

1 International Criminal Court

2 Trial Chamber I - Courtroom 1

3 Presiding Judge Adrian Fulford, Judge Elizabeth Odio Benito and

4 Judge René Blattmann

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

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

7 Trial Hearing

8 Tuesday 26 October 2010

9 (The hearing starts at 9.41 a.m.)

10 (Open session)

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

13 PRESIDING JUDGE FULFORD: Good morning. Mr Sachdeva, can we
14 first of all look at the real position in relation to two witnesses. First of all, Witness 38.
15 The Chamber has received an email. This was sent yesterday, timed 7.38 p.m., from
16 Mr Waltenburg which you were or the OTP was copied in on, which reveals that
17 there is to be a discussion today to discuss witness scheduling including that of
18 Witness 38. It's suggested with a bit of luck his passport will have been obtained by
19 the end of this week, possibly early next week, and then at least five working days
20 will be needed for the visa so that he can travel.

21 Now, if that's right, that means for sure that 38 will not be giving
22 evidence starting on Friday 5 November. At the earliest, we can hope to see him
23 during the course of the week of 8 November. Do you agree with that?

24 MR SACHDEVA: Mr President, it does seem so. I'd like to have that
25 discussion with VWU this afternoon. I may just add that when the 5th was

1 identified, we had been led to believe that perhaps the 5th was a possibility and that
2 once video link was not possible all the mechanisms were put in place to retrieve a
3 passport and to bring him here, but, yes, it does seem to be the case that the 8th is
4 more likely.

5 PRESIDING JUDGE FULFORD: Now, that deals with Witness 38 for
6 next week, certainly on a provisional basis. The other witness listed for next week is
7 555. Do you have an answer, Mr Sachdeva?

8 MR SACHDEVA: Mr President, we can safely say that 555 will not be
9 testifying next week but, with the Court's leave, we had not been in contact with the
10 witness since last Thursday. We hope to be able to speak to him today to essentially
11 ascertain whether he is going to testify and we would seek your leave to revert on
12 that final decision in the next couple of days or perhaps by the end of the week. We
13 just haven't been able to contact him and have that conversation with the witness.

14 PRESIDING JUDGE FULFORD: I imagine that your preferred position
15 would be that you are given an opportunity of talking to him to see whether he
16 wishes to give evidence, but I imagine you have also got to make a decision as to
17 whether or not you wish to call him, haven't you, Mr Sachdeva? Isn't it -- aren't there
18 two sides to this coin, rather than one?

19 MR SACHDEVA: There are certainly and in a sense, from what we are
20 gathering, they are slightly related and so we would need, if leave is given, the week
21 to decide that.

22 PRESIDING JUDGE FULFORD: I mean, let's be frank about it. I
23 imagine that you wish to have a conversation with him about the material that the
24 Defence has indicated it wishes to deploy in questioning; is that right?

25 MR SACHDEVA: That's certainly a possibility, Mr President, yes.

1 PRESIDING JUDGE FULFORD: Right. Now, without making any -- at
2 the moment without in any way committing ourselves as to whether or not we will
3 give leave for 555 to give evidence later, what you are saying is that 555 on any
4 assessment is not going to be called by the Prosecution next week; is that right?

5 MR SACHDEVA: Mr President, I think that is certainly the safest thing
6 to submit, that next week will be an impossibility.

7 PRESIDING JUDGE FULFORD: Right. Now, if 555 and 38 cannot come
8 next week, that then takes me to the suggestions I was making yesterday in relation to
9 582. Is a video link or a deposition a viable possibility, or was that an exercise in
10 over-optimism on my part?

