

1 INTERNATIONAL CRIMINAL COURT
2 SITUATION DEMOCRATIC REPUBLIC OF CONGO
3 Case No: ICC-01/04-01/06
4 Thursday, 26 October 2006 2.06 p.m.
5 OPEN SESSION
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7 Before: His Honour Judge Jorda (Presiding Judge)
8 Her Honour Judge Kuenyehia Her Honour Judge Steiner
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10 PRE-TRIAL CHAMBER I
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1 [2.06 p.m.] ICC-01/04-01/06-T-26-EN
2 THE USHER: All rise. The International Criminal Court is
3 now in session. Please be seated.
4 PRESIDING JUDGE JORDA (interpretation): Registrar, would
5 you please call the case, which we are dealing with today,
6 please.
7 COURT OFFICER (interpretation): Thank you, Mr President.
8 Situation in the Democratic Republic of the Congo, in the case
9 of the Prosecutor versus Thomas Lubanga Dyilo, case no.
10 ICC-01/04-01/06.
11 PRESIDING JUDGE JORDA (interpretation): Thank you. I would
12 like the parties to introduce themselves. First, the
13 representative of the Prosecutor -- even if we know each
14 other, it is important.
15 MR WITHOPF: Good afternoon, Mr President. Good afternoon,
16 your Honours. Good afternoon to my learned friends from the
17 Defence and from the Office of Public Counsel for the Defence.
18 Good afternoon to the legal representatives of the victims and
19 the representatives of the Registry and, as always, I extend
20 my greetings to everybody in and around the courtroom. For
21 the Prosecution today appear Ms Solano -- Ms Julieta Solano --
22 she's an Associate Trial Lawyer next to me; behind her
23 Ms Olivia Struyven, she's also an Associate Trial Lawyer;
24 Mr Michael Lees, behind Ms Struyven -- he's the head of the
25 OTP's Knowledge Base Unit; behind me, Ms Ramu Bittaye, our

1 Case Manager; and I, Ekkehard Withopf, the Senior Trial
2 Attorney.

3 PRESIDING JUDGE JORDA (interpretation): I am now going to
4 turn to the Defence. I see that Mr Lubanga is not present.

5 MS TAYLOR: Mr President, Mr Lubanga wished to continue
6 working this afternoon. My name is Melinda Taylor. I'm
7 appearing today on behalf of Me Jean Flamme, together with
8 Madame Veronique Pandanzyla. Thank you.

9 PRESIDING JUDGE JORDA (interpretation): Very well, thank you.
10 We also have the representatives of the victims, whom we
11 welcome. I'd like them to introduce themselves.

12 MR WALLEYN (interpretation): Thank you, Mr President. I am
13 here with Counsel Paolina Massidda for the first three
14 victims, that is, victims 1, 2 and 3, and my name is
15 Luc Walley. Luc Walley.

16 PRESIDING JUDGE JORDA (interpretation): I think we have a new
17 victims' representative. Yes?

18 MR GEBBIE: Gebbie, yes. I appear today for Me Carine
19 Bapita, who represents the victim number 105, and I'm assisted
20 today by Madame Sarah Pellet of the Office of Public Counsel
21 for Victims.

22 PRESIDING JUDGE JORDA (interpretation): I also welcome all
23 the participants in the courtroom from the Registry and their
24 assistants here for us and elsewhere in the courtroom.

25 I would like to recall for the benefit of the representatives

1 of the victims that they can only attend the public session
2 and we shall make a break in the session at a time which
3 I will indicate to you. For the time being, this hearing will
4 be in two parts. There will be a confidential part, which of
5 course I shall not discuss, but there will also be a first
6 part, which will be devoted to the modalities for the
7 confirmation hearing, because this confirmation hearing is to
8 take place on 9 November in the morning. So the Chamber needs
9 to answer a certain number of questions. Of course we have
10 had time limits, both on the part of the Prosecution and on
11 the part of the Defence, which were established beforehand.
12 We had many Status Conferences, especially through
13 Judge Steiner acting as Single Judge. I also worked in that
14 capacity. So we have to move now into the substance of the
15 case.

16 So I shall turn first to the Prosecutor, and I'm going to put
17 a few questions to him and I would like him to provide as
18 precise answers as possible to the Chamber. How much time
19 will you need to present your case? I am going to speak
20 slowly so that you can take notes. How much time do you think
21 you will need to present evidence and examine the witness? Do
22 you intend first to present some evidence and then examine
23 your witness, or do you wish to present evidence that can be
24 discussed in public sessions and then request closed sessions
25 afterwards?

1 So I repeat my question: do you wish first to present evidence
2 that can be discussed in open session prior to requesting
3 closed session? Do you wish to make any final written
4 submissions after the hearing? Perhaps we might have other
5 questions to put.

6 Now, on the part of the Defence, first, how much time will the
7 Defence need to respond to the submissions and presentations
8 of the Prosecutor? I would recall that 25 October, which was
9 the time limit, is now passed and there's a new time limit,
10 that is, 2 November. Although the Trial Chamber is aware that
11 the hearing itself will determine the answer of this -- answer
12 to this question, we would like to have some idea of what you
13 think so that we'll be able to set a calendar or an agenda for
14 this hearing. Do you have any intention to present written
15 submissions after the hearing, that is, during the
16 deliberations?

