

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 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 Wednesday, 11 May 2011
9 The hearing starts at 9.32 a.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 morning.
14 Mr. Sachdeva, I'm going to address the bar through you. We're
15 very shortly going to have to go into private session, but the public
16 element is that as a result of an e-mail that the Chamber received late
17 yesterday afternoon, it is now clear beyond doubt that Witness 0005 will
18 not be attending to give evidence next week. The reasons for that and
19 the steps that the Chamber is now going to take will have to be dealt
20 with confidentially, so private session, please. Do take a seat for a
21 moment, Mr. Sachdeva.
22 (Private session at 9.34 a.m.)
23 (Redacted)
24 (Redacted)
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13 Page 2 redacted – Private session

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17 (Open session at 9.39 a.m.)

18 COURT OFFICER: Your Honours, we're back in public session.

19 Thank you.

20 PRESIDING JUDGE FULFORD: We're now back in public session. For

21 the benefit of the public record, the schedule established by the Chamber

22 for the closing stages of the case remains unchanged and the dead-lines

23 that we have set still apply, and we will investigate as quickly as we

24 can as to whether or not it is going to be feasible given the new

25 information in relation to Witness 0005 that his evidence can still be

1 incorporated into the trial proceedings.

2 As regards disclosure, we have been informed that supplementary
3 information has been received by the Victims Participation and
4 Reparations Section as regards seven victims' applications. Those should
5 be transmitted to the Chamber without redactions and to the parties with
6 any redactions that are necessary by 4.00 p.m. tomorrow, and the parties
7 are, please, to respond to that new information by 4.00 p.m. on the
8 19th of May.

9 The only other outstanding business, certainly as far as the
10 Bench is concerned, is that we are now about to deliver an oral decision
11 on the Defence application to appeal the Chamber's decision to call
12 Witness 0005. Before we commence that oral decision, is there anything
13 else that anybody wishes to raise?

14 Yes, Mr. Sachdeva.

15 MR. SACHDEVA: Thank you, Mr. President. It's just a small
16 housekeeping issue. It's the request for an EVD number for a document
17 that the Prosecution showed to Defence Witness 0019 in cross-examination.
18 We have discussed this with the Defence and I understand that they do not
19 have an objection. With your leave, I could read out the ERN number.

20 PRESIDING JUDGE FULFORD: Could you please, and in the absence of
21 any objection, could the Court Officer please give it an EVD number.

22 MR. SACHDEVA: It is DRC.00113.057.

23 COURT OFFICER: Your Honour, the document shall be given
24 Exhibit number EVD-OTP-00740. Thank you, your Honours.

25 MR. SACHDEVA: Thank you very much, Mr. President.

1 PRESIDING JUDGE FULFORD: Now, this oral decision is, I'm afraid,
2 going to take rather a long time to read out. Not only will it not be
3 considered by the Bench to be dis-courteous if counsel leave at this
4 point in time, we would positively encourage you to make better use of
5 your time rather than listening to us reading out a fairly long decision.
6 Probably for the Prosecution and the Defence, one representative of each
7 team should remain. Of course, you are more than entitled to stay if you
8 wish, but if any of you wish to leave, now please is the time to do so.
9 And I will pause for a moment while the decision is made as to whether
10 anybody wishes to leave court at this stage, this includes any Court
11 Officers from Chambers who wish to leave. So I'll pause for a moment.

12 Maître Mabilie.

13 MS. MABILLE: (Interpretation) I'm sorry, your Honour. Does the
14 Chamber have any objection to our going -- not only going out but also to
15 ask our client to go out with us so that we can work with him while the
16 Chamber hands down the decision.

17 PRESIDING JUDGE FULFORD: Sounds like an extremely good idea,
18 Maître Mabilie. So if members of your team together with Mr. Lubanga
19 wish to leave court, you're fully entitled to do so.

20 MS. MABILLE: (Interpretation) Thank you very much, your Honour.

21 (Mr. Lubanga withdrew)

22 PRESIDING JUDGE FULFORD: I. Background

23 1. The Defence has applied (document 2729-CONF, 2 May 2011) for
24 leave to appeal the "Decision on the Prosecution's Application to Admit
25 Rebuttal Evidence from Witness DRC-OTP-WWWW-0005" delivered on the

1 21st of April, 2011, document 2727).

2 2. By way of background, the Chamber is reminded that on
3 25 February 2011 the Office of the Prosecutor, by e-mail, sought leave to
4 interview Witness 0005 as part of its preparation for the evidence called
5 by the Defence.

