system, in our civil
4 law system, we know -- well, a lot of defences before the -- in extenso,
5 they try to avoid, if they have reason to do so, that is, they try to
6 avoid this when it comes to the trial.

7 I think it's not permissible with regard to the presumption of
8 innocence to suppose that when we go to the confirmation hearing that we
9 will immediately go to the trial. The charges will be confirmed or they
10 won't be confirmed. And the system of the Court is such that the two
11 parties build a defence, a significant defence, even if it's not -- even
12 if it's not a trial defence.

13 But my point is, nevertheless, that knowing this, if the question
14 put to me is, "Well, the confirmation hearing --" and here I'm going to
15 say a formality, but if I'm told that it's a reduced hearing at that
16 time, well, then, I would ask the question, "Why does he have to
17 communicate such a huge dossier for this confirmation hearing?" But if
18 this dossier is communicated to me, it's so that I read it. And I have
19 carried out my mathematical calculations - I am basing myself on the team
20 that I will be able to count on - and if I make the calculations, I come
21 to these calculations which are perhaps -- which could be adapted
22 according to how many pages there are.

23 But we mustn't forget that when the Prosecutor responds that it
24 couldn't be a question of nine months, well, the Prosecutor has been
25 working on the dossier for two years. He has got the advantage of time;

1 he's got the advantage of numbers of persons. And he must allow the
2 Defence to be able to give a defence as envisaged by the Statute, to be
3 able to read the dossier and defend itself against this dossier.

4 If he decides to communicate one which is reduced, then, of
5 course, it will take less time. But communicating with such a massive
6 dossier requires the time to defend; otherwise, it's an inequality of
7 arms.

8 JUDGE JORDA (interpretation): Yes. As you're making a
9 comparison with the ad hoc tribunals, I hope that you've seen - and here
10 I pay homage to the Prosecutor, because I think he's done it - he has the
11 obligation to also present you with exculpatory evidence, Article 54(A).
12 So I don't think it can be said that you will be totally disarmed with a
13 type of poor defence, with a lack of IT, against an Office of the
14 Prosecutor which is titanic, gigantic, or at least I've been able to
15 verify this by myself and I pay tribute to the Office of the Prosecutor,
16 whenever there is evidence, exculpatory evidence, they do bring it. And
17 I think that's the application of the Statute.

18 MR. FLAMME (interpretation): If you will allow me to reply. Of
19 course that's essential, Mr. President. The Prosecutor investigates
20 exonerating and incriminating evidence. This is in the text; it's
21 provided for. It's a hope, it's a wish, but the Prosecutor is in an
22 accusatorial movement. That is the role of the Prosecutor. And
23 investigating exonerating evidence, as the investigating magistrates do
24 in our system, they investigate incriminating and exonerating evidence,
25 it's up to the Chamber to verify if there are sufficient grounds with

1 regard to exonerating and incriminating evidence.

2 But this isn't necessarily what the Prosecutor does exactly.
3 What we see in the testimony - and I don't want to be concrete here
4 because it isn't the point of this hearing here - but after the reading
5 and the verification of certain testimony, what we can see, for example,
6 is that it's impossible, I say "impossible," for this witness to say what
7 he's saying in this testimony. And he says, for example, that in the
8 morning he was there and the afternoon he was there, because after
9 verification, the distance between these two places is so great that,
10 under the circumstances of war and given the road conditions, it's
11 impossible to be there in the morning and over there in the evening. And
12 so I would say this witness isn't telling the truth, I'm sorry. And for
13 me, when I'm investigating exonerating evidence, I wouldn't present this.
14 That's not presenting this testimony.

15 JUDGE JORDA (interpretation): Very well. This is the center -
16 yes, you can stand up, Mr. Withopf - this is the center of our debate.
17 And I would say for the public as well, it's an innovation which was
18 introduced quite late into the ad hoc tribunals. And I would like to
19 know how you conceive your mission of Article 54(1)(a), Mr. Withopf.
20 69(3).

21 MR. WITHOPF: Mr. President, if I may first address very briefly
22 a few issues my learned friend from the Defence has raised.

23 The equality of arms principle has been mentioned a number of
24 times. I do explicitly not concur and I strongly disagree with the
25 statements made by my learned friend from the Defence. The Prosecution

1 has the burden in the confirmation proceedings to show evidence that
2 provide for a substantial grounds to believe that Thomas Lubanga Dyilo,
3 Mr. Thomas Lubanga Dyilo, is guilty of the crimes he is charged with.
4 And the Defence needs to challenge the evidence only, which is a huge
5 difference, and my learned friend from the Defence is very well aware of
6 it. So I would strongly disagree with the use of the equality of arms
7 principle in this context.

8 What I also find quite disturbing is the fact that my learned
9 friend from the Defence is permanently raising the point that he would
10 get key evidence or the key evidence only in future.

11 My learned friend from the Defence, in March, had access to the
12 arrest warrant application of the Prosecution, and, Mr. President, your
13 Honours, my learned friend from the Defence had plenty of time, more than
14 half a year, to very carefully read it. And, in addition, my learned
15 friend from the Defence has, very early on, received six statements, and
16 everybody who is working on this case knows exactly that these six
17 statements are the core of the Prosecution's evidence.

18 For that reason, I very much concur with the viewpoint -- with
19 the view as expressed by your Honour, the Presiding Judge, that there is
20 no reason at this stage to even think about a further delay of six to
21 nine months. There is for sure not such a reason.

22 Your Honour, the Presiding Judge, has asked me to address a
23 particular issue, and your Honour, the Presiding Judge, has asked me in
24 very broad terms. If your Honour, the Presiding Judge, doesn't mind, can
25 I please get specific questions? And I'm very happy to answer to

1 specific questions.

2 JUDGE JORDA (interpretation): My question was basically: Given
3 what's said in the Statute and different articles, 69(2), for example,
4 how did you conceive in the Office of the Prosecutor communication of
5 exculpatory evidence? I have seen that you have communicated a certain
6 number of them. So practically how have you conceived practically this
7 mission which is included in Article 67(2), the Prosecutor will
8 communicate to the Defence as soon as possible the evidence in his
9 possession which he believes shows or tends to show the innocence of the
10 accused? So Maitre Flamme seems to contest the content on a basis which
11 I don't know, but how have you worked on this question which is quite
12 new?

