

1 International Criminal Court
2 Trial Chamber I - Courtroom 1
3 Presiding Judge Adrian Fulford, Judge Elisabeth Odio Benito and Judge René
4 Blattmann

5 Situation in the Democratic Republic of the Congo - ICC-01/04-01/06

6 In the case of The Prosecutor v. Thomas Lubanga Dyilo

7 Monday, 25 January 2010

8 (The hearing starts at 9.30 a.m.)

9 (Open session at 9.30 a.m.)

10 THE COURT USHER: All rise. The International Criminal Court is now in
11 session. Please be seated.

12 PRESIDING JUDGE FULFORD: Good morning. Mr Biju-Duval, we understand that
13 you have an application for an adjournment of about two hours so that some
14 documents that have recently come into your possession can be considered fully
15 before the Chamber is supplied with them so that we can rule on whether two
16 witnesses should be recalled and also, as we understand it, you want time to
17 consider the documents before the examination of the current witness is completed;
18 is that right?

19 MR BIJU-DUVAL: (Interpretation) Yes, your Honour, that's quite so. New
20 elements that we think are very important have come in. They came in last night
21 and we have not been able to -- well, we really only began looking at them this
22 morning and we will continue reviewing them.

23 I would also like to inform the Chamber that these new information and
24 items appear to be so important that probably it will be necessary for us to bring
25 an application for an ex parte hearing before the Chamber for reasons that have to

1 do with the protection of people.

2 PRESIDING JUDGE FULFORD: I can't imagine at this stage anyone has any
3 submissions on this, but just in case? No.

4 Mr Biju-Duval, we of course trust counsel in these circumstances. If
5 responsible and senior members of the Bar say that it is absolutely necessary for
6 there to be a short adjournment so that material can be analysed in order to allow
7 the proceedings to continue fairly, we are essentially in your hands. Will you
8 please ensure that the time lost is kept to the absolute reasonable minimum, and
9 that if there needs to be an ex parte hearing that the Chamber is informed as early
10 as possible so that the necessary arrangements can be made and so that we can make
11 an estimate as to time in order to save others waiting in the Court building
12 unnecessarily. So the application is granted, but you do have a duty to be as
13 expeditious as possible.

14 We have had raised just before quarter past 9 this morning an issue as
15 regards the extent of disclosure and the modalities of disclosure between the
16 Defence and participating victims. Ms Massidda and other counsel have set out
17 their concerns in a short email. Mr Biju-Duval, we're of the view that the Defence
18 should respond to this. We would prefer the response to be in writing. We are
19 content for it to be by email and we ask whether, if we give you until 4:00 p.m.
20 tomorrow afternoon, whether that will be sufficient for a member of your team to
21 focus on the issue. We intend to give the Prosecution the same timeline if it's
22 acceptable, Ms Struyven.

23 MR BIJU DUVAL: (Interpretation) Your Honour, for us it's quite a simple
24 matter. The answer will be exclusively to make reference to a decision by the
25 Chamber, and that is a ruling that goes back to 9 December, and we will provide an

1 official response, but that is not a problem.

2 PRESIDING JUDGE FULFORD: Thank you, Mr Biju-Duval, that will be helpful.
3 If it is really only a reference to a ruling that the Chamber has made, and that is
4 the extent of the response that you wish to file, could you please do so as quickly
5 as possible today to save us having to wait until tomorrow to deal with it?

6 Similarly, Ms Struyven, we would ask whether the Prosecution's in response
7 to those circumstances could be in by midday today? I see you nod. Good. You
8 needn't stand up. Thank you.

9 Ms Massidda, given that it looks as though all we're going to receive is
10 reference to decisions that we've made, to which you'll be aware, in those
11 circumstances I think it would be otiose for the legal representatives to put in
12 any form of reply and, again, I see you nod. Unless somebody wishes to intervene
13 straightaway, we will not expect any further filings or emails on this issue.

14 MS MASSIDDA: Yes, your Honour. If the reference is only to the previous
15 decision of the Chamber we are not going to ask for any reply, but I need to see
16 the response. Thank you.

