

1 International Criminal Court

2 Trial Chamber I

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

4 Case Lubanga - Open Session

5 Thursday, 13 March 2008

6 The hearing starts at 10.04 a.m.

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

9 PRESIDING JUDGE FULFORD: Good morning.

10 The Prosecution today are represented by Mr. Withopf and
11 Mr. Sachdeva, along with other members of their team. The Defence, by
12 Mr. Desalliers, Ms. D'Angelo, and other members of the Defence team.
13 For the Registry, Mr. Dubuisson and Mr. Vaatainen are present, along
14 with other members of the Registry. Ms. Bapita and Mr. Walley, as
15 Legal Representatives for Victims. And Ms. Massidda and others from
16 the Office of Public Counsel for Victims.

17 Where we broke off yesterday was at the moment that Mr. Bulmer
18 was going to rise to his feet to make a submission. You now have the
19 opportunity of doing so, Mr. Bulmer.

20 MR. BULMER: Thank you very much, Mr. President and your Honours.

21 I rise just to address a question, Mr. President, you left or a
22 scenario you left with the Prosecution in the context of the issue of
23 translation of the statements during -- in the course of the protocol
24 for victim familiarisation.

25 Just to reiterate my understanding of what that scenario was, it

1 involved the possibility of the Prosecution translating the written
2 statements into the language knowledgeable to the witness and then
3 going to have the witness sign those statements. While I can indicate
4 that is certainly one along the panoply of various solutions, it is
5 not one that is certainly -- that the Prosecution would prefer.

6 I've considered the practical aspects of that, and my concern, in
7 fairness to voice it to the Chamber, is that it might run afoul, if
8 not the word, the spirit, of the familiarisation decision because it
9 would effectively have the Prosecution reviewing the statement at some
10 point before trial with the witnesses which may ultimately lead to
11 other investigative inquiries if there's a discrepancy in the
12 translation.

13 So there are -- if the Chamber sees fit to go that route - as I
14 indicated it is one possibility - I would ask the Chamber to keep in
15 mind that risk and give the Prosecution clear guidance insofar as how
16 it can adhere with the spirit of one decision while complying with the
17 other one.

18 I maintain the earlier position that given the number that we've
19 canvassed prior of the statements, the best and objective translation
20 capability would rest with the Registry. That was the only submission
21 I wanted to make on that point.

22 PRESIDING JUDGE FULFORD: Thank you for warning us, Mr. Bulmer,
23 of the possibility that we could issue contradictory decisions. It's
24 always good to focus on such things.

25 Mr. Bulmer, before you sit down, though, I want to ask this: Are

1 we right, therefore, in assuming that it is effectively impossible to
2 have the French or English statement taken at the same time as a
3 statement in the language that the witness principally speaks in?
4 Because if they're done -- if they're done essentially at one and the
5 same time, then they would be part of the same process and there
6 couldn't, in those circumstances, be a suggestion that this was in
7 some way a part of later witness familiarisation. It would simply be
8 part of the overall process of taking the witness' statement - one
9 version in French; in this case one version in Swahili.

10 MR. BULMER: From a practical perspective, it's not impossible,
11 obviously. That would be possible on a moving-forward basis. It
12 really, in my respectful submission would create effectively kind of
13 two statements of the witness. Assuming the witness was to sign both
14 statements, the translated one and the one in their original language,
15 you would have two statements. There's nothing inherently problematic
16 about that as long as proper protocols were followed. But there would
17 be two statements and arguably the witness, to use a vernacular from
18 my home jurisdiction, could be cross-examined on two statements given
19 exactly at the same time which may be inconsistent.

20 PRESIDING JUDGE FULFORD: I see that, Mr. Bulmer. So you're
21 saying, really, it's much easier: One statement, one language, and
22 then have it translated later by an independent body.

23 MR. BULMER: That's the kernel of my submission, yes.

24 PRESIDING JUDGE FULFORD: Okay. Judge Blattmann has a question
25 for you as well on this.

1 JUDGE BLATTMANN: Yes. I had the impression yesterday that the
2 Prosecution stated that you sometimes tape or sometimes record the
3 declarations of the witness but not always. Is there an explanation
4 why you do so? Is there a logical approach to that? Or would that
5 maybe be a solution if you just would tape all of the declarations of
6 the witness?