6 3. On 9 March 2011, Trial Chamber I (by e-mail) authorised the
7 Prosecution to meet Witness 0005, in the presence of the Defence, under
8 the conditions set out in the e-mail from the Chamber dated
9 18 February 2010.

10 4. On 11 April 2011, the Prosecution interviewed Witness 0005.
11 The Defence, although present at the meeting, did not ask any questions.

12 5. On 14 April 2011, the Prosecution applied to introduce the
13 transcript of the interview of 11 April 2011 into evidence under Rule 68
14 (see T-350, page 18, line 25 to page 19, line 2 and page 19,
15 lines 23- 25).

16 6. The Chamber ordered the parties to file written observations
17 on the Prosecution's request, whilst concurrently addressing the
18 possibility of Witness 0005 giving oral evidence (see T-350, page 31,
19 line 4-15; page 32, lines 3-12; and page 34, lines 12-19).

20 7. On 15 April 2011, the Defence and the Prosecution submitted
21 their observations by e-mail.

22 8. On 21 April 2011, Trial Chamber I ordered Witness 0005 to
23 testify as a Court witness (see document 2727).

24 II. The Defence submissions

25 The First Issue

1 9. The first issue raised by the Defence is whether Witness 0005
2 will address issues that have arisen for the first time during the
3 Defence evidence, or, instead, have they been anticipated by the
4 Prosecution since the beginning of its case.

5 10. It is submitted that the various matters set out in
6 paragraph 63 of the decision have been a part of the main lines of the
7 Prosecution case against Mr. Lubanga since the commencement of the
8 proceedings, and accordingly they have not arisen *ex improviso* during the
9 evidence of the Defence witnesses. In particular, the following matters
10 are highlighted:

11 - since 2006, the Prosecution has repeatedly maintained that the
12 armed branch of the UPC/RP was constituted during the years 2000 to 2002
13 by incorporating the Hema self-defence militias (the submissions of
14 15 April 2011, paragraph 12);

15 - since 28 August 2006, the Prosecution has maintained that a
16 significant number of children below the age of 15 form part of the Hema
17 militias who were integrated into the FPLC (see document 356, Annex 3,
18 paragraph 14);

19 - the Prosecution has suggested (at least since 2007) that there
20 was a fictitious UPC/RP policy during 2002 to 2003 of demobilising minors
21 (the submissions of 15 April 2011, paragraph 13).

22 11. The Prosecution addressed these topics with Witness 0005
23 during interviews with him in 2005 and 2007, resulting in a written
24 statement signed on 19 October 2007 (the submissions of 15 April 2011,
25 paragraphs 14-18).

1 12. It follows, it is submitted, that the matters addressed in
2 paragraph 63 of the decision are not new or unforeseen, and, moreover,
3 the Prosecution deliberately avoided addressing them in greater detail,
4 particularly by withdrawing Witness 0005 from its list of witnesses in
5 March 2008.

6 The Second Issue

7 13. The second issue raised by the Defence is whether
8 introducing a witness following the evidence called by the Defence, whose
9 existence was known prior to the commencement of the trial - indeed, who
10 was, until withdrawn, on the list of Prosecution witnesses - violates the
11 accused's right to a fair trial.

12 14. It is suggested that the evidence of Witness 0005, in
13 essence, tends to incriminate the accused (see document 2076,
14 paragraph 3, and document 2727, paragraph 13), and it is emphasised in
15 this regard that he was on the Prosecution's list of witnesses until
16 28 March 2008; furthermore, the Prosecutor relied on his written
17 submissions when compiling the presentation of the "Summary of
18 Prosecution evidence" (14 December 2007, document 1094, footnotes 82, 86,
19 and 127), along with the amended version of 23 May 2008 (document 1354,
20 Annex A).

21 15. Whilst it is accepted that Trial Chamber 1 undoubtedly has
22 the power to require the admission of all the evidence that it considers
23 necessary in order to establish the truth (Article 69(3)), it is
24 contended that the Judges must at all times ensure that the trial is
25 conducted fairly, with full respect for the rights of the accused

1 (Article 64(1)).

2 16. Against that background, the argument of the accused is that
3 it is manifestly unfair to permit an incriminatory witness to give
4 evidence after the accused has completed the process of introducing his
5 case, when the witness was available to be called by the Prosecution on
6 the matters set out in paragraph 63 of the decision, but was withdrawn
7 from the list of Prosecution witnesses. It is submitted that it is
8 irrelevant that calling him at this stage follows, certainly to an
9 extent, a proposal by the Chamber.

10 17. It is argued that the Defence developed its strategy
11 essentially in response to the evidence presented by the Prosecution, and
12 the addition of Witness 0005 to the list of those whose evidence tends to
13 implicate the accused irremediably prejudices the Defence, for the
14 reasons set out immediately hereafter.