17 I recall that after the final date of the hearing -- and this
18 is for the information of the public; I inform the public as
19 well -- that the Chamber will have 60 days, not 51, 59 or 61,
20 to decide. Now, it is based on whatever submissions you may
21 wish to make that we will determine how you will participate.

22 Before the participants respond, the Trial Chamber wishes to
23 indicate that the manner in which the witness will be examined
24 will be taken account of by the Chamber as well. So it is
25 important, in other words, that the witness stays in The Hague

1 only for the duration of the hearing. Of course, I say this
2 based on whether it is possible or not. Of course
3 participants may add other items to this list that they wish.
4 So, without further ado, during this first part I would like
5 to turn to Mr Withopf or his colleague for answers to these
6 questions I have put.

7 MR WITHOPF: Thank you very much, Mr President, and your
8 Honours, to give us an opportunity to outline how the
9 Prosecution sees the conduct of the confirmation hearing and,
10 in doing so, I will precisely answer to all of your questions.
11 The Prosecution, and most likely the Deputy Prosecutor,
12 intends to make on 9 November, which is a Thursday,
13 introductory remarks covering general aspects of the case
14 against Mr Thomas Lubanga Dyilo, such as the importance of the
15 case and such as the gravity of the crimes Mr Thomas Lubanga
16 Dyilo is charged with.

17 We understand, Mr President, your Honours -- and we understand
18 it from reading your 22 September 2006 decision on the
19 modalities of victims' participation -- that your Honours
20 expect the participants to the confirmation hearing making an
21 opening statement. The Prosecution notes that neither
22 Article 61 nor Rule 122 regulate an opening statement and,
23 therefore, we would appreciate, and we would appreciate very
24 much, to receive guidance and direction of your Honour,
25 Mr President.

1 Pending such guidance, we suggest to provide you with a
2 summary, and it would be a brief summary, of the case as the
3 Prosecution sees it, and of the evidence we will present to
4 establish substantial grounds to believe that Mr Thomas
5 Lubanga Dyilo committed the crimes charged.

6 We do not anticipate that such an opening statement of the
7 Prosecution takes longer than about 60 to 90 minutes, at the
8 maximum. At this stage, Mr President, your Honours, and
9 pending further guidance, we work on the basis that the agenda
10 for 9 November will be limited to the opening statements of
11 the participants, and we suggest -- and this is obviously a
12 suggestion only -- to the participants and to the Pre-Trial
13 Chamber to provide for the order of the opening statements as
14 follows: first, the Prosecution, and then in our view it
15 should be the representatives of the victims, of the two
16 groups of the victims and, finally, it should be, in our view,
17 the Defence.

18 Working on that basis and pending further guidance of you,
19 Mr President, and your Honours, the Prosecution intends to do
20 the following for the subsequent days: on Friday, 10 November,
21 on Monday, 13 November and, if needed, on Tuesday,
22 14 November, we intend to lead you, Mr President and your
23 Honours -- to lead you in detail -- through the Prosecution's
24 evidence covering all aspects as contained in the document
25 containing the charges.

1 What does "leading through the evidence" in this context mean?
2 It entails, Mr President, that we will discuss in detail the
3 evidentiary materials from our list of evidence and we will
4 limit the discussion to such evidentiary materials which, in
5 our view, are best suited to meet the threshold of
6 Article 61(5). We will pay particular attention to show you,
7 Mr President, and your Honours, the interlinkage between the
8 various elements of our evidentiary materials.
9 We wish to draw the attention of you, Mr President, and your
10 Honours, that we have no plan -- that we have no plan -- to
11 discuss each and every single item of evidentiary materials on
12 our list of evidence. There will be a selection -- and it
13 will be a very careful selection -- and I hasten to add that
14 the selection will very much depend on what the Defence is
15 going to present as evidence. Unfortunately, the Defence has
16 not filed, at least not to our knowledge, yesterday, as they
17 have been ordered, a list of evidence. So at this stage I
18 cannot make yet a clear determination what the selection of
19 the Prosecution's evidence will be about.
20 In order to plan, we would also appreciate, Mr President, if
21 the Pre-Trial Chamber could provide us information as to
22 whether the Chamber intends to sit full days or to sit half
23 days, and in either situation we would also appreciate to get
24 to know how many hours your Honours plan to sit in either
25 case.