13 MR. WITHOPF: I understand, Mr. President, you are referring to
14 Article 67(2), the communication of potentially exculpatory evidence, and
15 I have noted with great gratitude that your Honour, the Presiding Judge,
16 has five minutes ago mentioned that, in his view, the Office of the
17 Prosecutor appears to comply with the statutory duties, and indeed the
18 Office of the Prosecutor does so.

19 In order to answer your question, the Office of the Prosecutor
20 has, at the very beginning of the investigation, throughout the
21 investigation, identified areas which, in the context of the
22 investigation into the situation in the DRC, and in particular in the
23 context of the investigation against Mr. Thomas Lubanga Dyilo, could be
24 seen as of potentially exculpatory nature in the very broad terms of
25 Article 67(2).

1 The Prosecution has developed a key word list, and again a very
2 broad and a very extensive key word list, in order to allow the Office of
3 the Prosecutor for electronic searches, in order to ensure that all
4 materials are covered by these searches. The Office of the Prosecutor
5 has repeatedly requested my learned friend from the Defence to provide
6 the Office of the Prosecutor with any other key words, and I hasten to
7 add that the Office of the Prosecutor, at the very early stages of the
8 disclosure process, has disclosed the key word list to the Defence in
9 English and, in order to allow Mr. Thomas Lubanga Dyilo to participate in
10 this exercise, also in French. The Office of the Prosecutor at no point
11 in time, despite the numerous efforts that have been made, has ever
12 received an answer from my learned friend from the Defence.

13 So the Office of the Prosecutor has conducted its electronic
14 searches. It has identified a number of priority key words, which, in
15 the view of the Office of the Prosecutor, are more likely to produce
16 information or evidence of potentially exculpatory nature as other such
17 key words. And the Office of the Prosecutor has, whenever these searches
18 have generated results, the Office of the Prosecutor has examined these
19 materials, and in the event these materials turned out to fall within the
20 range of Article 67(2), the Office of the Prosecutor has immediately
21 disclosed such materials to the counsel for the Defence. It has done so
22 on an ongoing basis, and meanwhile there were about 14 or 15 such
23 disclosures of potentially exculpatory materials.

24 And I'm a bit surprised that this issue comes up today, since it
25 has been a fact that over months, over many months, my learned friend

1 from the Defence has never complained about the Article 67(2) disclosure
2 of the Prosecution. For that reason, it's quite surprising that this
3 aspect today is utilised to raise an expectation, a very unrealistic
4 expectation, that the confirmation hearing could be further delayed in
5 the range of about six to nine months.

6 Talking about disclosure, I also wish to draw the attention of
7 your Honour, the Presiding Judge, and your Honours to the fact that the
8 Office of the Prosecutor has highlighted - and this goes beyond, this
9 goes beyond the statutory obligations - has highlighted all portions it
10 thought would be of potentially exculpatory information. And as my
11 learned friend from the Defence is very well aware of, these contain, and
12 it's correct, documents which are sometimes comprised of thousands of
13 pages or hundreds of pages. The Office of the Prosecutor has undertaken
14 to read each and every single page in order to facilitate, to the extent
15 possible, the Article 67(2) procedures. This goes beyond the Office of
16 the Prosecutor's statutory obligation; it goes far beyond. The Office of
17 the Prosecutor has done so to ensure a fair, efficient, and timely
18 proceedings.

19 And I'm quite surprised that my learned friend of the Defence is
20 not even trying to concede that the Office of the Prosecutor has
21 significantly facilitated its work. I would like any understanding for
22 any allegation that my learned friends from the Defence need to go
23 through thousands of pages of materials to actually understand what the
24 material is; they only have, in our view, to focus on the portions that
25 are highlighted in these materials and it will be very easy, in our view,

1 to understand what the potentially exculpatory materials are about.

2 The Office of the Prosecutor - and I only raise this because
3 there appears to be a view that the Office of the Prosecutor is not doing
4 everything to accelerate proceedings - the Office of the Prosecutor,
5 since weeks, is doing research for documents that have been disclosed
6 previously under Article 61(3) as incriminatory evidence and that have
7 been disclosed in English. We are doing research whether there are
8 publicly available French versions of these documents. And as your
9 Honour, the Presiding Judge, and your Honours are aware of, this is a
10 pretty time-consuming work to do, and we do it as a matter of principle
11 to minimise the work of the Registry's translation unit which has to
12 provide further translation of such documents.

13 In the recent weeks -- and my learned friends from the Defence,
14 of course, are not providing such information to the Honourable Pre-Trial
15 Chamber. In the recent weeks, the Office of the Prosecutor has, beyond
16 its statutory obligations, provided such French versions of documents,
17 about 20 such documents comprised of more than 700 pages, that allows
18 Mr. Thomas Lubanga Dyilo to immediately being able to actually digest
19 these materials.

20 I invite my learned colleagues from the Defence at this juncture,
21 instead of permanently complaining about the fact that they are receiving
22 materials in English, that they do the work the Office of the Prosecutor
23 does, in essence, for the Defence themselves in future. We have made all
24 efforts to minimise the translation work of the Registry, and we will
25 certainly continue to do so within limits. But this does not mean that

1 the Defence team is freed from doing its job, namely, to search for such
2 materials itself.

3 Against this background, your Honours --

4 JUDGE JORDA (interpretation): Well, I wouldn't like us to have a
5 polemical discussion here which is not important. The Judges have an
6 impartial role here to listen to yourself and to the Defence, but we're
7 not here to take up the calls of the Defence or the Prosecution. Each
8 party speaks for itself. I would hope that these proceedings will
9 maintain the dignity they should have. The Judges, at the end of the
10 day, will set the date for the hearing. Today we are here to listen to
11 all-comers to the parties, particularly the Prosecution and to the
12 Defence.

