

1 International Criminal Court

2 Trial Chamber I

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/06

4 Case against Thomas Lubanga Dyilo

5 Hearing - Open Session

6 Monday, 6 July 2009

7 The hearing starts at 2.35 p.m.

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

10 PRESIDING JUDGE FULFORD: Good afternoon.

11 Mr. Sachdeva, we've had a request on behalf of Witness 46 that
12 she be allowed to refer to notes whilst she is giving evidence in the
13 witness box. Has that request been communicated to you or not?

14 MR. SACHDEVA: No, Mr. President, it has not.

15 PRESIDING JUDGE FULFORD: And I imagine, Mr. Biju-Duval, you
16 haven't seen it either. Right. It's come from the Victims and Witnesses
17 Unit, Mr. Sachdeva. We will have a copy of it transmitted to you a
18 little bit later this afternoon.

19 For the benefit of the parties and the participants, our
20 preliminary view is that given that Witness 46 is not an expert witness,
21 she really is in no different position than any other witness who would
22 be expected in the first instance to rely on her own memory and that if
23 specific issues arise which call for an opportunity of refreshing her
24 memory by looking, for instance, at a witness statement or at a
25 particular document, then a discrete application can be made for that to

1 happen in relation to that particular piece of evidence.

2 What we are currently not impressed by is the idea that she
3 should simply go into the witness box with a bundle of notes and sit
4 there and at her choice refer to assorted documentation that she's taken
5 with her. It seems to us that's an undesirable way of giving evidence.
6 But that's only a preliminary view. Once you've seen the application, if
7 you want to come back with submissions on the issue we have a complete
8 open mind on the subject.

9 Good. Thank you.

10 Now, Witness 15, Mr. Sachdeva. Have we established whether there
11 are any difficulties in Witness 15 returning in October?

12 MR. SACHDEVA: Mr. President, may I ask Ms. Samson to address the
13 Bench on this.

14 PRESIDING JUDGE FULFORD: Of course. Thank you very much.

15 MS. SAMSON: Thank you. Based on a report from the Victims and
16 Witnesses Unit, Witness 15 was asked if he would be ready and willing to
17 return to the court for testimony in October, and the answer was
18 favourable, positive. So he is willing to appear in October.

19 PRESIDING JUDGE FULFORD: Now, Ms. Samson, before you sit down,
20 we need to investigate this just a little bit further with your
21 assistance, please. Although we haven't had an opportunity to spend an
22 extensive period of time with the new statement from Witness 15, we are
23 familiar with the general terms of it, and it seems to us that a number
24 of things arise.

25 First, if Witness 15 is to give evidence, it's unlikely that his

1 testimony will be limited to an hour or two. Given that the witness says
2 that, for instance, in the main what he said in his second witness
3 statement is accurate, on a preliminary basis it seems to the Bench that
4 there is -- there would be some merit in an investigation of the matters
5 set out in that witness statement.

6 Second, we want the Prosecution to think very carefully indeed
7 about whether or not the witness should be called by the Prosecution,
8 because although the witness has raised particular issues in relation to
9 a particular individual, as I've just observed, as regards a very
10 substantial part of the evidence that he provided in witness-statement
11 form, he is saying that that is accurate, and we're not at the moment
12 persuaded that the witness has demonstrated such hostility to the
13 Prosecution's case that it would be right for you to abandon him
14 altogether.

15 So what we have in mind is this, and what we would ask you to
16 reflect on is whether the Prosecution should, nonetheless, still call him
17 in October, and we would in those circumstances be sympathetic to the
18 Prosecution pressing him on those issues where he has diverged from his
19 earlier apparent stance in relation to giving evidence for the
20 Prosecution, and in particular, we have in mind what he now says about
21 the intermediary.

22 If the Prosecution doesn't call him, it puts the Bench in the
23 position of having to call him ourselves, and we are not at the moment
24 particularly enthusiastic about having to lead a witness in relation to
25 whom there may be a number of questions from both sides through his

1 evidence in chief, which would be an extended enterprise.

