

1 International Criminal Court

2 Trial Chamber I - Courtroom 2

3 Presiding Judge Adrian Fulford,

4 Judge Elizabeth Odio Benito and Judge René Blattmann

5 Situation in the Democratic Republic of the Congo -

6 ICC-01/04-01/06

7 In the case of The Prosecutor v. Thomas Lubanga Dyilo

8 Wednesday, 7 July 2010

9 (The hearing starts at 9.35 a.m.)

10 (Closed session)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Open session at 9.36 a.m.)

15 THE COURT OFFICER: We are in open session, your
16 Honours.

17 PRESIDING JUDGE FULFORD: Mr Biju-Duval, first of all,
18 may I apologise to all counsel through you for us sitting five
19 minutes late, but we have been engaged longer than expected in a
20 discussion about what happened at the end of yesterday.

21 The problem that we're confronted with I think simply
22 can be put as follows. There is, we are told, going to be an
23 appeal, or a proposed appeal for which our leave is going to be
24 sought, as regards the order that we made for restricted
25 disclosure of the identity of 143. Whether or not that proposed

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1 appeal would ever satisfy the test, given it only concerns the
2 protective measures for one individual, is probably something
3 that I shouldn't investigate, or we shouldn't investigate, at
4 this stage. At the moment we are simply told that there is
5 going to be an application for leave to appeal and we must
6 proceed on the basis that this is a bona fide application.

7 It is said that a logical consequence of this proposed
8 application, in order to ensure that it remains effective until
9 we have decided whether or not to grant leave to appeal, is that
10 we should suspend the order for disclosure. At the moment, but
11 I stress heavily this is only a preliminary view -- at the
12 moment we see some force in that.

13 So what do we do today? The proposal that we make is
14 this. There are undoubtedly a number, possibly a considerable
15 number, of issues that you are going to want to explore with the
16 current witness. Our query of you is would it be possible for
17 you to ring-fence the 143 questions and proceed with all of the
18 other areas which you have got to canvass with this witness,
19 parking the 143 issues until such time as either the security
20 measures have been implemented or we have resolved the
21 application for leave to appeal, and at that stage a decision
22 will be made as to whether or not it is necessary to bring 321
23 back to The Hague so that you can complete your questioning of
24 him, or whether it can fairly be conducted via a video link?

25 That's our inquiry. If overnight you and Mr Sachdeva

1 have managed to come up with a better proposal then we would be
2 delighted to hear it, but that is at the moment the best that we
3 can do.

4 MR BIJU-DUVAL: (Interpretation) Yes, indeed,
5 Mr President. As you have just summarised, we did start the
6 cross-examination yesterday of the witness on the basis of the
7 certainty that the disclosure would be made within a day. The
8 position of the Office of the Prosecutor with regard to this
9 appeal puts the Defence in a very difficult situation indeed.

10 I shall reply to your question very precisely by
11 indicating the following. The position of the Defence is based
12 on two fundamental points. Firstly, that we be able to question
13 321 on 143. We do not need to develop that issue further.

14 Now, secondly - and this is the issue that is of
15 concern - we deem that it is not possible and nor is it
16 something that we wish that the cross-examination of 321 be
17 interrupted as such. As a result, it would seem to us that it
18 is not appropriate to make a distinction between on the one hand
19 the questions covering 143 and, on the other hand, the multiple
20 questions that do not touch immediately upon 143.

21 Now, why is it that we feel it is inappropriate to
22 stop the cross-examination of 321? Well, for two reasons.
23 Firstly, that as everyone understands this is, of course,
24 testimony covering a very sensitive and important issue. We do
25 not need to develop this further.

1 Secondly, the second reason is that this testimony is
2 very particular in nature. The Trial Chamber is not gathering
3 information here from a factual witness, rather the Trial
4 Chamber is in hearing this testimony ascertaining whether, yes
5 or no, Witness 321 did have or did show an inappropriate form of
6 behaviour, and it is up to the Trial Chamber to ascertain
7 whether there is serious probability that Witness 321 lied and
8 incited people to lie.

9 In other words, the Trial Chamber will understand that
10 what is happening during the hearing is of capital importance
11 and that the Trial Chamber needs to study the answers given by
12 the witness without the witness, how can I say, having the
13 possibility, or the excessive possibility, of revisiting his
14 testimony. He needs to face up to the questions put to him
15 without this questioning being interrupted for a month, or even
16 two, because that would give him the possibility of adjusting
17 his testimony and this would seriously jeopardise the
18 possibility of the Trial Chamber to ascertain the scope and
19 importance of his testimony.