13 But, in any case, it is not at issue here today whether the
14 Prosecution does its work or the Defence does its work. No. The
15 presumption today is that everybody is doing their work, but that, given
16 the complicated texts with which we work, and to ensure that the case is
17 as accessible to the public, to the international community, as possible,
18 we need to work as best we can.

19 Now, in fact, the Judges are in the best position. You, the
20 parties, have more difficulties than the Judges, but the Judges have
21 their responsibilities to the international community, as you do. So
22 that's why I would reiterate that this is the framework in which the
23 Judges shall be taking their decision.

24 We have heard your response to the initial points. We also want
25 to hear from Mr. Dubuisson who will speak about the IT aspects and the

1 computer systems in place.

2 I believe there was a second point, however, Mr. Prosecutor? Is
3 that not the case? No? You have finished?

4 MR. WITHOPF: I think I have finished, Mr. President.

5 JUDGE JORDA (interpretation): Very good. Thank you.

6 Before adjourning this hearing, because I think that we need not
7 go on to item 2 because we are not going to take a decision on the date -
8 November or April or whatever it may be - that a decision will be
9 deliberated on and a fresh hearing will be called. We will have a
10 separate hearing to discuss, to hear your views on how the actual
11 confirmation hearing shall be conducted and the various specific points.

12 Mr. Dubuisson, however, we would like to hear your views on the
13 points raised.

14 MR. DUBUISSON (interpretation): Thank you, your Honours. Well,
15 indeed, we are the object of some criticism, as is the IT system which
16 has been requested and put in place.

17 First of all, as regards human resources, the Registrar has taken
18 its decision; the Chamber was seized of the matter and it has taken its
19 decision. The matter of equality of arms cannot simply be reduced to a
20 matter of human resources.

21 Second point: There is talk of 24 weeks to read the documents.
22 We hear that the e-court system or the Ringtail system does not
23 facilitate the work and that there are regularly problems. Reading
24 documents, whether that takes 24 weeks or not, is not impacted upon by an
25 IT system. Reading a document takes the time that it takes. A document

1 is printed and read. As regards the 24 weeks, I have no view on that.

2 Now, my third point: The 12 weeks for studying the file and for
3 travel, I have a view on that. As regards travel, it has been underlined
4 that today it is very difficult, if not impossible, to travel to the
5 field. Indeed, it is very clear today. And the court itself has
6 minimised its presence temporarily in the field in order to reduce the
7 risk at this point in time as regards the needs of the court.

8 Now I would turn to the Defence. However, all requests for
9 travel will be dealt with on a case-by-case basis. I understand that the
10 requests up until now, or the limitations, concern Bunia. There is more
11 latitude as regards Bunia and other areas. Since Ms. Pandanzyla
12 returned, we have received no further requests for travel to the field.
13 So since the 22nd or 25th of August, we have received no further requests
14 for travel to the field.

15 Now, the other aspect, the study of documents, well, there, yes,
16 it is true that the IT system does facilitate the study of documents and
17 thousands of pages of documents. Having a system which makes it possible
18 to exchange information does facilitate work tremendously. However, the
19 Defence is saying that, "Well, each person, each party, has to work with
20 its own IT system. We do not have -- it is not easy for us to exchange
21 views and information."

22 Well, when you're working on paper, you might write a document on
23 paper and you hand it over to your colleague or you fax it through.
24 Today we have an IT system. The only problem is access to a server. The
25 problem has already been discussed here in this court. It will be

1 resolved on the 16th of October. On the 16th of October, we will make
2 available to the Defence a system which, when used, will facilitate
3 communication; that is to say, work done on one computer will be
4 accessible from another computer. This will be -- this is a plus point.
5 It is not available today. It will be available from the 16th of
6 October. But it is already much better than what can be achieved when
7 working on paper only.

8 I will not comment regarding the many key words that have been
9 provided by the Prosecutor. This is an issue which has already been
10 dealt with in this courtroom and has been dealt with many times over.
11 The Prosecutor says he has not received key words from the other party.
12 We are not concerned directly by this exchange between the Prosecution
13 and the Defence, so we do not interfere.

14 The matter of key words, key terms, is an important matter,
15 because it can dramatically assist a targeted search. Now, if the
16 Defence wants specific key words to be added to the list, this is
17 possible. It can be done. And it will make it possible to target a
18 search. So I can understand that the Prosecutor would like to have key
19 words so that he can do his work better, and as the Defence would wish.

20 Now, it would be possible to have a search engine-type system,
21 but decisions have already been taken regarding the system and it is now
22 up to the parties to play their part. We, at the Registry, are not
23 concerned here, we do not interfere in that exchange.

24 As regards protection, we are making tremendous efforts, as I
25 speak, to ensure the protection of witnesses in the field. This work is

1 extremely difficult. It involves not only many hours of work but also
2 communication, and it is a matter on which we are spending a lot of time
3 and which is also concerning us. Information needs to be dealt with and
4 identified today for a trial which might take place in six or seven
5 months. But from what I hear today, there is talk of a confirmation
6 hearing in six or seven months. But, once again, I have no view to offer
7 on that.

8 I would just say that the longer the period during which the
9 names of witnesses are circulating, the greater the risk and the greater
10 the threat. So all I can do is praise the work which has been done by
11 Judge Steiner up to date, up until this date, because it is entirely in
12 line with the wishes and needs of the Victims and Witnesses Unit.

13 JUDGE JORDA (interpretation): Thank you. I suggest that we
14 adjourn this hearing, unless my colleagues have something to add. Judge
15 Steiner? Judge Kuenyehia?

16 If not, I would like to add the last word, not to debate with the
17 Prosecutor, but what you have heard Mr. Dubuisson say, are you convinced
18 by it, or only in part? Have you taken note of what he has said.
19 Obviously there is a transcript of the utterings at this hearing. Is
20 that sufficient for you?

