

1 International Criminal Court
2 Trial Chamber I - Courtroom 1
3 Presiding Judge Adrian Fulford, Judge Elisabeth Odio Benito and Judge
4 René Blattmann
5 Situation in the Democratic Republic of the Congo - ICC-01/04-01/06
6 In the case of The Prosecutor v. Thomas Lubanga Dyilo
7 Friday, 8 January 2010
8 (The hearing starts at 9.30 a.m.)
9 (Open session)

10 THE COURT USHER: All rise. The International Criminal Court is now in session.
11 Please be seated.

12 PRESIDING JUDGE FULFORD: Maître Mabilie, good morning. Yesterday I indicated
13 that the Judges had in mind obviously if necessary holding a status conference at some
14 stage today *ex parte* Registry and Defence only on the issue of passports. There have
15 been I think at least two emails over the last 24 hours I think of which you are undoubtedly
16 aware which I think now raises a question over whether there is anything that needs to
17 be discussed today. That is not to say that we have dealt with all of the problems for
18 the future, the medium and long-term future but, as I understand it, everything that
19 can be done is now being done to resolve the difficulties for the immediate and short-term.

20 Now, can I ask you to reflect on that during the course of the morning and,
21 of course, if there are things that you believe we can usefully do then we are only too
22 delighted to have an *ex parte* status conference, but let's not have one if it is unnecessary,
23 and if you could let the court officer know perhaps at the mid-morning break as to whether
24 or not it is actually necessary. Thank you very much.

25 Witness, please.

1 (The witness enters the courtroom)

2 WITNESS: KAMBAYI BWATSHIA (Continued)

3 (The witness answers through interpreter)

4 PRESIDING JUDGE FULFORD: Good morning, sir.

5 THE WITNESS: Good morning, Mr President.

6 Questioned by Ms Samson:

7 Q. Good morning, Mr Kambayi.

8 A. Good morning, Madam.

9 Q. Sir, you have a copy of your report in front of you; is that correct?

10 A. Yes, I do.

11 Q. May I ask you to turn, please, to point Q in your report, which is on page 11?

12 A. Yes.

13 Q. And on this point you were asked by the Chamber, "Can a person choose to use
14 different names depending on the prevailing family, social, professional or official
15 context?" In your answer you said, "Yes, a person may choose different names depending
16 on these contexts." Could you please elaborate on that answer, perhaps by way of an example?

17 A. As we have already said yesterday, when the Court asked me whether a person
18 can choose to use different names depending on the prevailing contexts, my answer is
19 yes, but that person absolutely has to take into account the name given to him, or her,
20 by the parents. The person can also not change that name easily once the name has already
21 been registered, except it had been done in a frivolous manner. We also said that even
22 if the person has grown up and changes, it is the name that was given by the parents
23 that is important. The other names can be derived from his physical qualities, his virtues,
24 his attitude in life, and so I have said that the person can choose names depending on
25 the context.

1 Now, if you want me to give you examples, I can mention for example a girl who
 2 is born into the Kambayi family. That girl will bear the name given to her by her parents.
 3 For example, she will be called Tumba (phon). Kambayi is also called Bwatshia, so her
 4 name will be Tumba Bwatshia and, as I said yesterday, his parents called him Bwatshia
 5 Luendu (phon) or something else, so Tumba Bwatshia will only have that name Tumba Bwatshia,
 6 but in the course of her life she cannot afford to add any other names to the name of
 7 her father, but she can change the name given to her at birth. However, such cases are
 8 not very frequent. She can do that after submitting a declaration to the competent office,
 9 or authorities, and as we said yesterday there are -- there is serious confusion in this
 10 area and many incomprehensible or many uncalled for things are done.

11 MS SAMSON: Thank you, your Honour. I have no further questions.

12 PRESIDING JUDGE FULFORD: Thank you very much, Ms Samson. Gentlemen, you will
 13 of course bear in mind that - and this is not in any way to stop you from asking questions,
 14 and I emphasise that - that I think a good many of the areas that you had indicated interest
 15 in have now been covered by Ms Samson, so could you not forget that when putting your
 16 questions. Thank you very much. Yes, Mr Keta.