7 MR. BULMER: Thank you, your Honour. It's an operating protocol
8 that was in time with respect to -- you're referring to Mr. Withopf's
9 position on that. So is taping a preferable approach? To eliminate
10 this problem, logically speaking, yes, it would be on a moving-forward
11 basis because the -- because the statements then would be recorded in
12 their fulsome in both languages. And, indeed, when I gave you that
13 number yesterday, the 14, three of those statements in retrospect,
14 three of those are actually recorded audio-video interviews of persons
15 who were interviewed within the context of 55(2) so they actually have
16 those transcripts of those. So if I could just use this opportunity,
17 then, to resile from the earlier number, the 14 is actually reduced to
18 the 11 based on my review of that fact as well. And by that I mean
19 three of those are taped interviews in which both languages are used.
20 So when the person is reading the transcript, they would be able to
21 see both of those positions.

22 I hope I've addressed your question, your Honour. I think the
23 point being that yes -- your end question, yes, it would eliminate
24 this issue because you have one contemporaneous statement, and it also
25 eliminates the previous answer I gave to the question posed by the

1 President that you don't have two statements that may be contradictory
2 at once.

3 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Bulmer.

4 There are a number of other matters that we must deal with while
5 we have everyone together.

6 In no particular order, the proposal for the second videolink
7 test is that it should take place at 5.00 today in this courtroom.
8 Does that present any difficulties for any of the parties or the
9 participants, given the indication given yesterday? I can see there's
10 general consent. So I do encourage at least one representative for
11 each of the parties and the participants to attend so that you are
12 informed of this, because this may be an issue that arises later.
13 Thank you for your help with that.

14 There is a judicial recess approaching and I want to make it
15 clear that during this and all other judicial recesses whilst this
16 Chamber is sitting, the Judges propose to use the time, at least in
17 part, to have a holiday. It follows we will not welcome filings made
18 an hour before the judicial recess begins, requesting that various
19 matters are resolved during the course of the recess, particularly if
20 it's clear that there needs to be a hearing. So if you've got filings
21 up your sleeves, can you make sure that they are entered sufficiently
22 early for us to be able to deal with them before the recess starts.

23 Now, of course, if there are emergencies we will deal with them.
24 The Judges are able to contact each other and the legal advisor during
25 the course of a recess and so decisions can be made. But can you

1 please, all of you, ensure that these are limited to real emergencies.

2 Mr. Withopf, you don't necessarily have to respond to this now
3 but it's something that I'm going to ask you to think about.

4 There is a category of redactions which, if I understand the
5 position correctly, relates to limitations on disclosure that have
6 been imposed by information providers. As I understand it, the
7 Prosecution considers itself bound by the limitations that have been
8 imposed by the information providers unless and until they are lifted,
9 and that what has happened is that material in some instances has been
10 served with redactions because the information provider has not to
11 date given the requisite authorisation. However, again, as I
12 understand the position, the Prosecution are aware of the content of
13 the material that hasn't been disclosed.

14 Now, at least theoretically that creates this possibility: That
15 there is, to the Prosecution's knowledge, exonerating material or
16 material which could have a tendency to undermine the Prosecution's
17 case which is in existence which the Prosecution has not disclosed and
18 which it is unable to disclose in its own view. This, I believe, has
19 to be addressed at least in principle because the Chamber has got to
20 make a decision, in my view, as to what should happen if there is
21 material exonerating evidence which has not been disclosed which
22 otherwise would be disclosed but which isn't going to be disclosed.

23 Now, as I say, I've taken you completely by surprise on this so
24 I'm not asking you to respond now, unless you wish to do so. But at
25 some stage in the relatively near future I'm going to ask you to

1 return, please, to this issue.

2 MR. WITHOPF: Mr. President, a number of preliminary remarks I
3 wish to make, and I'm not taken by surprise because this is obviously
4 one of the very important pending issues, and what you are addressing,
5 Mr. President, your Honours, is exactly the dilemma between Article
6 54(3)(e) and Article 67(2), and this is of course something that is of
7 huge concern not only for the Defence and the Chamber but also for the
8 Office of the Prosecutor.

9 Against the background of that concern, Mr. President, your
10 Honours, we paid particular attention to two aspects of it. Whenever
11 the information provider makes redactions to information that is of
12 potentially exculpatory nature, as has been indicated yesterday, we go
13 back to the information provider, enter into further negotiations with
14 the information provider, and experience has shown that there's a
15 potential that these negotiations are successful to the extent that
16 the redactions to the potentially exculpatory portions in the
17 documents concerned are indeed lifted.