17 PRESIDING JUDGE FULFORD: Good. Thank you.

18 Now, are there any other matters that can be dealt with apart from the
19 oral ruling on discussions with Defence witnesses during this, as it were, fallow
20 period before the evidence recommences, once the Defence have had the benefit of an
21 adjournment this morning? Yes, Ms Massidda.

22 MS MASSIDDA: Thank you, your Honour. The legal representative also
23 signed a brief email this morning to the Chamber asking -- informing the Chamber
24 that we would like to respond to the Defence submissions on personal interest, on
25 the notion of personal interest of victims in respect of questioning of the Defence

1 witnesses. The Defence request was submitted on 20 January. If I'm not wrong the
2 document number is 2253, and we would like to respond by Wednesday this week at the
3 latest 4 o'clock if this is convenient with the Chamber. Thank you.

4 PRESIDING JUDGE FULFORD: You appreciate, of course, that the sooner your
5 filing is in the sooner we're going to be able to resolve the issue, but give me a
6 moment, please.

7 (The Trial Chamber confers)

8 PRESIDING JUDGE FULFORD: Granted, Ms Massidda. Obviously if you can get
9 your response in earlier than that, that's going to be to your advantage.

10 MS MASSIDDA: Thank you very much. We are trying for tomorrow.

11 PRESIDING JUDGE FULFORD: Thank you very much indeed.

12 MS MASSIDDA: Thank you.

13 PRESIDING JUDGE FULFORD: Anything else? No. We will now give the oral
14 ruling on the arrangements for the discussions with Defence witnesses before their
15 oral testimony. If any counsel wishes to leave, you are free to do so. There need
16 only be one representative as it were, from each team, so we will not consider it
17 disrespectful if any member of the Bar at this point in time quietly leaves court.

18 The applications. An issue has arisen as to the arrangements that are
19 appropriate for discussions between the Prosecution and certain Defence witnesses
20 in advance of their testimony in court. The parties in an email sent to the
21 Chamber on 20 January 2010 at 13.56 proposed the following arrangements:

22 (i) In each instance the discussion is recorded with the express consent
23 of the witness. We note that during the hearing on 21 January 2010 * Principal
24 Counsel of the Office of Public Counsel for Victims requested disclosure as
25 appropriate of any record of these meetings to the extent that the interests of

1 participating victims are engaged (transcript 230, pages 21 and 22).

2 (ii) A court stenographer is present during the discussion. It is
3 suggested that given the likely short period between the discussion and the
4 witness's oral testimony this step should be implemented so that a contemporaneous
5 transcript can be used, if necessary, during the Court hearings. Presumably, if a
6 dispute arises between the in-court evidence and what was said during the
7 discussion, the parties do not envisage asking the witness to sign any formal
8 record of the meeting.

9 (iii) The discussion will take place in the presence of a limited number
10 of members of the Prosecution and Defence teams but without the attendance of a
11 representative of the VWU.

12 (iv) Otherwise than in exceptional circumstances, the discussion will
13 take place outside of court sitting hours to allow the particular Defence counsel,
14 who is conducting the questioning of the witness, to be present. In those
15 instances, when this is not possible, an application might be made to the Chamber
16 for a rearrangement of the court schedule.

17 (v) The Prosecution will try to ensure that the discussions are as brief
18 as possible, not extending beyond three hours, and that they are limited to
19 essential matters. However, it is envisaged that exceptionally this may need to be
20 extended. Ms Samson repeated this approach during submissions to the Bench on 21
21 January 2010 (transcript 230, pages 17 and 18) whilst indicating that it is hoped
22 that the discussions will be considerably shorter than three hours.

23 (vi) The Defence suggests that the meeting between the Defence and the
24 witness, prior to the discussion, to establish whether he or she consents to this
25 arrangement, the "consent meeting" should take place without the attendance of a

1 representative of the VWU. During the consent meeting, the Defence undertakes not
 2 to discuss the witness's evidence. The Prosecution has indicated that it does not
 3 oppose this consent meeting taking place, absent the VWU. Maître Mabilille developed
 4 this suggestion during her oral submissions on 21 January 2010 (transcript 230,
 5 pages 19 and 20), outlining that in her view it is necessary for the consent
 6 meeting to take place so that counsel is able to explain fully the proposal that is
 7 being made to ensure that agreement is only given by the witness for the discussion
 8 following a proper explanation which includes the "basic information".