20 This is why we, unfortunately, find ourselves in a
21 situation where we feel that we must say -- we must state that
22 we do not want the testimony of 321 to be interrupted; that is
23 to say that we do not want the questions regarding 143 to be put
24 off to a later stage. This is the position of the Defence team
25 today, as we speak.

1 One last word on the subject. There is one possible
2 hypothesis that the Defence might take into account and deem
3 being a solution to this situation. I say that this is a
4 hypothesis, because I am reflecting on the matter here humbly
5 and this bears no prejudice upon decisions to be handed down by
6 the Trial Chamber with regard to the pending appeal.

7 Now, this hypothesis sends us all -- refers us to
8 three possible situations. First of all, if the request for
9 leave for appeal were filed by the OTP today. That's the first
10 "if". The second "if" is were the Trial Chamber to hand down a
11 decision on this appeal today - that's the second "if" - and,
12 thirdly, were the disclosure relative to 143 to be made
13 immediately and were these three conditions to be fulfilled
14 then, yes, we might be in a position to continue with the
15 testimony of 321 this week and why not the beginning of next
16 week?

17 These are the hypotheses that we humbly submit and
18 respectfully submit to the Trial Chamber, without any prejudice
19 to their decisions of course, and were this not to be pleasing
20 then of course the Trial Chamber will imagine that it would not
21 be pleasing to us to be in a position to ask that today we
22 interrupt the testimony of 321 and we adjourn this to a later
23 date where we will be able to conduct it from beginning to end.

24 Now, those are the observations, Mr President, of the
25 Defence team with regard to this issue.

1 PRESIDING JUDGE FULFORD: Thank you.

2 Is there anything you want to say, Ms Samson?

3 MR SACHDEVA: Thank you, Mr President.

4 In fact, yesterday we did have discussions with the
5 Defence and the proposal your Honours made was, in fact, the
6 proposal the Prosecution made; namely, that the Defence -- the
7 Prosecution sees no reason why the Defence cannot cross-examine
8 on the issues in question in response to 321's work with the
9 OTP. There is no reason why 321 cannot return and be recalled,
10 if necessary. There is no basis for the Defence to suggest that
11 321 is going to adjust his testimony, or rethink some of the
12 answers he's already given. That, in our submission, is based
13 on pure speculation. This has happened before. Witnesses have
14 been recalled, and I see no difference to a practice that has
15 been adopted beforehand and to this in fact practical solution
16 to the problem that we face.

17 The second point, Mr President, is in relation to the
18 adjustment of the time for which we have to file a leave to
19 appeal -- the application for leave to appeal. If I refer your
20 Honours to a decision in the Katanga case, document number 466
21 from 5 May 2008, in our submission on page 4 the Single Judge
22 quite clearly states that when there is a time limit prescribed
23 in the rules that limit cannot be reduced or extended through
24 Regulation 35, and in our submission Regulation 35 applies
25 solely to time limits prescribed in the regulations and time

1 limits prescribed by the Chamber.

2 PRESIDING JUDGE FULFORD: Yes. I assume in this
3 submission, Mr Sachdeva, you are trying to assist the Chamber,
4 rather than strictly relying on what may be inflexible
5 requirements in the regulatory framework.

6 MR SACHDEVA: Mr President -- Mr President, the
7 initial submission was in fact an attempt to assist the Chamber;
8 namely that --

9 PRESIDING JUDGE FULFORD: No, I'm dealing with the
10 observations that you're making in relation to the possibility
11 of abridging time limits.

12 What the Defence is suggesting is that, on a
13 relatively contained issue, the Prosecution could file their
14 appeal brief, or grounds, or whatever the correct expression is,
15 earlier than the time period specified. As I understand it,
16 what you're saying is you intend to exercise your maximum
17 entitlement under the regulatory framework; is that right?

18 MR SACHDEVA: Mr President, we of course could attempt
19 to file the brief earlier than the five days, but certainly not
20 within the one day as suggested by Mr Biju-Duval.

21 PRESIDING JUDGE FULFORD: Right. Now, Mr Sachdeva, as
22 counsel appearing before us, with all of your very considerable
23 obligations to the Chamber to conduct matters in good faith, you
24 are saying that you have confidence that you can make good the
25 argument under Article 82(1)(d) that the issue in question will

1 materially advance the proceedings, bearing in mind the
2 decisions of this Chamber on applications for leave to appeal
3 when we have observed that issues relating to particular
4 individuals do not satisfy that test?

5 MR SACHDEVA: Mr President, that is our understanding,
6 in the sense that the Victims and Witnesses Unit has
7 specifically stated that, once protective measures are in place,
8 the disclosure can take place, and in fact that is what your
9 Honours have decided.

10 PRESIDING JUDGE FULFORD: All right, Mr Sachdeva. We
11 won't debate this. You're saying to us, under your obligations
12 to this Chamber, that you believe this is a sustainable argument
13 that properly should be appealed?