18 There are instances, and it can be anticipated that there will be
19 further instances, where the information provider, for whatever
20 reasons, decides to not be prepared to lift the redactions. In such a
21 situation the next step we envisage would be to figure out whether
22 there is any alternative material which contains the same information
23 of potentially exculpatory nature. Then, of course, we would
24 disclose, and we would have disclosed, such material to the Defence.
25 It can be excluded, admittedly, that we will face situations that such

1 alternative material is not available and then we are exactly in that
2 dilemma.

3 These are my preliminary remarks. Of course, due to the high
4 importance of this matter, we would prefer to make supplementary
5 submissions in writing, Mr. President, your Honours.

6 PRESIDING JUDGE FULFORD: Can I ask you to approach those
7 submissions in this way, Mr. Withopf: I think it would be, if it's
8 not too onerous for the Prosecution, hugely helpful for the Bench if
9 you could identify for our benefit - and this of course would have to
10 be an ex parte basis - those areas of evidence which are potentially
11 exculpatory and which you are not at present able to disclose because
12 of the attitude of the information provider. If that could be set out
13 as part of the submission, this would help us enormously. Coupled
14 with that, if there is other evidence which you have been able to
15 disclose which covers the ground as regards the pieces of evidence
16 that cannot be disclosed.

17 MR. WITHOPF: Mr. President, your Honours, we will certainly do
18 so. And of course that also reminds me of the decision - I believe
19 it's the one of the end of November - which says that whenever there
20 is potentially exculpatory nature of key importance which would
21 undermine the Prosecution's case, that in such a situation we would
22 need to go back to the Trial Chamber.

23 In light of that order, we have scrutinised material and I can
24 affirm to the Trial Chamber that at this stage there is not such
25 potentially exculpatory information within the scope of documents the

1 Office of the Prosecutor has in its possession where we believe it
2 would require us to go back to the Chamber.

3 PRESIDING JUDGE FULFORD: Could you just check, Mr. Withopf, to
4 make sure that's the position? Because it was -- these remarks on my
5 part have really been brought about by something that you said
6 yesterday on the subject of information that you weren't able to
7 disclose because of the attitude of information providers. It rang
8 personal alarm bells, as it were, and I just wanted to make sure that
9 this was being addressed properly.

10 MR. WITHOPF: It will, indeed, be addressed properly. Thank you.

11 PRESIDING JUDGE FULFORD: Two weeks Friday?

12 MR. WITHOPF: That's okay.

13 PRESIDING JUDGE FULFORD: Thank you very much. Thank you,
14 Mr. Withopf.

15 We are conscious that there is a potentially important decision
16 which the parties and participants are awaiting following the Status
17 Conference on the 12th and 13th of February. Because of the
18 complexity of the issues and because of the potential length of the
19 decision, it is not available immediately for publication. As a
20 result there is one aspect of the decision which we have made which,
21 in our view, it is desirable to communicate to the parties and the
22 participants today.

23 It has become imperative, in our view, that this trial commences
24 in the near future once protective measures have been put in place,
25 whether on an interim or a long-term basis. In order to provide one

1 last opportunity for these to be implemented and to ensure that the
2 Defence has full disclosure 12 weeks in advance of the trial, the
3 Prosecution are granted until 4 p.m. on Friday, the 28th of March,
4 2008, to serve their case in full, save to the extent that redactions
5 have been approved in advance by the Chamber. The Chamber and the
6 Defence are to be informed immediately if the Prosecution intend not
7 to rely on any evidence that has been included as part of its case.

8 After Friday, the 28th of March, 2008, the Prosecution may not
9 add witnesses or documents to its trial evidence without the leave of
10 the Chamber. Given the length of time afforded to the Prosecution to
11 investigate these alleged crimes, the delays to date, and the
12 requirement of guaranteeing the accused a fair trial, any request to
13 add evidence after that date will be scrutinised with great care.

14 As far as the Bench is concerned, that concludes the matters that
15 we would wish to raise in open court. There now needs to be an ex
16 parte hearing with the Prosecution and the Registry only present. But
17 before we rise, does anybody wish to use this last opportunity to
18 raise any issues while the Bench is here?

19 We thank you all for your attendance and for your assistance over
20 the last two days. As I understand it, there now needs to be a
21 20-minute break. We shall sit again at a quarter to 11.00 in closed
22 session.

23 The Status Conference adjourned at 10.25 a.m.

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