

1 International Criminal Court
2 Trial Chamber I - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06
5 Presiding Judge Adrian Fulford,
6 Judge Elizabeth Odio Benito and Judge René Blattmann
7 Status Conference
8 Friday, 5 November 2010
9 (The hearing starts in open session at 12.01 p.m.)
10 THE COURT USHER: All rise. The International Criminal Court is now in session.
11 Please be seated.
12 THE COURT OFFICER: Good morning, your Honours, Mr President. We are in open
13 session.
14 PRESIDING JUDGE FULFORD: Good morning. This is a status conference in the
15 Lubanga case. Mr Lubanga is not present this morning. Fortunately we were able to
16 give him the opportunity of attending, but he is not here at his own request.
17 I want to remind the parties that we are in open session and, if at any stage this
18 conversation - this discussion - needs to move into private session, could we all please be
19 alert to make sure that that is addressed at an appropriate stage.
20 Ms Struyven, I see that you seem to be in the driving seat with the lectern in front of you.
21 The first question that we have of the Prosecution - and it is a question for which we
22 would be grateful if we receive a considered response which fully reflects the accuracy of
23 the position, rather than a speedy response that may on reflection prove to be
24 inaccurate - is the investigator's note of 23 February 2006 was, I think I am right in
25 understanding, only disclosed to the Defence this month. First of all, is that right?

1 MS STRUYVEN: Thank you, Mr President. That's correct, indeed.

2 PRESIDING JUDGE FULFORD: Thank you. You can take a seat again for a second.

3 Question 2 then is this: The material set out at the top of page 3 relates, again as we
4 understand it, to Witness 31 who gave evidence in the middle of 2009. During or as part
5 of the passage set out, now disclosed a few days ago, it is suggested that something
6 happened in relation to documents that in the view of those for the Prosecution who were
7 involved in compiling this note there were major questions that had arisen about his
8 credibility.

9 Now, the next question therefore that we have to ask, Ms Struyven, is why wasn't this
10 document disclosed prior to Witness 31's evidence in the summer of 2009?

11 MS STRUYVEN: Thank you, Mr President. Maybe as a first remark, in respect of the
12 documents, those documents were eventually handed over to the office and were treated
13 like any other documents in terms of disclosure.

14 Now, in respect of the question as to why this was not disclosed, in the opinion of the
15 Prosecution this type of information is really only purely internal work product. This
16 note in particular was drafted by two investigators, one P2 associate investigator and one
17 P1 assistant investigator, and they indeed had met Witness 31, and in respect of this
18 particular issue of documents they came indeed to the conclusion that there were
19 questions about his credibility. However, the Prosecution submits that this was a
20 snapshot, if you want, about what they believed and only they believed - it is their
21 opinion - at that particular moment.

22 As you may know, Mr President, after this disclosure -- after this investigator's note was
23 drafted, a statement was taken from Witness 31. The statement was signed in August of
24 2006 and, as we do with all witnesses, the office has conducted a very thorough
25 assessment on his credibility. After that assessment was done, the office as a whole

1 decided that he was a credible witness and he was subsequently called in July of 2009 by
2 the office as a Prosecution witness.

3 PRESIDING JUDGE FULFORD: Thank you. It follows, Ms Struyven, that this was a
4 deliberate decision, therefore, not to disclose the document. So we are not in the realms
5 where there may have been an understandable mistake. This was a deliberate decision
6 not to disclose.

7 We will, as a result of this, have to look very carefully at the approach therefore that the
8 Prosecution has taken to what constitutes properly disclosable material. I do not in any
9 way wish to say anything now that may in any sense have an impact on any later decision
10 that we take, but there certainly is an argument - and I put it no higher than that - that
11 when events have occurred, and as in this case documents have been involved which in
12 the mind of an investigator for the Prosecution raises major questions about the credibility
13 of a witness, that should be disclosed so that the Defence can explore the issue and it
14 should not be left to the Office of the Prosecutor to make a decision as to whether or not in
15 fact the material has an impact on the credibility of this person.

16 Now, if that decision has been made in relation to this document I assume it has or may
17 have been made in relation to other similar documents and, Ms Struyven, we are going as
18 a Bench to have to reflect, therefore, on the entirety of the approach that's been taken by
19 the Office of the Prosecutor in relation to disclosure if that is the decision that has been
20 taken in this instance.