2 So, Ms. Samson, I sorry to go on, but to put it together, we're
3 encouraging you to reconsider your decision about not calling him with
4 the undertaking that you would be given some latitude as regards the
5 areas of difficulty.

6 MS. SAMSON: Thank you very much, your Honour. We will certainly
7 do our best to reconsider that position bearing in mind the Chamber's
8 guidance on the issue and the ways in which the Chamber sees the
9 development of this witness's testimony.

10 PRESIDING JUDGE FULFORD: Thank you very much.

11 Mr. Biju-Duval, is there anything you'd wish to say on this issue
12 at this moment in time?

13 MR. BIJU-DUVAL (interpretation): No, your Honour.

14 PRESIDING JUDGE FULFORD: Thank you very much. I'm afraid the
15 hard reality, Mr. Biju-Duval, is that given the constraints as regards
16 time between now and the judicial recess, we are not going to be able to
17 deal with the evidence of Witness 46, Witness 116, and what would be
18 extensive evidence, in our view, from Witness 15, that those three
19 witnesses would take very greatly in excess of the days that are
20 available to us. So if Witness 15 is to be recalled, I think as a matter
21 of inevitability that is going to have to be in October.

22 Right. No observations. Now, nothing as yet has been asked of
23 the participating victims. Anything, Ms. Massidda, gentlemen?

24 MS. MASSIDDA: No, your Honour. Thank you very much.

25 PRESIDING JUDGE FULFORD: Thank you very much.

1 We have -- oh, I'm sorry, we're going to have to go into private
2 session for this ruling.

3 (Public session at 2.44 p.m.)

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Hearing (Private Session)
Ruling

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Hearing (Private Session)
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Hearing (Private Session)
Ruling

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20 (Open session at 3.09 p.m.)
21 COURT OFFICER: Open session.
22 PRESIDING JUDGE FULFORD: Yes.
23 MR. SACHDEVA: Mr. President, with your leave, Ms. Solano will
24 handle these submissions.
25 PRESIDING JUDGE FULFORD: Certainly.

1 MS. SOLANO: Your Honours, good afternoon. As your Honours were
2 informed via e-mail earlier today, the Prosecution and the Defence have
3 had a meeting this morning to try to reach an agreement or an
4 understanding on the documents that the Prosecution proposes to show to
5 Witness 46 when she takes the stand tomorrow. And we have managed to
6 reach such an agreement or understanding for all documents but two, and
7 we are therefore coming before you to seek a ruling on whether these two
8 documents can be put to the witness and, in fact, admitted into evidence.

9 We have binders for your Honours and the Defence and the
10 participants which we will now distribute with a note that we will ask to
11 have the binders back at the end of the hearing because they're the ones
12 that we will use with the witness tomorrow, and we need to make some
13 adjustments to them.

14 PRESIDING JUDGE FULFORD: Yes. Could the usher kindly distribute
15 those.

16 MS. SOLANO: Your Honours, and the first document that I will
17 refer to can be found under tab 12.

18 PRESIDING JUDGE FULFORD: Yes, Ms. Solano.

19 MS. SOLANO: This is a document bearing the ERN
20 DRC-OTP-0074-0422, which is a public report from the United Nations, more
21 precisely from MONUC, and it is the special MONUC report on the events in
22 Ituri in 2002 and 2003 which was published in July 2004.

23 This document, your Honours, was shown to the witness during her
24 testimony at the Confirmation Hearing, and the witness described the
25 relationship between this report, more precisely between chapter 5D of

1 this report, which is titled "Children associated with armed groups,"
2 and --

3 PRESIDING JUDGE FULFORD: Which page?

4 MS. SOLANO: Your Honour, that chapter begins at page 39 of the
5 report which bears ERN DRC-OTP-0074-0460.

6 PRESIDING JUDGE FULFORD: Thank you.

7 MS. SOLANO: During her testimony at the Confirmation Hearing,
8 the witness explained that chapter 5D of this report is a final version
9 approved for publication of an internal MONUC report which the witness
10 was involved in preparing and which your Honours can find at tab 11.