17 MR KETA: Thank you, Mr President.

18 Questioned by Mr Keta:

19 Q. Good morning, Mr Expert.

20 A. Good morning, counsel.

21 Q. My name is Joseph Keta. I am a lawyer representing a certain number of victims.
 22 As the President has said, many of the aspects have already been raised by the Prosecution,
 23 but I will ask for some points of clarification regarding the civil registry situation
 24 in Congo and, as you said yesterday, there is inconsistency between the texts and the
 25 culture.

1 Now, let me refer you to page 3 of your report in which you mentioned Article
2 59 of the Family Code and you said that the name in Congolese law is given by the parents,
3 but in case of disagreement it is the father's name that is admitted. Now, can you explain
4 what you mean by such disagreement?

5 The second question is as follows: When it comes to changing names, as you
6 are aware one has to go through a court. You cannot just change your name in the civil
7 status registry. So, as an expert, what are the concrete difficulties that you come across
8 in Congo, first of all concerning the giving of names and then the changing of names?

9 A. Let me begin by telling you that it is easy to answer that question. If there
10 is disagreement, for example, when the father decides on a name, he may say that the
11 child will bear the name Zola (phon) and we are in the Congolese culture, but in another
12 culture where the tradition is patrilineal, in which the uncle, that is the elder brother
13 of the mother, is very important in the family, it might be said that the child will
14 not be called Zola. The child will bear the name Tima (phon). So there is a disagreement
15 there. You are fully aware of this, because you work in this field, but I carried out
16 investigations and the code stipulates that it is the father who gives the name. You
17 will therefore understand that given that the uncle in that particular culture is very
18 important, he will leave the Court or the hospital with a heavy heart because the law
19 recognises the father's name.

20 In the Court of course the uncle will agree, but when they return home there
21 are going to be a few problems, but the law recognises the name given by the father.
22 That is my answer to your first question.

23 Now, when it comes to the changing of names, you would like to know what difficulties
24 that people might come across. Today things are different, but the difficulties are the
25 same. Yesterday, I pointed out that all depended - that is in answer to your first question - I

1 said that when it comes to the couple, the nuclear family, we had said yesterday that
2 there was a difference between the nuclear family, that is the father, mother and children,
3 and the extended family. Based on the context, if the family follows the western civilisation,
4 then the nuclear family will be important but in the cultural context it is the extended
5 family that is important, so that is where the first difficulty arises.

6 Now when it comes to changing, there is a difficulty at the level of the person
7 who is registering the name. Which culture does he belong to and how is he going to spell
8 that name? We have been talking about that since yesterday. And the person who is declaring
9 the child, is it the father from the most remote areas? Is it the uncle or the aunt?
10 Already in areas where there is no war the difficulties are present, so you will understand,
11 counsel, that in the war-torn areas, where maybe the fathers are not -- no longer there,
12 there is only the mother, maybe the uncle will be most influential, or maybe the mother
13 will assume responsibility. So I am saying that difficulties arise at all levels. In
14 your country, which is also my country, we are making major efforts to ensure that the
15 law could resolve those difficulties and so the Courts in this country face several
16 difficulties when it comes to the registration of names.

17 Q. My second question is still related to the civil status registry and it concerns
18 the difficulties faced by the civil status registries in Congo in general and particularly
19 in Ituri as a result of looting and pillaging that took place during the war. We know
20 that the evidence in the registry is derived from the registers that are kept in those
21 registries. Now, based on your experience, what is being done to fill the gap that is
22 to resolve the problems caused by the absence of inadequate civil status registries?

23 A. During our investigations, we discovered that it was very difficult to operate
24 under such circumstances, but we believe that the Congolese state must issue orders.
25 It should become much more severe and rigorous in this area and, as I said yesterday,

1 it is the court that gives citizenship to an individual. It is not sufficient to give
2 someone a name at birth. I believe the time lapse is 15 days or three months; I do not
3 know because the law is changed. It is the state that decides on citizenship. And you
4 are quite correct, counsel, because the people who are employed in the civil status registries
5 must be people who are competent in those domains and, as you are fully aware, in the
6 major cities, such as Kinshasa, things are already going -- things are already better.

