

1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/07

4 Confirmation of Charges Hearing - Open Session

5 Friday, 11 July 2008

6 The hearing starts 9.05 a.m.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 PRESIDING JUDGE KUENYEHIA: Good morning. Could the security
10 officer please bring in the suspects.

11 Court Officer, could you please call the case.

12 COURT OFFICER (interpretation): Situation in the Democratic
13 Republic of the Congo, case of the Prosecutor versus Germain Katanga and
14 Mathieu Ngudjolo Chui, case number ICC-01/04-01/07.

15 PRESIDING JUDGE KUENYEHIA: This is a continuation of the
16 confirmation hearing that began on the 27th of June, 2008, and the same
17 parties and participants are present in court today. Of course
18 Mr. Katanga is not here with us today.

19 The Chamber, following the request of Mr. Germain Katanga for the
20 waiver of his right to be present for the remainder of the confirmation
21 hearing and the subsequent discussions with the parties and participants,
22 issued its decision on consultations under Rule 124(1) of the Rules on
23 Wednesday, 9th July, decision number 672, by which the Chamber decided to
24 hold consultations pursuant to Rule 124(1) of the Rules of Procedure and
25 Evidence this morning. As such, we shall begin this --

1 We have no transcript. I believe the technicians are working on
2 it. Do you know how long it will take, Court Officer?

3 (Court officer and Bench Confer)

4 PRESIDING JUDGE KUENYEHIA: We seem not to have realtime
5 transcript. The Registry's checking whether it's just realtime or
6 whether there's a problem with the whole of the transcript process and
7 then we should have an answer within the next minute or so, and then we
8 will decide what to do.

9 We have been informed that currently there is no realtime
10 transcript but the typing is still going on. There is a transcript, and
11 as soon as possible, the -- I hear it is back, but everybody has to
12 reconnect.

13 I think we have the realtime transcript now. Do I take it that
14 everybody has the transcript on their screen? Yes. Okay. So we can go
15 on.

16 So we will begin this hearing with a discussion on Mr. Katanga's
17 request pursuant to Rule 124(1) of the Rules of procedure. Yes, Mr. --

18 MR. HOOPER: Before we enter that can I just raise a matter that
19 arose on -- on Wednesday and which affected the -- and inconvenienced the
20 Court yesterday and make plain what the position is? I've written a
21 letter, but I think it's appropriate for the record that I set out what
22 happened.

23 On Wednesday, it was stated in court that there was some
24 uncertainty as to whether I was to be here the next day or not. That
25 uncertainty may have existed in the mind of the person who stated it, but

1 it certainly didn't exist in mine, and by the time those words were
2 spoken I was and had been for at least two days committed to returning on
3 the plane from Tanzania on Wednesday night. I had my ticket booked, and
4 I was committed to it.

5 I think the misunderstanding arose because Ms. Buisman who makes
6 the submissions in respect of the modalities of liability, criminality,
7 had said to me on Tuesday or at some point early in the week that she was
8 in fact not going to ask for the case to be accelerated as in fact you
9 may recall I had proposed at one point but was going to take advantage,
10 with the Court's leave, of the scheduling in order to better prepare her
11 submissions, which I think the Chamber will agree involve a complex
12 subject, and I said, well, you know, that's fine, subject of course to
13 the Chamber's view.

14 If that had led to the Court not sitting yesterday and we would
15 have known as soon as the Court sat, which was -- or should have been, we
16 thought, Wednesday morning, then I would have put in and may very well
17 have thought of putting in an application to this Chamber for yet another
18 further indulgence of one day, because the defendant who is giving
19 evidence and whose evidence I was taking in Arusha had started his
20 evidence Tuesday. It went slower than I thought, and in fact he's
21 completing it this morning, but there had been several witnesses now
22 interposed. So I -- if I had been able to win a further day, that would
23 have been of assistance. But in fact as you know, on Wednesday there was
24 a difficulty with Mr. Katanga and his non-appearance, and I spoke to him
25 at some length at about lunchtime on Wednesday, and I was quite sure in

1 my own mind that this Court would almost certainly want to sit yesterday,
2 because this was a new problem that needed to be addressed. So there was
3 absolutely no thought in my mind by then of -- of not coming back, and in
4 fact I was here in good time yesterday, 8.00 in The Hague in my hotel.
5 It was only then that I discovered that the Court wasn't sitting.

6 So I do apologise for that, and may I in fact thank the Court for
7 its gracious indulgence in allowing me the time that it did in Tanzania.
8 It proved far more significant than I'd anticipated, in fact, because of
9 the way circumstances developed there, and I'm sorry there was this
10 breakdown in understanding. I'm still unclear how it happened, and I'm
11 afraid it's probably a combination of my absence and distance and
12 discussions that I've indicated that had taken place but hadn't been
13 resolved and were totally overtaken by the events as we now know them to
14 be. Thank you.

15 I should stress that I wouldn't have dreamt of staying there
16 without the Court's consent.

17 PRESIDING JUDGE KUENYEHIA: Thank you very much, Mr. Hooper, for
18 that apology. I believe that all parties would be gracious enough to
19 accept your apology despite the inconvenience that we all suffered
20 yesterday.

21 MR. MacDONALD: The Prosecution would request that these
22 correspondence in relation to Mr. Hooper's presence be filed with the
23 Court, meaning the court management, instead of directly to the Chamber
24 so that all the parties and participants should have access to this
25 information. We feel that, first all, maybe if confidential information

1 is provided in regard to other cases the letters can be drafted in such a
2 way that they can still be available to all parties and even made public,
3 and it should be on record that the counsel of -- on the case, when he's
4 not available, these requests should be even made in open court and
5 decided in open court where all the parties have an opportunity to -- to
6 argue these matters when it affects the schedule. This is obviously
7 respectfully submitted, your Honour.

8 PRESIDING JUDGE KUENYEHIA: Yes. We will go on with Mr. Hooper's
9 observations on the absence of Mr. -- the request by Mr. Katanga to waive
10 his rights to be present for the remainder of the confirmation hearing.

11 MR. HOOPER: Can I raise just an initial matter, and that is the
12 thought occurs to me whether in fact Rule 124 is appropriate to these
13 circumstances. I say that perhaps rather daringly, because everyone's
14 proceeded on that basis, and I'm of course open to correction, but it
15 strikes me that Rule 123 and 124 are really there to address a very
16 particular scheme that's present in the -- in the Statute in respect of
17 confirmation, and maybe it may not be appropriate to the kind of
18 situation that's arisen -- arisen today.

19 We can see that in Article 61 there's a clear reference to the
20 hearing in relation to confirmation. "The hearing shall be held in the
21 presence of the Prosecutor and the person charged as well as his or her
22 counsel." And we can see that in the trial provisions, of course, the
23 trial should be held in the presence of the person, of the accused. And
24 those must be correct and first and perhaps general principles, and
25 certainly in terms of trial and indeed in confirmation. They reflect a

1 fair trial right to be present. But it's interesting that there's no
2 similar or parallel scheme for trial, for absence of the accused. And I
3 stand corrected on that if I'm mistaken, that one finds for -- in Rule
4 123 and 124 for confirmation. And if I'm right about that, does that not
5 suggest that 123 and 124 are particular to a particular scheme and
6 circumstance, because with confirmation, as one understands it, in Rule
7 123 we can see that where there's a warrant of arrest or summons in
8 accordance with Article 58(7), and just to remind ourselves that Article
9 58(7) deals with the alternative to the seeking of a warrant of arrest
10 and the issuance of summons, where such a either warrant or summons has
11 been issued, then the Pre-Trial Chamber shall ensure the person is
12 notified of the provisions of Article 61(2), and 61(2) is the provision
13 that permits a waiver of right to be present.

14 123(2) deals with the situation where the person has fled or
15 cannot be found, and then we come to 124, and it talks about if the
16 person concerned is available to the Court, and "available" is not
17 defined.