21 MR. FLAMME (interpretation): Your Honour, just a word about the
22 fact that we have not requested travel in recent weeks. Well, yes,
23 obviously because the trip that did take place in August ended very bad,
24 as you know, and thereafter we were in the period which was immediately
25 to precede the confirmation hearing and therefore we had all of the

1 duties incumbent upon us regarding victims, amicus curiae, et cetera.
2 There were a large number of filings that had to be dealt with. I won't
3 say that the Defence was overwhelmed, but it does involve tremendous
4 work, research and drafting.

5 By the way, that is why I said my staff can only work part time
6 on reading the disclosed texts. It is also the reason why we have not
7 made additional requests to travel.

8 On top of this, we received the letter from the Registrar wherein
9 he noted, at least this was our interpretation, wherein he noted or
10 stated that there could be no travel to the DRC at this time. And that
11 is why this essential travel has not been requested over the last weeks.
12 But, needless to say, it must happen at some point.

13 And then finally, just a word by way of response, but just a word
14 in relation to what the Prosecutor said about the list of key words.
15 Yes, the key words - yes, in the plural; unfortunately it's not just one
16 word but many, unfortunately - we have not yet made suggestions to the
17 Prosecutor. Also because, in order to provide key words, we must already
18 have devised a defence strategy, and to devise a defence strategy, one
19 must have a knowledge of the Prosecutor's dossier.

20 JUDGE JORDA (interpretation): Okay. I suggest we adjourn now,
21 that we have a break. I'm sure our colleagues in the interpretation
22 booths will be delighted to take a break.

23 After this break, our colleague, the Single Judge, Judge Steiner,
24 who we must thank wholeheartedly for her hard work, will open a second
25 hearing. But I suggest a break of 30 minutes now, please.

1 --- Recess taken at 3:45 p.m.

2 --- On resuming at 4:15 p.m.

3 [Judge Steiner, the Single Judge, presiding]

4 THE USHER: All rise. Please be seated.

5 JUDGE STEINER: So we are resuming this -- we are resuming this
6 Status Conference now -- sorry, I was speaking and listening to the
7 translation. It was complicated.

8 We are resuming this Status Conference. Now we will focus on the
9 process of disclosure and inspection, process of communication of
10 evidence, and the other aspects of the preparation for the confirmation
11 hearing.

12 I would like that, before we enter a discussion on the disclosure
13 process, first we have an update from the Defence and the Registry on the
14 logistical issues, as we did at the last Status Conference, and in
15 particular on the problems of the Defence team as a result of these
16 difficulties of having access to the court's network, and maybe with the
17 updating given by the Registry, most of these problems seem to be solved.
18 But anyway, I would like to listen to the Defence team and the Registry
19 on that. Then the updating on the disclosure process, the communication.
20 And then finally the parties will have the opportunity, as always, to
21 raise any matters they would like to raise at this point related to the
22 disclosure proceedings.

23 If this way of working is agreeable to the parties, we can so
24 proceed. Let us start with preliminary matters that are related to
25 logistical issues.

1 In the Status Conference held on 5th September, Mr. Flamme raised
2 some concerns in relation to access to the court's network, training,
3 Ringtail software, and other issues. Besides the decision of the Chamber
4 of 22nd September, the Chamber ordered the Registry to make sure that a
5 GTA, additional legal assistant, at P2 level, joins the Defence team as
6 soon as practicable.

7 I would like, first, for the Registry to inform the Chamber on
8 the logistical issues and on this specific one related to the additional
9 legal assistant to the Defence team. The Registry first has the floor.

10 MR. DUBUISSON (interpretation): Thank you, your Honour.

11 Now, first of all, as regards all matters regarding IT, I would
12 like to pass the floor to Uros Mijuskovic.

13 However, as regards making available an associate legal officer
14 on a temporary basis from the 1st of October, I would like to address
15 that. We are currently in the process of identifying possible candidates
16 who would meet the wishes of the Defence. This process is underway, and
17 the Defence support section is working on this topic in particular.

18 I would now like to hand the floor to Uros Mijuskovic as regards
19 matters pertaining to IT.

20 MR. MIJUSKOVIC: Good afternoon, your Honour.

21 I will be presenting you with a short report on various issues,
22 point by point, in relation to the IT matters/issues that were raised at
23 the previous Status Conference, the problematic ones.

24 Let me start with the computer accounts. The computer accounts
25 were created and activated on Friday, the 8th of September. Only one

1 computer account was created and activated later; it was the one of the
2 case manager. This was done on the 13th of September.

3 A collaborative space, which would mean a shared space to work
4 and access court records between the members of the Defence team, has
5 been created also. This has been done on the 11th of September. A
6 similar collaborative space allowing the members of the Defence team to
7 share the analysis work they do on Ringtail has been created, too, and
8 this was done on the 13th of September. The work stations were
9 configured on the 12th. So as of the 13th of September, working on
10 Ringtail, analysing disclosed materials, is possible.

11 E-mail accounts have been created. For the case manager, it was
12 done on the 13th of September, and the rest of the team, on the 14th of
13 September. This actually means that members of the Defence team can now
14 communicate between themselves and with the rest of the court via these
15 e-mail accounts.

16 The issue of LiveNote and access to transcripts, it was available
17 as of the 8th of September, Friday, and successfully tested.

18 It's also good to point out that a training manual has been
19 provided with the availability dates as far as the training is concerned
20 for the Ringtail software. Training was also provided for LiveNote.

21 The only remaining issue that has to be solved is the access to
22 printers, and the ICT services are working currently on this issue. It
23 should be solved pretty soon, in a matter of days.

24 Thank you.

25 JUDGE STEINER: Thank you very much.

1 Mr. Flamme.

2 MR. FLAMME (interpretation): Thank you, your Honour. I can,
3 indeed, confirm that most of the matters referred to by the Registrar or
4 Registry have, indeed, been dealt with. There are a number of things
5 outstanding, however.

6 First of all, allow me to refer to the computer in the Detention
7 Centre. For a number of weeks now, my client has been encountering
8 difficulties in using it. First of all, the password wasn't renewed, as
9 it should be, each month. Now that it has been renewed, once again, my
10 client is not succeeding in accessing a number of documents and therefore
11 has requested the assistance of a member of staff from the section
12 concerned to ensure that the computer is working as it should.