15 i) The Defence tailored its list of witnesses in order to
16 meet the evidence presented by the Prosecution, and it elected not to
17 call certain individuals who could have testified on the subjects that
18 would be raised by Witness 0005.

19 ii) The Defence is now prevented from addressing either the
20 issues raised by Witness 0005 or the material related to his credibility
21 with the witnesses who have already testified before the Chamber. It is
22 said the Defence would have raised a number of additional matters with
23 all the former UPC/RP representatives, the representatives of the
24 Prosecution, and intermediary 316, who is a friend of Witness 0005 and
25 who presented him to the Prosecution (see EVD-D01-01039, page 1, the

1 table of links between witnesses and intermediaries provided to the
2 Defence on 24 November 2010). It is suggested that it would be
3 impossible to re-call all of these witnesses at this stage of the
4 proceedings.

5 iii) The Defence argues it could have investigated
6 Witness 0005 if he had testified before the witnesses called by the
7 Defence and, additionally, that its limited resources prevent proper
8 investigation of individuals who could potentially give evidence but who
9 are not on the Prosecution list, given the Defence was provided in this
10 context with the identities of about 180 individuals.

11 18. The Defence submits that it does not have the time and
12 resources to prepare for the testimony of this witness on 16 May 2011,
13 again for the reasons set out below.

14 i) The witness provided, first, a written statement
15 comprising 68 pages, accompanied by six annexes; second, his agendas for
16 the years 2002 and 2003, which include numerous handwritten notes,
17 totalling 680 pages; third, five notebooks, 472 pages in length; and
18 finally, several other documents. The Defence maintains it is still
19 awaiting disclosure of various outstanding documents relating to this
20 witness.

21 ii) The Defence suggests that it is necessary to analyse the
22 entirety of the relevant documentation, and that time will be needed to
23 conduct investigations in the field relating to this witness. It is
24 suggested that the importance of the functions carried out by
25 Witness 0005 within the UPC between September 2002 and August 2003 (see

1 document 2727, paragraph 64); his contacts with intermediary 316; and the
2 need to research relevant potential witnesses, demonstrate the extent of
3 the preparatory work to be undertaken by the Defence before the testimony
4 of Witness 0005 commences.

5 The application of Article 82(1)(d)

6 19. The Defence relies on the provisions of Article 82(1)(d),
7 namely that either party can appeal a decision "that involves an issue
8 that would significantly affect the fair and expeditious conduct of the
9 proceedings or the outcome of the trial, and for which, in the opinion of

10 the [...] Trial Chamber, an immediate resolution by the Appeals Chamber
11 may materially advance the proceedings."

12 20. It is suggested that this decision raises questions that
13 significantly affect the fair and expeditious conduct of the proceedings,
14 essentially for the reasons set out above. In essence it is contended
15 that irreparable prejudice has been caused to the accused, in that he
16 will be unable to present all the evidence that is necessary to
17 contradict the potential evidence of Witness 0005, having been properly
18 investigated within a reasonable period of time.

19 21. As to the outcome of the trial, it is argued that the
20 evidence of Witness 0005 may add new incriminatory evidence, directly
21 affecting the outcome of the case, which the Defence has been unable to
22 address adequately.

23 22. Finally, the Defence submits that the immediate resolution
24 of these issues by the Appeals Chamber may result in Witness 0005 not
25 giving evidence, thereby avoiding the possibility of a number of

1 additional witnesses being required to give evidence (including
2 Witness 0005).

3 III. The Prosecution submissions

4 23. The Prosecution filed its submissions on 6 May 2011
5 (document 2731). It argues that the issues raised by the Defence are not
6 appealable within the meaning of Article 82(1)(d) and it is submitted
7 that they do not meet the criteria for granting leave to appeal
8 (paragraph 3). The Prosecution particularly highlights that Witness 0005
9 is not being called in rebuttal, but instead - given the developments in
10 the case - his evidence is necessary for the determination of the truth
11 (paragraph 4). It is submitted that the Defence has erroneously focused
12 on whether the issues to be raised by Witness 0005 are unforeseen: the
13 Chamber instead determined the matter on the basis that the issues were
14 new in the context of the trial proceedings, but that they were
15 potentially foreseeable.

16 24. The Prosecution suggests that the Defence inappropriately
17 focuses on whether Witness 0005 has been added impermissibly to the list
18 of witnesses who tend to incriminate the accused: instead, the Chamber
19 decided that his evidence was necessary, under Article 69(3), to
20 determine the truth (paragraphs 6 and 7).

