

1 International Criminal Court
2 Trial Chamber I - Courtroom 1
3 Presiding Judge Adrian Fulford, Judge Elizabeth Odio Benito and
4 Judge Rene Blattmann
5 Situation in the Democratic Republic of Congo - ICC-01/04-01/06
6 In the case of The Prosecutor versus Thomas Lubanga Dyilo
7 Status Conference
8 Friday, 20 May 2011
9 The hearing starts at 2.31 p.m.
10 (Open session)

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

13 PRESIDING JUDGE FULFORD: Good afternoon. This is a public
14 Status Conference to address the position of Witness 5. In order to
15 maintain a public hearing, I turn to the Registry to inquire as to
16 whether it will be sufficient if we obviously avoid identifying Witness 5
17 and if we refrain from mentioning the particular sum of money that is in
18 issue. It seems to me, having read the e-mail communication, that those
19 are the two areas that has caused concern to the Registry. Is that
20 correct? I see nods. Thank you very much.

21 Now, Mr. Sachdeva, I'm going to address you first. You've seen
22 the e-mail exchanges. They tell their own history. I'm not going to
23 rehearse or summarise the contents of them. The simple question that
24 it's entirely up to you whether or not you address it, but the question
25 is what now do you submit we should do?

1 MR. SACHDEVA: Thank you, Mr. President. From the information
2 that we have all seen, it is readily apparent to the Prosecution that at
3 this stage it appears Court Witness 5 is unlikely to come to the seat of
4 the Court within the time-lines that the Court has made in respect to the
5 closure of this case. In our submission, the Registry had expended all
6 appropriate methods to secure the witness's testimony and it now seems
7 highly unlikely that the witness -- as stated, the witness would indeed
8 come to testify in a manner that would be appropriate for the running of
9 this case. And accordingly, our submission would be that it seems that
10 we are at the end of the road, to put it in that way, Mr. President.
11 Thank you.

12 PRESIDING JUDGE FULFORD: It's a colloquialism but very clear,
13 Mr. Sachdeva. Thank you very much.

14 In light of that, Mr. Biju-Duval, is there anything you would
15 wish to say?

16 MR. BIJU-DUVAL: (Interpretation) Your Honour, if I understood
17 the Prosecutor correctly, he has concluded from all of this that the
18 witness is not going to arrive and that we should therefore terminate the
19 reception of evidence. We agree with that arrangement. The witness,
20 Witness 5, is proposing conditions which are unacceptable. His conduct
21 should be interpreted as a refusal and the consequence should therefore
22 be therefore that he is not going to turn up.

23 Your Honour, I believe that it's important that we should not
24 give additional time under the circumstances. It's high time the Defence
25 finally spent time on the preparation of its closing statements because,

1 as I said three weeks ago, the energies and the resources of the Defence
2 are exclusively devoted to the announcement of the appearance of
3 Witness 5. Our position, therefore, is that the Chamber should simply
4 take note that Witness 5 is not going to come to give testimony. That is
5 our position, your Honour.

6 PRESIDING JUDGE FULFORD: Thank you.

7 Ms. Massidda.

8 MS. MASSIDDA: (Interpretation) Thank you, your Honour. We have
9 no solution. We agree with the observations made by the Prosecution and
10 the Defence. Thank you.

11 PRESIDING JUDGE FULFORD: Anyone else? No. Thank you.

12 (Trial Chamber confers)

13 PRESIDING JUDGE FULFORD: On the 28th of April, 2011, this
14 Chamber decided in a written Decision that Witness 5 was to be called
15 pursuant to Articles 64(6)(b) and 69(3). This was based on our
16 conclusion, set out in paragraph 64 of that decision, that his account is
17 relevant to certain issues in the case (see paragraphs 63 and 64) and we
18 formed the view that he may be able to give evidence of potential
19 probative value on these matters. His evidence was set for Monday of
20 this week, 16 May 2011.

21 His evidence was adjourned because on 10 May 2011 the Chamber was
22 informed by e-mail that Witness 5 was not prepared to travel to The Hague
23 in order to give evidence at the appointed time. His evidence was
24 subsequently fixed for 6 June 2011 (see the e-mail of Monday 16 May 2011
25 from the Chamber to the Registry).

1 The Registry has been in contact with Witness 5. All of the
2 relevant documentation relating to the communications with Witness 5 and
3 the Chamber on this issue has been disclosed to the parties and
4 participants (see the e-mail of 19 May 2011 from the Chamber to the
5 parties and participants) and we order that they are attached to a public
6 filing by the Registry (with any necessary redactions) so that they form
7 part of the record of this trial.

8 In summary, Witness 5 has indicated that he will not travel to
9 The Hague, and he will not give evidence (even by video-link), unless the
10 Court pays him a particular sum of money that he has stipulated.
11 Further, he has informed the Registry that in June he will be engaged on
12 other activities. The Chamber has been informed that despite requests
13 from the Registry he has not submitted this particular financial request
14 in writing, supported by documentation. The witness has told the
15 Registry that he has not yet decided whether he will provide a written
16 claim, and if he does so, he has indicated that this may take some time
17 (anywhere between several days to several months).