14 MR SACHDEVA: That is our position, Mr President, yes.

15 PRESIDING JUDGE FULFORD: Fine. Right. So we're in a
16 position where we cannot hope for any appeal document today.
17 You will try to do it earlier than the five days, but you cannot
18 at the moment provide us with a date when the appeal will be
19 launched, and the sole proposal that the Prosecution has for
20 using time efficiently is that we should order the Defence to
21 cross-examine this witness in a particular way; that we should
22 legislate, as it were, as to how questions are to be divided up
23 so that the issues in relation to 143 are ring-fenced.

24 Now, do you have any other proposals, Mr Sachdeva, as
25 to how time can be saved?

1 MR SACHDEVA: Mr President, we -- the Prosecution
2 could try and file the application in two days. That could be
3 one way to try and reduce the time period, but also in our
4 submission there are -- there is sufficient material for the
5 Defence to cross-examine on with this witness.

6 PRESIDING JUDGE FULFORD: We understand that point.
7 You're saying that he should divide up his cross-examination and
8 that's something we'll reflect on. Any other proposals,
9 Mr Sachdeva?

10 MR SACHDEVA: At this stage, Mr President, that is the
11 proposal.

12 PRESIDING JUDGE FULFORD: Thank you. We'll rise.

13 THE COURT USHER: All rise.

14 (Recess taken at 9.54 a.m.)

15 (Upon resuming at 10.12 a.m.)

16 (Open session)

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

18 THE COURT OFFICER: We are in open session, your
19 Honours.

20 PRESIDING JUDGE FULFORD: On 12 May 2010, the Chamber
21 delivered its decision on intermediaries. At paragraph 143, the
22 Chamber observed as follows as regards the issue of disclosure
23 of the identity of intermediary 143:

24 "In the event the Chamber is sure that, in order to
25 enable the Defence to conduct necessary and meaningful

1 investigations and to secure a fair trial for the accused, it is
2 strictly necessary for his identity to be disclosed. Without
3 his identity, this will not be possible. The Chamber reminds
4 the Defence that this information is disclosed confidentially
5 solely for the purposes of bona fide trial preparation.
6 However, the evidence concerning this intermediary does not meet
7 the criteria for ordering him to be called in the context of the
8 abuse of process application."

9 In the final orders of the Chamber in that decision,
10 at paragraph 150 the Chamber ordered as follows:

11 "The Prosecution is ordered to:

12 (i) disclose confidentially to the Defence the names
13 and other necessary identifying information of the intermediary
14 143 (...) once the necessary protective measures have been
15 implemented."

16 It is clear, on the basis of those extracts from our
17 decision on intermediaries, that the Chamber was concerned to
18 ensure that two things occurred: first, that the Defence had
19 full disclosure of identifying information in order to enable it
20 to carry out meaningful investigations in the DRC; and, second,
21 that before those investigations commenced necessary protective
22 measures were implemented.

23 Extensive proposals were put together in order to
24 ensure that intermediary 143 is properly and sufficiently
25 protected. As rehearsed in this Court yesterday afternoon, the

1 original plan which had been explained to intermediary 143 and
2 which he had accepted was very recently called into question by
3 him.

4 The current position is that it is unclear as to
5 whether he is simply going to reject the proposals that have
6 been put forward by the Victims and Witnesses Unit, or whether
7 he is going to accept them but only on the basis that further
8 ingredients are added to the proposals.

9 We are told that we will not know his position in all
10 likelihood until the end of Friday of this week and, thereafter,
11 if the proposals are accepted, whether modified or not, they
12 will not be implemented until the end of next week.

13 A position that, as we understand it, was acceptable
14 to the Defence and canvassed in open court yesterday was that
15 questioning of this witness should continue with the Defence
16 having been provided with the full identifying information for
17 143, but the dissemination of that information is for the time
18 being limited to those in the Defence team present in Court,
19 including the accused, and the resource person who operates in
20 the DRC. It was expressly recognised by counsel for the accused
21 that no investigative steps would be taken and that information
22 would not be handed on to any other person without prior leave
23 of the Chamber.

24 At the close of play yesterday, Mr Sachdeva on behalf
25 of the Prosecution indicated that the Prosecution intend to seek

1 our leave to appeal the disclosure order that we made, which was
2 entirely consistent with the limited disclosure regime that I
3 have just outlined.

4 We asked the parties to reflect on the position
5 overnight. Mr Biju-Duval this morning has indicated that for
6 the accused it would be unworkable for him to divide up his
7 questions so that the 143 issues are reserved until a later
8 date. He submits that the issues that he wishes to explore as
9 regards that individual are intrinsically bound up with all of
10 the other areas which he wishes to explore.