11 MR SACHDEVA: Mr President, in terms of the availability of the
12 witness, we did not get an outright "no," so I understand that there may be a
13 possibility in terms of his schedule, but of course we haven't -- we haven't received a
14 full response this morning. We did speak to him, or the investigations department
15 did speak to him briefly last night. The problem that we have is that according to the
16 Registry the technical requirements to set up the video link from a secured link in the
17 place where the witness is is going to be nigh on impossible to resolve by next week.
18 That's our understanding but --

19 PRESIDING JUDGE FULFORD: And is the assessment therefore that, in
20 order for him to give evidence via a video link, it would have to be using ICC
21 equipment and it is considered unsafe for him to use a commercially provided video
22 link because it's anticipated that some malevolent individual may hack into a
23 commercially provided video link thereby obtaining information which that
24 individual is not entitled to receive? Is that it?

25 MR SACHDEVA: Mr President, I understand a secure location needs to

1 be found in that country, and it could be for example a UN office, but because we are
2 seeking to apply for protective measures for the witness there needs to be, for
3 example, a mechanism to employ face distortion, voice distortion, which could cause
4 problems.

5 The other factor is that I have been advised that the Registry would
6 need to send an IT team. There needs to be a test undertaken before they can
7 essentially say that the system is going to function appropriately. That's the problem
8 that we face, Mr President.

9 PRESIDING JUDGE FULFORD: Right. That one looks as though it is
10 nose-diving rapidly. That means that we are likely to have little or no work next
11 week on the basis of the schedule that's been provided to us. Given that is the case,
12 we now look at 321.

13 The assessment that we were given last night was that 321 needs or
14 would like or both five days to familiarise himself with his testimony back in July and
15 with the interviews in October last year, January and June of this year. There is also
16 the issue of disclosure. Maître Mabilie was absolutely right to raise it. I had
17 forgotten. There is a completed decision on that subject which will be issued today,
18 which was going through the final stage of editing.

19 The advantage of putting 321 over until next week, much as we regret
20 the loss of this week, is that it gives him the opportunity of refreshing his memory in
21 a way which he would prefer and it means, hopefully, that any necessary disclosure
22 can be effected with protective issues being considered en route. So, standing back
23 and looking at it globally, it does seem as though there are advantages to moving 321
24 to next week.

25 Now, I don't know whether you want to discuss this with Ms Samson

1 for a moment or whether you are able to respond straightaway?

2 MR SACHDEVA: If I may have the Court's indulgence for a moment,
3 Mr President?

4 PRESIDING JUDGE FULFORD: Certainly.

5 (Counsel confer)

6 MR SACHDEVA: Yes, Mr President, it does seem to be the best
7 solution. I had initially thought because I understand 316 is arriving on Sunday and
8 of course in the schedule I think he is down for 10 November but --

9 PRESIDING JUDGE FULFORD: Starting on the 9th at the moment.

10 MR SACHDEVA: 9th, yes. Of course if the interview can be completed
11 during next week, there is a faint possibility that perhaps he could start earlier, but
12 again, that is still very tentative and probably not --

13 PRESIDING JUDGE FULFORD: Thank you very much, Mr Sachdeva.
14 So, Maître Mabilles, the proposal is, with a very heavy heart, that given something
15 seriously went wrong with the familiarisation process for 321, which we will turn to
16 in a moment, given it did go wrong, in order to put him in a position in which he will
17 be best able to answer your questions in an informed way to commence his evidence
18 next Monday.

19 MS MABILLES: (Interpretation) It is unfortunate, your Honour, but
20 I think it is the wisest solution and we hope that in the meantime we will be able to
21 receive all the disclosures we have been waiting for for some time now.

22 PRESIDING JUDGE FULFORD: It's a legitimate complaint on your part
23 and I had hoped that our decision on this would have been issued immediately after
24 the lifting of the stay. However, there were a number of decisions stacked up like
25 planes over an airport and we had not been able to deliver this one quite as quickly as

1 we had hoped, but you will have it today. Right.