21 25. The Prosecution contends that the Defence submissions on the
22 effect of the Chamber's decision on the fairness of the proceedings and
23 on the outcome of the trial are, essentially, speculative. The testimony
24 of Witness 0005, and more particularly, the weight to be ascribed to it,
25 is in a real sense unknown. Furthermore, the Chamber has indicated that

1 if "the testimony of Witness 0005 leads to consequences for the accused
2 that need to be confronted by the Defence at this stage in the trial, an
3 application can be made to the Chamber at an appropriate stage" (document
4 2727, paragraph 64). Therefore, any potential prejudice will be
5 addressed during the trial.

6 26. The Prosecution highlights that since the Prosecution
7 withdrew Witness 0005 from its list of witnesses, the Defence has been
8 aware (since July 2009) that he was a potential Court witness (the
9 Prosecution refers to document 2033). As to time-lines, the Prosecution
10 highlights the Chamber's direction that the timetable for closing
11 submissions is to be maintained (paragraphs 10 and 11).

12 27. The Legal Representatives did not file submissions.

13 IV. Relevant provisions

14 28. In accordance with Article 21(1) of the Statute which sets
15 out the applicable law, the Trial Chamber has considered
16 Article 82(1)(d):

17 "Appeal against other decisions

18 "1. Either party may appeal any of the following decisions in
19 accordance with the Rules of Procedure and Evidence:

20 "[...]

21 "(d) A decision that involves an issue that would significantly
22 affect the fair and expeditious conduct of the proceedings or the outcome
23 of the trial, and for which, in the opinion of the Pre-Trial or
24 Trial Chamber, an immediate resolution by the Appeals Chamber may
25 materially advance the proceedings."

1 V. General remarks

2 29. In reaching its conclusions the Chamber has examined the
3 application for leave to appeal against the following criteria:

4 "a) Whether the matter is an 'appealable issue' arising from the
5 impugned decision;

6 "b) Whether the issue at hand could significantly affect:

7 "i) the fair and expeditious conduct of the proceedings, or

8 "ii) the outcome of the trial; and

9 "c) Whether in the opinion of the Trial Chamber, an immediate
10 resolution by the Appeals Chamber could materially advance the
11 proceedings."

12 30. The requirements set out above are cumulative; therefore,
13 failure to fulfil one or more of the requirements is fatal to an
14 application for leave to appeal. The cumulative nature of this test
15 means that if one criterion is not satisfied it is unnecessary for the
16 Chamber to consider whether the other criterion for granting leave are
17 met.

18 31. The established approach on applications for leave to appeal
19 in which the arguments raised by the parties relate to the merits of a
20 substantive issue, rather than the test for leave to appeal, is that the
21 substantive arguments will not be addressed. Instead, the Chamber will
22 focus solely on the submissions directed at satisfying the criteria of
23 the test for leave to appeal. This is the approach applied in this
24 decision, and thus the substantive arguments of the parties have not been
25 considered by the Chamber.

1 VI. Analysis and conclusions

2 32. Applying the test in Article 82(1)(d), the Chamber needs
3 first to determine whether the matters advanced by the Defence constitute
4 "appealable issues" arising from the impugned decision. The
5 Appeals Chamber has held that:

6 "Only an 'issue' may form the subject-matter of an appealable
7 decision. An issue is an identifiable subject or topic requiring a
8 decision for its resolution, not merely a question over which there is
9 disagreement or a conflicting opinion. [...] An issue is constituted by
10 a subject the resolution of which is essential for the determination of
11 matters arising in the judicial cause under examination. The issue may
12 be legal or factual or a mixed one." (Document 168 in the DRC Situation,
13 13 July 2006, paragraph 9).

14 33. The Defence submissions have focused substantially on issues
15 that were not determinative of the Chamber's decision. As set out above,
16 the Court recognised that:

17 "The incorporation of existing Hema militias and forces into the
18 UPC has been repeatedly referred to during the evidence in the case,
19 along with aspects of the suggested demobilisation of young combatants.
20 However, the testimony of the final Defence witnesses has focused
21 attention on these two interrelated issues in a way that has not been
22 significantly explored hitherto. There is a real element of novelty in
23 the description that has been given of the particular relationship
24 between the self-defence groups that use child soldiers and the UPC,
25 which has only crystallised at this stage of the trial" (paragraph 56).