11 The document which your Honours can find at tab 11 is a draft
12 child protection report on children associated with armed groups in the
13 Ituri conflict. It bears ERN DRC-OTP-0152-0256, and in this internal
14 draft form it is my understanding that the Defence agree that the
15 document can go into evidence. This draft report was also shown to the
16 witness during the Confirmation Hearing, and for that reason the
17 Prosecution considers it to be part and parcel of the evidence which she
18 gave at that time.

19 PRESIDING JUDGE FULFORD: Now, Ms. Solano, what are the
20 differences between what we find in tab 11 and the section that begins on
21 page 39 of the report? If the one is the preliminary version and the
22 latter, starting at page 39, is, as it were, the perfected version, are
23 there any substantive differences between the two?

24 MS. SOLANO: Yes, your Honour. In addition to the final public
25 version being much shorter, there's a difference from 7 pages to

1 18 pages. The content has been summarised in -- in certain respects.
2 There's information in the public -- in the draft report which has been
3 excluded from the public report, and the wording has also been edited
4 because it has gone through a further drafting process.

5 PRESIDING JUDGE FULFORD: Well, Ms. Solano, forgive me being
6 slightly tedious about this, but do I take it, then, that tab 11 is
7 longer, it's fuller, it's more comprehensive, and what we see in tab 12
8 in the relevant section is shorter and it doesn't add anything to the
9 material behind tab 11? Is that right?

10 MS. SOLANO: Yes, your Honour.

11 PRESIDING JUDGE FULFORD: Right. So thinking in terms of
12 Witness 46's evidence, all the witness -- if there's no objection to
13 tab 11 and all the relevant material is there, surely all you're going to
14 need to do is -- depending, of course, on the reaction of Mr. Biju-Duval,
15 is to get the witness to say that the content of tab 11 was incorporated
16 in the report dated the 16th of July, 2004, in a summarised version.

17 MS. SOLANO: Yes, your Honour, and to some extent the witness has
18 already said that during the Confirmation Hearing, and so if your Honours
19 will grant -- if your Honours permit the tendering of the transcripts of
20 the Confirmation Hearing into evidence when the witness takes the stand,
21 what she already said about it would be, in fact, in evidence before this
22 Chamber. However, the Prosecution would like, nonetheless, to have the
23 report, the final public report, tendered into evidence because it is
24 public, it is the last step in the chain of documentation and publication
25 of the findings by the United Nations from the time of cases of

1 recruitment of child soldiers, and insofar as it is public, the
2 Prosecution submits that it was a document of which people in general and
3 the accused in particular would have had notice at around the time of its
4 publication.

5 PRESIDING JUDGE FULFORD: Is there any other part of tab 12 that
6 you positively rely on, Ms. Solano, or is that the extent of it?

7 MS. SOLANO: That is the extent of it, your Honour, where this
8 witness is concerned. It is possible that the Prosecution might make
9 submissions on this document through a bar table motion, but for the
10 purposes of Witness 46's evidence, this is the only part of the document
11 that we seek to rely on.

12 PRESIDING JUDGE FULFORD: It's getting quite late for bar table
13 motions, Ms. Solano, but we understand that you want to keep the door
14 open in that regard. Now, anything more to be said, then, on this first
15 document?

