

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 Tuesday, 16 June 2009

7 The hearing starts at 9.30 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. Two very brief matters
11 of housekeeping first of all. We have received a curriculum vitae for
12 Mr. Garreton which needs to be entered into the Court's electronic paper
13 system so that it is accessible to the parties and the participating
14 victims.

15 Secondly, we understand that there may be an issue in relation to
16 a filing by the Defence as regards the victims' reports and seven new
17 applications, to the extent that a reply from the Defence may have been
18 an hour and an hour and a half out of time, we waive that slight delay.
19 So it will be treated as if it was filed within the time-frame set by the
20 Chamber.

21 Ms. Samson, in relation, therefore, to the next witness whose
22 evidence I think we can now commence, we should presumably go into closed
23 session for him to come into court; is that right?

24 MS. SAMSON: Yes, that's correct.

25 PRESIDING JUDGE FULFORD: The accused to remain in court or not?

1 MS. SAMSON: The accused to remain in court.

2 PRESIDING JUDGE FULFORD: Good. Are there any known difficulties
3 as regards the witness being able to read the card in order to take the
4 oath?

5 MS. SAMSON: No, no known difficulties.

6 PRESIDING JUDGE FULFORD: Good. And as we understand it, an
7 agreement has been reached that the witness will give evidence I think
8 it's in Swahili rather than Lingala, but there may be some individual
9 words and I think particularly when it comes to describing people or
10 places when the witness may prefer to either give his evidence or to
11 supplement his evidence in French.

12 Now, a very strong and particular request today, please. We are
13 short of one of the team of stenographers, which makes it all the more
14 important that we do not impose too much of a burden on those who are
15 here. So the kind of pace that we established on Friday, please can we
16 make sure that we do not go any faster than that. Good. Thank you,
17 Ms. Samson.

18 Closed session, please, so Witness 15 can come into court.

19 *(Closed session at 9.34 a.m.)Reclassified as Open session

20 COURT OFFICER: Closed session.

21 (The witness entered court)

22 PRESIDING JUDGE FULFORD: Good morning, sir.

23 THE WITNESS (interpretation): Good morning.

24 PRESIDING JUDGE FULFORD: A few explanations, first of all, some
25 of which you may well have heard already. You will be aware that we have

1 taken fairly considerable steps to make sure that your identity is
2 protected in this case and that particularly only those sitting within
3 this room will know who you are. It follows that when we are in public
4 session, it is important that the questions that are put to you and the
5 answers which you give do not reveal your identity. If a question is put
6 that you think should be answered in private session in order to protect
7 you because of what you're going to say, please indicate to me
8 immediately that you want to give the answer in private session and we
9 will immediately move into private session. Is that clear? Good.

10 The other thing is this: Sitting in the various booths to the
11 left and to the right of me are people who are interpreting what you're
12 going to be saying and there are typists who are writing the transcript.
13 It is hugely difficult for them to do their job if people speak too
14 quickly, and just as importantly, it's critical that there's only one
15 person speaking at any time. So could you make sure that you don't cut
16 across the questioner, and if possible, leave a short gap between coming
17 in with your answer. Is that clear? Good. Thank you.

18 We're now going to go into public session so that you can take
19 the solemn undertaking, and we will then very quickly go back into
20 private session so that you can identify yourself.

21 Public session, please.

22 (Open session at 9.38 a.m.)

23 COURT OFFICER: Open session.

24 THE WITNESS (interpretation): I solemnly declare that I will say
25 the truth, the whole truth, and nothing but the truth.

Witness: Witness DRC-OTP-WWW-0015 (Private Session)
Procedural Matters

Page 4

1 PRESIDING JUDGE FULFORD: Thank you very much indeed.

2 Ms. Samson, I imagine your first questions need to be asked in
3 private session as I indicated just now; is that correct?