18 What are the situation where, as it seems possible under the
19 Rules, a person has been the subject of a warrant of arrest which can be
20 issued at any time in the course of investigation or has been the subject
21 of a summons but has been provisionally released or been released by the
22 State under its powers to do so, is perhaps nominally available, but
23 perhaps, for example, could be a serving minister of a State and where
24 it's deemed inconvenient for him to have to come and attend a
25 confirmation process, the very, very start of these provisions. So in

1 such circumstances, hypothetical circumstances, might it not be that
2 that's what Rule 124 is addressing, and indeed 125? And why is it that
3 there's no similar parallel provisions addressing voluntary appearance or
4 non-appearance or waiver of appearance in relation -- in relation to
5 trial?

6 In any event, whether it's applicable or not, and let me assume
7 for a moment then that it is, it really here represents general
8 principles, in my submission, or can be interpreted as reflecting general
9 principles concerning the right of an individual to be present at trial,
10 or in this case to be present at -- at the confirmation hearing.

11 What is the situation if a -- if someone is ill in the course of
12 a confirmation hearing? What is the situation here where Germain Katanga
13 has actually commenced his confirmation hearing and has attended it but
14 now is not attending it for a day or days or for so long as the future
15 may reveal?

16 So I raise those matters at the beginning of my submissions, and
17 I readily welcome and would be assisted by comments on those -- those
18 matters.

19 Now, turning to the particular position here on the 9th of this
20 month, July, Wednesday, the Defence informed this Chamber that
21 Mr. Katanga had chosen not to attend. On the 9th of July, the same day,
22 the Defence filed his waiver of his right to be present, returning to
23 Rule 124 in conformity with that, which constitutes, in my submission,
24 clearly a waiver, and following on that the Chamber's decision to hold
25 these consultations under -- under Rule 124.

1 I think the groundwork here is that, first of all, I've had the
2 opportunity, as have members of this Defence team, to meet and talk with
3 Mr. Katanga. I can confirm that he understands fully his right to be
4 present, and he understands fully the consequences of the waiver of that
5 right. That is to say, essentially, that the hearing, the confirmation
6 hearing, can proceed and would proceed in his absence in its fullest
7 sense.

8 I wish to stress, and this is important, and particularly in the
9 light, as I understand it, of some matters that were mentioned by
10 Mr. MacDonald on Wednesday, that this is not done, having spoke to him,
11 and this has been his position from the beginning, this has not been done
12 in -- in order to seek to disrupt this process. This is not a disruptive
13 act or intended to be a disruptive act even though it has caused a loss
14 of time, of course, over the last few days. That was not a consequence
15 either foreseen or intended by Mr. Katanga. He thought that he could --
16 that he had a right not to attend and that as long as the Court was happy
17 that he was conscious of the nature of the waiver that the proceedings
18 would go on. And he is, I hasten to add, quite happy that we do go on
19 and continue at present in his -- in his absence.

20 So it wasn't an attempt to frustrate Mr. MacDonald's possible
21 submissions on Wednesday or anything of that sort, and through me he
22 apologises formally if that was a consequence.

23 Thirdly, in my submission at this stage, aside from exercising
24 his right to be present, in my submission Mr. Katanga has no functional
25 input into this confirmation hearing. He has no functional input to

1 place, to put into -- into the hearing. This is not a trial, nor is it
2 an inquisitorial process.

3 Fourthly, he can follow these proceedings. He will get advice
4 and updates from us, and he has access, as I understand it, through
5 LiveNote to the transcript, and that would be perhaps a reflection of the
6 possible utilisation of other facilities that's reflected in Rule 124(3).

7 Fifthly, perhaps in respect of these kind of proceedings, the
8 Chamber need not be so much alert to the difficulties caused to him by
9 his choosing to waive his right of attendance in contrast, say, to
10 perhaps the more serious position of where an individual makes that
11 decision, and it could be a foolish decision, in respect of trial. We
12 are at a preliminary stage where -- where such a decision has left --
13 less effect, and I believe that that is reflected in decisions in the
14 case law, certainly at the European Court of Human Rights of which the
15 cases of Pobornikoff and Austria at paragraph 26, merely distinguishing
16 between preliminary hearings and trial.

17 In terms of his personal situation, I think this has already been
18 said, and the Chamber, I know, both knows and is sympathetic to this
19 position. You know that he's now just recently turned 30 years of age.
20 He's under a great deal of pressure. He's away from country, family, and
21 friends, and supporting community. You will note that he has attended
22 all hearings until Wednesday and that he's treated this Court with
23 appropriate respect.

24 This is not, I stress, some kind of confrontational act, and I'd
25 strongly invite you, the Judges, to put that out of your mind. This is

1 not some demonstration against you. He has respect for the Judges of
2 this Chamber. And indeed, following the Lubanga decision he was
3 fortified, if I can put it like that, in his recognition through that
4 decision of the independence of the Judges of this court. So there's no
5 disrespect, no seeking confrontation here at all. He's still a
6 relatively young man who will inevitably in his situation have difficult
7 days.

8 The start of this particular problem, as I understand it, arose
9 at the beginning of the confirmation hearing. It was a family problem
10 which he doesn't feel he can solve on the telephone but can, perhaps,
11 solve with a face-to-face meeting with his wife. In such circumstances
12 and with such a view, that family visit, which you know has been of
13 concern to him from time to time, loomed large and became his imperative.
14 And you will recall in this context that he's been in custody now for
15 three and a half years, and he hasn't seen either wife or children in
16 that time. And he's spent now best part of nine months here, and you
17 know that he asked for, and it was agreed that he could have, a family
18 visit, and it's been a long time coming. And I know that the Registry
19 have been doing -- making their efforts in order to have such family
20 visit. And you may recall the problem that the DRC has set up or stated
21 is the problem: No paper for passports. Then we heard they did have
22 paper for passports, but there's still no passport, and this has been
23 going on now for several months. I think it was first raised in
24 December, was it not, or maybe in November even, this family visit, and
25 its certainly been repeated since, I know its been of clear concern to

1 you, the Judges.

2 So in those circumstances, he has become perhaps or felt rather
3 repressed, certainly distracted, and it's against that background he's
4 chosen not to be here while at the same time, I stress, quite capable of
5 following the day-to-day, indeed minute-by-minute discussions that we
6 have.

7 So in those circumstances, I'd invite the Court, as I hope it
8 will, not in any way, of course, to take this matter out of proportion.
9 We're here. He's fully represented. He's made this decision of waiver
10 with his eyes open. It's not an act of disrespect. It's not sought to
11 cause delay, and I exhort the Court to continue in his absence, and we
12 hope in the meantime in our discussions with him, if we can, to perhaps
13 affect his attitude as much as we reasonably can, but there is in my
14 submission no prejudice to him, and it would be quite disproportionate to
15 take a coercive -- make a coercive decision, perhaps, in these -- in
16 these particular circumstances.

17 Thank you.

18 PRESIDING JUDGE KUENYEHIA: Thank you very much, Mr. Hooper.

19 Mr. MacDonald, do you want to make any observations?

20 MR. BULMER: Thank you very much, Madam President and your
21 Honours. I was just going to start by making submissions on the
22 statutory framework, and Mr. MacDonald is going to follow up with
23 submissions on the substantive issue of waiver.

24 I don't think it lies in my mouth to remind this Chamber and this
25 Court that as a creature of statute it must follow and apply the

1 statutory terms that are given to it within the Rome Statute and the
2 subordinate texts. Not -- I'm not quite convinced that Mr. Hooper's
3 position is quite helpful where he flags the issue with the Chamber
4 unclearly whether this is an issue under 124 -- Rule 124 or not. I think
5 Mr. Hooper has to take a position whether he thinks this Rule applies or
6 not. It's not appropriate to say it may apply and then -- or may not
7 apply. To be clear it is the Prosecution's position that the Rule 124
8 analysis and procedure does apply and Mr. MacDonald has said previously,
9 and I would just reiterate, the presumption for the confirmation hearing
10 is attendance by the suspect, the detainee, and that's in Article 61.
11 The waiver is found in 61(2) and then is governed by the Rules.