16 MS. SOLANO: No.

17 PRESIDING JUDGE FULFORD: Second document?

18 MS. SOLANO: The second document, which your Honours can find
19 under tab 8, bears the ERN DRC-OTP-0152-0274, and this document, too, was
20 shown to the witness during her Confirmation Hearing testimony. The
21 document is titled "Histoires Individuelles - Bunia (Ituri),
22 Enfants-Soldats." It is a compilation of notes from interviews with 34
23 child soldiers who were interviewed by Witness 46 or partners from NGOs
24 in Rwampara and Bunia in late March 2003. The notes were compiled by
25 Witness 46 herself and when she was shown this document during the

1 Confirmation Hearing she confirmed that this was the case. She said that
2 she had typed the notes and that she wrote the document on the basis of
3 notes which took at the interviews carried out with the children by her
4 or by her colleagues.

5 Your Honours, we seek to tender this document as a
6 contemporaneous documentation of 34 cases of child soldiers identified by
7 the witness at that time, also as an example of the methodology used by
8 the witness in documenting cases of recruitment by armed groups in Ituri
9 generally, and finally, as an example of the reports which the witness
10 indicated she periodically forwarded to her supervisors in Kinshasa.

11 PRESIDING JUDGE FULFORD: And in any event, as you said at the
12 outset, Ms. Solano, this was part of her evidence during the Confirmation
13 Hearing; is that right?

14 MS. SOLANO: Yes, your Honour.

15 PRESIDING JUDGE FULFORD: Thank you very much.

16 Yes, Mr. Biju-Duval.

17 MR. BIJU-DUVAL (interpretation): Thank you, your Honour. Let me
18 begin by tab 12, the United Nations report dated July 2004. My first
19 comment, leaving aside the extract that is in paragraph (D) entitled
20 "Children associated with armed groups," my first comment refers to the
21 remainder of the report, the remainder of the document, because if I've
22 understood correctly, the OTP would like to include as evidence the
23 entire report.

24 The first problem --

25 PRESIDING JUDGE FULFORD: Please forgive me, Mr. Biju-Duval, so

1 that we don't detain you for longer than we should. As I understand it,
2 the Prosecution at the moment are only relying on page 39 onwards.
3 They -- they've put down a marker that they might come back with an
4 application for the rest of the document, but I think it's probably fair
5 to observe that that was only suggested very tentatively.

6 MR. BIJU-DUVAL (interpretation): Your Honour, thank you very
7 much. I beg your pardon. That is also what I had understood this
8 morning, but as I listened, I thought perhaps I had heard something else.
9 Perhaps I misunderstood what was said in the French interpretation.

10 As regards the extract, it would appear that this is a text
11 drafted on the basis of a fuller document which is directly linked to the
12 witness. The Defence is not against using the basic document that the
13 witness claims as her own, and therefore it would seem that this document
14 from 2004 is of little use as regards providing additional -- as
15 providing information, because there's a fuller document which exists, a
16 more complete document.

17 In addition, the Defence's objection is based on the fact that
18 certain interventions occurred between the initial fuller, basic document
19 and the drafting of the summary. In particular, we do not know who
20 drafted the summary. And if we were to stray from the information that
21 is closest to the witness, we believe that we would thus be losing a
22 portion of its value, in particular the value of the final report dated
23 2004.

24 And lastly, the fact that some elements were eliminated from the
25 final version -- or, rather, in the final version, this would seem to

1 reduce the value of the 2004 document more than would seem acceptable,
2 and therefore we believe that the 2004 document, which is quite far and
3 quite different from the basic document drafted by the witness, we
4 believe that it is not sufficiently valuable in order to be tendered into
5 evidence.

6 That is our position as regards this UN document.

7 Now, as regards the document under tab 8, which is entitled
8 "Individual Stories," here the situation is quite different and, in our
9 view, even more serious. The question is whether or not to tender this
10 document into evidence or not.

11 Tendering this document gives rise to a problem for us, because
12 as the Chamber can note, this document contains numerous redactions and
13 major redactions regarding essential bits of information, because these
14 are short stories which were supposed to have been given by children
15 regarding their enlistment, short accounts given by these children as
16 regards their enlistment in armed groups.