21 Now, focusing on this document, because this is what is before us today, the Office of the
22 Prosecutor by 4 p.m. on Tuesday of next week is to provide to the Bench a full report on
23 the circumstances surrounding this incident that led to the conclusion of the P1 and the P2
24 investigators that Mr -- that this individual's credibility was called into question. We
25 need full chapter and verse so that we can be in a fully informed position to decide

1 whether there is more extensive disclosure that should take place and so that we, as a first
2 stepping stone, can assess whether the approach of the Office of the Prosecutor to
3 disclosure has been appropriate.

4 Now, will you be able to provide us with that report?

5 MS STRUYVEN: Yes, your Honour.

6 PRESIDING JUDGE FULFORD: Thank you very much indeed. Now, can we go, please,
7 to page 1 of the report. Without in any way reading out the detail of what is set out in
8 the first redacted passage, what we currently have in mind is ordering the disclosure of
9 what has been redacted on page 1 apart from the names of two organisations which
10 appear in inverted commas, so they for the time being would remain redacted, and for the
11 name at the bottom of the page that has been redacted we are proposing at the moment
12 the substitution of the appropriate witness codes.

13 Do you want to discuss that with Mr Sachdeva?

14 MS STRUYVEN: Yes, thank you.

15 (Counsel confer)

16 MS STRUYVEN: Thank you, Mr President. That is no problem. Currently I'm not 100
17 per cent sure that we have a code for the individual mentioned in line 5, but we will
18 certainly check that.

19 If I may, Mr President, there may be a second slight problem in terms of the village that is
20 mentioned on the third line, almost the last word. That's a location that we may want to
21 redact for the time being.

22 PRESIDING JUDGE FULFORD: All right. For the time being, the village can remain
23 redacted as well. Forgive me a moment. To assist you, Ms Struyven, for the name at
24 the bottom of the page the number 0177 may help.

25 Now, turning on to the -- to page 2, in the first indented paragraph there are two names

1 there mentioned. We would like you please to cooperate with the Victims and Witnesses
2 Unit to see whether there are any security problems that can be sensibly apprehended in
3 relation to the disclosure of those two names.

4 In relation to the second indented paragraph as regards the first name, we make a similar
5 request. In relation to the second name, for your consideration, as we understand it, that
6 individual is a known militia leader and there may be no proper reason for the name
7 remaining redacted, but that is for your consideration, Ms Struyven, please to come back
8 to us by 4 p.m. on Tuesday. And in relation to then -- I'm sorry, I'm jumping ahead of
9 myself.

10 There is then a fairly large indented paragraph. That can remain redacted because there
11 is nothing within it that could conceivably assist the Defence, but in relation to the last
12 indented paragraph which has a redaction, it is possible that that name corresponds to the
13 witness code 0017. If that is right, then there may be no sustainable argument for
14 retaining non-disclosure of that material as regards the Defence. Could you please
15 consider that and revert to the Chamber by 4 p.m. on Tuesday, unless Mr Sachdeva has
16 something that he feels you should say now.

17 MS STRUYVEN: Well, your Honours, in respect of these redactions, the Prosecution
18 submits that the names that are listed here, namely, on the first and the second paragraph,
19 as well as the other two names that are redacted, all have to do with the identity of the
20 individuals concerned, and we believe that those identities should remain redacted
21 simply because their credibility has not been put into question in any way whatsoever, as
22 can be read from the text where it clearly says that the office believes that they are indeed
23 child soldiers. That was the reason why we sought to maintain these two redactions.
24 In respect of the last redaction, we can verify indeed if it is Witness 0017 and we can do
25 that indeed by 4 p.m., although we believe it's not. But we can certainly double-check.

1 PRESIDING JUDGE FULFORD: Thank you. We're going to ask you to carry out those
2 checks, Ms Struyven, because redactions in relevant passages should only exist if there is a
3 need for them, and we wish, please, to have it established as to whether there is a
4 legitimate security concern in relation to those named in these relevant paragraphs.
5 These are relevant, not irrelevant paragraphs, and redactions must be there for a good
6 reason.

7 MS STRUYVEN: Your Honours, could we have a minute, please?

8 PRESIDING JUDGE FULFORD: Of course, Ms Struyven.

9 MS STRUYVEN: Your Honours, we would seek your leave to add also by Tuesday at 4
10 p.m. arguments as to whether or not, apart from the security reasons, these names
11 should remain redacted.

12 PRESIDING JUDGE FULFORD: Certainly. We would encourage you to review the
13 Chamber's jurisprudence so far and to advance your submissions in the context of what
14 has been decided to date, Ms Struyven, and bearing in mind also what the Appeals
15 Division has said about redactions but certainly, if you wish to advance arguments in
16 principle, we will not in any way prevent you from doing so.