7 Now, we have said in the context of the history of mentalities, we have said
8 that the mentalities do not leave the individual. And what I am saying is that it is
9 absolutely necessary for the people who are given the responsibility for registration
10 in the civil status registries should be competent and fully prepared and, when I talk
11 about preparation, it is not sufficient to be a university graduate. It is not enough
12 to simply know how to read and write or to be an intellectual. You need the technical
13 know-how in addition to the university degree. The person who is going to work in that
14 domain must be up to date with the law. He must be knowledgeable about the law. So,
15 in a nutshell, I can say that the state must be very serious and so far at the written
16 level, that is at the level of legislation, the state is serious, but how can that law
17 be implemented if the person is not aware of the law, even though we know that ignorance
18 of the law is not an excuse. But if that person is not knowledgeable about the law there
19 are going to be difficulties. And we have to know how to sort out these situations of
20 chaos and confusion but, as experts, we are hopeful, and we are working to assist the
21 parents and state to take matters seriously just like we are doing today in front of
22 your august court.

23 Q. Thank you for your answer. I am going to move on to the second part on names.

24 A. Which page is that, please?

25 Q. It is on page 6.

1 A. Yes, I am there.

2 Q. I was interested in the examples that you gave concerning the Balubas and the
3 Bakongos and the Alur in Ituri. Now, you have the two Congolese systems that you have
4 described, patrilineal and matrilineal. The Balubas, patrilineal, and the others are
5 matrilineal.

6 Now, in the case that is of interest to us - that is, most of the participants
7 from Ituri - we are in the patrilineal or patriarchal system. And I would like you to
8 elaborate on the issue of the patronymic names, and, as you are aware, that is very important
9 in Congo; that is, the name of -- the problem of patronymic names as well as the immutability
10 of the order of names. How does this happen in the patriarchal system and how is change
11 possible?

12 A. When you talk about the patrilineal or the matrilineal systems, someone who
13 is not in that cultural or historical context -- in fact to that person, the implementation
14 of those principles do not seem very important to that person, but the patrilineal system
15 does not mean that the children belong to the fathers only. It is not because it is a
16 patriarchal system that the children who are born into that system belong to the fathers.

17 From the anthropological point of view, the children belong to the father's
18 lineage. This means that the elder brother of the father is important when it comes to
19 giving names. The aunt, who is actually a woman in a patrilineal system, is very important
20 when it comes to giving names. Once again, at that level, the confusion was resolved
21 simply because people were fully conversant with their customs. But when you include
22 the law and the written culture from the colonial masters the difficulties become enormous.
23 And if the couple is a couple that is moving towards what we referred to as a western
24 or modern civilisation then the difficulties are even greater.

25 Now, coming to the second part of your question, there is a problem that is

1 quite apart from everything that we have already mentioned as difficulties. What can
2 the civil status authorities do? In answer to your first question a short while ago,
3 we said that it was important for the state to employ competent officers who have been
4 educated and who have undergone practical training in this domain.

5 Now, what can these people do? When this same person is found in a matrilineal
6 context, then there is a problem. Even the person who is from a patriarchal system, what
7 is he able to do when faced with the significant influence of the uncle, the aunt or
8 the traditional leader? It becomes complicated.

9 It is for that reason that in our centre we are making efforts to sensitise
10 the state on the necessity to popularise the written culture, but you know even better
11 than me that when it comes to that it is the media that can be effective. And what is -- what
12 are the media? When we come to the schools even, these school systems that we have borrowed
13 from others, emphasis is placed on mathematics, law and economics, and so on and so forth.
14 But all the subjects that concern the human being as such are quite difficult, so that
15 is where a problem also arises.

16 Now, when it comes to names, this is so important that the Congolese people
17 in particular - and the African people in general - should take the issue very seriously
18 because the name identifies the individual and it specifies the inner character of the
19 person, the individuality of the person. It represents the dynamics of the person.

20 Now, when we come to implementation, there is something like a free-fall of
21 incomprehension and confusion. There is an entire problem concerning the patrilineal
22 and matrilineal systems. Now, the example that I took include the Balubas, the Bakongos
23 and the Alurs. The first is patriarchal and the other two are matriarchal. And it is
24 very interesting to note that the patrilineal system functions in the same manner in
25 the entire country because of -- despite certain differences.

1 Even the matrilineal systems are similar. If you look at the systems in one
2 of the regions in the Equateur Province and you look at how it functions in the northern
3 part of Angola, it is the same. What happens in Ahmaddy (phon) and in the other regions
4 are the same. So there are problems at the level of the state and there are other problems
5 at the lower levels when it comes to the civil registry, the Family Code and the Children's
6 Code. There are other problems when it comes to the education and training of the person
7 who has to carry out registration as well as the understanding of the domain itself in
8 the Democratic Republic of the Congo.