12 There's no reason or explanation to deviates from the quite clear
13 terms found within the Statute, and it is in fact contrasted with the
14 Rule with respect to trial found in Article 63, 63(1), which clearly
15 unambiguously outlines attendance is mandatory from the suspect, and only
16 under very exceptional circumstances Article 63(2) can he be, or she,
17 removed from the courtroom.

18 So in my respectful submission to this Chamber, the statutory and
19 codified framework is clearly applicable in this case and ought to be
20 applied. The reasons, obviously, and we don't need to engage in any
21 submissions as to the differences between the trial where guilt or
22 innocence is at stake and the difference at this stage of the proceeding,
23 but in my respectful submission when one analyses the two different
24 processes it becomes more understandable why in one circumstance, this
25 one, a suspect may waive the right to be present and in the other venue

1 where guilt or innocence is at stake no such waiver provisions exist in
2 the Statute.

3 Those are my submission on that point. I pass the floor over to
4 Mr. MacDonald.

5 MR. MacDONALD: Briefly, your Honour. I think it is important
6 that we go back to how this all started. It all started last Wednesday
7 morning when we were informed in court that Mr. Katanga was seeking a
8 waiver of his presence. And just as a reminder and in answer to
9 Mr. Hooper's presentation this morning, we were at that stage to start
10 the presentation of the case or the Defence presentation of Mr. Kilenda.
11 Mr. Kilenda was to start his presentation. The Prosecution had completed
12 its presentation.

13 I think it is also important to go back to the transcript and
14 what was mentioned at that time by the Defence team for Mr. Katanga, and
15 I will refer back to the transcript. The transcript of Wednesday
16 morning, and I refer to page 2, line 6, where Ms. Buisman mentions the
17 following: "That Mr. Katanga told me he is tired. There are a number of
18 issues that concern him, and the main issue is his family visit. He --
19 when I spoke to him a few times yesterday, his morale was very low, and
20 this is his main concern, that he really would like to see his family.
21 He has never seen his -- his latest born," never -- "ever" -- sorry.
22 "Well you know the story. He has never seen his wife since 2005 when he
23 was arrested."

24 And then a little lower, on line 17: "Having said that, I don't
25 want to give the impression that Mr. Katanga's boycott is a blackmail.

1 He specifically stated not to make any submissions."

2 So this is what was said on Wednesday. Now today or this morning
3 we can softly wrap up one's presentation in indicating that the purpose
4 of this waiver is not to disrupt the proceedings, that is not the intent
5 of Mr. Katanga, but I think we have to look at these facts objectively,
6 of course understanding that being detained, no matter where, be it in
7 your own country or country abroad for such crimes is difficult. One can
8 only agree to this, but one cannot be distracted either by the purpose
9 and the function of a waiver even though we're at confirmation and this
10 is not the trial stage.

11 I just want to briefly go back to the drafting history of Rule --
12 or Rule 124, and I'm quoting here from Mr. Lee's book, "The International
13 Criminal Court: Elements of Crimes and Procedure of Evidence," the
14 latest edition. And on page 529 in relation to Rule 24 (sic), it is
15 mentioned the following: "Now, many delegations --"

16 PRESIDING JUDGE KUENYEHIA: Mr. MacDonald, you mean Rule 124 or
17 Rule 24? You said 24.

18 MR. MacDONALD: Rule 124. Rule 124 to be -- to be precise.

19 "Many delegations raised concerns that such a provision, at least
20 if drafted in mandatory terms, would encourage the person not to attend
21 the hearing. Different qualifying requirements for allowing such
22 participation were discussed, such as (exceptional circumstances) or
23 (good reasons), but the attempts were discarded at the end in favour of a
24 simple non-mandatory provision which would allow the Chamber to exercise
25 its discretion. The person concerned would also given an opportunity to

1 submit written observations on issues before the Chamber in spite of his
2 or her waiver or presence."

3 And in the end we have the final text as -- and this is what
4 prevailed.

5 You are given a discretionary power to grant or not waiver.
6 Again, we can wrap one's presentation in soft terms and say that this is
7 not to -- it's not being disrespectful, it's not to disrupt the
8 proceedings. Well, Mr. Katanga did not show up on Wednesday to make such
9 submissions and be present while his counsels want to make such
10 submission.

11 We can understand that his morale is low. We can understand that
12 he's demoralised because of his -- the fact that he cannot see his
13 family, and that is understandable, but you have to ask yourselves, your
14 Honours, is this a good enough reason? Is this a good enough reason to
15 grant waiver when the person is available? We're not in a situation
16 where a minister of government has -- is being charged, is before the
17 Court and may have and may still be in function elsewhere in a country.
18 This is not the situation we're in at all. The situation is that an
19 arrest warrant was issued against Mr. Katanga, and unless you grant
20 waiver his presence is mandatory. He should be here today until you
21 grant this waiver or not, and this is not what's happening.

22 We respectfully submit also that my colleague's proposal that it
23 is an informed consent and that Rule -- the provisions of Rule 124(3)
24 were discussed with him and that he has access to the transcript.
25 Unfortunately, there are no Lingala transcript. It is in French or in

1 English, and we were informed a while -- a few months ago that
2 Mr. Katanga's language of choice was Lingala. So he cannot at this stage
3 follow from the courtroom -- from the prison cell or from the detention
4 centre these proceedings according to his own wishes.

5 We submit that obviously this Rule exists for reasons that one
6 could imagine a detainee having other occupations -- or sorry, not a
7 detainee but a person that is not detained may have other occupations
8 elsewhere and is requesting a waiver on that basis. We can also imagine
9 situations where a detainee could be sick one day and still is saying,
10 "Although I am sick, I authorise my counsel to continue and proceed with
11 my case if the Chamber so allows." We can foresee those situations. But
12 was this Rule meant for a detainee that because he hasn't seen his family
13 for such a long time is taking a stand and showing it and presenting it
14 to the Chamber, and "Until such a time I see don't see my family, I'm not
15 coming to court"? That is what Mr. Katanga is saying. And let's not be
16 distracted by this. That's what -- exactly what he is saying.

17 So the Prosecution has submitted -- has indicated law, is giving
18 an interpretation to these Rules, is also objectively looking at the
19 Defence presentation, and in these circumstances we respectfully submit
20 that we do not think that waiver was meant for these circumstances but
21 for different ones, for different legitimate and real concerns.

22 Thank you.

23 PRESIDING JUDGE KUENYEHIA: Thank you, Mr. MacDonald.

24 The Victims Representatives will have five minutes each, and no
25 more than five minutes each.

1 MS. MASSIDDA (interpretation): Thank you very much. That will
2 be enough.

3 First, we agree with the Office of the Prosecutor's observation
4 concerning the applicability of Rule 124 in the present case. I will not
5 repeat what Mr. Bulmer and Mr. MacDonald have just said concerning the
6 preparatory work to the Regulation that led to the final version of Rule
7 124. However, I would like to inform the Chamber of what the victims'
8 interests are.

9 For the victims, the presence of the suspect during the
10 confirmation hearing is an essential point in the procedures, because the
11 proceedings are very far away already from where the events took place.
12 For victims, the presence of the suspect at the hearing to establish
13 whether or not there are substantial grounds to believe that those who
14 could have committed the crimes also is important in the fight against
15 impunity.

16 I am aware, President, your Honours, that the suspect is allowed
17 to request not to be present during the confirmation hearing, but I am
18 also aware, your Honours, that for the victims in the proceedings and in
19 view of the role of the proceedings for the community and for the
20 appearance of justice being done and for justice to be understood, the
21 presence of a person in judicial settings is just as important as the
22 justice itself and the law applied.

23 I would like to remind at this point -- recall at this point,
24 your Honours, President, that the preparatory work that lead to the
25 current wording of 124 included a proposal by France in 1999, on the 1st

1 of June, which was presented to the -- the Preparatory Commission of the
2 13th of August on the same year, and it provided in Rule 62(3), which
3 then became Rule 124, provided the following: "After having held
4 consultations, the Pre-Trial Chamber will decide, taking into account the
5 gravity of the crimes committed and interests of the victims." This part
6 of the Regulation was thereafter deleted and another wording was given to
7 it, but it shows that during the discussions in the Preparatory
8 Commission the impact of a decision which -- and the impact this decision
9 could have on the victims, such as the decision of today, was taken into
10 account.