1 At this stage, working on the basis that there will be full
2 day court sessions, the Prosecution is planning for Friday,
3 10 November, to address matters linked to the general
4 allegations and to the background sections in the document
5 containing the charges. And we will also provide evidence and
6 discuss evidence in respect of Mr Thomas Lubanga Dyilo's
7 background. If time permits, on 10 November we will also
8 cover the UPC's and the FPLC's structure, and obviously we
9 will focus on the role Mr Thomas Lubanga Dyilo played in that
10 structure during the relevant period of time.
11 In particular, in the context of these portions of our
12 presentation we plan to use -- obviously in addition to
13 evidentiary materials we plan to use visual aids such as maps,
14 such as charts, and we will, obviously as part of our
15 evidentiary materials, also use video materials, and possibly
16 photographs.
17 On Monday, 13 November, the Prosecution intends to present its
18 evidence on the UPC and the FPLC's policy to recruit children
19 and to use children to participate actively in hostilities.
20 We will also present --
21 [Pause in proceedings due to technical difficulties]
22 PRESIDING JUDGE JORDA (interpretation): Mr Prosecutor, you
23 know the Court is very sophisticated. It is perhaps designed
24 for sophisticated judges, which I'm not. Thank you. Very
25 well, please continue.

1 MR WITHOPF: Thank you very much, Mr President. Be assured
2 I'm sometimes facing the very same problems.
3 I refer to Monday, 13 November. The Prosecution intends to
4 present its evidence on the UPC and FPLC's policy to recruit
5 children and to use them actively to participate in
6 hostilities, the transformation of this policy into practice,
7 and the pattern of the FPLC in the recruitment and use of
8 children.
9 If we need to do so, we want, on Tuesday, 14 November, to
10 discuss the individual cases of the six victim witnesses.
11 By saying "if we need to do so", I obviously am asking the
12 question whether we can do it on Monday, or whether it is
13 necessary to do it on Tuesday. We will obviously do it in any
14 event.
15 In addressing a further question of you, Mr President, your
16 Honours -- and the question was put to us in relation to the
17 sole and the single witness the Prosecution will call for the
18 confirmation hearing -- our plan is the following: we intend
19 to examine in chief that witness on Wednesday, 15 November and
20 on Thursday, 16 November. We anticipate that the
21 examination-in-chief will take us two full days. We
22 anticipate two full days because of the lengthy statement that
23 witness has the Office of the Prosecutor provided with [sic]
24 and also and in particular because we intend to make that
25 witness comment on a whole series of documents.

1 In this context, Mr President, we wish to use the opportunity
2 to address a whole series of matters -- namely, first, the
3 Prosecution has invited the witness for what is commonly
4 referred to as "proofing" for next week, and the Prosecution
5 intends to have proofing sessions with that witness for a
6 number of days next week.
7 Second, Mr President, the Prosecution would appreciate to get
8 to know to what extent your Honours plan to make use of
9 Rule 140(1)(c), namely, to question the witness before -- and
10 the emphasis lies obviously on the word "before" -- the
11 parties. If your Honours intend to do so, this would
12 obviously have a significant impact on the scope of the
13 Prosecution's examination-in-chief of the witness.
14 Third, the Prosecution has taken note of the request of the
15 Defence, that the Defence wishes to receive obviously a
16 questionnaire -- and I believe the Defence requests a very
17 detailed questionnaire -- detailing the questions the
18 Prosecution intends to put to the witness. I emphasise at
19 this stage and at this opportunity that the Prosecution
20 doesn't see any legal basis for such a request and,
21 accordingly, the Prosecution has no intention to provide such
22 a questionnaire to the Defence.
23 Finally, the Office of the Prosecutor, the Prosecution, works
24 on the basis, pending further contacts with the witness, that
25 most -- at least most -- of the examination of the witness can

1 be done in public session. But, again, I emphasise we are in
2 contact with the witness, and if this further contact reveals
3 that there are issues that may lead to requests for protective
4 measures, the Office of the Prosecutor would obviously request
5 such protective measures.

6 Obviously, the Prosecution cannot much talk about the
7 Defence's portion of the confirmation hearing. I understand
8 Defence has a great interest to cross-examine the witness, and
9 of course the Prosecution would then like to re-examine the
10 witness if the need arises. The Prosecution will certainly,
11 as foreseen in the law -- and I refer to Rule 122(8) -- the
12 Prosecution will certainly make final observations, possibly
13 comprehensive such observations, providing in detail for the
14 assessment of the evidence as submitted by the parties.

15 The Prosecution has also taken note of the request of the
16 Defence for written submissions -- that the parties should be
17 allowed to submit submissions in writing after the conclusion
18 of the confirmation hearing. The Prosecution would agree that
19 there should be a certain time in between the end of the
20 presentation of the evidence and the final observations. The
21 Prosecution, however, opposes the suggestion or the request of
22 the Defence that the parties should be allowed to make written
23 submissions either replacing the final observations, or in
24 addition to the final observations.

25 The Prosecution is of the view that a confirmation hearing has

1 an oral character, and the law only provides for final
2 observations. And in the context of Rule 122, these are oral,
3 final observations.

4 If your Honours -- if you, Mr President, however, intend to
5 grant the Defence request, we would suggest that the time
6 period in between the conclusion of the confirmation hearing
7 proper and the written submissions should be a limited one --
8 a very limited one -- not exceeding five or six calendar days.

9 Mr President, your Honours, I'm coming to the conclusion,
10 obviously, of my observations. There are only very few
11 matters left I wish to very briefly address, and I address
12 you, Mr President, because the law provides a particular role
13 of the presiding judge.

