

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 Wednesday, 4 February 2009

7 The hearing starts at 9.37 a.m.

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

10 PRESIDING JUDGE FULFORD: Good morning. I'm sorry that we're
11 late, but apparently my keyboard has decided that it is not going to
12 function, which hopefully will be fixed in a moment.

13 Now, Mr. Walley, I understand that you have an ex parte
14 application that you wish to make. Is that right?

15 MR. WALLEYN: Yes, Mr. President.

16 PRESIDING JUDGE FULFORD: Are you able to say in open court, in
17 general terms, what the ex parte is about, or are you not even able
18 to reveal the subject matter?

19 MR. WALLEYN: I can say that there is a request from the witness
20 we should hear today to have an additional special measure of protection.

21 PRESIDING JUDGE FULFORD: And in your view, it's necessary for
22 that application to be made ex parte so that you can give full details to
23 the Chamber; is that right?

24 MR. WALLEYN: Some details should not be known to the accused,
25 but I would not have any problem that his counsel assists, if that is

1 possible, and if counsel accepts such a situation.

2 PRESIDING JUDGE FULFORD: Well, what we'll do is we'll hear you
3 ex parte first of all, Mr. Walley, and we will work out what parts of
4 your application can be made public and what parts can be revealed to
5 Maitre Mabil, and what parts should remain wholly private.

6 One issue that I don't think we've addressed so far in this case
7 is the extent to which it's appropriate for things to be revealed to a
8 lawyer, placing the lawyer on a restriction against then going on to
9 reveal those matters to his or her client. There is a view in some
10 jurisdictions that that is an inappropriate stance to take and could
11 place lawyers in a very difficult position if they're privy to
12 information that they're not then able to disclose to their own client,
13 and that's something that Maitre Mabil may wish to reflect on before
14 you say something to her which you do not expect her to relay on to
15 Mr. Lubanga. But we'll do these things in order. We'll hear from you in
16 a moment ex parte, and then we'll revert into open court.

17 Thank you very much.

18 Before we go into ex parte session, Mr. Sachdeva, on reflection
19 overnight I want to revisit very briefly the issue that was raised by
20 Mr. Mabanga about disclosure to him. On reflection, it seems to us that
21 in order for him to be able to provide advice to a witness on the risks
22 of self-incrimination, he needs to know in sufficient detail what ground
23 is going to be covered by the witness so that he can give meaningful
24 advice. Otherwise, he's going to be providing advice wholly in abstract.

25 Therefore, would it be possible for you, with all relevant

1 witnesses to provide Mr. Mabanga with the basic statements so that he is
2 able to understand what areas of evidence are going to be covered?

3 MR. SACHDEVA: Mr. President, of course, but I understand -- in
4 fact, I know that Mr. Mabanga had the statement of the last witness.
5 That would be our policy, yes.

6 PRESIDING JUDGE FULFORD: Good. Well, it sounds as though what
7 we consider should be done is already happening. Can you just make sure
8 that that is the position in relation to all of the witnesses to come?

9 MR. SACHDEVA: Yes, Mr. President.

10 PRESIDING JUDGE FULFORD: Thank you very much.
11 Something you want to say, Maitre Mabilille? Certainly.

12 MS. MABILLE (interpretation): Before hearing witness number two,
13 the Defence would like to recall that the hearing was suspended after
14 having heard witness one, and the Office of the Prosecutor told us then
15 that given that witness one is linked to witness two and that there were
16 potentially threats which had been made vis-a-vis witness one and witness
17 two, and an investigation would be carried out by the Office of the
18 Prosecutor. This morning we are going to hear witness two and we would
19 like also to hear the results, the outcome of the investigation and
20 that was conducted. We would like to hear that from the Office of the
21 Prosecutor. That is my first observation.

22 My second observation: In cross-examining witness two, we may be
23 obliged to refer to the transcripts of witness one. Now, I wanted to be
24 sure that the observations made by the Defence regarding the poor
25 translations made have been noted and that we can now use the amended

1 transcript of witness one in the wake of the amendments made by the
2 Registry services.