11 Now, I would like to finish by stating -- and by returning to the
12 reasons why Mr. Katanga wishes to be absent from the proceedings, and I
13 would like to refer to the document -- annex to document 670 which was
14 written by him. He says that he is so demoralised that that is why he is
15 unable to attend, because his family hasn't been able to visit him yet,
16 and that's why he is unable to attend the hearing.

17 We would like to submit that this reason of not being able to
18 have family visits is not a sufficient reason to allow the victim not to
19 be present during the confirmation hearing, and the reasons that were
20 advanced by Mr. Katanga even are a -- show of lack of respect towards the
21 victims in these proceedings that have themselves have lost several
22 members of their family.

23 Thank you very much.

24 MR. DIAKIESE (interpretation): Your Honours, Madam President, in
25 light of what has just been said, I will be extremely brief.

1 Mr. Katanga is demoralised because he cannot see his family. The
2 victims that I represent will never again be able to see the members of
3 their families and their loved ones.

4 We understand from what was submitted by the Defence that
5 Mr. Katanga has a right to waive his right to appear at the confirmation
6 hearing. Unless we have not properly read the Rules of Procedure and
7 Evidence, we also have understood that Rule 125(4), and I read: "If the
8 Pre-Trial Chamber decides not to hold a confirmation hearing in the
9 absence of the person concerned and if this person is available to the
10 Court, the Chamber orders for them to appear."

11 If I've understood the content of this Rule properly, that would
12 mean that despite the right Mr. Katanga has to waive his right to appear
13 before your Chamber, despite this your Chamber may decide -- has the
14 discretionary power to order his appearance.

15 Following what the previous speaker just said and following what
16 the Prosecution submitted, we hold, President and your Honours, that this
17 consists in camouflaging the memories of the victims and of their loved
18 ones who also perished in atrocious circumstances. And we should also
19 take into account the interests of victims in the case law and their
20 participation to prosecute, try, and, if necessary, convict persons
21 suspected of the facts that are alleged in the charges at present should
22 be done in parallel with consideration being given to the situation of
23 the victims and their family situation, and the fact that they will never
24 be able to see their families and loved ones and -- which perished in
25 atrocious circumstances. And we consider, therefore, that your Chamber

1 can correctly and legally order the appearance of Mr. Katanga.

2 Thank you.

3 MR. GILISSEN (interpretation): Thank you, your Honours. I will
4 be even shorter.

5 What is the problem this Court faces today? Well, it is not the
6 issue of the visits which Mr. Katanga may have, no. The issue today
7 before the Court is that of the proper conduct of proceedings and the
8 proper administration of justice. The absence -- and thank you,
9 Mr. Hooper, for the objective information you provided us with. The
10 voluntary absence of Mr. Katanga, could it or not at some stage block the
11 judicial proceedings, and can Mr. Katanga follow the proceedings from
12 where he is and give power or mandate his Defence? This choice by
13 Mr. Katanga is a voluntary choice not to appear before your Chamber.
14 Your Honours, can justice be blocked by this? The answer should be no.

15 Your Honours, President, we cannot take the justice system
16 hostage because one is tired or because one has a loss of morale. We
17 want Mr. Katanga to be present to ensure the efficiency and usefulness of
18 the hearing for Mr. Katanga in exercising his rights to enable this
19 hearing to have its full importance.

20 Mr. Katanga's right at present is his right to not take into
21 account the victims. It is his right to ignore the Court and not honour
22 us with his presence. Things can't be said any differently. The court
23 has the obligation to enable the proceedings to continue even in the face
24 of Mr. Katanga's unilateral choice.

25 Thank you, your Honours, and I hope that you allow me to say that

1 anything more is literature. This textual response that the Chamber has
2 given to the decision is excellent, and I think it is the perfect
3 response to the problems we are facing.

4 And I would like to conclude with what was said by all the
5 Victims Representatives. We want justice to be done, and we want, in the
6 name -- or on behalf the victims for their status to be recognised, and
7 we want justice to be able to be said by your Chamber, by the Court, in
8 these proceedings, and we want these proceedings to happen in the best
9 possible conditions in the interests of victims, in the interests of the
10 Defence, and in the interests of the suspects.

11 Thank you.

12 PRESIDING JUDGE KUENYEHIA: Thank you very much. That concludes
13 the observations of the Legal Representatives of Victims. In line with
14 the fact that the Defence always has the last word, I'm asking Mr. Hooper
15 whether he has -- he wants to say something, but it has to be very brief.

16 MR. HOOPER: Yes. First of all, Rule 124 is drafted in respect
17 of quite a different --

18 PRESIDING JUDGE KUENYEHIA: I'm sorry, I should have asked
19 Mr. Kilenda whether he has --

20 MR. HOOPER: We forgot about Mr. Kilenda. Sorry.

21 PRESIDING JUDGE KUENYEHIA: So if Mr. Kilenda has something to
22 say.

23 MR. KILENDA (interpretation): Thank you, Madam President, your
24 Honours. The Defence of Mr. Ngudjolo observes that Mr. Katanga exercised
25 a right which is a right not to appear before the Court. We just want to

1 rely on the wisdom of the Court so that the schedule of the confirmation
2 hearing as published should be maintained.

3 PRESIDING JUDGE KUENYEHIA: Thank you. Mr. Hooper, you can
4 now --

5 MR. HOOPER: Yes. Well, now I submit that Rule 124 is drafted in
6 respect and with a view of addressing a very particular scheme that's
7 established under the Statute and is not appropriate in these present and
8 simple or simpler circumstances where, rather, a right to waive
9 attendance can be viewed in the light of general principles of fairness.

10 In the alternative, if the Chamber takes the view that this is
11 the applicable section of the Rules, then as Mr. MacDonald said, we're
12 looking here at a simple non-mandatory provision. And indeed looking at
13 Rule 124, it's written and couched and anticipated -- anticipates by its
14 very existence, in my submission, a liberal and sympathetic scheme.

15 There is, in my submission, sufficient cause here for him not to
16 be present if we're applying or looking at Rule 125, and to continue
17 these proceedings in his absence is a wholly proportionate response to
18 this clear waiver. And the alternative, which is to order him, just
19 raises a perspective which I would hope this Court would naturally resile
20 from. It would be -- what would ordering mean? Ultimately, what are we
21 going to have sat at the back of our court? Is he going to be brought
22 here? Is this what's being asked? Some bruised some battered man if he
23 resists the word? Is he going to sit at the back there out of something
24 like Silence of the Lambs?

25 We have a situation here, a very simple and straightforward

1 situation. And we are at an early stage of these proceedings -- of these
2 proceedings, of this process, we're at an important -- but it's still a
3 confirmatory proceeding and not a trial.

4 I know -- I can think of no case before any of the international
5 tribunals where any defendant has been ordered and brought forcibly to
6 attend trial. Mr. Barayagwiza at the ICTR, he wasn't. Mr. Seselj, a
7 recalcitrant individual, perhaps, has never been ordered to attend his
8 trial or forced to attend. Mr. Sesay at the Sierra Leone Tribunal wasn't
9 ordered to attend, wasn't forced to attend. And I represented Andre
10 Rwamakuba at the ICTR who never attended one day of his trial. He was
11 not order. The Prosecution at one point suggested that and the Judges
12 utterly rejected the proposal of forcing that man to attend.

13 Thank you.

14 PRESIDING JUDGE KUENYEHIA: Thank you very much. We would
15 adjourn the hearing for exactly 15 minutes for the Chamber to deliberate
16 on its decision, after which we will proceed with the hearing.