9 (vii) The parties seek the assistance of the VWU in order to arrange the
 10 consent meeting between the Defence and the witness during the day immediately
 11 following the arrival of the witness in The Hague in order to enable the Defence
 12 speedily to investigate the issue of the witness's agreement. The discussion
 13 between the witness and the Prosecution can potentially then take place the
 14 following day.

15 (viii) It is suggested that the familiarisation process could begin as
 16 soon as the meeting between the Prosecution and the witness has concluded. This
 17 will allow the Prosecution to benefit from a delay between the discussion and the
 18 testimony of the witness before the Chamber. The Prosecution requests a delay of
 19 three days "to be able to undertake any follow-up action that may be required",
 20 whilst the Defence suggests two days in order to limit the time the witness needs
 21 to spend in The Hague.

22 * Principal Counsel of the Office of Public Counsel for Victims, in an
 23 email of 20 January 2010 (sent at 13.51), requested a similar opportunity to meet
 24 with Defence witnesses whenever the interests of the victims she represents are
 25 affected. She reiterated this request during the hearing on 21 January 2010

1 (transcript 230, pages 21 and 22). The Chamber is reminded that on 22 January 2009
2 (transcript 105, pages 60 and 61) the Chamber approved the presence of counsel
3 representing victims during the courtesy meetings which form part of the
4 familiarisation process. In later emails, counsel from the other teams
5 representing victims in this case joined principal counsel in her applications in
6 this regard.

7 During the hearing on 21 January 2010, the representative of the VWU
8 suggested that its presence at meetings of this kind was only necessary in
9 exceptional situations when there are particularly vulnerable witnesses (page 15
10 onwards). Therefore, it is suggested that the VWU need not be present during the
11 short consent meeting with the Defence, or the more substantial discussion if one
12 follows thereafter. The VWU suggests that the normal procedure of welcoming and
13 briefing is followed when the witness arrives, not least so that it can be
14 explained to the witness that there may be a pre-evidence interview. Indeed the
15 VWU suggests that the familiarisation process, which includes the principle of
16 non-contact between the witness and the party or participant calling him or her,
17 should continue to commence as presently ordered by the Chamber (viz. on arrival in
18 The Hague), but that it is temporarily suspended for these particular purposes.
19 The VWU is of the view that if a number of people are present during these
20 meetings, including a stenographer, then its own accommodation is inappropriate.
21 The VWU is concerned from a practical point of view of the implications of
22 discussions that may last three hours.

23 Determination

24 In our decision of 30 November 2007, entitled the "Decision Regarding the
25 Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial"

(document 10449), 30 November 2007, the Chamber dealt substantively with the issue of witness familiarisation. At paragraph 56, the Chamber decided that "once the process of witness familiarisation has been commenced, any further meeting between a party and its witnesses outside of court is prohibited". On 16 January 2009 (transcript 104), the Chamber decided that the familiarisation process begins when the witness arrives in Holland and that the legal representatives are to be excluded throughout, although the clear exception to this ban relates to the courtesy meeting.

This latter meeting, the so-called courtesy meeting, was provided for in the decision of 30 November 2007 (document 1049):

"53. The Trial Chamber therefore orders the Victims and Witnesses Unit to undertake the following process of witness familiarisation in consultation with the party introducing the witness before the Court previous to their testimony being given. This process shall include:

- a. Assisting the witness to understand fully the Court's proceedings, its participants and their respective roles;
- b. Reassuring witnesses about their role in proceedings before the Court;
- c. Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witnesses the process of examination;
- e. Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
- f. Providing witnesses with an opportunity to acquaint themselves with the people who may examine them in court;
- g. "Walking witnesses through" the courtroom and its procedure prior to

1 the day of their testimony in order to acquaint them with the layout of the court,
2 and particularly where the various participants will be seated and the technology
3 that will be used in order to minimise any confusion or intimidation."