13 Now, I have understood that we would have remote access, that is
14 to say, that we would not be restricted to accessing Ringtail from our
15 offices in The Hague. I believe that from the 16th of October, we shall
16 have remote access to the system. We note that date because it is a
17 matter of great importance to us.

18 A matter, however, which remains rather unclear to me, it's
19 something which strikes me as essential but something which is not yet in
20 place: I believe it is essential that we be able to communicate with our
21 client in prison regarding his comments on documents provided to him. We
22 would like him to be able to send comments to us.

23 Now, I don't know if that is provided for. Perhaps I missed it
24 if it was mentioned last time. However, it is a facility that strikes me
25 as being essential.

1 So that is the current status as regards the IT system.

2 JUDGE STEINER: Thank you, Mr. Flamme.

3 On this last point of exchange of communication, could the
4 Registry clarify on this point?

5 MR. DUBUISSON (interpretation): I think that we have to be quite
6 clear. I've already said that, for security grounds, there is an access,
7 one-way access, from a specific office to the Detention Centre. There
8 will not be additional access or a return access from the Detention
9 Centre towards any other place. Today this is the position of the
10 Registry in this matter, for security reasons.

11 JUDGE STEINER: Thank you for this clarification.

12 Has the Prosecution something to add to this logistical issue?

13 MR. WITHOPF: Your Honour, there's nothing we have to add. Thank
14 you.

15 MR. FLAMME (interpretation): If you will allow me, your Honour.
16 I'd forgotten one point which was in the presentation that we heard.

17 It was said that we also had through Ringtail access to the court
18 records, and that's not the case, as far as we can see. We've only got
19 access to the evidence and not to the ones -- the individual evidence for
20 the proceedings. That's an important remark, I think.

21 JUDGE STEINER: Before giving the floor to the Registry, I would
22 like, Mr. Flamme, if possible, for you to clarify what you mean by
23 "pieces de procedure" in this case.

24 MR. FLAMME (interpretation): This was mentioned as court
25 records. But that, I understand the judgements, the requests, the

1 different procedural documents, as such.

2 JUDGE STEINER: Court management.

3 MR. MIJUSKOVIC: Thank you, your Honour. As a matter of
4 clarification, of course Ringtail is used for access to evidence
5 material, "pieces de procedure." What we wanted to say is that specific
6 space is created, you could say it's a folder, where all court records
7 can be inserted, put, and then accessed by all the members of the team.
8 It's a collaborative form. It would mean that Maitre Flamme and
9 Ms. Pandanzyla, working on different computers, could access those court
10 records. Thank you.

11 JUDGE STEINER: So, if I well understood, your concerns are
12 covered.

13 MR. FLAMME (interpretation): What I don't understand as yet is,
14 if it's the court records, to use the English term, if we put them in,
15 yes; but if they are already there in the system, I don't think so, if
16 I've understood what you said.

17 MR. MIJUSKOVIC: Yes. As a matter of fact, the court records are
18 notified in regular procedures, but, importantly, the folders by the
19 Defence team themselves. What is in place is a space to put those
20 records.

21 JUDGE STEINER: Thank you.

22 I first would like to personally welcome Maitre Walleyne. Because
23 this second part of the Status Conference is much more focused on
24 disclosure proceedings, I would like you to feel free, if you want to
25 intervene, it's just a matter of calling the attention of the Single

1 Judge and the floor will be given.

2 MR. WALLEYN: Thank you very much.

3 JUDGE STEINER: So if we may go to the second topic of the
4 agenda, it's specifically the disclosure process and the filing of
5 evidence with the Registry.

6 As always, I would like, first, the Prosecution to give an
7 overview on how the process of disclosure has taken place since the last
8 Status Conference on 5th of September, and how you envisage the process
9 of disclosure within the coming, if not weeks, at least days. And the
10 Single Judge is particularly interested in knowing whether the second
11 decision on application under Rule 81 has been already implemented.

12 So the Prosecution has the floor.

13 MR. WITHOPF: Your Honour, with your permission, we would like to
14 apply the same procedure as we have established over the last few Status
15 Conferences. So I would like to invite Ms. Solano to provide you with
16 the update. I will afterwards have a few additional remarks on
17 disclosure.

18 JUDGE STEINER: Ms. Solano.

19 MS. SOLANO: Thank you, your Honour. Good afternoon.

20 I will then proceed with the report on the disclosure activities
21 that have taken place since the last Status Conference on the 5th of
22 September.

23 Since the last report to your Honour, the Defence and the
24 Prosecution have had five disclosure exchanges which continue to take
25 place at mutually agreed dates and times. At these meetings, the

1 Prosecution has continued to discharge its ongoing obligations to
2 disclose potentially exculpatory evidence and to provide an opportunity
3 for the Defence to inspect or pre-inspect materials that fall within the
4 scope of Rule 77.

5 Additionally, the Prosecution has disclosed documents it intends
6 to rely on at the confirmation hearing for which redactions have been
7 authorised by your Honour in the second decision, including witness
8 statements, and we have also disclosed a number of incriminating
9 documents in French for which only English versions had been provided in
10 the past.

11 I will now, your Honour, take you through each of these exchanges
12 with the Defence.

13 The first one took place on the 6th of September. And on this
14 day, pursuant to its Article 61(3)(b) obligations, the Prosecution
15 disclosed a single document, comprising 1 page. Pursuant to its Article
16 67(2) obligations, the Prosecution disclosed one document, comprising six
17 pages. And pursuant to its Rule 77 obligations, the Prosecution provided
18 the Defence with a CD containing two documents, comprising 12 pages.
19 Your Honour, a total of four documents, comprising 19 pages, were thus
20 disclosed or provided for pre-inspection on September 6th.