4 MS. SAMSON: Yes, your Honour.

5 PRESIDING JUDGE FULFORD: Good. Then private session, please.

6 *(Private session at 9.39 a.m.)Reclassified as Open session

7 COURT OFFICER: Private session.

8 PRESIDING JUDGE FULFORD: Yes, Ms. Samson.

9 MS. SAMSON: Thank you, your Honour.

10 WITNESS: WITNESS DRC-OTP-WWW-0015

11 (Witness answered through interpreter)

12 Questioned by Ms. Samson:

13 Q. Good morning, sir.

14 A. Good morning.

15 Q. My name is Nicole Samson and I'll be asking you questions today
16 on behalf of the Office of the Prosecutor. My first series of questions,
17 as Mr. President has indicated, will focus on your identity and some
18 areas that may identify you and so should be done in private session.

19 A. Fine. I'd like to say the following before I give my identity.
20 I wanted to say the following. My coming here -- the purpose of this
21 statement is to say everything that I lived through during that period.
22 I came here to denounce certain things, certain irregularities, and also
23 to denounce the crooks who tried to work against the OTP's investigation.
24 They first tried to weaken the investigation carried out by the MONUC and
25 now they're fighting against the OTP, and that is why I came here.

Witness: Witness DRC-OTP-WWW-0015 (Private Session)
Procedural Matters

Page 5

1 When I arrived here, your Honours, I would like to ask that I be
2 allowed to speak slowly and in detail to explain why I've come here and
3 why I left where I came from.

4 PRESIDING JUDGE FULFORD: Thank you, sir. In the first instance
5 I'm going to ask you, please, to focus on the questions from Ms. Samson
6 and the questions which will be put to you by other counsel in the case.
7 But before you leave, if there is anything that you believe has been
8 missed out which should be dealt with, you will be given an opportunity
9 at that stage. So it will be easier for us and I think more productive
10 if we could begin, please, by you listening to and answering Ms. Samson's
11 questions. Thank you.

12 Yes, Ms. Samson.

13 MS. SAMSON: Thank you.

14 Q. Sir, could you please state your full name for the Court.

15 A. Well, before I give you my name I would like to ask you to allow
16 me to denounce the situation that occurred. I wanted to say the
17 following. I met the intermediary from the OTP, the investigator, and
18 that man - I believe I can give his name - his name was (Redacted). I
19 met him in Uganda --

20 PRESIDING JUDGE FULFORD: Sir, I'm going to interrupt you and I'm
21 going to repeat what I said just now. In the first instance, the Court
22 is going to ask you, please, to listen to Ms. Samson's questions and to
23 answer them. If at a later stage in your testimony it becomes clear,
24 partly by what you say, that things have been left out, you will have an
25 opportunity at that stage to make the kind of intervention that you're

Witness: Witness DRC-OTP-WWW-0015 (Private Session)
Procedural Matters

Page 6

1 making now. At the moment a very simple question has been put to you as
2 to your name, and could I ask you, please, to answer that question and
3 then to wait and to listen for Ms. Samson's next question.

4 So, Ms. Samson, could you put the question again, please.

5 MS. SAMSON: Yes, your Honour.

6 Q. Sir, could you please state your full name.

7 A. My name is (Redacted). *(Open session) This is contrary to
8 the statement given to the OTP and that's why I wanted to make the statement
9 and explain why I came here. That's why I met the OTP's intermediary who
10 told me the following. He said, You have to change your name, you have
11 to change your identity. Don't give the true story that took place; in
12 other words, there was a story that they were telling to the witnesses.
13 And I say that they're crooks. Why is it that I say that they're crooks
14 and swindlers? Well, instead of letting me tell the true story of what
15 took place and instead of letting me describe all of the events that I
16 lived through, they are inventing statements in order to manipulate the
17 investigation. They began doing that -

18 *(Private Session) Reclassified as Open session

19 PRESIDING JUDGE FULFORD: I'm going to interrupt you again.

20 Now, is it, therefore, your account now that your witness statement does not
21 reflect the truth of what happened because you were persuaded to say things
22 that were not true and accurate? Is that the position? It is. Good. Right

23 THE WITNESS (interpretation): Yes, that's the case.

24 PRESIDING JUDGE FULFORD: So your statement, therefore, the one
25 that you provided to the Office of the Prosecutor is substantially

Witness: Witness DRC-OTP-WWW-0015 (Private Session)
Procedural Matters

Page 7

1 inaccurate; is that correct? Is that correct?