4 In our decision of 19 November 2009, entitled "Second decision on
5 disclosure by the Defence and decision on whether the Prosecution may contact
6 Defence witnesses" (document 2192), the Chamber indicated that there may be reasons
7 as to why "discussions" between Prosecution and witnesses called by the Defence in
8 advance of their testimony may assist in the efficient management of the
9 proceedings and assist the Chamber in its determination of the truth. The Chamber
10 cited as examples of the potential benefits first that irrelevant lines of
11 questioning may be identified and discarded; second, lines of further enquiry may
12 become clear, enabling their timely investigation prior to the witness giving
13 evidence; and, third, this exercise may lead to agreement as records relevant
14 evidence (see paragraph 49).

15 This opportunity given to counsel to speak with witnesses he or she has
16 not called, prior to the commencement of oral testimony, is directed therefore at
17 purposes of this kind. The Chamber envisages discussions that will assist the
18 Chamber in the management of the proceedings and its determination of the truth, as
19 opposed to some form of alternative or preliminary oral testimony. The Chamber is
20 concerned that the presence of a stenographer and the suggested upper three hour
21 limit for each witness has the real potential to turn what is supposed to be
22 preparation for in-court questioning into the equivalent of taking an unsupervised
23 deposition. The proposals advanced by counsel may well lead to lengthy
24 questioning, but without any judicial control. The consequences of this could be
25 unfair on the witness, who may in the result give evidence substantively twice; the

1 Chamber may routinely be invited to contrast and compare different accounts, the
2 first given during the discussion and the second thereafter in court (although both
3 accounts may have been provided within a very short time of each other); and there
4 will be inevitable disputes in our view between those participating, but without an
5 arbiter, on whether or not certain topics should be pursued at length, or at all,
6 during the discussion.

7 It is critical that the parties approach these meetings sensibly, with
8 focused and identified questions that are reasonable and proportionate. Whilst the
9 Chamber has currently sanctioned discussions for the purposes identified in
10 paragraph 49 of the decision of 19 November 2009 (as summarised above), if this
11 procedure leads to questioning that is onerous for the witnesses, or if the
12 meetings tend to turn into alternative or preliminary oral testimony, then the
13 Chamber will have to consider imposing limitations and tighter controls on the
14 exercise.

15 At present the Chamber is not prepared to give more than the following
16 general guidance, leaving it in the first instance to the parties to organise these
17 discussions appropriately and sensibly within the framework that has been
18 summarised above.

19 The Familiarisation Process

20 a. In general, we are of the view that the existing arrangements as to
21 familiarisation should remain in place. It follows that, once the witnesses have
22 arrived in The Hague, the rule is that there is to be no contact between the
23 witnesses and counsel or the various legal teams acting in this case without the
24 express consent of the Chamber, save for the courtesy meeting and subject to the
25 directions given hereafter.

1 The Consent Meeting and the Discussions

2 b. The consent meeting with the Defence and the discussion between the
3 Prosecution and any Defence witnesses in advance of their oral testimony are,
4 therefore, an exception to the established principle that once the familiarisation
5 process has commenced there should be no contact between the witness and the legal
6 teams. We are of the view that, to the extent achievable, the protective measures
7 that have been put in place for this familiarisation period should be maintained,
8 particularly as regards the involvement of the VWU which takes responsibility for
9 the welfare of the witness (see paragraph 33 of document 1049, the decision of 30
10 November 2007). In this regard, we have reminded ourselves of a quotation of the
11 Pre-Trial Chamber that was cited by the Trial Chamber in the same paragraph:

12 "From a systematic perspective, the attribution of the practice of witness
13 familiarisation to the VWU is consistent with the principle that witnesses to a
14 crime are the property neither of the Prosecution nor of the Defence and that they
15 should therefore not be considered as witnesses of either party, but as witnesses
16 of the Court."