21 The next exchange with the Defence took place on the 11th of
22 September. On this day, the Prosecution disclosed four documents,
23 comprising 51 pages, as potentially exculpatory evidence, pursuant to its
24 Article 67(2) obligations. Two of these documents contained redactions
25 which had been requested by the providers. The Prosecution also provided

1 the Defence with a CD containing two documents comprised of eight pages,
2 which fall within the scope of Rule 77. There were no documents
3 disclosed under Article 61(3)(b) on the 11th of September. Thus, on this
4 date, a total of six documents, comprising 59 pages, were disclosed or
5 provided for pre-inspection to the Defence.

6 The next exchange, which took place on the 15th of September, saw
7 the Prosecution disclosing to the Defence 13 documents, comprising 603
8 pages, which the Prosecution intends to rely on at the confirmation
9 hearing. These 13 documents, your Honour, all in French, had previously
10 been disclosed to the Defence in English only. And by this we mean that
11 these documents had been disclosed prior to the 20th of August deadline
12 and were thus already part of our list of evidence in their English
13 version. The French version is provided to the Defence as it had been
14 our undertaking to -- our undertaking to do this. The Prosecution also
15 disclosed two documents comprising 98 pages as potentially exculpatory
16 evidence on the 15th of September. And it disclosed the fourth
17 spreadsheet containing excerpts of potentially exculpatory information in
18 witness statements, some of which included very limited redactions and in
19 which pseudonyms were used to protect the identity of the witnesses.
20 Finally, the Prosecution provided the Defence with a customary CD
21 containing four documents comprising 165 pages which fall within the
22 scope of Rule 77. Your Honour, a total of 19 documents, comprising 866
23 pages, were thus disclosed or provided for pre-inspection on the 15th of
24 September.

25 Yesterday evening, that is on the 25th of September, the

1 Prosecution disclosed to the Defence 21 documents, comprising 304 pages,
2 that it intends to rely on at the confirmation hearing. Twenty of these
3 documents contained redactions authorised by your Honour, and these were
4 all documents which are being -- which were disclosed in compliance with
5 your second decision, your Honour. The twenty-first document of this
6 group of 21 documents was, again, a document in French which had
7 previously been disclosed to the Defence in English only.

8 At this disclosure meeting yesterday evening, the Prosecution
9 also disclosed four documents, comprising 123 pages, as potentially
10 exculpatory evidence; two of which contained redactions authorised by
11 your Honour in the second decision and one of which is a French version
12 of a document previously disclosed only in English to the Defence.
13 Finally, the Prosecution provided the Defence with a CD containing six
14 documents, comprised of 46 pages, which fall within the scope of Rule 77.
15 This brought the total number of documents disclosed or provided for
16 pre-inspection, on the 25th of September, to 31 documents, comprising 473
17 pages.

18 Finally, your Honour, today, that is during the break of this
19 Status Conference, the Prosecution disclosed to the Defence one, one-page
20 document that it intends to rely on at the confirmation hearing. And,
21 again, in the case of this document, it was a French version of an
22 English document disclosed and which was already part of our list of
23 evidence. The Prosecution also disclosed three documents, comprising 94
24 pages, as potentially exculpatory evidence. And, again, these were three
25 French documents that are French versions of previously disclosed English

1 versions -- English documents. This brought the total of documents
2 disclosed today to four documents, 95 pages.

3 Your Honour, with your permission, I am now going to give you an
4 overview of the overall status of disclosure.

5 Since the beginning of the disclosure process in March of this
6 year, the Prosecution and the Defence have met on 18 opportunities. The
7 average interval of disclosure and inspection or pre-inspection meetings
8 has thus continued to be roughly one and a half weeks. The combined
9 result of these 18 disclosure exchanges that have taken place brings the
10 total number of materials disclosed as incriminating evidence to be
11 relied on at the confirmation hearing to 279 documents, 4.468 pages, and
12 18 videos. The number of materials disclosed as potentially exculpatory
13 evidence is now 102 documents, spanning 1.419 pages. And finally, the
14 number of materials which have now been provided for inspection or
15 pre-inspection is 77 documents, spanning 810 pages. The total, the
16 overall number of disclosed or inspected materials comes to 458
17 documents, 6.697 pages, and 18 videos.

18 I will now, your Honour, proceed with an account of the filings
19 in the record of the case that are related to the disclosure activities
20 since the last Status Conference. I will first address a filing of the
21 originals of all incriminating materials the Prosecution intends to rely
22 on at the confirmation hearing.

23 The originals of the documents disclosed to the Defence as
24 incriminatory evidence on the 6th of September were filed with the
25 Registry on the following day, that is on the 7th of September. The

1 originals of the documents disclosed to the Defence on the 15th of the
2 September were filed with the Registry on the 19th of September. The
3 originals of the documents filed -- disclosed to the Defence on the 25th
4 of September are being filed with the Registry, and we expect them to be
5 filed by tomorrow. The originals of the documents disclosed to the
6 Defence as incriminating evidence today, and that's a single document,
7 will be filed with the Registry shortly.

8 I will now address the filings related to the disclosure of
9 potentially exculpatory evidence.

10 Since the Status Conference on September 5th, the Prosecution has
11 filed three disclosure notes of potentially exculpatory evidence in the
12 record of the case on the 7th of September, the 12th of September, and
13 the 19th of September. Two further disclosure notes, those that
14 correspond to the disclosures that took place on the 25th of September
15 and today, will be filed with the Registry very shortly. We anticipate
16 maybe even as early as tomorrow.

17 Finally, as for the materials provided for pre-inspection
18 pursuant to Rule 77, the pre-inspection notes were filed as follows:

19 The pre-inspection note for the materials inspected on the 6th of
20 September was filed with the Registry on the 7th of September. The
21 pre-inspection note for materials disclosed on the 11th of September was
22 filed on the 12th of September. The pre-inspection note for materials
23 inspected on the 15th of September was filed on the 19th of September.
24 And the pre-inspection note for materials inspected yesterday will be
25 filed with the Registry shortly.