14 It would help the Prosecution -- and obviously, also, in our
15 view the Defence and the legal representatives -- if the
16 Chamber would provide guidance and direction, not only in
17 respect to the aspects and elements I have mentioned, but
18 also, and in particular, in relation to the areas of the
19 document containing the charges, your Honours, which you
20 particularly have addressed by the Office of the Prosecutor.

21 That would allow us to focus our presentation on these
22 particular aspects.

23 There are two further issues I only want to flag, and you have
24 mentioned it at the beginning, Mr President. Yes, the
25 Prosecution believes that whilst the majority -- the vast

1 majority of the confirmation hearing, in our view, can be
2 conducted in public session, there will be certainly portions,
3 including significant portions, which should be conducted --
4 PRESIDING JUDGE JORDA (interpretation): I cannot hear the
5 interpretation. Please continue, Mr Withopf. I don't know
6 whether I have interpretation so far, but please continue.
7 MR WITHOPF: I was about to address the issue to what extent
8 the confirmation hearing can be in public and to what
9 extent --
10 PRESIDING JUDGE JORDA (interpretation): I'm afraid I'm going
11 to have to listen to the English, even though I prefer not to
12 do so.
13 MR WITHOPF: I was about to address, and I'm happy to repeat
14 myself -- no worries, we are discussing a very important
15 matter, and I'm very happy to repeat our observations.
16 PRESIDING JUDGE JORDA (interpretation): So, I had got to the
17 point about the Chamber presenting you observations and you
18 wanted to flag two other points. I think that's where I was.
19 MR WITHOPF: That's exactly correct, Mr President. And,
20 again, I'm very happy to repeat what I said in respect to the
21 public portions and what we believe should be dealt with in
22 closed session.
23 At this stage we work on the basis that most of the
24 confirmation hearing can be conducted in public session.
25 However, we also work on the basis that significant portions

1 and, in particular, everything that's related to the
2 individual cases of the victim witnesses should be dealt with
3 in closed session. Accordingly, the Prosecution would
4 appreciate a determination of this matter by your Honours,
5 Mr President.

6 And, finally, though it appears to be a very technical aspect,
7 it is a very important aspect, and I'm talking about the
8 technical way to present the evidence. We wish to emphasise
9 that the Prosecution should be able to control the use of the
10 presentation system in selecting and presenting the evidence
11 to be presented, and we also believe that the Registry should
12 be invited to initiate a further dialogue with the
13 participants to the confirmation hearing to discuss in more
14 detail the technical modalities of the presentation of
15 evidence. Again, the Prosecution will rely, inter alia, on
16 video footage, on photographs, on charts. For that reason, we
17 believe, for a smooth running of the confirmation hearing, it
18 is very important that these issues are discussed and decided
19 upon prior to the confirmation hearing.

20 This remark, Mr President, your Honours, concludes our
21 observations on the conduct and the modalities of the
22 confirmation hearing. Thank you very much.

23 PRESIDING JUDGE JORDA (interpretation): Thank you. We are
24 going to try and answer some of your questions -- not all,
25 but I just wish to consult with my colleagues.

1 [Pause]

2 PRESIDING JUDGE JORDA (interpretation): Excuse us, we just
3 wanted to clarify a couple of technical points.
4 Now, clearly, you have provided some information by way of
5 response to certain points which we have put. There are a
6 couple of points that I would like to pick up on myself as the
7 presiding judge at the end. But, for the time being, my
8 colleagues and I agree that we now hear from the
9 representative of Jean Flamme and hear her observations, and
10 then we shall turn to the victims in due course. Mrs Taylor,
11 I believe you are taking the floor.

12 MS TAYLOR: [Microphone not activated].

13 PRESIDING JUDGE JORDA (interpretation): Can you hear me? Can
14 you hear me? I think it is possible to consult Mr Flamme, but
15 please do it as soon as you can, because you are not always in
16 keeping with time limits. You need to consult him, as I think
17 is normal. Please do so as quickly as possible, and then you
18 should try to answer the questions that we have raised and
19 which questions I'm sure you have thought about for some time
20 now, I'm sure.

21 MS TAYLOR: I will consult with Me Flamme during the next
22 break.

23 The first issue was regarding the submissions, or the opening
24 submissions for the confirmation hearing, and in this regard
25 the Defence would like to distinguish between two types of

1 opening submissions, the first being clearly foreseen by
2 Rule 122, and that would be the opportunity of the Prosecutor
3 or the person to raise any submissions regarding any
4 objections it's had in relation to the proceedings prior to
5 the confirmation hearing.
6 At this point in time the Defence can't completely anticipate
7 what submissions it will make, because obviously there are
8 some issues that may arise before the confirmation hearing.
9 It does, however, submit that such objections or submissions
10 are separate from the category of opening submissions and, as
11 such, time should be allocated accordingly.
12 In terms of the timing for opening submissions, the Defence
13 would like to submit that it is, in effect, being presented
14 with two categories of opening submissions -- those of the
15 Prosecutor and those of the victims -- which both impinge upon
16 its rights and both impinge upon its case and, as such, it
17 should be provided adequate opportunity to address both
18 categories of submissions and, as such, time should be
19 allocated accordingly.
20 Thirdly, regarding the issue of timing for cross-examination,
21 the Defence would submit that any time provided to the
22 Prosecutor should also be allocated pro rata to the Defence.
23 There is also the additional issue of the dates for the
24 presentation of evidence and the date for the
25 examination-in-chief of the witness. In this regard, the