17 The hearing is therefore adjourned for 15 minutes.

18 Recess taken at 10.08 a.m.

19 On resuming at 10.28 a.m.

20 COURT USHER: All rise. Please be seated.

21 PRESIDING JUDGE KUENYEHIA: Can the security please bring
22 Mr. Ngudjolo in. Thank you.

23 After listening to the submissions of Mr. Hooper and the
24 observations made by the Prosecution and the Legal Representatives of
25 Victims, the Chamber is convinced that Mr. Katanga has exercised his

1 right to waive -- he has exercised the right to waive his right to be
2 present for the remaining of the confirmation hearing. The Chamber is
3 also convinced that in accordance with Rule 124(2) that Mr. Katanga is
4 fully aware of the consequences of this waiver of his right to be present
5 for the rest of the confirmation hearing. The Chamber is of the view
6 that the absence of Mr. Katanga will not cause any prejudice to him, his
7 defence, or to the right to a fair and expeditious trial. Therefore, the
8 Trial Chamber decides on the basis of Rule 125(1) that to grant
9 Mr. Katanga's to waive his right to be present and decides that the
10 confirmation hearing will continue in his absence.

11 That means that we can move ahead with the -- but before we move
12 ahead with the confirmation hearing, the Chamber has one issue it wants
13 to raise before I give the floor to the Defence.

14 On the 7th of July, the Defence of Mr. Germain Katanga filed a
15 confidential request for the redaction of pages 16, lines 4 to 7, and
16 page 19, lines 4 to 10 of the public transcript of the hearing of 7th
17 July 2008, ICC-01/04-01/07-T.44-ENG RT. The request was made on the
18 basis that one of the Legal Representatives of Victims, and I quote:
19 "Quoted substance matters from a confidential document during the hearing
20 and that the requested redactions would give appropriate respect to
21 confidential status of this document."

22 The Chamber notes that the relevant excerpts of the transcript do
23 not identify any person other than Mr. Germain Katanga. No victim or
24 witness shall be put at risk as a result of the disclosure to the public
25 of the excerpts of the confidential document in question, and therefore

1 the requested redactions will serve no purpose. The Chamber is of the
2 view that although the information comes from a confidential document,
3 the excerpts can remain on the public record. The Chamber therefore
4 decides to reject the request of the Defence for Germain Katanga for
5 redactions to transcript as numbered above.

6 Furthermore, the Chamber finds no reason why the request should
7 remain confidential and hereby reclassifies document
8 ICC-01/04-01/07-663-Confidential as public.

9 We can now proceed with the discussion of the Prosecution's
10 evidence by the Defence of Mr. Mathieu Ngudjolo.

11 MR. KILENDA (interpretation): Your Honours, following a
12 discussion that we had with Mr. Hooper's team, we agreed that his team
13 should start today because we have a major problem with our case manager,
14 who has travelled unexpectedly to France and will return on Sunday night.
15 We are therefore hoping to make our presentation on Monday if you agree
16 with this.

17 (The Pre-Trial Chamber confers)

18 PRESIDING JUDGE KUENYEHIA: Okay. Since it's an agreement
19 between the two Defence counsels, the Chamber has no objection. We will
20 therefore ask Mr. Hooper to make their -- to have their discussion on the
21 evidence presented by the Prosecutor.

22 MR. HOOPER: Yes. We have nothing, in fact, to state other than
23 that Ms. Buisman will be addressing you in respect of Article 25, and
24 that is expected to take about an hour and a half.

25 We haven't distributed to the booths her skeleton argument. I'm

1 afraid that was overlooked this morning. We are attending to it now and
2 what we propose in the time we have is to copy it in sufficient numbers
3 to provide the French and Lingala interpreters. I think it assists them
4 more than anyone else, really.

5 PRESIDING JUDGE KUENYEHIA: Yes. Actually, the Chamber wanted
6 find out about Lingala interpretation. Since Mr. Katanga, who basically
7 was granted the right to Lingala interpretation is not available, we
8 did -- the Chamber did also grant the interpretation to Mr. Ngudjolo, we
9 would like to know from Mr. Ngudjolo whether he wants to continue with
10 the Lingala interpretation in view of the fact that Mr. Katanga is not
11 going to be here for the rest of the hearing.

12 (Defence and Mr. Ngudjolo confer)

13 MS. ALIE (interpretation): Madam President -- (Microphone not
14 activated)

15 PRESIDING JUDGE KUENYEHIA: I believe that there is an audio
16 recording of Lingala, so we will probably keep the Lingala recording in
17 the record.

18 MR. HOOPER: Thank you.

19 PRESIDING JUDGE KUENYEHIA: But are you asking for a little break
20 to --

21 MR. HOOPER: No. I'm quite -- Ms. Buisman is quite content to
22 start now, and as soon as we've got these four photographs, we can get
23 them to court management and those four copies can be distributed to the
24 French and Lingala interpreters who I think may appreciate it.

25 PRESIDING JUDGE KUENYEHIA: The Registry informs me that you can

1 actually send it to them by e-mail and then they will distribute it
2 faster.

3 MR. HOOPER: It's just -- can they do that in time? It's being
4 photocopied now. So I think it will be quicker. Thank you, Natacha.

5 PRESIDING JUDGE KUENYEHIA: May I suggest that because the
6 interpreters don't have the text yet, if Ms. Buisman can speak slowly to
7 allow them to do a good job of interpretation.

8 MR. HOOPER: She's going to speak in Swahili, I understand.

9 PRESIDING JUDGE KUENYEHIA: I am sorry. Mr. Kilenda, when we got
10 the response from Mr. Ngudjolo that French would be perfect, there was
11 no -- the microphone was not on, so it's not in the record. So can you
12 just say it for the record?

13 MS. ALIE (interpretation): Yes, Madam President. I also
14 observed that the microphone was not on. I am sorry, and I repeat now
15 that the French will be perfect as a translation for Mr. Ngudjolo. Thank
16 you.

17 MR. HOOPER: I see Ms. Menegon has arrived in a very timely
18 fashion, and so if she can hand those four copies in. Thank you very
19 much. They can be distributed. Thank you.

20 MR. MacDONALD: Madam President, it's a question that I'm asking
21 the Chamber that can maybe ask Mr. Hooper about these four photographs.
22 Are they part of the list of evidence of the Prosecution, and if not, the
23 Prosecution will now object, because the Defence did not submit any list
24 of evidence of its own, so --

25 MR. HOOPER: Sorry, it's not photographs. It's not photographs.

1 They're four photocopies, sets of the speaking notes, if you like --

2 MR. MacDONALD: Sorry.

3 MR. HOOPER: -- of Ms. Buisman which are being distributed to the
4 interpreters.

5 MR. MacDONALD: Because the -- I'm sorry about this. It was in
6 the transcript.

7 PRESIDING JUDGE KUENYEHIA: I think it was a miscommunication, it
8 was --

9 MR. MacDONALD: The transcript indicates photographs and that's
10 what I had heard.

11 PRESIDING JUDGE KUENYEHIA: I think we will correct it. It's
12 photocopies you meant rather than photographs, so ...

13 Before Ms. Buisman starts, the Chamber would like to say that
14 interpretation in Lingala will continue so that we have the Lingala
15 record, because there is an audio recording of Lingala. So Mr. Ngudjolo
16 is free to use it if he so -- if it is his wish. Thank you.

17 MS. BUISMAN: Thank you, your Honours. First of all I would like
18 to note that Germain Katanga was charged under Article 25(3)(a) under
19 co-perpetration, and Article 25(3)(b), ordering. Initially when the
20 Prosecution filed an application for warrant of arrest for Germain
21 Katanga, the only allegation that was there was actually Article
22 25(3)(b), ordering.

23 By 6th July 2007 decision on the evidence and information
24 provided by the Prosecution for the issuance of a warrant of arrest for
25 Germain Katanga, the Single Judge held that there was reasonable ground

1 to believe that indeed Germain Katanga had ordered the crimes set out in
2 the application, but also added that it would be appropriate to charge
3 him under 25(3)(a) as a co-perpetrator as well. On this basis, the
4 Prosecution proceeded, and indeed now it's also in the document
5 containing the charges.