18 Subsequently, the witness terminated contact with the Registry
19 and Witness 5 has indicated that he does not wish to speak with its
20 representatives (see the e-mail from the Registry to the Trial Chamber of
21 19 May 2011).

22 The Registry operates a scheme for reimbursing witnesses pursuant
23 to the Regulations of the Registry that has been applied in this and
24 other cases. We have not been asked to review its efficacy, but it is of
25 note that it has not led to material difficulties during the course of

1 this trial.

2 In submissions today, the Prosecution accept that on the basis of
3 all the material, it appears that it is unlikely that Witness 5 will
4 attend to give evidence within the schedule fixed by the Chamber for the
5 closing stages of this case. It is accepted by the Prosecution that the
6 Registry has done everything reasonable to secure either his attendance
7 or his evidence via a video-link, and therefore the Prosecution in its
8 submissions has indicated that it does not press the Chamber to take
9 further steps to try to secure the testimony of this witness.

10 Similarly, the Defence submits that the conduct of Witness 5, as
11 demonstrated in the disclosed material, should be taken in effect as a
12 refusal on his part to testify. It is argued by counsel for the accused
13 that in the circumstances this should be treated as the end of the matter
14 in relation to this potential witness, and the parties and participants
15 should from now on be allowed to focus entirely on their closing
16 submissions.

17 Ms. Massidda, on behalf of the OPCV* concurs with the submissions
18 of other counsel.

19 The Chamber has no power to compel the attendance of witnesses.
20 At this stage, in light of the information that has been received, and
21 particularly given what Witness 5 has recently said, it is beyond doubt
22 that he will not testify unless he receives the sum of money he has
23 specified that is presently unsupported by any documentation. Indeed, as
24 just rehearsed, it is wholly unclear whether this claim will be reflected
25 at any stage in a written application, and if this is to be provided, it

1 is equally uncertain when it will be submitted (as indicated, this may
2 take months). These significant uncertainties cannot be further
3 clarified because of the witness's refusal to liaise further with the
4 Representatives of the Registry. The practical effect of these events is
5 that Witness 5 is presently unwilling to testify.

6 The Prosecution's closing submissions are due to be filed the
7 week after next and the time-limit for the Defence submissions is 15 July
8 2011. There needs to be finality on the evidence so that the closing
9 arguments can be appropriately framed. There is now grave doubt as to
10 whether Witness 5 will testify within a reasonable time-frame or indeed
11 at all. Given these circumstances it would be disproportionate to delay
12 the trial further, since it is wholly unclear whether Witness 5 will
13 resume contact with the Registry.

14 In all the circumstances, therefore, the Chamber will proceed
15 without hearing the testimony of Witness 5 and pursuant to Rule 141(1) I
16 therefore declare the submission of evidence in this case is now closed.

17 We are due to meet in August. Before we part, does anybody wish
18 to raise anything? Slightly hesitantly, Mr. Sachdeva.

19 MR. SACHDEVA: Mr. President, I suspect it's nothing, but your
20 Honour referred to the Prosecution's closing submissions to be filed next
21 week. We just want to make sure that it still remains the 1st of June.

22 PRESIDING JUDGE FULFORD: I'm wishing May away, Mr. Sachdeva.
23 You're quite right, the week after next. And the record of the oral
24 ruling should be suitably amended to reflect what Mr. Sachdeva has just
25 said, so not "next week," it should read "the week after next."

1 Yes.

2 MR. FRANCK: (Interpretation) Your Honour, my name is
3 Mr. Mulenda Franck. I simply wish to introduce myself to you because
4 this is the first time I am appearing in your Trial Chamber since the
5 problems I had on the eve of the opening of the case. I simply wish to
6 thank you and thank my learned colleagues in the Defence team and the OTP
7 and each and everyone for all the support I have received over the past
8 two years or so. I am now able to appear before this Trial Chamber -- in
9 fact, I'm here, as you can see, and that's all I have to say. I am
10 standing here right now with you and thank you for everything.

11 PRESIDING JUDGE FULFORD: Thank you very much for that. We are
12 extremely pleased to see you and only regret that your first appearance
13 is in what may be the penultimate hearing certainly before the end of the
14 main part of the case but nonetheless, sir, you're welcome. Thank you
15 very much.

16 I would like to thank the Registry for the considerable efforts
17 that they've taken in relation to Witness 5. Your contribution was
18 extremely helpful. Thank you all very much. We look forward to seeing
19 you in August.

20 COURT USHER: All rise.

21 The hearing ends at 2.49 p.m.

22 CORRECTION REPORT:

23 Trial Chamber I has made the following correction in the transcript:

24 * Page 5 line 17

25 "VWU" is corrected by "OPCV"