11 Mr Sachdeva, for the Prosecution, argues that a
12 divided cross-examination is achievable and that the Chamber
13 should require the Defence to conduct this examination in two
14 stages, leaving the 143 issues until after protective measures
15 have been implemented. Otherwise there are no proposals before
16 the Chamber as to how we can proceed, apart from simply
17 adjourning until there is a resolution of the security issues
18 for 143.

19 Against that background, we return therefore to the
20 decision that we handed down on intermediaries. As already
21 stressed, the underpinnings of the decision on 143 included the
22 critical element that disclosure should not undermine proper
23 protective measures. That is a safeguard that we do not intend
24 to water down.

25 In our judgment the proposal outlined by the Chamber,

1 which as I have said we understood to be acceptable to the
2 Defence, namely that disclosure should be limited to those in
3 Court today and the Defence resource person with no
4 investigative steps being taken until a further order was issued
5 by the Chamber, does not materially undermine the position of
6 143, or in any way enhance any risk that may exist for him.

7 There are no reasons to suppose that any member of the
8 Defence team, or the accused, will breach the clear indication
9 that we have given as regards the effective non-use of this
10 material save for questions by Mr Biju-Duval, and in those
11 circumstances we intend to vary our decision of 12 May 2010 by
12 ordering, as we did last night, that there should be limited
13 disclosure to the Defence team that will encompass those in
14 Court today, including the accused and the resource person, but
15 limited in the sense that its use is only for the purposes of
16 Mr Biju-Duval's questions.

17 In those circumstances we do not consider that there
18 is any potential increased risk to 143 and, in those
19 circumstances, we do not consider it necessary to suspend that
20 order pending any application that may be made by the
21 Prosecution for leave to appeal. It would, in our view, only be
22 necessary to suspend that order if there was a risk that it
23 would enhance or increase the security risk for 143.

24 In conclusion, the disclosure that we ordered last
25 night is to be effected today.

1 Now, Mr Biju-Duval, in terms of the practicalities of
2 this, are you able to continue your examination now, or do you
3 require us to adjourn for a period so that this material -- so
4 that this material can be given to you and so that you can
5 assimilate it before you continue with your questions? And, if
6 you want to take time to discuss this with your colleagues,
7 please do so.

8 (Counsel confer)

9 MR BIJU-DUVAL: (Interpretation) Yes, your Honour.
10 The Defence would like to have disclosure of the material, first
11 and foremost, before it carries on with its cross-examination,
12 and so we would prefer a suspension pending disclosure of the
13 material.

14 PRESIDING JUDGE FULFORD: Now, the scheme of things as
15 of yesterday was that you were going to be receiving the
16 material presumably after we had risen yesterday afternoon,
17 hopefully overnight giving you enough time to prepare for today.
18 Given that we are now at half-past-10, Mr Biju-Duval, if
19 disclosure is effected within the next half-an-hour, when do you
20 think you will be ready to recommence your questioning?

21 MR BIJU-DUVAL: (Interpretation) Insofar as this
22 disclosure occurs immediately, we hope that we will be in a
23 position to resume early in the afternoon. We would suggest
24 that we inform the Chamber by email with a more specific time at
25 which we would be able to resume once we have reviewed the

1 material disclosed.

2 PRESIDING JUDGE FULFORD: I think what we will say,
3 Mr Biju-Duval, is that we will sit again at 2.30, unless we
4 receive an email from you - and hopefully one in good time -
5 telling us that you would wish to apply for additional time. If
6 we receive that request, we will consider it and respond to you
7 by email. Is that acceptable?

8 MR BIJU-DUVAL: (Interpretation) Yes, your Honour.

9 If you don't mind, I would take this opportunity to
10 touch upon one detail that may be of importance. Now, as it was
11 requested earlier, we would like the witness to come with the
12 originals of the professional cards that he will be showing the
13 Chamber. I believe they are not in the possession of the OTP,
14 but rather in the possession of the witness himself, and we
15 would like the witness to come back with the originals of these
16 cards.

17 PRESIDING JUDGE FULFORD: Are you happy to see them
18 when he's in the witness box, or do you wish to see them in
19 advance, Mr Biju-Duval?

20 MR BIJU-DUVAL: (Interpretation) Once he's in the
21 hearing room, your Honour.

22 PRESIDING JUDGE FULFORD: Thank you. The order that
23 we make then is that the witness should be asked, please, to
24 bring the original of the cards with him when we reconvene at
25 2.30.

1 Is there anything else that anyone else wishes to
2 raise? Thank you. We sit again at 2.30.
3 (The hearing ends at 10.32 a.m.)