1 Defence would like to stress that it's absolutely necessary
2 that it be given sufficient time to be able to consult with
3 Thomas Lubanga Dyilo regarding any issues arising during the
4 confirmation hearing.
5 During -- if the Court intends to sit full days, it is not
6 really feasible or practical for the Defence to be able to
7 consult, on an ongoing basis, with Thomas Lubanga Dyilo. In
8 addition, it is constrained by the visiting hours of the
9 Detention Unit and, as such, it submits that there should be a
10 break between the examination-in-chief and the
11 cross-examination, which would serve two purposes. Firstly,
12 it would allow the Defence to consult with Thomas Lubanga
13 Dyilo and, secondly, it would allow the Defence to address any
14 issues which have arisen through the witness's testimony which
15 it can't anticipate, and this is something which would be more
16 properly addressed in closed session.
17 Regarding the issue of the list of Defence evidence, I'm not
18 sure if this is an appropriate time to address this question,
19 or to address it after the questions have been addressed.`
20 Absolutely, and that's what we have been expecting since
21 yesterday. Indeed, you are out of time. Either you wish to
22 speak of it or you do not. There is a new deadline which was
23 set out in a recent decision -- that is 2 November for your
24 main exculpatory evidence, but you are out of date. If you
25 wish to speak of the matter, you may, but in theory the matter

1 is now overdue.

2 MS TAYLOR: Thank you, Mr President. I have been asked
3 Me Flamme to present the following submissions very forcefully
4 on his behalf, and that is he strongly submits that this
5 Chamber must recognise the practical impossibilities and
6 impediments faced by a Defence team trying to conduct
7 investigations under the current circumstances.

8 Your Honours, the Defence informed the Chamber in a filing of
9 the practical impossibility of communicating between Defence
10 team members. Your Honours, this Chamber, this Court, has
11 repeatedly emphasised the necessity of confidential
12 communications and of witness protection. Surely it cannot
13 expect, or cannot expect the Defence to have anything less for
14 its own witnesses and for its own evidence.

15 Last week the amended list of evidence was disclosed on a
16 confidential basis. As such, because it is sent by email by
17 the Registry, at this point in time, or at that point in time
18 the Registry was unable to send confidential filings to the
19 Defence team. As such, Me Flamme would not have received it
20 in the DRC. He was therefore unable to compare anything he
21 may have had with this list of evidence, nor was he able to
22 access Ringtail on a remote basis, because the necessary
23 software had not been provided to him before he left for the
24 DRC.

25 In September, the Defence team was informed of the practical

1 impossibility of going to the DRC because of the deterioration
2 in the security situation. It was informed that the Court
3 could not rely on the current security structures in the DRC.
4 It therefore did not plan a mission because it did not expect
5 that such a mission would be technically feasible, nor, given
6 what happened in August, did it wish to place itself in the
7 same position -- that of having to be evacuated from the DRC.
8 As soon as it received the date of the confirmation hearing,
9 it attempted to schedule its mission. The lead counsel is
10 currently in Uganda. He attempted to -- he wished to come
11 back earlier, but was unable to schedule another flight.
12 Me Balembo is currently waiting to see if he can have a visa
13 to know if he can come back to the Netherlands. Me Balembo
14 has documents with him, but unfortunately, we asked -- the
15 Defence team asked that he be put on a flight so that he would
16 be back here before 2 November. At this point in time we
17 still don't know if that can be organised in time. Since the
18 Defence team cannot communicate by confidential email, your
19 Honours, I really must ask how we were supposed to put
20 together this list of evidence. Should I have spoken to
21 Me Flamme on a phone? It would have just been, "List A,
22 document -- I'm sorry, you're breaking out." There must be
23 some understanding of the practical impediments for Defence
24 teams in the field, and this is something that we ask your
25 Honours to take into consideration, since the Defence team is

1 definitely doing its best to ensure that this confirmation
2 hearing takes place as soon as possible.

3 Another issue regarding the list of evidence is that the
4 Prosecutor has, on numerous occasions, informed this Chamber
5 that the Defence has never asked for exculpatory materials, or
6 never given any exculpatory criteria to the Prosecution -- a
7 fact which is incorrect. The Defence has officially requested
8 the Prosecutor to disclose or provide certain documents to it,
9 and it is still waiting for compliance with that request.

10 So that is something that also has to be taken into
11 consideration.

12 Your Honours, regarding the issue of the questionnaire,
13 I think that is also something which might be better addressed
14 in closed session, since it does entail the modalities in
15 which that person will participate.