6 So we have reason to believe that this Pre-Trial Chamber may
7 adopt the theory of joint -- or common plan as set out in Lubanga.
8 Obviously at this moment this is only something that we cannot predict,
9 but that is our reasonable belief, and we submit -- first of all, we
10 request this Pre-Trial Chamber to set out the parameters within which
11 Germain Katanga is actually charged as a co-perpetrator, so we are clear
12 on the theory of liability. And if indeed our suspicion is correct and
13 you -- you intend to apply the same theory of common plan under 25(3)(a)
14 as co-perpetration, we submit that there are a number of flaws in the
15 reasoning of the Lubanga Pre-Trial Chamber, and we would request you to
16 correct those if -- for our case.

17 Before I give you the reasons why I think that, I would like to
18 stress that this is a huge topic, and you can write a Ph.D. about it.
19 I'll try to be brief. There is a number of authorities that I will
20 quote, but although we will not add any further arguments after today, we
21 do intend to submit a fuller argument in our submissions by 28th of July,
22 2008. So -- so we hope that we still have the opportunity to add, if
23 necessary, authorities that would support the points we're raising today.

24 Also, I would like to stress that this is not a challenge to
25 jurisdiction. This is simply asking clarification, because at this

1 moment we do not know the mode of liability and the theory on which basis
2 you will proceed.

3 Our main concerns with the Lubanga -- this is, to be clear, the
4 confirmation decision of 29 January 2007. This is the decision
5 confirming the charges where a theory is set out that is essentially a
6 theory of joint control, and I will quote a paragraph which actually sets
7 out this issue of joint control, which is paragraph 332. It states:
8 "According to this approach," being the joint-control approach, "only
9 those who have control over the commission of the offence and are aware
10 of having such control may be principals, because: 1. They physically
11 carry out the objective elements of the offence, commission of the crime
12 in person or direct perpetration," and indeed we note that this is one of
13 the options under Article 25(3)(a), "or they controlled the will of those
14 who carried out the objective elements of the offence," and that's indeed
15 is also provided for in 25(3)(a). It's what is referred to as indirect
16 perpetration, or, there's a third one, "they have, along with others,
17 control over the offence by reason of the essential tasks assigned to
18 them," and this would be a co-perpetration principle. And indeed this
19 one is also provided for in Article 25(3)(a).

20 I think at this moment I will read out the article, 3(a), which
21 says: "A person shall be criminally responsible and liable for
22 punishment for a crime within the jurisdiction of the court if that
23 person commits such a crime, whether as an individual, jointly with
24 another, or through another person regardless of whether that other
25 person is criminally responsible."

1 So far the Defence for Katanga has no objection. There are three
2 distinct options. However, the way the Lubanga Pre-Trial Chamber went
3 about is they merged co-perpetration with indirect perpetration, and
4 this, the Defence for Germain Katanga submits, is improper. I will give
5 the reasons in a second.

6 The second issue we have with the decision in Lubanga is that it
7 defines common plan in a very, we submit, vague and wide manner.

8 And the third issue we have is actually one of mens rea. The
9 first two I mentioned relate to the actus reus, and the third, mens rea,
10 it seems that the Pre-Trial Chamber has included dolus eventualis, which
11 is in fact the foreseeable consequences, although not intended. We
12 submit that there is no room for this dolus eventualis in the Statute.

13 So to come back to the first issue, which is the merging of two
14 modes of liability under Article 25(3)(a), namely co-perpetration and
15 indirect perpetration, I would like to set out first of all what we
16 actually mean by the concept. They are both not very controversial.
17 Co-perpetration, jointly with another. We accept that this notion of
18 co-perpetration is not new, that in many domestic systems, particularly
19 those based on Roman-Germanic traditions, have incorporated some sort of
20 co-perpetration liability. And indeed, although there is a variety in
21 the exact scope of this liability, in essence co-perpetrators by virtue
22 of their close cooperation with each other to commit a crime and their
23 essential contribution to this crime, each co-perpetrator can be held
24 liable for the action, not only of them personally but also of the other
25 co-perpetrators. We submit that this can be done under 25(3)(a) on --

1 there is some room for a common plan theory, but we submit that what is
2 set out in most domestic systems, this does not extend beyond those who
3 are identified as co-perpetrators.

4 We note that those who -- who support the notion of joint control
5 have indicated, I will actually refer to our most well-known person,
6 Mr. Olasolo, he indeed has indicated that in domestic systems, there are
7 many domestic systems - he has given many examples, I'll give you the
8 reference in a second - where there is a difference of liability between
9 of co-perpetrators and other persons of the common plan. So in fact,
10 what we're doing here, we are -- if we're talking about the common plan,
11 which I think mostly supported by domestic systems, we're talking about a
12 horizontal structure.

13 In -- in acknowledging that there may be co-perpetrators and
14 accessories who have a different level of culpability, there is -- also,
15 we do create a hierarchical structure within this horizontal structure.
16 We know in -- in principle we understand the reasoning behind this. We
17 understand that perhaps we're looking for a manner in which we can find
18 that the more senior -- senior persons within the common plan should
19 somehow be on another level from those who are less senior. However,
20 those who are less senior, we submit, can be held liable as aiders and
21 abettors, for example. And I think it's also more the notion of aiding
22 and abetting that is well known in the civil law tradition. In the
23 common law tradition, it's mainly based on conspiracy and everybody's
24 equally guilty. So although we accept that there's some countries where
25 indeed there is -- there are some levels of culpability depending on your

1 position, in other systems it is not. And, we submit, even in those
2 systems, if we are talking like we are here about the common plan and at
3 the same time we introduce a hierarchical structure, we do create a
4 situation where, like in the present one, where someone can be held
5 liable not only for his own actions but also for his co-perpetrator's
6 actions, which as we said before we accept, but also for his own
7 subordinates, as well as the subordinates of all of his co-perpetrators.
8 We submit this is a very, very wide notion of culpability that does not
9 exist anywhere.

10 There is -- there is one case that you probably are aware of,
11 which is Stakic. In Stakic the Trial Chamber Judges held that it was
12 more appropriate to -- to find that Mr. Stakic was liable as a
13 co-perpetrator under a notion that is applied here of joint control.
14 However, this was overturned on appeal. Whether we agree or not with
15 that decision is irrelevant. The point is that it has been tried once
16 and it did not succeed.

17 Just to give you a brief idea of what we feel indirect
18 perpetration means, I am now referring to Albin Eser: "Individual
19 Criminal Responsibility, The Rome Statute of the International Criminal
20 Court." This was the Volume 3, Cassese et al. At page 795, he is
21 discussing what is called -- what he calls organisationsherrschaft, and
22 this means that there is a hinter man behind the physical perpetrator,
23 which would be the indirect perpetrator liable under 25(3)(a), and on
24 this theory, which is principally a German theory, a -- the crime of the
25 direct perpetrator is attributed to the perpetrator behind him, being the

1 hinter man, as though it were his own. It can be justified only if there
2 is a sufficiently tight control by the indirect over the direct
3 perpetrator, similar to the relationship between the superior and the
4 subordinate in the case of command responsibility.

5 So this, we submit, is indirect perpetration, and again nothing
6 controversial. But if we're talking about a sufficiently tight control,
7 apply that to our situation, your Honours. We are talking about 1.000
8 persons allegedly fighting under Mr. Germain Katanga's command. We
9 submit that under the notion of indirect perpetration, it is hardly
10 possible that a 24-year-old boy can actually have such a tight control
11 over 1.000 persons.

12 I do quote Mr. Olasolo and Mr. Cepeda, the notion of control of
13 the crime in the jurisprudence of the ICTY, the Stakic case, it's 4
14 International Criminal Law Review 474. This is the year 2004, starting
15 at page 485 and I quote from 488 to 489. This is where the authors
16 describe indirect perpetration. They say, "The physical perpetrator" --
17 they say about "the indirect perpetrator is someone who doesn't
18 physically carry out the actus reus of the crime indirectly commits the
19 crime by using the direct perpetrator as an instrument or a tool who is
20 controlled by his dominant will. In these cases, the notion of control
21 of the crime is denominated control of the will because unlike in those
22 cases of control of the action, the indirect perpetrator commits the
23 crime although he does not physically carry out the actus reus of the
24 crime. Thus, the indirect perpetrator's control of the time is not
25 derived from the physical execution of the actus reus but it is derived

1 from the power of his dominant will," and it carries on.