2 Mr Sachdeva, can we now turn to what went wrong, and this is not to
3 engage in a blame exercise, but there does appear to have been a very peculiar
4 misapprehension that the witness was going to be going to Bunia instead of staying in
5 Kinshasa and coming to The Hague. And it seems as though neither the VWU, nor
6 the field staff of the OTP in the DRC, picked up on the fact that the belief was that 321
7 was going to Bunia in order to give his evidence via the video link rather than coming
8 here.

9 Now, really, there is a plea from us for everyone involved in these
10 processes to talk to each other. We have a suspicion that the lines of communication
11 have not always been perhaps as good as they should be. I don't know whether you
12 have any observations on this, Mr Sachdeva, but it does seem to be a rather bizarre
13 misunderstanding.

14 MR SACHDEVA: Indeed, Mr President, and Ms Samson's email I
15 believe has explained that. We ourselves were extremely surprised that this had
16 occurred. We had taken all the steps to ensure that familiarisation could commence at
17 the right time and perhaps, yes, there may have been a misunderstanding and maybe
18 there ought to be better modes of communication, but I am at a loss, Mr President, I
19 apologise, and we can say at least from the Prosecution's point of view that we will be
20 more vigilant in future but it does depend on other departments of the court to
21 regularly liaise with us as well.

22 PRESIDING JUDGE FULFORD: Absolutely, and thank you. But we do
23 stress, and I am sure the representatives of the VWU will read this, we do stress that
24 we consider it unfortunate that there was a misunderstanding as to what was going to
25 happen with this witness, that it should have been appreciated that he was to be a live

1 witness being called at this Court so he would be remaining in Kinshasa until he
2 transferred here, rather than going to Bunia to give evidence via a video link, but
3 there we are. That kind of detail really should be picked up so that proper decisions
4 can be made about the familiarisation process.

5 Do we have any up-to-date information, Mr Sachdeva, on order 2 and
6 the electoral card?

7 MR SACHDEVA: Mr President, at this stage, no, we do not.

8 PRESIDING JUDGE FULFORD: Do we have any ideas as to when we
9 are likely to be able to make a decision in relation to that? I don't know whether
10 Ms Pellet can help?

11 MS PELLET: (Interpretation) Thank you, your Honour. No, for the
12 moment I can't help you any more than what the Office of Public Counsel for Victims
13 has already written in the email where it concerns its position. I can perhaps consult
14 my colleagues who are also concerned by this issue in order to try to come back to
15 you as soon as possible.

16 PRESIDING JUDGE FULFORD: Right.

17 MS PELLET: (Interpretation) Excuse me, your Honour. I am sorry, but
18 that is going to take a bit more time than envisaged.

19 PRESIDING JUDGE FULFORD: And, Ms Pellet, I understand this isn't
20 easy because part of it involves contacting the relevant individual or individuals and
21 as I think I observed yesterday that is not always easy. You will understand,
22 however, that in order for there to be effective cross-examination for the accused there
23 needs to be timely disclosure so that counsel can reflect on appropriate questions to
24 ask.

25 If I were to say that every possible effort should be made to have a

1 definite answer to the Chamber by 4 p.m. on Friday of this week, does that give you
2 and everyone else at least a realistic opportunity of being able to provide the
3 Chamber with information that will enable us to make a decision?

4 MS PELLET: (Interpretation) We will do everything possible on the
5 part of the legal representatives of victims, but the question does also involve work on
6 the part of VWU, so I cannot myself speak for them, but with regards to our work we
7 will have a decision.

8 PRESIDING JUDGE FULFORD: Right. Can I then stress that we
9 consider it to be critical that the VWU fully engages with this issue and does
10 everything that is reasonably possible to put the Chamber in a position of being able
11 to make a decision at 9.30 on Monday next week as regards the disclosure of the
12 signature or signatures on the relevant application forms to participate, and that
13 involves as I understand it an element of disclosure as regards the electoral card of
14 the person who was involved.