16 PRESIDING JUDGE JORDA (interpretation): There will be a
17 second part this afternoon in closed session and, if you wish,
18 we shall speak of that then in closed session. We are in
19 public session now, and you are hearing [as interpreted] your
20 case -- case vehemently. I would like to inform you that we
21 have recently met with the Defence team and you have had all
22 means, notably you have known that the confirmation hearing
23 will take place on 9 November. This you know; this is a fact.
24 You may, of course, put forward arguments that testify to the
25 difficulty of the task you face, and the difficulties are

1 largely known. You do have an investigator and you are in a
2 position to travel to the field, although I do realise that
3 the circumstances are difficult. I would suggest that you do
4 not overemphasise these difficulties, which are known to us.
5 This hearing has been held to deal with some specific points,
6 and the judges here present, I would like to emphasise, are
7 not here to give an advantage to one party or the other. The
8 judges are here to establish the truth and to ensure that the
9 Prosecutor, who is obliged to investigate incriminating and
10 exonerating circumstances equally, and who has provided
11 exculpatory evidence to you, has indeed done so, so please try
12 to be balanced. If, however, in the closed part of the
13 session you would like to put forward other arguments, we will
14 hear them with great interest. Could you now please respond
15 to the other questions regarding the organisation of the
16 hearing, because the hearing will be taking place on
17 9 November, as you know, and we would like to hear your
18 answers to the questions put.

19 MS TAYLOR: Thank you, Mr President. Regarding the issue of
20 written submissions, the Defence respectfully disagrees with
21 the submissions of the Prosecutor that such submissions are
22 not foreseen by the Statute or the Rules. Indeed, they are
23 foreseen but, in the view of the Defence, it is simply a
24 matter of timing. And in light of the fact that some of the
25 timing requirements have been waived on behalf of the

1 Prosecutor, we would respectfully ask that such waiving also
2 be applied to the Defence. Also, it is in the interests of
3 justice to do so, given the unique position of the witness.
4 And, again, this is something that is perhaps better addressed
5 in closed session.
6 Regarding the submission of the Prosecutor requesting that the
7 Chamber provide some focus on what the Prosecutor should
8 concentrate on during the confirmation hearing, the Defence
9 would respectfully submit, or express its concern regarding
10 the fact that such focus may be seen to be pre-judgment on
11 some issues, or may be seen to be a statement of sufficiency
12 already. So we would just like to attach a caveat or express
13 our concern in relation to that possibility.
14 Regarding the issue of the technical presentation of evidence,
15 the Defence would also like to request that there be a dress
16 rehearsal and that this be scheduled when lead counsel is back
17 in The Hague, so that we can make sure that all the logistical
18 issues are functioning and are implemented in time.
19 Your Honour, that concludes my submissions. Thank you.
20 PRESIDING JUDGE JORDA (interpretation): Very good, and thank
21 you very much for bringing up that issue. I think that the
22 Prosecutor will have an opportunity to respond to a number of
23 issues. While we are in public session, I would like to state
24 that the Chamber does not pre-judge when it gives direction.
25 The texts provide that it is the Chamber and, indeed, the

1 presiding judge who shall determine how the hearing is to be
2 conducted. The confirmation of charges hearing is not a
3 trial. I would like to reiterate that once again. It is
4 incumbent on the Chamber to provide certain or some direction.
5 As regards a dress rehearsal, the procedures in this Court or
6 proceedings in this Court can be quite lengthy. If we are to
7 have a dress rehearsal, that may also take its time.
8 Today we have an opportunity, indeed, to prepare the
9 confirmation hearing, and the Prosecution, the Defence and the
10 representatives of the victims have an opportunity here today
11 to prepare and I hope that we shall continue to do so.
12 I would now like to hear from the representatives of the
13 victims, please.

14 MR WALLEYN (interpretation): Thank you, your Honour. First
15 of all, I would like to say -- and you did underline it
16 yourself -- that preparing for this hearing does bring with it
17 difficulties for all of us. It is not always easy for the
18 legal representatives of the victims to communicate within the
19 representation team and to prepare notably for the hearing
20 with their clients.

21 I have, for instance, travelled to the field to prepare with
22 clients for this hearing, but, in doing so, a certain number
23 of precautions had to be taken because the victims -- or a
24 certain number of victims are living in the area under
25 difficult conditions. So it is not just the Defence who will

1 have encountered difficulties of that type.
2 Now, as regards our plans for our observations, as you know,
3 the role of the legal representatives of the victims will be
4 limited at this hearing, and we accept that. We propose to
5 organise amongst ourselves to ensure that the various groups
6 of victims being represented limit their observations at the
7 hearing. We would like to present who the victims who are
8 participating are. We shall not reveal the identity of the
9 victims, but I believe that it is important for the Defence
10 and all those participating in the hearing to have an
11 understanding of what the day-to-day circumstances and real
12 human difficulties are of the victims who are being
13 represented without getting into the detail of the prejudice
14 suffered. It is important, at least, that the participants
15 know why the victims have chosen to participate and what their
16 expectations are of the Court and of the trial proper.
17 I think that if the Court could allow one hour in total for
18 the various initial presentations or observations that will be
19 made by the legal representatives of victims, that would be
20 agreeable.
21 That said, developments during the rest of the proceedings
22 will condition the further involvement of the legal
23 representatives of victims. If the Prosecution and the
24 Defence make observations, the legal representatives would
25 like to be able to respond to them.