2 We submit that under this tight definition, again, it's hard to
3 imagine a thousand of people, but that is one issue. The main concern,
4 again, is the combination of co-perpetration and indirect perpetration,
5 because it means that not only is Mr. Germain Katanga possibly liable for
6 the acts of 1.000 persons, but also of more than 300 persons from another
7 force.

8 In --

9 PRESIDING JUDGE KUENYEHIA: Ms. Buisman, sorry, we will to take a
10 break at 11.00 for half an hour and then you can continue at 11.30.

11 MS. BUISMAN: Yes. We can break now if you --

12 PRESIDING JUDGE KUENYEHIA: We will make a break now, so the
13 hearing is adjourned for half an hour. We will resume at 11.30. Thank
14 you.

15 COURT USHER: All rise.

16 Recess taken at 11.00 a.m.

17 On resuming at 11.35 a.m.

18 COURT USHER: All rise. Please be seated.

19 PRESIDING JUDGE KUENYEHIA: Could the security please bring
20 Mr. Ngudjolo in.

21 We continue with Ms. Buisman's presentation.

22 MS. BUISMAN: Thank you, Madam President.

23 Just before the break I was going to refer to the Trial Chamber
24 decision of Stakic. As I said earlier, as far as I can tell it's been
25 the only decision where the notion of indirect co-perpetration was

1 upheld.

2 I, just for the record, will give you the reference of this case.
3 It's the Prosecutor versus Milomir Stakic, case number IT-97-24-T,
4 judgement of the 31st of July, 2003, and it's the Trial Chamber II. It's
5 particularly -- in this judgement, particularly relevant are paragraphs
6 440 and continuing.

7 I also referred earlier to once more Mr. Olasolo having given
8 examples of systems where, we submit, either co-perpetration was a
9 liability or indirect perpetration was a liability. I just give you the
10 reference there as well. It's International Criminal Law Review 7, the
11 year 2007, pages 143 and to 161, title: "Reflections on the Treatment of
12 the Notions of Control of the Crime and Joint Criminal Enterprise in the
13 Stakic Appeal Judgement."

14 It's in this article where Mr. Olasolo discusses a number of
15 domestic systems and, as I said, mainly in support of either or notion.
16 I do know that Mr. Olasolo is a great supporter of the motion of indirect
17 perpetration, but I have not found any other author, perhaps I'm mistaken
18 and I haven't come across one that would be as clearly in support of this
19 notion.

20 I would just like to highlight, this is page 156 of this article
21 I just mentioned in the International Criminal Law Review where
22 Mr. Olasolo expresses, perhaps, his disappointment with the Appeals Chamber
23 to overturn the Stakic Trial Chamber judgement because the Appeals
24 Chamber held it wasn't supported by customary law. So I'm just quoting
25 one last time, Mr. Olasolo, page 156. He states that: "In the author's

1 view the existing precedence of application of the notion of control to
2 crime at national and international levels do not necessarily lead to the
3 conclusion that the different manifestations of such a notion were part
4 of customary international law at the time the offence alleged in the
5 indictment in the Stakic case took place in 1991."

6 Then he carries on that there is indeed room for argument and
7 that a more careful analysis of the customary status of the notion of
8 control would have been appropriate.

9 Just one more thing on the Stakic situation. I would like to
10 highlight not only that it was overturned on appeal, but also that the
11 circumstances were quite different from the circumstances at present in
12 our case.

13 Indeed Mr. Stakic -- we're talking about three structures. One
14 of them he -- he was directly in control of, and the other two structures
15 would not actually operate without his intervention. So there was an
16 interdependence of the three structures, which may have led the Trial
17 Chamber to come to the decision it made.

18 In our situation, we're talking about two armed -- independent
19 armed forces. So I do not think that we can rely on Stakic to introduce
20 a, to us, new concept of indirect co-perpetration.

21 I leave it like that for -- on this issue. I will move on to the
22 second, and I just hope that the Pre-Trial Chamber will consider our
23 concerns when they actually determine the theory of liability in the
24 instant case.

25 As I mentioned at the beginning of my presentation, we also have

1 a problem with the way "common plan" is structured, and I'll just read it
2 out to you. In the Lubanga decision, 29 January 2007, paragraph 344
3 states: "The common plan must include an element of criminality,
4 although it does not need to be specifically directed at the commission
5 of a crime. It suffices that the co-perpetrators have agreed to start
6 the implementation of the common plan to achieve a non-criminal goal and
7 to only commit the crime if certain conditions are met or that the
8 co-perpetrators are aware of the risk that implementing the common plan,
9 which is specifically directed at the achievement of a non-criminal goal,
10 will result in the commission of the crime and accept such an outcome."

11 We submit that this notion of a common plan may include such a
12 wide variety of plans and the criminality is so far remote that we
13 submit, particularly in the overall problem we already have with this
14 liability, would actually make many people who would normally not be
15 culpable, culpable. And I do want to stress that although in the Lubanga
16 decision the Pre-Trial Chamber clarified that there is no relationship,
17 there is -- it's not a JCE, a joint criminal enterprise, as it was the
18 doctrine set out by the ad hoc tribunals, clearly took a different path,
19 but the joint criminal enterprise theory was also contested, and there's
20 three levels of them and there is controversy about the joint criminal
21 enterprise theory, particularly the third version which includes intent,
22 dolus eventualis, which I'll highlight later, but at least compared to
23 here the plan has to actually include the commission of crimes under the
24 Statute. We submit that also in -- in the instant case that would be the
25 appropriate notion to -- to adopt.

1 I do refer to Gerhard Werle who is -- who wrote "Individual
2 Criminal Responsibility in Article 25 of the ICC Statute." For the
3 interpreters this is page 24 of my notes. I acknowledge that it may have
4 been hard to follow.

5 This article was published in the journal of international
6 criminal justice, number 5, 2007, pages 953 to 975, and he quotes at page
7 963, he states: "Actus reus of joint commission requires (a), a
8 plurality of persons; (b), a common plan involving the commission of a
9 crime under international law"; and then "(c), an essential contribution
10 to the execution of the common plan."

11 We note that in the Lubanga decision they do indeed refer to an
12 essential contribution, and we accept that is appropriate, but we also
13 submit that the common plan should be structured as suggested by
14 Mr. Werle.

15 And then the last point I wanted to raise is the mens rea that is
16 needed to be one of the co-perpetrators of a common plan.

17 We note that in the Lubanga decision the dolus eventualis has
18 been incorporated, and I defined it at the very beginning of my
19 presentation. I'll just simply repeat. We're talking about crimes
20 committed that were not intended, that were not part of the common plan.
21 They were the reasonable, foreseeable consequences.

22 We submit that unlike the ad hoc tribunals where indeed such a
23 notion was incorporated and also has created a lot of controversy, and
24 this is as I briefly mentioned the JCE III liability mode.

25 In the ICC, we submit, there is a higher standard required of

1 dolus. I will first refer to the relevant paragraphs in the Lubanga
2 decision which highlight our concerns, and then I will point out why we
3 think this is contrary to the ICC Statute.

4 Paragraph 352 of the Lubanga 29 January 2007 decision states
5 that: "As a second point of dolus, the situations in which the suspect
6 is aware of the risk that the objective elements of the crime may result
7 from his or her actions or omissions and accepts such an outcome by
8 reconciling himself or herself with it or consenting to it."

9 Then we note that in paragraphs 353 and 354, reference is made to
10 substantial likelihood, and then I refer to paragraph 355, which states
11 that: "Where the state of mind of the suspect falls short of accepting
12 that the objective elements of the crime may result from his or her
13 actions or omissions, such a state of mind cannot qualify as a truly
14 intentional realisation of the objective elements."

