

1 International Criminal Court

2 Trial Chamber I - Courtroom II

3 Presiding Judge Adrian Fulford,

4 Judge Elizabeth Odio Benito and Judge René Blattmann

5 Situation in the Democratic Republic of the Congo -

6 ICC-01/04-01/06

7 In the case of the Prosecutor v. Thomas Lubanga Dyilo

8 Tuesday, 29 June 2010

9 (The hearing starts at 2.32 p.m.)

10 (Open session)

11 THE COURT USHER: All rise. The International

12 Criminal Court is now in session. Please be seated.

13 PRESIDING JUDGE FULFORD: Good afternoon. Private

14 session, please.

15 (Private session at 2.33 p.m.)

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12 Page 2 expunged. Private session.

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13 (Open session at 2.38 p.m.)

14 THE COURT OFFICER: We are in open session,
15 Mr President.

16 PRESIDING JUDGE FULFORD: This is the Chamber's oral
17 decision on the individual known as Cordo.

18 1. On 11 June 2010 the Prosecution made various
19 applications regarding an individual who has been referred to as
20 Cordo (document 2473).

21 2. Against the background that this individual is
22 allegedly a cousin of the accused, who - it is suggested - acted
23 as an intermediary of the accused, it is argued that he should
24 be called to give evidence prior to submissions on the abuse of
25 process application. In the alternative, it is argued that the

1 Chamber should call him to give evidence under Articles 64(6)(b)
2 and 69(3) (paragraph 23).

3 3. The foundation for the submission is that there is
4 evidence that this individual has attempted to persuade a
5 witness to give false testimony and that he put pressure on two
6 other witnesses (possibly successfully) to testify untruthfully
7 (paragraph 24). On this basis it is argued that this evidence
8 is "necessary for the determination of the truth." The
9 witnesses referred to are Witness 297, Defence Witness 4 and
10 Witness 213.

11 4. The Prosecution places considerable reliance on
12 the Chamber's decision on intermediaries (document 2434,
13 paragraph 139), and particularly the direction that relevant
14 Prosecution intermediaries are to be called at this stage in the
15 trial if there is evidence that he or she attempted to persuade
16 one or more individuals to give false evidence. The statutory
17 basis particularly highlighted is the Trial Chamber's
18 entitlement to require the testimony of witnesses and the
19 production of documents and other evidence and to order the
20 production of evidence in addition to that presented by the
21 parties (Article 64(6)(b) and 64(6)(d)). Furthermore, by
22 Article 69(3), the Chamber has the authority to request the
23 submission of all evidence that it considers necessary for the
24 determination of the truth.

25 5. The Prosecution acknowledges that the Chamber has

1 already refused its application for disclosure of Cordo's
2 identity (2 June 2010, T-297, page 38, et seq). In that
3 decision, having reviewed earlier conclusions as to Defence
4 disclosure, the Chamber then indicated that:

5 "16. This analysis from these earlier decisions
6 applies without reservation to the suggested disclosure of the
7 full identity of (Cordo). Applying [that] reasoning [...], his
8 real name (if known) is not something that the Defence has
9 indicated it intends to utilise as part of the evidence for the
10 accused, and in the result the Chamber is of the view that there
11 is no proper basis under the Rome Statute framework that would
12 justify an order for its disclosure to the Prosecution. The
13 Defence has been ordered to disclose sufficient information to
14 enable the Prosecution to identify and conduct appropriate
15 inquiries about the Defence witnesses. The sole argument raised
16 by the Prosecution, as set out above, is that since the name
17 "Cordo" emerged during evidence that is being introduced by the
18 Defence in support, inter alia, of an abuse of process
19 application, the Defence cannot withhold his full name if it is
20 in the accused's possession.

21 17. The mention of a name, even on more than one
22 occasion, during an interview with, or as part of the evidence
23 of, a witness cannot alone trigger Defence disclosure
24 obligations - as just described, these have essentially been
25 limited to, first, the summaries of the evidence of the

1 witnesses the accused intends to call, and, second, affording
2 inspection of the other evidence he anticipates using during the
3 trial. Absent a contrary indication from the Defence, the name
4 "Cordo," given the circumstances in which this nickname has been
5 mentioned by two witnesses, does not fall into either category
6 and it is not disclosable. Furthermore, it is to be observed
7 that if the Prosecution analysis is correct, the Defence would
8 bear continuous disclosure obligations, triggered each time a
9 witness called by the accused mentions a person, place, event or
10 document (whether in interview or during evidence): immediately
11 thereafter the Defence would need to effect service on the
12 Prosecution of any additional information thereon in its
13 possession.

14 18. For all these reasons, the Prosecution
15 application as regards the name "Cordo" is refused."