1 These proceedings may have a largely oral nature, if that is
2 the wish. However, if the Court would like to invite written
3 submissions, we could also participate in a written capacity
4 also.

5 I must say that we have limited information, as is perhaps the
6 case of the Defence. We hope from today to benefit from a
7 clearer view of the scheduling and the plans for the coming
8 weeks. There are legal representatives who reside and work in
9 the DRC, and they, in particular, will need to know what steps
10 will need to be made to prepare and attend the hearing as
11 necessary. Visa applications must be made and a certain lead
12 time needs to be provided to ensure that they can participate.
13 Today we have a reasonably good view of the plans of the
14 Prosecution.

15 Now, as regards the Defence, we would like to have an idea as
16 to whether the Defence does plan to call witnesses other than
17 the main witness of the Prosecution. Could the Defence at
18 least give an idea of the time the presentation of its
19 evidence will take. Would it be one day, or one week?

20 Obviously those two are quite different periods of time.

21 PRESIDING JUDGE JORDA (interpretation): Mr Gebbie, would you
22 like to take the floor?

23 MR GEBBIE: If I may, Mr President. I have the utmost
24 sympathy with my learned friend, counsel for the Defence, on
25 the difficulties of shortness of time for preparation. I,

1 myself, was only instructed as of Tuesday of this week, and
2 without the admirable assistance of the Office of Public
3 Counsel for Victims, I would have found myself in great
4 difficulty standing here and addressing the Tribunal, the
5 Court.

6 But, at the same time as someone who is here for me, I see
7 Me Bapita who is counsel for victim 105, and not as appears in
8 the transcript, victim 105, and perhaps that could be
9 corrected. As I stand here, in view of Me Bapita, who is
10 unable to attend today for reasons very similar to those
11 experienced by the Defence, I am acutely aware that the
12 interests of the victims are a core part of the purpose of
13 this Court in doing justice, and I am acutely aware also that
14 it is axiomatic in all developed legal systems that justice
15 delayed is justice denied, and it is for the Court to balance
16 all considerations, including those of the necessity of
17 providing a fair trial. But, time is an important element in
18 any justice procedure and I would ask the Court to bear that
19 in mind from the victims' point of views, and I'm sure that
20 will be done.

21 In respect of the hearing that is to take place on the 9th,
22 again, my role here is to preserve as far as possible the
23 position for Me Bapita, so that when she attends, as the Court
24 fervently wishes that she will be able to do, she is as
25 unrestricted as possible in making the case or presenting the

1 arguments necessary at that particular hearing for victim 105.
2 In so doing, we accept, evidently, that the role of the
3 counsel for the victims in the process of confirming charges
4 is extremely limited. But there is a subordinate issue which
5 may or may not arise -- I'm not in a position to say that it
6 will -- but it may be that we'll be seeking at that hearing
7 guidance from the Court on the matter of the application, on
8 whatever charges are ultimately confirmed by the Court, of
9 Article 25 of the Rome Statute, which is the definitions of
10 "criminal responsibility". So it may be that aspects of what
11 can be explored in terms of Article 25 under the headings that
12 are ultimately provided by the charges as confirmed may be
13 something that would be required to be addressed by Me Bapita
14 and those representing victim 105.
15 My learned friend Me Flamme has already indicated that we
16 would hope that between ourselves we may reduce the time taken
17 for submissions to an hour. But, at the same time, I would
18 reiterate and emphasise, as Me Flamme already has, that,
19 depending on what transpires, what comes forth from the
20 submissions of the Prosecutor and indeed of the Defence, it
21 may take somewhat longer. May I apologise also to the
22 interpreters if I am speaking somewhat quickly.
23 At the moment, then, Mr President, your Honours, the position
24 is as expressed by Me Flamme, and -- I beg your pardon, I am
25 saying Me Flamme, my apologies, Me Walleyne -- and my

1 difficulty is compounded by the fact that I was instructed on
2 Tuesday --

3 PRESIDING JUDGE JORDA (interpretation): No, no, no, I'm
4 sure the solidarity between lawyers, we had understood that
5 you meant Mr Walley. Please proceed.

6 MR GEBBIE: Yes, I beg your pardon. My learned friend
7 Mr Walley has expressed the position perfectly and precisely,
8 but we would wish, as far as possible, to reserve whatever
9 options, limited as they may be, to counsel for the victims,
10 to properly explore such matters as may appropriately in the
11 view of the Court be explored, because we are acutely aware
12 also that there will be aspects of the work of the Court to
13 which counsel for the victims, or the victims themselves, are,
14 for sound and proper reasons, excluded. But it is important
15 for all concerned and all those who look on the workings of
16 the court, from outside the Court itself, to know that the
17 Court can be taken to be well aware of the concerns, such as
18 they may be, that may be raised by counsel for the victims on
19 behalf victims for those parts of the proceedings to which the
20 victims are actually not included.