17 In order for this document to be of value and be considered as
18 valuable evidence, we believe this document should be thoroughly
19 investigated by the Defence. In other words, we -- the Defence has to be
20 able to examine the witness in detail regarding these documents. But
21 given the fact that the document has been redacted, the Defence cannot
22 check and verify through investigative measures with the children
23 mentioned in the document. We cannot verify whether or not the
24 information is indeed true. We cannot verify with any other person, for
25 that matter, as to whether or not these accounts are true.

1 We have a document here which cannot be contested in a useful
2 fashion by the Defence, and therefore we believe that this document
3 cannot be tendered into evidence, which would require verification by the
4 Defence. So this is a real problem, a real difficulty which is made even
5 more serious by the fact that these redactions were never authorised by
6 the Chamber, unless I'm mistaken. Nor were they accepted by the
7 Pre-Trial Chamber or the Trial Chamber, and therefore, we believe that
8 the document is therefore unacceptable for those two reasons, your
9 Honour.

10 Those are the comments, Mr. President, that the Defence wanted to
11 submit and explaining our objection to tendering this document into
12 evidence.

13 PRESIDING JUDGE FULFORD: Thank you very much, Mr. Biju-Duval.

14 Ms. Solano, two questions quickly if I may. First of all, just
15 going back to tab 11, who is the author of tab 11, and who was the -- who
16 made the summary at tab 12 of the relevant section?

17 MS. SOLANO: Your Honour, with respect to the document at tab 11
18 which is a draft report, Witness 46 confirmed during the Confirmation
19 Hearing, and I'll refer your Honours to transcript 37, page 116, that
20 this report -- I'm going to quote:

21 "This report was drafted by one of her anglophone colleagues.
22 The report is based on all the documents I collected among the children I
23 met from the beginning of my presence in Ituri. It is also based on the
24 reports of minutes of meetings which were held in various military camps
25 which I visited or which other colleagues such as military observers

1 visited. It is also based upon all the documents made available to the
2 child protection section. I prepared all the documents that served as a
3 basis for this report. I participated in the draft and reviewed the
4 final version published by MONUC and I endorsed the content of the report
5 in its entirety."

6 PRESIDING JUDGE FULFORD: That's very full. So, and then the
7 text in tab 12?

8 MS. SOLANO: Witness 46 said at the Confirmation Hearing your
9 Honour at page 117 of the same transcript, 37, that the draft report --
10 I'm quoting:

11 "The draft report we prepared with other colleagues on the basis
12 other information was thereafter re-examined and reworked by people of
13 the section and other colleagues working in the area of human rights.
14 They worked on its formatting and presentation and for what was going to
15 become the public report."

16 And that is all the information I have available, your Honour.

17 PRESIDING JUDGE FULFORD: Thank you very much. Now, turning
18 back, then, to tab 8, have we approved these redactions, Ms. Solano?

19 MS. SOLANO: No, your Honours, you have not. These redactions
20 have been made on the document disclosed to the Defence by the United
21 Nations pursuant to Article 54(3)(e).

22 PRESIDING JUDGE FULFORD: And presumably we haven't seen this
23 document before in that context because it is not considered to contain
24 anything of an exculpatory or Rule 77 nature; is that right?

25 MS. SOLANO: Your Honour, the Prosecution has not considered that

1 the information that is redacted in this document, which as your Honours
2 might be able to see, relates to the identity of the children who were
3 interviewed by Witness 46. The Prosecution has not considered this
4 information to be either potentially exculpatory or falling within the
5 scope of Rule 77.

6 If I may add, your Honour, the 34 entries that comprise this
7 report relate to as many individuals whose individual stories are also
8 part of another report which your Honours have seen in fully unredacted
9 form, and I'm happy to provide reference to that if it assists.