15 We agree. However, we note the reference to "may." And a few
16 more references, and then I will read out what actually the Statute says
17 in Article 30.

18 In paragraph 35 -- sorry, 361, again it says "may result."
19 Paragraph 363 again refers to "substantial likelihood," and paragraph 364
20 refers to "a low risk." If the risk is low, we need express consent. We
21 submit if the risk is low, there is no crime.

22 Article 30, under (2)(b) it states: "For the purposes of this
23 Article, a person has intent where in relation to a consequence that
24 person means to cause that consequence or is aware that it will occur in
25 the ordinary course of events."

1 With all the respect, I think the -- the language is very clear.
2 This excludes *dolus eventualis*. It will occur in ordinary course of
3 events. What does that mean? It means that it will occur unless
4 something extraordinary happens, unforeseen, and that's why it doesn't
5 occur.

6 We submit that this is a different standard as the standard set
7 out in the Lubanga decision.

8 I'm not alone in this opinion. I can quote a few authorities.
9 The already-mentioned Gerhard Werle. For the interpreters this is page
10 29 of my notes. It's the same article, "Individual Criminal
11 Responsibility in Article 25 ICC Statute," at page 963 of the Journal of
12 International Criminal Justice he states: "While foreseeability and
13 acceptance of the risk suffices in the Yugoslavia Tribunal's view," my
14 own comment, as I earlier indicated the JCE III liability mode, "this
15 must be rejected for joint commission under Article 25(3)(a) of the ICC
16 Statute. Under the ICC Statute, each co-perpetrator has to act with the
17 requisite specific intent."

18 There is another article of him, Gerhard Werle, together with
19 Florian Jessberger. It's called: "Unless otherwise provided: Article
20 30 of the ICC Statute and the Mental Element of Crimes Under
21 International Criminal Law." It's again the Journal of International
22 Criminal Justice, number 3, in the year 2005, pages 35 to 55, and I quote
23 at pages 41 to 42: "In the perpetrator's perception at the time of the
24 act, carrying out the conduct would cause the consequences, unless
25 extraordinary circumstances intervened. Thus, it is not enough for the

1 perpetrator to merely anticipate the possibility that his or her conduct
2 would cause the consequences. This follows from the words 'will occur.'
3 After all, it doesn't say 'may occur.'"

4 So that was the point I made earlier.

5 I also want to stress that it's not coincidence that *dolus*
6 *eventualis* has not been incorporated in the ICC Statute. It's been
7 debated. It's been vigorously debated during the days in Rome and there
8 was a 1998 draft. There was a draft to incorporate such a mode -- or
9 such an intent, and it was decided to delete it.

10 I can -- I can quote many, many other authorities who would
11 support my point of view, but I could also just leave that for the
12 written submissions. It's not adding anything. It's just that they all
13 feel that Article 30 does not leave room for *dolus eventualis*.

14 Your Honours, everything together, the three issues I've raised,
15 we have, we submit, a new rather controversial mode of indirect
16 co-perpetration with a *dolus eventualis* and a command plan that is only
17 remotely linked to crimes under the Statute. We create -- as a
18 consequence we create a catch-all crime. Perhaps one issue we can be
19 sure of, the schedule crime only applies to the most senior members of a
20 common plan. That we accept. But once you've been identified as such,
21 you can be held liable for crimes almost of -- of any stranger, I would
22 say.

23 I already highlighted that we are talking about over 1.300
24 fighters from two different groups, allegedly under the command of two
25 different co-perpetrators. We're talking about crimes that were not

1 intended, that were not part of the common plan, perhaps carried out by
2 subordinates, or not, but alleged subordinates of a co-perpetrator that
3 our client, Mr. Germain Katanga, may never have met in his life up till
4 now, and these crimes may be committed not even in the course of this
5 alleged attack but as a consequence, and I -- I think the very clear
6 example is the rape charge. There is no time span. There is no limit to
7 this. So we have some serious issues of concern here. And first of all,
8 I would just repeat, we would like you to clarify whether or not -- to
9 what extent -- I mean, for example, as I said, the rape charge are --
10 what are we talking about? What is the scope here? And you may or you
11 may not follow the Lubanga approach. If you do, we hope that you will
12 take our concerns into consideration.

13 I thank you very much.

14 PRESIDING JUDGE KUENYEHIA: Thank you very much.

15 I take it, Mr. Hooper, that that is the end of your presentation.

16 MR. HOOPER: Yes, those are our submissions.

17 PRESIDING JUDGE KUENYEHIA: Thank you very much. I think that
18 brings us to the end of the presentation for this morning as agreed
19 between you and Mr. Ngudjolo. Mr. Ngudjolo would -- sorry, Mr. Kilenda,
20 would make his presentation on Monday.

21 The Chamber would therefore like to find out from the Prosecution
22 whether on Monday, since Mr. Kilenda has indicated to us, unless he
23 changes his mind, that he will only use two hours of his time, whether
24 you would be willing to start your closing statement or you want us to
25 wait till Tuesday? The Chamber is fine with either way.

1 MR. MacDONALD: Thank you, Madam President, but we would kindly
2 request that we start the final presentations on Tuesday to enable us,
3 obviously, to respond orally, if need be, to arguments presented by
4 Mr. Kilenda during his -- his presentation.

5 PRESIDING JUDGE KUENYEHIA: Thank you very much. Then what the
6 Chamber is going to do is the Chamber will adjourn this hearing, the
7 confirmation hearing, until Monday morning. We have an issue of an
8 ex parte hearing with Mr. Hooper on behalf of Mr. Germain Katanga, and
9 with the -- that is a closed ex parte hearing, and therefore we will only
10 have Mr. Katanga and the Registry here for that hearing. We can take a
11 half an hour break, and since our time is not up, finish the hearing
12 before we leave today.

13 Ms. Paolina Massidda.

14 MS. MASSIDDA (interpretation): Thank you, Madam President. I
15 would like to raise a practical issue. As you know, I have been
16 provisionally appointed, and I would like to have some indication from
17 the Chamber in relation to the issue of Mr. Mulamba. I'm requesting,
18 because the Legal Representative conclusion are scheduled at the moment
19 for Tuesday next week. So I would like to have some indication on
20 whether the office has to consider itself bound by this calendar or if we
21 can wait a decision from the Chamber before scheduling the presentation
22 of myself or Mr. Mulamba if -- for the conclusion, of course, of the
23 confirmation of the charges hearing. Thank you.

24 PRESIDING JUDGE KUENYEHIA: Yes, Ms. Massidda, the Chamber is
25 very much aware of the issue. We'll issue a decision in due course.

1 Thank you very much.

2 MS. MASSIDDA (interpretation): Thank you.

3 PRESIDING JUDGE KUENYEHIA: Mr. Hooper, do I take it that

4 Mr. Katanga will not be available for the ex parte hearing?

5 MR. HOOPER: No, he won't be.

6 PRESIDING JUDGE KUENYEHIA: Thank you.

7 We will then adjourn this hearing. For the rest of the parties
8 it is adjourned until Monday morning at 9.00. For those involved in the
9 ex parte hearing for half an hour only. We will start at 12.30, and
10 hopefully we will be able to finish by 1.30, Mr. Hooper.

11 MR. GILISSEN (interpretation): With your leave, Madam President,
12 you will recall that before the problems that this Chamber encountered,
13 we requested disclosure of the note that Ms. Massidda had read and made
14 observations on. We have not received a response so far or even so from
15 your Chamber, and that we would be grateful if we were told something
16 about it. I just wanted to know what stage we were at. Thank you very
17 much.

18 PRESIDING JUDGE KUENYEHIA: Okay. Thank you for reminding the
19 Chamber. The Chamber will make a decision on it before we start the
20 proceedings on Monday.

21 MR. GILISSEN (interpretation): Thank you very much.

22 PRESIDING JUDGE KUENYEHIA: Okay. So finally the hearing is
23 adjourned until Monday, but for the rest of us for half an hour only.
24 Thank you.

25 COURT USHER: All rise.

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