21 Thank you.

22 PRESIDING JUDGE JORDA (interpretation): Well, before closing
23 the public part of this hearing, I would just like to add a
24 point -- and here I address the Defence who has joined the
25 Prosecutor exceptionally -- regarding the separation of a

1 legal adviser from the Chamber. As regards that application
2 with which both the Prosecution and Defence are familiar, the
3 Chamber shall be issuing a decision before the end of the week
4 and we are in a position to state that the judges plenary has
5 been seized of the matter. Very good. Well, we are still in
6 public session. We are sitting here as a Full Bench, and I
7 would like to inform you that we intend to sit full days, but
8 with a shorter afternoon. We need also to bear in mind the
9 working hours of the interpreters, et cetera.

10 We will, of course, further discuss these issues, but we do
11 intend to sit both morning and afternoon -- perhaps from
12 9 until 10.30, from 11 to 12.30, 2 o'clock to 3.30. But, in
13 any case, it is important that we bear in mind the rest times
14 which the interpreters require.

15 Now, before the legal representatives of the victims leave us,
16 I would like to have your views on the fact that the -- or on
17 the proposal that the legal representatives for victims take
18 the floor before or after the Defence. I think that one could
19 argue that either way. Perhaps you have a view on that, or
20 perhaps you would like to consult each other?

21 MR WALLEYN (interpretation): Mr President, after a brief
22 consultation on the part of the victims, we think that it is
23 logical for the Defence to have the last word in the phase of
24 the presentation that is at the opening stages, and then the
25 Prosecutor will start. So that will be between the two.

1 Thank you.

2 PRESIDING JUDGE JORDA (interpretation): We are not going to
3 decide; we are just going to note what you have said. Does
4 the Defence have anything to say regarding that? We shall
5 decide on this later, but we are noting your observations. Do
6 you wish to add something?

7 MS TAYLOR: Your Honour, we would just agree with the
8 representatives of the victims that the Defence should be
9 given the opportunity to present its submissions after the
10 Prosecution and the victims.

11 PRESIDING JUDGE JORDA (interpretation): All right. There is
12 also a question, but I think we shall discuss this with our
13 colleagues. This is the question of the re-examination, or
14 the cross-cross-examination. This is not a trial. We could
15 have divergent views on the matter. For the benefit of the
16 public, there is the examination-in-chief, there is a
17 cross-examination and then there is a re-examination. There
18 is no re-re-examination, so far, but perhaps we'll discuss
19 this. I think Ms Taylor raised the matter, so we shall issue
20 an orientation document. There are a few important points
21 pertaining to written documents. I think that there are
22 divergent views on the matter and the Chamber will decide on
23 that.

24 Now, regarding the problems of visas, if the victims wish to
25 come, you know that, in any case, that if victims must take

1 the floor, it must be on 9 November. Is that --
2 clarification, Mr President? I was not referring to visas for
3 victims who wish to come here, but for the counsel.
4 PRESIDING JUDGE JORDA (interpretation): Mr Gebbie, I
5 understood that you - perhaps I made a mistake. You wish to
6 come with the victims?
7 MR GEBBIE: Mr President, the concern is that Me Bapita
8 should be here.
9 PRESIDING JUDGE JORDA (interpretation): Thank you. All
10 right. In any case, either counsel Bapita or the victims, you
11 are well aware that the hearing starts on 9 November, and I
12 expect that the Registry and the Dutch authorities will act.
13 The Registry should ensure that the Dutch authorities
14 understand that it is up to them to allow the Court to
15 function properly and our -- you must remind them of our date.
16 Now, for the cross-examination, we did not say that we were
17 going to adopt the Prosecutor's calendar, Ms Taylor. This
18 hearing is for the purpose of collecting what observations you
19 may have. It seems to me that you have enough time to discuss
20 with Mr Lubanga Dyilo, your client. Unless my colleagues have
21 any observations, for the time being perhaps we shall organise
22 a hearing on 3 November -- that is, after the 2nd, which is
23 our time limit for the Defence. Does the Registry have any
24 remarks to make regarding all that has been said so far?
25 MR DUBUISSON (interpretation): Mr President, your Honours,

1 we have no particular observations.

2 PRESIDING JUDGE JORDA (interpretation): Now, the second part

3 of the hearing. In such a modern Court, I have been told we

4 needed 30 minutes to change the transcript, I'm sorry to tell

5 you. Perhaps in much less sophisticated courts it might be a

6 bit simpler. So we are going to endure that. We'll give the

7 interpreters a break, in any case. I apologise to the

8 victims' representatives, since the session will no longer be

9 public. We have a few more points to discuss, and so, under

10 the circumstances, the Court is adjourned. We shall resume in

11 30 minutes when the changes will have been made in respect of

12 the transcript. Thank you.

13 [At 3:10 p.m. the Court adjourned and later resumed in closed

14 session]

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