17 As regards the remainder of the material in this document, and that is pages 3, 4 and 5, we
18 wish, through you, to reassure Maître Mabilie that there is nothing within those
19 paragraphs that could conceivably assist the Defence in support either of the abuse of
20 process argument or in relation to the trial more generally. And although it makes the
21 document look rather odd, there is nothing there which would assist the Defence.

22 Ms Struyven, I imagine by now it will be clear, but in case it isn't, we wish to indicate that
23 we have profound concerns about your submission a little bit earlier this morning that it
24 was justified to withhold what appears in the first paragraph of page 3 because the
25 Prosecution had decided that, notwithstanding the major questions that had arisen about

1 the credibility of this individual, the passage was not to be disclosed to the Defence
2 because the Prosecution had made up its own mind as to the credibility of this witness.
3 Without in any way committing ourselves one way or the other, we consider that there is
4 now a major question as to whether or not the Prosecution has been applying the right test
5 to disclosure.
6 Within the context of what has happened, by 4 p.m. on Friday of next week we wish to
7 have a document which summarises the principles and the approach that has been
8 applied by the OTP to disclosure so that we can make up our own minds as to whether or
9 not you have been applying appropriate principles and an appropriate approach during
10 the course of this case.
11 Can you meet that deadline, Ms Struyven?
12 MS STRUYVEN: Yes, Mr President.
13 PRESIDING JUDGE FULFORD: Much obliged. We now turn -- we now leave that
14 document and we turn to the Defence application for specific disclosure in relation to
15 Witness 31. Are there any submissions that you would wish to make in relation to that
16 application?
17 MS STRUYVEN: Yes, Mr President. As indicated before in respect of the note of 23
18 February 2006, the Prosecutor believes that, as mentioned before, that is not -- the opinion
19 of two investigators on a very particular issue is not evidence -- is not evidence on which
20 one could base further disclosure requests.
21 In addition, your Honours - and I'll keep the second part brief - the links that are indicated
22 by the Defence have been known to the Defence for a very long time. No questions were
23 put to Witness 31 when he was here to testify. None of these allegations were addressed
24 with him during cross-examination, but moreover the Prosecution submits that these links
25 were known to this Chamber when it decided, both in its decision on intermediaries as

1 well as in the decision on the Defence request for disclosure of screening notes, in both
2 those decisions this Chamber decided that no further disclosure in respect of Witness 31
3 was necessary.

4 We haven't, unfortunately, been in a position to investigate or add more information to
5 this in this short time period, but we would like to do so, if necessary, later in writing.

6 PRESIDING JUDGE FULFORD: No, no, Ms Struyven, this is going to be dealt with
7 today and now. Is there anything else you'd like to say?

8 MS STRUYVEN: No, Mr President, apart from the fact that, of course, we believe that
9 this far-going disclosure that is now requested and which was similar to what was
10 disclosed in respect of the intermediaries 143, 321 and 316, is not warranted in this case.
11 However, of course, we will continue to honour our obligations under Rule 77 and
12 Article 67(2). Thank you.

13 PRESIDING JUDGE FULFORD: Thank you very much indeed. Maître Mabilie?
14 Maître Mabilie, you needn't repeat the contents of your email last night. We've got that.
15 It's really whether there are additional matters you'd wish to raise and particularly
16 anything you'd wish to say in response to Ms Struyven's objection to this application.

17 MS MABILLE: (Interpretation) Just one point, your Honour, and I believe the Bench
18 understands that it cannot be said that we did not do our work when Witness 31 was here
19 since obviously but we didn't have the information necessary to cross-examine him at that
20 stage on issues that we discovered I must say on November the 1st. I must stress that
21 seriously one should not make such statement, that's all I have to say. Thank you.

22 PRESIDING JUDGE FULFORD: Thank you very much indeed. We're going to rise for
23 ten minutes.

24 THE COURT USHER: All rise.

25 (Recess taken in open session at 12.27 p.m.)

1 (Upon resuming in open session at 12.34 p.m.)

2 THE COURT USHER: All rise. Please be seated.

3 PRESIDING JUDGE FULFORD: A decision on further disclosure in relation to Witness

4 31 is at least to a significant extent dependent on our eventual decision as to whether or

5 not the Prosecution has complied with its disclosure obligations in relation to the

6 investigator's report which was disclosed this month, dated 23 February 2006, and in

7 particular as regards the passage which appears at the top of page 3.