1 Your Honour, this will be all as far as my report goes. Thank
2 you.

3 JUDGE STEINER: Thank you very much, Ms. Solano.
4 Mr. Withopf.

5 MR. WITHOPF: Your Honour, following the update by Ms. Solano, I
6 wish to make, as usual, a number of additional observations. These
7 observations this time will be slightly different as compared to the
8 observations at the occasion of previous Status Conferences for the very
9 obvious reason, since, since the filing of the list of evidence on 28th
10 of August of this year, the Prosecution's disclosure activities have
11 substantially changed.

12 At this stage, the Prosecution is not disclosing additional
13 incriminatory evidence for the only reason, the 28th of August was the
14 deadline, and I hasten to add that, of course, we are implementing any
15 decision of your Honour, the Single Judge, in relation to the
16 Prosecution's Rule 81 applications as soon as possible and as we have
17 done in respect to the second decision that was rendered in the course of
18 last week.

19 In addition, all matters related to disclosure have been reported
20 to the Single Judge at the various Status Conferences and they have been
21 extensively litigated. As can be seen from Ms. Solano's report,
22 disclosure becomes a routine. It's a routine each month. And we almost
23 weekly meet with our friends from the Defence and disclose additional
24 materials.

25 We, nevertheless, want to highlight a number of facts that show

1 the Prosecution's commitment to its disclosure obligations. A number of
2 these issues have been addressed earlier on today, and I will keep these
3 matters short. I will, however, address a few additional matters.

4 We highlight these facts: That at no point in time, at least not
5 up until recently when the Defence changed its approach - and I will
6 address this change later on - at least up until recent times, there was
7 never, ever a serious complaint of the Defence in respect of the
8 Prosecution complying with its statutory duties. I think it's also worth
9 to mention, and it's in particular worth to mention, that your Honour,
10 the Single Judge, has never raised significant concerns in relation to
11 the Prosecution's disclosure practice. It can therefore be concluded
12 that as a matter of fact the Prosecution has, and continues to, fulfil
13 its obligations, and continues to do so.

14 Against this background, we want to draw the attention of your
15 Honour to a number of facts or details that provide further insight into
16 the Prosecution's disclosure activities. We have mentioned earlier on
17 today that the Prosecution is highlighting in the materials that are
18 being disclosed to the Defence the portions which we believe are of
19 potentially exculpatory information. We are of the view that, in doing
20 so, we are facilitating the work of the Defence and we are certainly
21 going beyond our statutory duties.

22 Second, the Prosecution has completed, or almost completed - only
23 a handful of statements need to be further reviewed - the Prosecution has
24 almost completed its review of all, and we repeat "all," its witness
25 statements taken in the DRC situation. And I'm talking about 200 such

1 statements. And we have to emphasise that whenever we talk about
2 statements, we define this term in the broadest terms possible, meaning
3 signed statements, unsigned statements, investigators' notes, and notes
4 of screening interviews.

5 Having applied these criteria, the Prosecution has disclosed to
6 date all excerpts of such statements that are of potentially exculpatory
7 nature. All excerpts in this context means the Prosecution has provided
8 for disclosure excerpts of 59 statements. Your Honour, and the Defence
9 team will certainly appreciate, this is a particular -- that it is a
10 particularly important aspect of the Prosecution's duty under Article
11 67(2), and the Prosecution has made very particular efforts to discharge
12 that duty.

13 Third, the Prosecution - and I'm not going into further detail
14 because it has been addressed a number of times - has taken particular
15 care in identifying potentially exculpatory materials and documents that
16 fall within the protection of Article 54(3)(e) and has requested a
17 lifting of such restrictions. These efforts have resulted, in particular
18 during the last weeks - and my learned friends from the Defence have
19 certainly noticed it - in repeated disclosures of substantial amounts of
20 materials that were previously Article 54(3)(e)-protected. In addition,
21 the Prosecution continues to be in contact with providers in order to
22 ensure that the various lifting requests are dealt with in time.

23 I only want to flag the fact that has been addressed today a
24 number of times, that we are providing for French translations of
25 previously disclosed English materials. This is a matter of professional

1 courtesy, and this exercise has resulted, within the last few days or the
2 last few weeks, in providing about 20 such documents comprised of about
3 736 pages.

4 Finally, though not very important, however still of some value,
5 the Prosecution in respect of handwritten documents always provides both
6 the electronic version and the paper copies because, as a matter of fact,
7 the paper copies are easier to read.

8 As I mentioned at the beginning, the Prosecution has noticed
9 recently a change in the Defence approach in respect of the Prosecution's
10 compliance with its statutory duties, a change coupled with an obvious
11 change in style and tone. The Prosecution leaves it to the Defence which
12 style and tone they want to use. The Prosecution will, however, always -
13 always - identify factual inaccuracies in the Defence submission and the
14 Prosecution will set the record straight.

15 In this context, we wish to address two aspects of the Defence
16 filing of 20th September 2006, titled "Request for Further Information
17 Regarding the Confirmation Hearing and for Appropriate Relief to
18 Safeguard the Rights of the Defence and Thomas Lubanga Dyilo."

19 In this filing, the Defence was wondering and was trying to make
20 an issue of the fact that the Prosecution continues to disclose materials
21 of potentially exculpatory value beyond the date of the 28th of August,
22 2006. The Defence obviously reads the 28th of August, 2006, also as a
23 deadline for the Prosecution's disclosure obligations under Article
24 67(2). The Prosecution considers its disclosure obligation under Article
25 67(2) being an ongoing obligation, beyond the date of the filing of the

1 document containing the charges and the list of evidence. Accordingly,
2 the Prosecution will continue, because it's bound so by the law, to
3 disclose materials of potentially exculpatory nature.

4 The Prosecution is also a bit surprised that the Defence
5 continues to make the argument that the Prosecution has not complied with
6 the e-court protocol as attached to the 15th May decision of your Honour,
7 the Single Judge. This issue has been discussed at length a number of
8 times, and the Single Judge has expressed her concurrence with the
9 Prosecution's view, and that the Defence, in our view, would be well
10 advised to not raise again and again issues that aren't dealt with.