1 34. Notwithstanding the "real element of novelty" in the
2 description of the relationship between the self-defence groups that use
3 child soldiers and the UPC, significant elements of the anticipated
4 testimony of Witness 0005 has been alluded to at various stages in these
5 proceedings during the pre-trial phase and in the evidence during the
6 trial of Witness 0017 in particular (T-160 page 38, line 3 to page 39,
7 line 2). The Chamber therefore concluded that the Prosecution could
8 reasonably have foreseen this development in the case, and it followed
9 that these matters have not arisen *ex improviso*. For this reason, the
10 Chamber decided that the Prosecution should not be permitted to call
11 Witness 0005 as rebuttal evidence.

12 35. Instead, the Chamber indicated that it was necessary to call
13 Witness 0005 as a Court witness to address issues in order to determine
14 the truth in the case, pursuant to Article 82(1)(d). This conclusion
15 that Witness 0005's evidence is necessary for the determination of the
16 truth is entirely unaffected by the question of whether the issues it is
17 anticipated he will address arose for the first time during the
18 presentation of the Defence evidence or whether they had previously been
19 alluded to. In these circumstances, the first issue identified by the
20 Defence was not in any sense determinative of, and it does not arise
21 from, the Chamber's decision.

22 36. The Chamber determined that the account of Witness 0005 is
23 relevant to the determination of the truth on the following topics: "(i)
24 whether certain Hema self-defence groups were independent of, or were
25 instead incorporated into, the UPC (and if so when); (ii) whether these

1 self-defence groups included children under the age of 15; and (iii)
2 whether the accused made efforts to demobilise these children, including
3 during the discussions in the UPC executive committee meetings with
4 representatives of the groups" (paragraph 63).

5 37. As set out above, the Chamber indicated that any
6 consequences for the accused flowing from this decision were to be
7 addressed following an application to the Chamber (paragraph 64).

8 38. As a result, the accused's submission that the witness could
9 have been called by the Prosecution but was withdrawn from the list of
10 Prosecution witnesses fails to address the fundamental basis of the
11 Chamber's decision: that this testimony is necessary in order to
12 determine the truth. The consequences, if any, for the accused as
13 regards preparation and investigation (outlined in the Defence
14 submissions) can be addressed on an application to the Chamber, and, if
15 necessary, in the Article 74 decision. Therefore, the Chamber will be
16 able to protect the fairness and expeditiousness of the trial
17 (Article 82(1)(d)). These are all matters that have not yet emerged for
18 consideration in any substantive sense and it follows that the second
19 issue identified by the Defence does not arise from the impugned
20 decision.

21 VII. Conclusion

22 39. In all circumstances, the Chamber refuses the Defence
23 application for leave to appeal.

24 During the course of reading out that decision there were I think
25 two or three false starts which should not appear in the transcript as

1 false starts, but only as I amended them. I omitted number 24, moving
2 from 23 to 25. 24 should be inserted. And to the extent possible, the
3 layout and grammar set out in the written form of this decision that's
4 been provided to the stenographers and interpreters should be reflected
5 in the perfected version of this oral decision which is to be sent to me
6 so that I can review it before the final approved version is published.

7 I am told - and I am grateful to one of the Legal Officers - that
8 at page 12 between lines 14 and 16, I made a reference to
9 Article 82(1)(d), that should, in fact, be a reference to Article 69(3)
10 and the transcript of the oral decision is to be amended to that effect.

11 Mr. Sachdeva, one of the issues raised by the Defence in their
12 submissions was that they say that they are still awaiting disclosure
13 from the Prosecution. We make no comment on that at all at this stage,
14 save to invite you to ensure that the Prosecutor has discharged his
15 obligations in relation to this witness. And given the events of
16 yesterday, leading the witness to indicate that he is not going to be
17 attending at this court next week, it may be sensible for you to reflect
18 on whether there are any matters that should be brought to the attention
19 of the Defence as regards any past unwillingness on the part of this
20 witness to give evidence before this Court. It may be, on review, that
21 there are matters which you feel should be disclosed to the Defence; on
22 the other hand, it may be that what Ms. Samson said I think back in
23 April of 2008 has fully encapsulated the matter and there is nothing else
24 to be disclosed. But could you please reflect on that and see whether
25 there are any additional matters.

1 MR. SACHDEVA: Certainly, Mr. President, and in fact we are doing
2 that. And if I may say so, the submissions of the Defence have probably
3 been overtaken by events in terms of the disclosure.

4 PRESIDING JUDGE FULFORD: Thank you all for your very
5 considerable patience.

6 Is there anything else that anyone wishes to raise? Anything
7 arising out of the decision?

8 MR. SACHDEVA: No, Mr. President.

9 PRESIDING JUDGE FULFORD: Ms. Buteau? No.
10 I'm not sure when we will meet again. We shall have to wait and
11 see. Thank you all very much.

12 COURT USHER: All rise.

13 The hearing ends at 10.24 a.m.

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