2 THE WITNESS (interpretation): Yes, that's the case. It's a
3 false statement. I believe they're doing that to get rich.

4 PRESIDING JUDGE FULFORD: Thank you very much.

5 Ms. Samson, in light of that intervention by the witness, namely,
6 that the statement that has been provided to the Court is fundamentally
7 inaccurate, we should not embark upon his evidence as some kind of voyage
8 of discovery before this Court, finding out what it is now said the truth
9 is. A further statement needs to be taken from this witness, setting out
10 what he now says is the real position. And a decision can be taken at
11 that stage as to whether or not he is to be called by the Prosecution, by
12 the Defence, or by the Court. But if -- I repeat myself, if it is now
13 said that his original statement is said not to be relied on, then the
14 true position needs to be established before he gives evidence. Do you
15 wish to make any observations on that?

16 MS. SAMSON: Thank you very much, your Honour. I have no
17 difference of opinion in terms of the process that your Honour has
18 outlined in terms of how to best go forward now. I would like to ask the
19 witness, with your permission, to clarify one comment that he did make
20 this morning in relation to - I don't know if I should use the term
21 "inducement" - but it's unclear from whom this -- where the pressure was
22 coming from to falsify the statement.

23 PRESIDING JUDGE FULFORD: The -- sorry.

24 (Trial Chamber confers)

25 PRESIDING JUDGE FULFORD: No, Ms. Samson, this can all be

Witness: Witness DRC-OTP-WWW-0015 (Private Session)
Procedural Matters

Page 8

1 investigated as part of the process of a further witness statement being
2 taken.

3 Maitre Mabilille, before we go any further, are there any
4 submissions that you would wish to make on this subject?

5 (Defence counsel confer)

6 MS. MABILLE (interpretation): Your Honour, following our own
7 investigations, we knew that today's witness had not given his true
8 identity and we also knew that his statement was untrue. We had prepared
9 our cross-examination along those lines because we had that information.
10 The question that comes to rise on the part of the Defence is that since
11 we have already been submitted, or rather, it is our position that such
12 situations have already occurred, we wonder whether we couldn't be
13 allowed to ask the witness exactly what the process was that led him to
14 be here today. That is basically the question we would like to put
15 forward, your Honour.

16 PRESIDING JUDGE FULFORD: Maitre Mabilille, we have the obligation
17 of establishing the truth in this case. And if a witness comes into the
18 witness box and says under oath that he's given a false name and the
19 statement on which his evidence was supposed to be based is false
20 testimony, that is not a good starting point for the Chamber achieving
21 the truth by way of that witness. I will in a moment reflect on this
22 with my colleagues, but as I understand it, you are suggesting that there
23 should be some kind of halfway house with some questions being put now
24 and a statement being taken thereafter. But give us a moment.

25 (Trial Chamber confers)

1 PRESIDING JUDGE FULFORD: Yes, we have no doubt but that the
2 correct procedure that should be adopted in these circumstances is that
3 the evidence of this witness is to be adjourned, a statement is to be
4 taken, the modalities of that process we will discuss with counsel in a
5 moment, but for the time being, the witness should be requested to return
6 to the witness waiting-room so that we can decide on what steps next
7 should be taken.

8 Thank you for your cooperation, sir. We will ask -- we may ask
9 you to return in due course.

10 Closed session, please -- no, could you wait for a moment,
11 please, sir.

12 *(Closed session at 9.52 a.m.)Reclassified as Open session

13 COURT OFFICER: Closed session.

14 PRESIDING JUDGE FULFORD: Yes. Thank you.

15 (The witness stands down)

16 (Trial Chamber confers)

17 PRESIDING JUDGE FULFORD: Ms. Samson, the Bench is going to
18 retire for a moment and we're going to ask you to reflect on one issue.
19 The issue is who should now take the further witness statement from the
20 witness. The two obvious choices are a representative of the Office of
21 the Prosecutor, given that he is being called by the Prosecution; but
22 given what appear to be the suggestions that he's making, as it were,
23 adverse to the Office of the Prosecutor - of course not in any way making
24 any judgements as to whether they're right or not, of course we have no
25 idea, but whether it may be better from a point of view if the statement

1 was taken by a neutral body, perhaps somebody from the registry.
2 However, we're going to retire for a moment because we wish to consider
3 this ourselves, we wish to give you an opportunity to discuss this as a
4 team, Maitre Mabilie of course to being given the opportunity of making
5 representations on the point, and we will sit at ten past 10.00, when you
6 can give us the benefit of your thoughts.