11 The Prosecution is even more concerned about the statement of the
12 Defence that "the Prosecution," and I quote, "the Prosecution bears
13 special responsibility for the delays in processing Rule 81
14 applications." This issue has been discussed at length earlier on today,
15 and the Defence knows exactly that this statement is factually incorrect.
16 The Prosecution has simply applied the law in an effort to provide for
17 adequate standards of protection of victims and witnesses, and the
18 Prosecution has, most importantly, filed its applications by the
19 deadline. I refer, in respect to these applications, to what we have
20 said earlier on today.

21 Your Honour, I stop here in summarising that, in our view, the
22 Prosecution has complied and continues to do so with its disclosure
23 obligations. This brings my submission to an end, your Honour. Thank
24 you very much.

25 JUDGE STEINER: Thank you very much.

1 Mr. Flamme.

2 MR. FLAMME (interpretation): I have no specific observations to
3 make, your Honour. Simply the following: I do not have the documents
4 before me, the document to which the Prosecutor refers, but it is
5 certain - and I have already expressed this to the Prosecutor directly,
6 that is to say my concerns - it is certain that the Defence is of the
7 opinion that the Prosecutor is making exaggerated use of the ex parte
8 technique. I would remind the Chamber that ex parte does not figure in
9 the Statute but that it only appears in the rules, under the coverage of
10 an article.

11 In your decision of the 19th of May, I believe, you said that in
12 the framework of 84, ex parte was the exception and that justification
13 had to be made of exceptional circumstances to request the use of this
14 technique; whereas I note that, the Prosecutor, as a rule, has not made
15 an inter partes request under 84.

16 So I'm obliged to note that we find ourselves in a situation
17 where the Prosecutor leads the Chamber to discuss ex parte a large part
18 of the evidence and perhaps the greater part of the evidence. And
19 therefore we find ourselves in a situation, a confirmation hearing
20 situation, where the Defence has been excluded from a large part of the
21 evidence and has not been put in the position of being able to establish
22 the credibility of these documents, documents that are redacted by the
23 Prosecutor and the Chamber. The Prosecutor and the Chamber will have a
24 full knowledge of the documents, and I believe that this is an enormous
25 problem.

1 JUDGE STEINER: Would the Prosecution like to add something to
2 this topic?

3 MR. WITHOPF: Yes, very briefly. I don't think that the
4 Prosecution is making exaggerated use - I think that's the words that
5 were used - of the Rule 81 applications on the ex parte proceedings.
6 What is being discussed in these proceedings, and it's very obvious to
7 the Defence, are matters related to the protection of victims and
8 witnesses. It's not the evidence that's being discussed.

9 I think this is very important to mention to avoid any
10 misunderstanding on the side of our learned friends from the Defence.
11 These applications are pursuant to Rule 84(4), and the only purpose is to
12 provide for the protection of victims and witnesses. Evidence is not
13 being discussed.

14 JUDGE STEINER: If Mr. Flamme has nothing to add, I would ask the
15 Registry to -- if the Registry has something to add in this disclosure
16 process, and mainly on the communication of evidence.

17 MR. MIJUSKOVIC: Thank you, your Honour. The Registry has
18 nothing to add.

19 JUDGE STEINER: In relation to the filing of the evidence and the
20 use of the e-court protocol for the filing of evidence, is there any
21 update to be made?

22 MR. MIJUSKOVIC: Yes, your Honour. Perhaps something that wasn't
23 mentioned in the comprehensive report by Ms. Solano, on the 7th of
24 September, the Prosecution resubmitted previously disclosed evidence in
25 accordance with the new protocol, with the protocol as it stood once

1 finally adopted.

2 We received three CDs -- four CDs, sorry. An additional one was
3 received on the 19th, and two additional CDs were received yesterday.
4 The materials were imported into the system, after which we requested the
5 OTP to release those documents, which would actually mean that they
6 confirmed that what is imported in the system is actually what should be
7 there; there are no technical mistakes, that nothing was deleted in the
8 process of importing.

9 Once that is done, access is given also to Chambers to the
10 materials. 299 documents have been released so far; nine -- yes, nine
11 documents or, rather, data in relation to nine witnesses also has been
12 released. We are still awaiting for the release of the materials that
13 were received yesterday evening, which were received in compliance with
14 your second decision. Once that is done, these materials will be also
15 released and the Chamber will be given access in a matter of hours.
16 Thank you.

17 JUDGE STEINER: Thank you very much. Unless the parties have
18 something to add on this disclosure process and filing of evidence, I
19 think we can go to the last item of the agenda, which is other matters.
20 I would ask the Defence and Prosecution if there are any other matters to
21 be dealt with in this Status Conference.

22 MR. WITHOPF: Your Honour, the Prosecution has no further matter
23 to raise today. Thank you.

24 JUDGE STEINER: Defence?

25 MR. FLAMME (interpretation): I have nothing to add, your Honour.

1 Thank you.

2 MR. DUBUISSON (interpretation): Nothing to add.

3 JUDGE STEINER: Representative of the victims, is there any other
4 matter that should be raised?

5 MR. WALLEYN (interpretation): Your Honour, for the time being, I
6 have not raised any observations, but I can say that we may request some
7 clarifications, particularly regarding the consequences of the decision
8 of the 22nd of September as regards the servicing of public documents to
9 the representatives of the victims. But we need not deal with that
10 today. We can return to this later.

11 JUDGE STEINER: Thank you very much.

12 I would like to thank all participants of this hearing, of this
13 second part, for this very brief updating on the situation, on the
14 disclosure proceedings leading to the confirmation hearing.

15 The Chamber has taken notice of all complaints made by the
16 Defence team, mainly by the Defence team, since the beginning of this
17 Status Conference, and we will decide on the issues at the proper moment.

18 I would like to thank you very much, the Prosecution, the legal
19 representative of victims, the Defence team and the Registry. I would
20 like to again welcome Mr. Thomas Lubanga Dyilo, who is present at this
21 Status Conference. If there is nothing else to be discussed, the hearing
22 is adjourned.

23 THE USHER: All rise.

24 --- Whereupon the Status Conference adjourned at 5:07 p.m.