8 We are going to receive submissions in the near future as regards the principles that have

9 been applied up until now by the Prosecution in relation to disclosure and, in our

10 judgment, a decision on this issue should await our determination as to whether or not a

11 proper approach has been applied thus far.

12 Accordingly, we intend to adjourn this application, but not for long; it will be decided

13 within the next three weeks, and we hope before then.

14 Turning to other matters, Ms Struyven, there's been a request today for a two-page

15 extension on the part of the Defence for an application for the Bench to receive additional

16 documents. Do you object?

17 MS STRUYVEN: No, we do not, your Honour.

18 PRESIDING JUDGE FULFORD: Thank you very much. You have your extension,

19 Maître Mabilie.

20 Finally, from us, there has been a request, document number 2432, by the Defence dated

21 12 May for the Defence to reconsider the EVD numbers that have been given to 74

22 documents.

23 In a filing numbered 2584 and dated 2 November, the Prosecution raised certain

24 objections in principle to the application.

25 We would -- I'll start that sentence again. We request the Prosecution to file by 4 p.m. on

1 Friday next week a substantive response to the application setting out those documents in
2 particular in relation to which the Prosecution argues they should retain the EVD
3 numbers presently attributed, providing us with a short explanation in each instance as to
4 why that contention is advanced. We will then consider all of the arguments collectively,
5 both those in principle and if necessary those that relate to the individual documents.

6 Ms Struyven.

7 MS STRUYVEN: Thank you, Mr President. We were wondering if that last deadline
8 could be extended until Monday because it concerns a considerable amount of documents.

9 PRESIDING JUDGE FULFORD: It does. So Monday of the following week.

10 MS STRUYVEN: Thank you, Mr President.

11 PRESIDING JUDGE FULFORD: Certainly, Ms Struyven. Certainly. That concludes
12 the matters that we wish to raise. Mr Sachdeva, I see you --

13 MR SACHDEVA: Thank you, Mr President. I just wanted to inform the Court that
14 Witness 582 has told us that he is potentially available for the 15th -- week of 15
15 November to come here and conduct deposition testimony. It just remains to be seen
16 whether that's -- will actually be taking place. I just wanted to inform your Honours on
17 that.

18 And secondly, I had raised I think a week ago that there was a possibility the Prosecution
19 would seek leave to add or to replace 555 with another witness. Again, I apologise, but I
20 can't be certain, but perhaps next week there will be an application made orally, with your
21 leave.

22 PRESIDING JUDGE FULFORD: Thank you for the warning. We'll wait to receive your
23 application, Mr Sachdeva, but thank you for telling us that it may arrive.

24 MR SACHDEVA: Thank you.

25 PRESIDING JUDGE FULFORD: Maître Mabilie.

1 MS MABILLE: (Interpretation) Your Honour, just one clarification on the extension of
2 pages. On the transcript, I read two pages, but we rather ask for six. We rather ask for
3 six pages. We ask for an extension of six pages, and not two pages, your Honour.

4 MS STRUYVEN: We still have no objection, your Honours.

5 PRESIDING JUDGE FULFORD: My mistake. Six pages, Maître Mabilille.

6 MS MABILLE: (Interpretation) Very well. Another problem which is more serious,
7 your Honour, is that we are examining 316 again. I had to leave that examination or that
8 questioning to come and attend this hearing.

9 Since there are a lot of contradictions in the course of this examination, we absolutely need
10 a transcript. When I discussed with the OTP, they told me that it was impossible to
11 obtain a transcript of what we are currently doing; that is, for the questioning which
12 should take place next week.

13 I am concerned for two reasons. First of all, we absolutely need transcripts in order to be
14 able to really cross-examine the witness. The second point is that the lawyer --

15 PRESIDING JUDGE FULFORD: Maître Mabilille, I'm sorry. I'm being extremely dense.
16 Transcripts of what?

17 MS MABILLE: (Interpretation) Transcript of the questioning which we are currently
18 conducting. There is an audio recording of that questioning and we need a written
19 transcript of the questioning, of the examination. This is a major concern for us and we
20 are raising this point because the counsel for 316, who is with us, has said that he is going
21 to instruct his client to answer questions only when he has a transcript in front of him. In
22 any case, I think that we need this document for cross-examination purposes, and I would
23 not like that in the course of cross-examination the witness tells me "I am not going to
24 answer because you have not shown me the transcript which indicates that I said
25 such-and-such a thing."