15 Now, Mr Sachdeva, returning to you, I think that - again, as was
16 observed yesterday - the application for disclosure as regards 555 is in part dependent
17 or may be in part dependent on whether or not he is going to be called. You of course
18 are alive to the fact that Maître Mabilie is going to be applying for disclosure whether
19 or not he's called, but the strength of that application may in part depend on your
20 eventual decision. So unless Maître Mabilie says otherwise now, we will adjourn that
21 until a decision has been made, but I think we need to know your stance at the latest
22 by 4 p.m. on Friday of this week as regards 555, Mr Sachdeva.

23 MR SACHDEVA: Yes, Mr President, and the Court will have our stance
24 by that time.

25 PRESIDING JUDGE FULFORD: Good. So do you agree that that is a

1 reasonable period of time to set for you to make a final decision on him?

2 MR SACHDEVA: We agree.

3 PRESIDING JUDGE FULFORD: Thank you. Anything on that,
4 Maître Mabilles?

5 MS MABILLES: (Interpretation) Just a couple of points, your Honour.
6 Where it concerns 565, I don't really see -- 555, I really don't see what the problem is
7 with at least giving the name of the intermediary with regards to 555, the name of
8 the --

9 THE INTERPRETER: Or the number of the intermediary, the
10 interpreter corrects.

11 MS MABILLES: (Interpretation) And I thought I understood what the
12 Office of the Prosecutor was saying that they had the intention of questioning 555,
13 re-examining 555. If there is any question of that, it is clear that this should be done
14 with a recording and the recording of the telephone communication with 555 should
15 be provided to us.

16 PRESIDING JUDGE FULFORD: Can we break that down,
17 Mr Sachdeva? Are there in fact any sustainable reasons for refusing to give 555's
18 number? I understand you may be reluctant at this stage to give the name, but is
19 there a problem with the number?

20 MR SACHDEVA: We can provide the number, Mr President.

21 PRESIDING JUDGE FULFORD: Thank you.

22 MR SACHDEVA: The number of the intermediary, yes.

23 PRESIDING JUDGE FULFORD: Today?

24 MR SACHDEVA: Yes.

25 PRESIDING JUDGE FULFORD: Thank you. If there is to be a further

1 interview, you'll record it?

2 MR SACHDEVA: Indeed, Mr President.

3 PRESIDING JUDGE FULFORD: Now, I think Maître Mabilles was
4 suggesting there should be a telephone link that's live while the recording is taking
5 place. I don't remember us ever having ordered that before.

6 MR SACHDEVA: I don't know if Maître Mabilles was suggesting that,
7 Mr President, but when we --

8 PRESIDING JUDGE FULFORD: Ah, there should be a telephone
9 communication thereof. Right, I understand. I thought it was a telephone -- there
10 should be a live telephone line while the interview was taking place. I
11 misunderstood. Right. If there is to be a further interview, can you inform the
12 Defence that there is going to be a further interview and make sure it's properly
13 recorded.

14 MR SACHDEVA: Certainly, Mr President.

15 PRESIDING JUDGE FULFORD: Thank you. Anything else,
16 Maître Mabilles?

17 MS MABILLES: (Interpretation) Yes, your Honour. This morning I have
18 a new call, which means that we've decided to speak about this problem in the
19 hearing. We have serious concerns with regards to two of our witnesses, and I should
20 say that we have alerted the VWU I think in every possible way and I should also say
21 that we can't accept the current situation; that is to say, no serious measure has been
22 taken with regards to these concerns that we have mentioned on several occasions.

23 I therefore propose to address if the Chamber gives me leave, to address
24 all the emails which we have made to the VWU in order to alert them of the situation.
25 I would add to that whilst still not satisfied we've alerted Marc Dubuisson himself

1 and I think that on receipt if we are given leave on the receipt of all these emails the
2 Chamber will see the seriousness of this situation, and we are available to the
3 Chamber for an ex parte if the Chamber considers it useful, for an ex parte to be
4 organised.

