

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-01/06

Date: 31 March 2014

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public

**Prosecution's submissions regarding the conduct of the hearing before the Appeals
Chamber**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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REGISTRY

Registrar

Mr Herman von Hebel

1. Pursuant to the order of the Appeals Chamber dated 25 March 2014,¹ the Prosecution hereby provides its submissions regarding the conduct of the hearing before the Appeals Chamber.

Submissions related to the conduct of the evidentiary portion of the hearing²

2. For the hearing of witnesses D-0040 and D-0041, the Appeals Chamber should adopt the procedure followed during the evidentiary phase of the trial in this case, which was largely based on an agreement between the parties,³ and which the Defence endorsed in its most recent submission.⁴
3. Accordingly, the Defence, calling witnesses D-0040 and D-0041, should question each witness first.⁵ During examination-in-chief, leading questions should not be used for contentious areas⁶ and the Defence should confine its questioning to the issues for which they have sought to admit the evidence of these witnesses on appeal.
4. To the extent that the Appeals Chamber has granted leave to the Legal Representatives of Victims V01 and V02,⁷ they should next be allowed to question each witness. The scope of their questioning should be limited to issues that were raised during examination-in-chief and that affect the Victims' personal interests.⁸
5. Thereafter, the Prosecution should be allowed to cross-examine witnesses D-0040 and D-0041 on matters related to their testimony and its reliability, as well

¹ ICC-01/04-01/06-3068 OA4 OA5 OA6 ("Scheduling Order").

² ICC-01/04-01/06-3068 OA4 OA5 OA6, paras.1(b) and (c).

³ ICC-01/04-01/06-1140, paras.31-43; ICC-01/04-01/06-T-104-ENG, pp.35-38.

⁴ ICC-01/04-01/06-3070, para.3.

⁵ Rule 140(2)(a); ICC-01/04-01/06-T-104-ENG, p.35, lns.22-23; p.37, lns.8-9.

⁶ ICC-01/04-01/06-T-104-ENG, p.37, lns.9-11.

⁷ ICC-01/04-01/06-3068 OA4 OA5 OA6, para.1(d).

⁸ Article 68(3); ICC-01/04-01/06-T-104-ENG, p.37, lns.12-13; ICC-01/04-01/06-3068 OA4 OA5 OA6, para.2(e).

as on the credibility of the witnesses and on other relevant matters.⁹ The Prosecution estimates that it will need 90 minutes for the examination of witness D-0040 and 60 minutes for the cross-examination of witness D-0041, which mirrors the amount of time requested by the Defence for their examination-in-chief of these witnesses.

6. The Defence should then be allowed to re-examine the witnesses.¹⁰ Re-examination should be limited to matters arising out of cross-examination and out of examination by the Legal Representatives of Victims.¹¹ If the Defence wishes to raise new issues, it should be required to make an application to that effect.¹² During re-examination, leading questions should be avoided.¹³
7. The Appeals Chamber may ask questions whenever the Judges consider it appropriate, ensuring that the Defence rights under Rule 140(2)(d) are respected and that the parties generally have the opportunity to explore any new issues to the extent that is necessary.¹⁴
8. The Defence should be required to provide the Prosecution, through the Registry, a list of the evidence it intends to use in questioning the two witnesses, and the electronic version of such evidence, at least seven full working days in advance.¹⁵ The Prosecution should be required to provide the Defence, through the Registry, such evidence it intends to use in questioning the two witnesses at least three working days in advance.¹⁶ Because cross-examination of a witness is to some extent reactionary, the Appeals Chamber

⁹ Rule 140(2)(b); ICC-01/04-01/06-1140, para.32; ICC-01/04-01/06-T-104-ENG, p.36, lns.15-22. ICC-01/04-01/06-T-104-ENG, p.35, lns.22-23, p.37, lns.1-5; p.37, lns.14-15.

¹⁰ Rule 140(2)(d).

¹¹ ICC-01/04-01/06-T-104-ENG, p.36, lns.4-9; p.37, lns.16-20.

¹² ICC-01/04-01/06-T-104-ENG, p.37, lns.18-20.

¹³ ICC-01/04-01/06-T-104-ENG, p.36, lns.2-4.

¹⁴ ICC-01/04-01/06-T-104-ENG, p.37, ln.25 – p.38, ln.3.

¹⁵ Rules 77 and 78 and Regulation 52 of the Regulations of the Registry; ICC-01/04-01/06-2192-Red, para.64; ICC-01/04-01/06-1140, para.34.

¹⁶ ICC-01/04-01/06-2192-Red, para.64; ICC-01/04-01/06-T-119-ENG-WT, p.1, ln.24 – p.2, ln.16.

should allow the Prosecution to add documents for the purposes of cross-examination if this becomes necessary as a result of the examination-in-chief.¹⁷

9. The parties should be required to make any objections to the admissibility of a document that the other party intends to use at the hearing in writing and prior to the commencement of the hearing.
10. Finally, the Prosecution should be allowed to speak to witnesses D-0040 and D-0041 before they give evidence, provided that they agree.¹⁸ This would assist the Prosecution in focussing its cross-examination. The Defence has informed the Prosecution that it is in the process of asking the witnesses for such consent.

*Submissions related to the hearing of submissions and observations*¹⁹

11. The Prosecution does not object to the order in which the Appeals Chamber is considering to invite the parties and participants to address it and the time allocated to the Prosecution to make submissions.²⁰



Fatou Bensouda, Prosecutor

Dated this 31st day of March 2014

At The Hague, The Netherlands

¹⁷ ICC-01/04-01/06-1140, para.34.

¹⁸ ICC-01/04-01/06-2192-Conf, paras.50-51.

¹⁹ ICC-01/04-01/06-3068 OA4 OA5 OA6, para.2(b).

²⁰ ICC-01/04-01/06-3068 OA4 OA5 OA6, para.2(a).