1 I tried to discuss this with the OTP and I was informed that they do not have the means
2 for this. They have a staff of 300 persons in the OTP, but they say apparently they do not
3 have the means to take a transcript of this interview and I believe that it's of utmost
4 importance. I think we can at least take a draft, which can be reviewed later. But if we
5 are going to take an audio recording of two or three hours, I don't see why one would
6 need 15 days to perform this task. I wished to draw the attention of the Chamber to this
7 problem.

8 MR SACHDEVA: Mr President, thank you. Again, this issue has raised its head. In
9 fact, I did not say that we would not be able to do that. What I said was that under
10 Rule 112 (e) the obligation is to provide a transcript as soon as practicable.

11 And we're conducting an interview today. To expect a quality controlled full
12 transcription of the interview by Monday is nigh on impossible, which is what I told my
13 learned friend. I said of course that we would try to do so.

14 And at the moment, we have one of our associate trial lawyers conducting a
15 contemporaneous transcription - obviously, in draft form - to be used by both parties and
16 the participants on Monday when 316 testifies. And so, yes, we do have more persons
17 working in the Office of the Prosecutor, but the transcription unit covers all cases, all
18 investigations, all interviews, and it's not that the Lubanga case has a transcription unit
19 just working for it and therefore we will try to provide it as soon as possible.

20 If there are to be problems during the examination of course we can have recourse to the
21 audio tape which has been done in the past, contemporaneous recording of the interview.
22 So in my submission, this should not -- this should not suspend the testimony of 316
23 whatsoever.

24 PRESIDING JUDGE FULFORD: Thank you. Mr Sachdeva, thank you very much for
25 that submission. In the view of the Chamber, this is a very high priority as a piece of

1 work. 316 is potentially an extremely important witness, as regards this stage of the case,
2 possibly the trial overall, and if significant things are being said during the course of this
3 pre-testimony interview, then in order for counsel to put properly formulated questions,
4 and for the witness to respond to those in a way that does justice to his account, it is
5 critical that there is a transcript that can be used by counsel during questioning.

6 Now, we understand of course this is being done at short notice and that the Office of the
7 Prosecutor has other obligations but, insofar as it is appropriate for us to express the view,
8 we consider, as I've just said, that this is a high priority.

9 There are only four-and-a-half days for 316 to give evidence, and it would be highly
10 regrettable if his evidence has to be adjourned because the process of locating the right
11 passage on the audio tape, for a number of questions, has taken a very long period of
12 time.

13 Certainly my experience of trying to cross-examine witnesses on the basis of an audio tape
14 is that it is exceedingly laborious because you have to identify exactly the right part of the
15 tape before you can put the question. So, we ask you please, as I am sure you would do
16 in any event, to do everything you possibly can to ensure that the transcript is in a suitable
17 form for use on Monday.

18 MR SACHDEVA: Thank you, Mr President. We will certainly do so. And in fact, we
19 have made a request for an official transcription to be done on an urgent basis.

20 PRESIDING JUDGE FULFORD: That would be excellent if that can be done. Thank
21 you very much indeed.

22 MR SACHDEVA: Thank you.

23 PRESIDING JUDGE FULFORD: On your final request or your final point, Mr Sachdeva,
24 we are of the view that the arrangements for 582 should be put in place. If he is able to be
25 here, there will be a deposition-taking exercise, probably in the small pre-trial courtroom,

1 and it is likely that it will be supervised by the legal adviser to the division.

2 During the course of next week, if it's necessary, we will take submissions from the parties
3 as to what I'm going to describe as the rules of engagement, but we will not do that today.

4 The Chamber wishes to reflect a little bit longer on what steps are appropriate for that
5 exercise.

6 MR SACHDEVA: Thank you very much, Mr President. That's very good to know.

7 PRESIDING JUDGE FULFORD: Thank you very much. Anything else? Maître
8 Mabilie.

9 MS MABILLE: (Interpretation) I beg your pardon but, for 582, I would like to inform
10 the Chamber: Apparently, at the prison in Scheveningen there is a means of ensuring
11 that Thomas Lubanga follows the deposition-taking exercise on the screen. I am afraid
12 administrative problems may take too long a time. Will it be possible, therefore, to
13 ensure that Thomas Lubanga watches the deposition-taking exercise from the prison at
14 Scheveningen, please?

15 PRESIDING JUDGE FULFORD: We will make the inquiry of those with the
16 responsibility this afternoon, Maître Mabilie. Thank you for raising the point.
17 Thank you all for your attendance. 2 o'clock on Monday.

18 THE COURT USHER: All rise.

19 (The hearing ends in open session at 12.50 p.m.)