17 The Victims and Witnesses Unit

18 c. The Chamber in paragraph 51 of its decision of 19 November 2009 stated
19 unequivocally that a representative of the VWU should be present during these
20 meetings, having assisted in the necessary arrangements for them. We see no reason
21 to depart from that approach, given (as just observed) the familiarisation process
22 will have commenced and the unit is the independent body best equipped to ensure
23 that the procedure does not become onerous or otherwise adverse to the witness's
24 mental or emotional stability. This will apply to both meetings: the consent
25 meeting and any discussion that may follow.

1 Stenographer

2 d. This request is refused. Although an adequate record or summary
3 should be made of the discussion, either in manuscript form or by a digital or tape
4 recording with the consent of the witness, the cost of this proposed step (which
5 may in some instances include the presence of interpreters) will be
6 disproportionate and the proposal is, in any event, unnecessary. Since the witness
7 is not giving evidence during the meeting, there is no need for a transcript to be
8 prepared in this way of his or her answers.

9 The Participating Victims

10 e. The victims have a right to express their views and concerns at those
11 stages of the proceedings which are determined by the Court to be appropriate (see
12 Article 68 (3) of the Rome Statute). Crucially, this out-of-court procedure is not
13 part of the court proceedings and, in our judgment, the victims do not have the
14 right to be present, nor is it appropriate to extend this opportunity that has been
15 afforded to the parties; most particularly the presence of participating victims,
16 whose counsel may also wish to put questions, will tend strongly to turn this
17 exercise into alternative or preliminary oral testimony. This exercise is to be
18 distinguished from the courtesy meeting, which is essentially for the benefit of
19 the witness so that he or she meets all the lawyers who will be asking questions in
20 court in advance. However, if anything relevant emerges that affects the interests
21 of a participating victim during a discussion of this kind, an appropriate summary
22 is to be provided by the Prosecution to the legal representative, or
23 representatives.

24 Location

25 f. The parties and the VWU need to make sensible arrangements as to

1 venue, depending on the number of people who are to be present. It follows from
2 this ruling that only representatives of the Prosecution and the Defence will be
3 present, along with one or more representatives of the VWU.

4 Timing of the Discussions

5 g. The Chamber approves the suggestion that the discussions should occur
6 outside of the published schedule for court sittings, unless the Chamber
7 exceptionally rules otherwise on an application. However, since this arrangement
8 is to enable counsel who will be conducting the questioning to attend the
9 discussion, the Chamber cautions that the situation should be avoided in which
10 counsel who attends this meeting (the discussion) becomes a witness to a dispute as
11 to what was said therein, or to other events that occurred during this pre-evidence
12 discussion. This result could have extremely unfortunate consequences for the
13 efficient running of this trial.

14 Timing of Evidence

15 h. Most of the witnesses have already experienced considerable disruption
16 to their lives in coming to The Hague and we consider that the length of their stay
17 in this country should be kept to the shortest reasonable duration. Accordingly,
18 the period between the discussion and the Prosecution's questions need be no longer
19 than 48 hours (the Defence questions are not time-limited in this way).

20 That concludes this oral ruling on the arrangements for the discussions
21 that are to occur prior to the testimony of some Defence witnesses. Any
22 significant difficulties should be brought immediately to our attention.

23 Unless there are any other matters, we will rise now until such time as
24 the Defence send a message that they are ready. It follows that counsel need not
25 remain in the area of this courtroom. You may return to your offices, but please

1 keep a close eye on your email inbox because at the appropriate time there will be
2 a message sent to you by email requesting you to return to court either
3 immediately, or at a specified time.

4 Mr Biju-Duval, it would be very helpful to know, as it were at some stage,
5 at what time you anticipate the Court being able to sit again, either ex parte or
6 with everyone present, so that people can plan their mornings. Good. We'll rise.

7 THE COURT USHER: All rise.

8 (Recess taken at 10.11 a.m.)

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1 CORRECTIONS REPORT

2 The following modifications have been made into the transcript:

3 * Page 4 lines 23-24 and page 6 line 22:

4 "Principal Counsel of the Victims and Witnesses Unit"

5 Is replaced by

6 "Principal Counsel of the Office of Public Counsel for Victims"