7 Thank you all very much. We will rise.

8 COURT USHER: All rise.

9 Break taken at 9.55 a.m.

10 On resuming at 10.12 a.m.

11 COURT USHER: All rise. Please be seated.

12 PRESIDING JUDGE FULFORD: Public session, please.

13 (Open session at 10.13 a.m.)

14 COURT OFFICER: Open session.

15 PRESIDING JUDGE FULFORD: So the position is clear for the
16 public, Witness 15 shortly after he was called to give evidence indicated
17 that he had provided the Office of the Prosecutor with a false name and
18 that the statement that he had provided was in important respects
19 inaccurate. And I'm going to read out the last relevant question and
20 answer on what he said the true position was, and I take this from
21 page 6, line 16, of the English transcript. The question from the Bench
22 was:

23 "I'm going to interrupt you again. Now, is it, therefore, your
24 account now that your witness statement does not reflect the truth of
25 what happened because you were persuaded to say things that were not true

1 and accurate?"

2 To which the witness said:

3 "Yes, that is the case."

4 The following question was as follows:

5 "So your statement, therefore, the one you provided to the Office
6 of the Prosecutor, is substantially inaccurate; is that correct?"

7 Answer: "That's the case. It's a false statement."

8 We, after hearing short submissions from the Prosecution and the
9 Defence, then adjourned the witness's evidence so that a further witness
10 statement can be taken from this witness, setting out what he now says is
11 the truth, and we have reconvened so that the parties can make
12 submissions on the process to be adopted for taking from him a fresh
13 witness statement.

14 A preliminary observation, Ms. Samson, but this is not in any way
15 to deter you from making such submissions as you feel appropriate, is
16 that it may be a wise course to take that the statement, for reasons of
17 appearance only, should not be taken by somebody within what I'm going to
18 broadly describe as the Lubanga team but from someone within Office of
19 the Prosecutor who has experience of taking witness statements from a
20 team wholly unconnected with this case. Although we floated the idea
21 that perhaps this could be done by someone from the Registry, taking
22 witness statements is likely to be a process that is more familiar to
23 those in the Prosecution and indeed the Defence team than it is to the
24 officials within the Registry. But that is merely a suggestion and you
25 are free to make any submissions that you consider appropriate.

1 MS. SAMSON: Thank you, your Honour. Indeed the Prosecution team
2 did discuss the suggestion of having the Registry conduct the further
3 statement taking, but for the reasons you have outlined have determined
4 that it may not be the best course of action. And that, in fact, the
5 team that takes the further statement should be familiar with the
6 processes within the Office of the Prosecutor for statement taking and
7 should at some level have a familiarity with this witness's previous
8 evidence.

9 On discussion with the Defence and by a suggestion raised by the
10 Defence, what the Prosecution is now proposing is that indeed it be a
11 Prosecution investigator, not one of the individuals currently involved
12 in the case, who would lead the questioning, having had of course
13 discussions with the team in terms of this witness or previous contacts
14 with him and that a member of the Defence be present but not be taking --
15 making -- asking questions or otherwise providing input but being
16 available to oversee and observe the proceeding.

17 In any event, the Prosecution is also suggesting that the process
18 be audio and videotaped to ensure that it is correctly recorded for the
19 future.

20 (Trial Chamber confers)

21 PRESIDING JUDGE FULFORD: Maitre Mabilille, do we take it,
22 therefore, that in light of the decisions thus far taken by the Chamber,
23 that you are in agreement with the summary just provided by Ms. Samson as
24 to how this process should be undertaken?

25 MS. MABILLE (interpretation): Absolutely, your Honour, since

1 that is the suggestion that we made to the OTP during the break.