16 6. The Prosecution attempts to distinguish its
17 present application from that decision on the basis that it is
18 linked to the Court's responsibility to discover the truth. It
19 is suggested that this Defence intermediary should be treated in
20 the same way as Prosecution intermediaries, and that the same
21 test should apply. The Prosecution underlines the suggestion
22 that Cordo influenced, or attempted to influence, the testimony
23 of Prosecution and Defence witnesses. It is argued that an
24 order from the Chamber would not infringe the accused's right of
25 silence or the privilege against self-incrimination, because the

1 evidence of Cordo is irrelevant to the guilt or innocence of the
2 accused - instead, it relates to the abuse of process
3 application and the credibility of the witnesses the Defence has
4 called in this regard. Finally, it is submitted that Cordo
5 should be called to ensure that the Chamber fully explores the
6 intermediary issue, and decides the abuse of process application
7 on the basis of complete and balanced evidence.

8 7. The Defence resists this application, submitting
9 that the Chamber is unable to call the witness because his
10 identity is unknown (to the Court) (28 June 2010, T-306, page
11 17, et seq). Second, the details provided already as to Cordo's
12 identity, it is suggested, are sufficiently extensive to enable
13 the Prosecution to locate and interview him. It is denied that
14 Cordo has acted as a Defence intermediary. It is suggested that
15 in any event alleged misbehaviour by a Defence intermediary is
16 not relevant to the Defence abuse application, and that the
17 evidence called in any event will be sufficient to resolve the
18 main issues, for instance, the evidence given by Witness 297.
19 Finally, it is suggested that calling Cordo will unnecessarily
20 delay the trial.

21 8. In our judgment, the principles set out on the 2
22 July 2010, rehearsed above, apply equally to the instant
23 application. Essentially, save as regards witnesses the accused
24 intends to call or documents or other materials he proposes to
25 introduce (or the details of an alibi or any other "evidence":

1 Rule 79 of the Rules of Procedure and Evidence), the accused is
2 protected from orders for disclosure. The identity of Cordo is
3 not "evidence" that the accused can be compelled to reveal,
4 particularly given he does not intend to call him. The
5 distinction that the Prosecution seeks to draw between the
6 issues that go to the accused's guilt or innocence on the one
7 hand and the abuse of process argument on the other is a false
8 one: all of this material is advanced as part of Mr Lubanga's
9 defence to the charges, although the Defence additionally
10 intends to utilise some - indeed, a large part - of the evidence
11 currently before the Chamber as the foundation for the abuse of
12 process application.

13 9. The positions of the Defence and the Prosecution
14 in this regard cannot be put - as the Prosecution has attempted
15 - on the same footing, not least because the Prosecution bears
16 the burden of proof to the criminal standard, whilst the accused
17 is entitled to remain silent and is protected from
18 self-incrimination; their "intermediaries", therefore, should
19 not be - indeed, cannot be - subject to similar orders for
20 disclosure; and the Chamber's decision on intermediaries was
21 clearly directed solely at those utilised by the Prosecution.
22 It is to be stressed that, in any event, the Defence avers that
23 Cordo has never acted as an intermediary for the accused.

24 10. The Chamber is unaware of the identity of Cordo
25 and it is, therefore, unable to call him, even if it concluded

1 that this step is in the interests of justice. Additionally, it
2 is not for the Chamber to direct the Defence as to which, if
3 any, witnesses it is to call. It is entirely for the accused to
4 decide whether or not to introduce evidence. The Chamber is
5 entitled to call any evidence it decides is necessary to assist
6 in establishing the truth (Article 69(3)), but this provision
7 does not entitle it to impose disclosure obligations on the
8 accused, thereby circumventing or undermining his express
9 statutory protections (e.g. those set out in Article 67).

10 11. In all the circumstances, these applications for
11 Cordo to be called either by the Defence or by the Court are
12 refused. That concludes this Decision.

13 Mr Sachdeva, we have received your email application
14 to delay by 24 hours the Prosecution response to Defence filing
15 2503. Although we intend to grant it, the difficulty that it
16 raises is of course it is -- it would have been preferable for
17 this to have been resolved before 321 commences his evidence,
18 and so if you are in fact able to deliver your response by
19 midday tomorrow, rather than by 4 p.m., the Chamber would very
20 much appreciate that rather speedier example of service by the
21 Prosecution.

22 MR SACHDEVA: Certainly, Mr President. Yes, thank
23 you.

24 PRESIDING JUDGE FULFORD: Thank you very much. We
25 have received from the Registry an indication that, due to an

1 internal error, the Registry has overlooked our direction that
2 it should transmit 15 applications for participation to the
3 parties in a confidential redacted form; that order having been
4 given on 17 June.

5 As a result of that oversight, we are asked to
6 consider amending the dates that we have set for observations
7 and further submissions. We do so. As regards the parties we
8 extend the date from 2 to 9 July and, as far as the legal
9 representatives are concerned, we extend the date from 9 to 16
10 July.