3 These are the two comments which I wanted to make before we hear
4 witness two.

5 PRESIDING JUDGE FULFORD: Thank you for those observations,
6 Maitre Mabilille. As regards both of them, can I suggest that during the
7 ex parte hearing that is about to take place, members of your team have
8 conversations first with the Prosecution in relation to their
9 investigations into the alleged threats, and secondly, that you speak
10 with the Court Officer about what has happened in relation to the
11 transcripts of witness one.

12 As a word of caution, Maitre Mabilille, I have to say that if it is
13 proposed to cross-examine the witness who is to come on the basis of what
14 another witness has said in his absence, we may, when this happens, want
15 to reflect on whether or not this is a legitimate tactic in
16 cross-examination. I'm not going to make a ruling now, but I put down a
17 note of caution that we may need some persuasion that this is an
18 appropriate course to take.

19 Mr. Desalliers, before we rise, we were copied into an e-mail
20 last night that appeared to indicate that almost everything that the
21 witness to come is going to say is in dispute. Now, I want to make sure
22 that we are -- that we fully understand what is being said.

23 The e-mail appears to indicate that even his identity is in
24 issue. Now, without revealing it, are you saying that the Defence do not
25 accept that he is the person that he maintains that he is?

1 MR. DESALLIERS (interpretation): Your Honour, the Defence will
2 put questions to the witness on his true identity. The question as to
3 whether he is really the person he maintains that he is is difficult
4 until the issue of the name is clarified, but we will be putting
5 questions as to the real identity of the witness. He has indicated an
6 identity to the investigators. He's also going to state an identity here
7 in the courtroom. Perhaps it will not be necessary for the Defence to go
8 further and to look for further answers from the witness, but to answer
9 your question, yes, the Defence will be putting questions on the very
10 identity of witness two.

11 PRESIDING JUDGE FULFORD: Well, certainly, Mr. Desalliers, we
12 understand that. We, of course, expect there to be a proper foundation
13 for a dispute of this kind. And if it is to be challenged or it is to be
14 suggested that somebody is not the person they say they are, there needs to
15 be a proper basis for alleging that they are someone else or that they
16 have not told the truth.

17 MR. DESALLIERS (interpretation): To be more specific, I would
18 not say that the Defence claims that the person is not the person he says
19 he is, but there are very serious questions regarding the identity
20 which he has stated when his name was been requested of him on the basis
21 of checks carried out by the Defence. That is all that we would say at
22 this stage.

23 PRESIDING JUDGE FULFORD: All right, Mr. Desalliers.

24 Now, the other thing I want to raise is this: Within his witness
25 statement he refers to matters such as training in Rwanda, to munitions

1 being dropped by air, all of which were not the subject of dispute as
2 regards Witness 38 who testified yesterday. Now, is it being suggested
3 that those matters are not in dispute in relation to Witness 38, but they
4 are in dispute in relation to this witness?

5 MR. DESALLIERS (interpretation): That is correct, your Honour.
6 What is in question is the real involvement of the
7 witness in such events.

8 PRESIDING JUDGE FULFORD: That is a perfectly satisfactory
9 explanation, Mr. Desalliers, but you can understand, I hope, why we would
10 have concerns over it, because on the face of it it appears that there is
11 a contradiction in the Defence position as between witnesses. But on
12 that explanation, you must take the course that you consider to be
13 appropriate. I'm most sorry for the delay but since Mr. Walleyne has raised
14 this issue at this stage, we need to deal with it properly. It's going
15 to take, I think, a few minutes for us to be able to go into ex parte
16 session. We're then going to have to hear the application. I think I
17 can say, therefore, with confidence that we will not be sitting on the
18 trial again until at the earliest at quarter past 10.00.

19 Thank you very much. We'll rise now.

20 COURT USHER: All rise.

21 Recess taken at 9.50 a.m.

22

23

24

25