2 PRESIDING JUDGE FULFORD: It strikes the Bench as being an
3 eminently sensible way of proceeding save with this one caveat,
4 Ms. Samson. We are not aware, nor should we be, as to the precise steps
5 that have been taken as regards this witness receiving advice in relation
6 to self-incrimination. And it seems to us that given that a second
7 witness statement is to be taken which presumably will be signed if one
8 is provided with the appropriate solemn undertaking within the statement,
9 the witness is entitled to be reminded of his right to legal advice on
10 the issue of self-incrimination because this may expose him to a
11 suggestion that he has committed some kind of criminal offence in
12 addition to anything that may be mentioned in his original witness
13 statement.

14 So unless there is disagreement on this, it seems to us that the
15 first thing that your representative must do is to remind the witness of
16 his rights in this regard and to ask him whether or not at this stage and
17 before the witness statement process commences, whether he wishes to see
18 a lawyer specifically for this purpose. Would you seek to dissuade us
19 from incorporating that as one of the steps that needs to be taken?

20 MS. SAMSON: No, your Honour, no. This particular witness, based
21 on information that had been collected by the Office of the Prosecutor at
22 the time of his interview, was not interviewed in accordance with
23 Article 55(2), the information that we had did not lead us to conclude
24 that he should be interviewed under that provision. It may be, however,
25 that as the statement-taking process carries on, that we may find that he

1 does fall under Article 55(2), which engages, again, a separate right to
2 have counsel and to be advised of various rights to silence, et cetera,
3 that he may be entitled to.

4 PRESIDING JUDGE FULFORD: Because at the moment we do not know
5 what it is that he is now going to say, and those matters may - they may
6 not - but they may raise issues directly relevant to
7 self-incrimination -- well, sorry, that's unfortunately expressed, which
8 raises the issue of self-incrimination.

9 Maitre Mabilille, anything you would wish to say on that issue?
10 No.

11 MS. MABILLE (interpretation): No, your Honour.

12 PRESIDING JUDGE FULFORD: One final observation that we would
13 wish to make is that whatever is the eventual outcome of this
14 investigation, of course this witness potentially is available to the
15 Defence. And we of course have no idea what the result of the process
16 will be or what eventual decisions will be taken by the Office of the
17 Prosecutor. But one can envisage a result as one of a range of options
18 that may mean that the Defence will wish to take the opportunity of
19 considering whether or not to call this witness itself. But I think that
20 needs to be stressed and underlined. So this is not, as it were, a
21 once-and-for-all event in relation to this witness giving evidence.

22 Now, looking at this issue from a practical point of view, it is,
23 I think, highly unlikely that we're going to be returning to Witness 15's
24 evidence today. The reality is that this is going to take longer than
25 today's hearing.

1 Mr. Garreton is due to give evidence tomorrow and he has been
2 given a definite slot which is not going to be broken. So unless anybody
3 says anything to the contrary now, this in fact means that we will not,
4 regrettably, be able to take this case any further today.

5 (Trial Chamber confers)

6 PRESIDING JUDGE FULFORD: So I'm afraid we're going to have to
7 adjourn today -- unless, Ms. Samson, you take a contrary view? Something
8 else that can be done today?

9 MS. SAMSON: No, your Honour. We are prepared to proceed with
10 Mr. Garreton, but I understand that he is scheduled for tomorrow morning.

11 PRESIDING JUDGE FULFORD: Yes. Good.

12 One thing I think that needs to be emphasised is the advice to be
13 given to the witness should include a warning against giving false
14 testimony.

15 Right. Thank you all very much indeed. We will sit again at
16 9.30 tomorrow morning, when we will hear the evidence of the expert
17 called by the Court, Mr. Garreton.

18 COURT USHER: All rise.

19 The hearing ends at 10.27 a.m.

20 RECLASSIFICATION REPORT

21 *Pursuant to Trial Chamber I's oral order dated 22 March 2010, the
22 excerpt of the transcript Page 6 line 7 to line 18 is reclassified from
23 Private Session to Open Session.

24 SECOND RECLASSIFICATION REPORT

25 Pursuant to Trial Chamber I's instruction dated 6 February 2012, the

1 transcript is Reclassified as public after the indicated redactions have
2 been implemented as ordered by the Chamber. All private and closed
3 sessions(*) are now available to the public with the exception of the
4 portions of the transcript that have been redacted.