11 Mr Desalliers, looking at the matter realistically and
12 bearing in mind what leading counsel for the Defence said
13 yesterday, the hard reality, I think, is that between now and
14 the beginning of the judicial recess at the very best we're only
15 going to hear from 321 in person, 38 by the video link and if
16 we're lucky the beginning of 316. Do you agree?

17 MR DESALLIERS: (Interpretation) Yes, your Honour,
18 that seems to be the kind of calculations that we undertook
19 ourselves, and so indeed Ms Mabilie wished to raise that point
20 yesterday mainly to draw the Chamber's attention to the fact
21 that, if we were to begin 316 after 38, it is quite likely that
22 we would have to cut it off short during -- for the judicial
23 recess. That was the conclusion that we came to ourselves.

24 PRESIDING JUDGE FULFORD: I've used the expression
25 many times before and I imagine this afternoon will not be the

1 last occasion in this trial when I shall do so, but it is very
2 difficult for the Chamber to micromanage these kind of issues.

3 What needs to happen, if I may say so, Mr Desalliers,
4 in relation to how we spend the time between now and the
5 beginning of the recess, is for sensible decisions to be taken,
6 and they won't be able to be -- that won't be able to happen
7 with finality until after 321 has begun his evidence, but
8 sensible decisions as to whether 316 should be brought at all to
9 The Hague and, if he's not, whether there is other evidence to
10 be called on the abuse application that can be substituted for
11 him either because the evidence is shorter, or because it will
12 be less sensitive if that evidence goes part heard.

13 Now, I don't have the forms in front of me and I can't
14 remember whether there are any other witnesses who can be
15 slotted in, as it were, before the judicial recess, but over the
16 coming days can I ask you, please, to liaise closely with
17 Mr Sachdeva and the VWU to see whether a package can be
18 presented to us as the most sensible way for us to try to
19 utilise the Court's time.

20 MR DESALLIERS: (Interpretation) Yes, your Honour, we
21 are going to strive to do that.

22 PRESIDING JUDGE FULFORD: So, please don't wait for
23 us. Try to take -- please do take proactive steps to make sure
24 that witnesses are called in the most efficient order.

25 MR DESALLIERS: (Interpretation) Very well, your

1 Honour.

2 PRESIDING JUDGE FULFORD: To that extent we don't
3 really care what order it is, so long as the time is used
4 sensibly.

5 Anything on that, Mr Sachdeva?

6 MR SACHDEVA: Mr President, indeed. Of course we're
7 still awaiting authorisation for Witness 583 to testify and he's
8 scheduled to testify prior to 316.

9 PRESIDING JUDGE FULFORD: Have we not addressed that,
10 Mr Sachdeva?

11 MR SACHDEVA: We've addressed it with respect to 582.

12 PRESIDING JUDGE FULFORD: So you're waiting for
13 authorisation from us, rather than from the DRC?

14 MR SACHDEVA: No, excuse me, Mr President. We are
15 waiting for authorisation from the State from which 583 is from.

16 PRESIDING JUDGE FULFORD: Ah, that's a relief. I
17 thought you were telling me that we had failed to deal with an
18 application of yours.

19 Good. Right, I interrupted you. Please carry on.

20 MR SACHDEVA: In other words, if that authorisation is
21 forthcoming, we would have 321, video link 38, 583 and then 316
22 and, in our submission, that would indeed be a very hectic
23 schedule.

24 In fact, from what I understand, Victims and Witnesses
25 Unit need to know by Friday whether the authorisation is

1 forthcoming for 583, otherwise he will be unable to travel, and
2 unfortunately after 12 July he has professional commitments that
3 would bar him from testifying until after the recess.

4 PRESIDING JUDGE FULFORD: Speaking very much off the
5 top of my head, it would seem likely, if we can get
6 authorisation for 583, that he would be a more sensible witness
7 to follow 321 than 316. I don't know whether the intervention
8 perhaps by Ms Bensouda, her speaking to whoever it is that will
9 be making the decision as to whether or not authorisation will
10 be given, may be a helpful step to be taken to see whether we
11 can get that sorted out by the end of the week, Mr Sachdeva.

12 MR SACHDEVA: Indeed, and the Prosecution is
13 attempting to utilise all its offices to arrange a speedy
14 resolution of this. It may be, however, that the video link for
15 Witness 38 would have to be postponed -- might have to be
16 postponed until 12 July, because if Witness 583 commences he, as
17 I understand it, must depart by 12 July.

18 PRESIDING JUDGE FULFORD: Right. No more on this this
19 afternoon, Mr Sachdeva. Do your best, please. It's clearly
20 unsatisfactory that we waste court sitting days. Please see if
21 you can sort something out.

22 MR SACHDEVA: Yes, Mr President, certainly.

23 PRESIDING JUDGE FULFORD: Thank you very much. Thank
24 you all for your attendance.

25 THE COURT USHER: All rise.

1 PRESIDING JUDGE FULFORD: 9.30 tomorrow morning.
2 (The hearing ends at 3.04 p.m.)