10 PRESIDING JUDGE FULFORD: Thank you, Ms. Solano.

11 Now, what about the Defence contention that effectively what is
12 going to happen is that we are going to be asked to consider as part of
13 the general evidence in the case the individual circumstances of
14 34 individuals who were interviewed by Witness 46 but in relation to whom
15 it's going to be impossible for the Defence to investigate those
16 individual cases because the identities of the various children are being
17 withheld? Now, how do you meet that suggestion that there is going to be
18 unfairness to the accused because he is going to be disabled from being
19 able to investigate and properly meet the suggestion that, for instance,
20 these case histories are accurate? And take a moment if you want,
21 Ms. Solano.

22 MS. SOLANO: Thank you, your Honour.

23 Thank you, your Honour. The Prosecution is relying on this
24 document principally as an example of the methodology which Witness 46
25 used in carrying out her work. The Prosecution does not purport to rely

1 on these individual cases in the way that the Prosecution purports to
2 rely on the individuals who were at one point child soldiers and who have
3 given evidence before the Court.

4 We submit that the position the Defence is presently in light of
5 these redactions is not entirely dissimilar from the position the Defence
6 are in with respect to documents based on sources who are not named and
7 who, because they're not named, are not -- have not been the subject of
8 redactions. And we would submit, finally, that any concerns that the
9 Defence may have about the unfairness that might be brought on the
10 accused through the tendering of this document and the Prosecution's
11 reliance on it should be taken into consideration by the Chamber in
12 assessing the weight to be accorded to the document rather than in
13 determining its admissibility.

14 PRESIDING JUDGE FULFORD: Thank you, Ms. Solano.

15 Now, Mr. Biju-Duval, if the only evidential value, according to
16 the Prosecution, of tab 8 is that it shows effectively how Witness 46
17 kept her notes and the Prosecution do not invite us to rely in any way on
18 the individual case histories that have been redacted in the way that
19 you've identified, do you object to this document being -- forming part
20 of Witness 46's evidence for that limited purpose, namely, to demonstrate
21 how she went about her work?

22 MR. BIJU-DUVAL (interpretation): Your Honour, with your leave,
23 this procedure seems very artificial to me. This is a document, the
24 contents of which are at the heart of the issue before the Chamber, and
25 one is supposed to imagine that the Chamber is not interested in the

1 contents at all.

2 If we balance the interest that presenting this document has as a
3 demonstration of the witness's methodology and if we examine this in the
4 light of the prejudice that the contents of the document might inflict,
5 well, I believe that the risk of prejudice is very serious. So that is
6 what the Defence has to say about the matter, your Honour.

7 (The Trial Chamber confers)

8 PRESIDING JUDGE FULFORD: Thank you both very much indeed. Given
9 that we're seeing these documents for the first time this afternoon, we
10 want to reflect on this material before Witness 46 is called. At
11 9.00 tomorrow morning we will deliver a very short oral ruling in
12 relation to these two disputed documents.

13 Ms. Solano, anything else that you wish to raise this afternoon?

14 MS. SOLANO: No, your Honours. Thank you.

15 PRESIDING JUDGE FULFORD: Mr. Biju-Duval? No? Gentlemen?

16 Ms. Massidda? No?

17 (The Trial Chamber confers)

18 PRESIDING JUDGE FULFORD: Ms. Solano, you told us quite properly
19 that you wanted the return of the binders. I then immediately forgot
20 that you had said that and I've been quietly making my own notes on my
21 copy. I'm afraid I can't in those circumstances return mine to you. I'm
22 afraid somebody in the Prosecution team is going to have the tedious job
23 of having to produce another binder for me, I'm afraid, if there are
24 going to be some additional documents. You have my apologies for that.
25 I think the other two can be returned.

1 MS. SOLANO: Thank you.

2 PRESIDING JUDGE FULFORD: Thank you all very much. We'll sit
3 again then at 9.00 tomorrow morning for Witness 46's evidence, and we
4 will briefly have to resolve the outstanding issue as well as regards any
5 notes that Witness 46 is going to take into the witness box with her.

6 Thank you all. We'll sit again tomorrow at 9.00.

7 COURT USHER: All rise.

8 The hearing ends at 3.39 p.m.

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