5 I am very concerned, your Honor. On the side of the Defence, we are
6 worried. We are very worried, and the phone call that I had this morning does
7 correspond with the calls that I've had regularly with regard to this problem and I'm
8 not going to say anymore, but I just want to say that all the measures -- well, no
9 serious measure has been taken while I would say this is the only case that we've
10 asked the VWU to intervene in a very expeditious way. Well, the first message was
11 from August and we've continued since August to have correspondence with them.

12 So I would ask the Chamber to give us leave to communicate [...] all the
13 correspondence which we have had on that subject. And I would also like to state
14 that we are at the Chamber's disposition for an ex parte hearing if the Chamber would
15 consider there to be merit therefore.

16 PRESIDING JUDGE FULFORD: Certainly, Maître Mabilie. Could you
17 send the relevant emails through and in a cover email to the legal adviser to the
18 Division could you summarise the problem and summarise the steps that at this stage
19 you would wish the VWU to take in relation to these two witnesses so that we know
20 exactly what it is at this point in time that you are requesting? Now, I think you said
21 there was another point, or is that it?

22 MS MABILLE: (Interpretation) No, no. That's the only point. Exactly,
23 your Honour, we'll do that.

24 PRESIDING JUDGE FULFORD: And, if necessary, there will be an ex
25 parte hearing either today or I would have thought more likely tomorrow morning.

1 So if somebody from your team could remain available for an ex parte if necessary
2 tomorrow morning.

3 Mr Sachdeva?

4 MR SACHDEVA: If I may, I know that the Court doesn't like to deal
5 with uncertain issues, but depending on what we decide with respect to 555 it may be
6 that the Prosecution might apply to call another witness in response to the Defence
7 abuse of process. I am just foreshadowing that possibility with the Court for the
8 convenience.

9 PRESIDING JUDGE FULFORD: All right. Well, I am going to do
10 everything I can to try to prevent Maître Mabilie from responding at this stage. You
11 can anticipate the likely reaction. We'll deal with it on its merits as and when it arises
12 and look at the fairness of the situation at that stage, but we understand therefore that
13 if 555 disappears from the list you may seek to replace him by somebody else.

14 MR SACHDEVA: Yes, Mr President.

15 PRESIDING JUDGE FULFORD: Certainly. Thank you for warning us.
16 Now, anything else from anyone else? No.

17 We will therefore commence the evidence of 321 at 9.30 next Monday
18 and the VWU must ensure that the familiarisation process is completed by then.

19 Mr Sachdeva, in relation to 582, can you please continue to explore the
20 possibility first of the video link for that individual and, if a video link looks as
21 though it is technically going to be difficult or it is going to delay the efficient
22 progress of this part of the case, can consideration be given urgently to a deposition
23 being taken with all those interested present and being given a full opportunity to ask
24 such questions as they wish with discussions taking place as to who should supervise
25 the deposition taking exercise, because there will need to be somebody in control.

1 Straight off the top of my head, the options are a Single Judge from the
2 Pre-Trial Chamber. I think there's power to ask him or her to do it. It could be the
3 legal adviser to the Division. It could be a legal officer from the Division. There are a
4 range of options.

5 MR SACHDEVA: Yes, Mr President, and in fact the Defence and the
6 Prosecution have commenced those discussions and we will revert as soon as
7 possible.

8 PRESIDING JUDGE FULFORD: I think at this stage what is absolutely
9 critical is that a solution is found that is fair, but which also ensures that this part of
10 the trial is not delayed. Thank you very much.

11 MR SACHDEVA: Yes, Mr President.

12 PRESIDING JUDGE FULFORD: There may be an ex parte then either
13 today or tomorrow. We will all meet again at 9.30 on Monday next week. Thank you
14 all very much.

15 THE COURT USHER: All rise.

16 (The hearing ends at 10.12 a.m.)