9 PRESIDING JUDGE FULFORD: Sir, you are providing us with some extremely useful
10 and helpful evidence. I think, though, in light of the last two or three answers you
11 have given, I am going to ask you - if you can - to try to condense your contributions
12 rather more. The last answer was a very long one, indeed, and I would ask you if it is
13 possible to make your responses - if it's feasible - slightly more succinct. I don't
14 mean that in any way disrespectfully; it's just, otherwise, it will become difficult
15 to digest the really important parts of your evidence.

16 Yes. Mr Keta.

17 MR KETA:

18 Q. Mr Expert, I would like you to answer the sub-question that I put to you with
19 reference to the example that I am about to give you as to the inconsistency between
20 names. My name is Keta Orwinyo Joseph. Now, can I also be called Joseph Keta Orwinyo?
21 This is the issue at stake in the Congo, and you will find a number of documents where
22 people sign and switch their names around. What are your observations with reference
23 to this specific observation, with regard to the change of the order of names?

24 A. You will probably have found reference to this in my report, in taking into
25 account the very beneficial comment that the President just made. The name Keta Orwinyo

1 Joseph, as regards to the fact that one cannot change this name at all. Yesterday we
 2 talked about this, but you are more aware of the law in the Congo than I am. It prohibits
 3 the changing of any name. You will agree with me that one cannot -- or you cannot start
 4 your name by Orwinyo Keta, nor can you start your name with the words Jean Keta Orwinyo
 5 or Orwinyo Jean Keta.

6 There is a whole principle underlying the fact that these names cannot be changed,
 7 and this is in the written law itself and inscribed in the culture, also. But as we said
 8 yesterday, the name represents an entire story, and when you change the place or the
 9 position of the names, then you change the name itself, and the person bearing this name
 10 will feel somewhat insulted. There we are.

11 Q. I am very satisfied by this response, but I would like you to tell us about
 12 the law in the Congo. Yes, but as an expert, what do you yourself note the situation
 13 is in the field?

14 A. Yes. It is true that this is prohibited by the law, but some people like to
 15 say that they are called Orwinyo, because Orwinyo means force or courage, and sometimes
 16 they will call themselves Mr Keta. If they are from the Christian world, they will say
 17 their name is John; or if they are from the French speaking world, they will say their
 18 name is Jean, but the law prohibits all of this when one has to make a declaration.

19 Q. I will ask the last question with reference to the last subject matter in the
 20 report, notably, the family.

21 A. Could you please remind me of the page, counsel?

22 Q. Page 12. You talked to us about the structure of the family, but I would like
 23 you to speak to a phenomenon that is recurrent in the Congo, notably, the Shégué or the
 24 street children. As an expert, those children who are born outside of a marriage or who
 25 are abandoned, how in concrete terms are names attributed to them?

1 A. Bearing in mind what Mr President just said to me, you have really come to the
 2 crux of the issue here. I do not want to start describing or defining things here, because
 3 I do not like definitions as such, but Shégué is a phenomenon in itself, my word. God
 4 only knows that this phenomenon is very difficult to circumscribe.

5 The Shégué or the street child is one and the same thing, more or less; but
 6 the Shégué is an individual who has been thrown out of their home, maybe at the age of
 7 18, or maybe younger, and this individual -- well, you asked the question as to how one
 8 becomes a Shégué. Well, he might have been said to be a sorcerer, and maybe he was called
 9 a sorcerer because he would wet his bed too often and his parents have a bad image of
 10 him.

11 And maybe if he lives with the aunt or uncle, or the wife of the elder, rather,
 12 she might say, "Well, I have never seen a child who wets his bed at the age of 10," and
 13 then this child is given the name of "sorcerer." And you know only as well as I do that
 14 a pastor who lives nearby will say, "Well, if you do not have any money, then that child
 15 will be thrown out," and that child becomes a Shégué. He becomes a street child. He
 16 becomes abandoned. And these children are at a loose end in the streets of Kinshasa.

17 And often experts in our field, whenever the question about Shégué is put to
 18 them, and -- they will say, "Well, I am Ali Baba," and another will say, quite simply,
 19 "My name is Big John," the name of a Texan cowboy. Another street child will say, "I
 20 am (indiscernible)," and another one will say, "My name is (indiscernible). I am a leopard."
 21 Often the name is not said with regard to these children.

22 And, you know, they don't often give their identity. Not everybody can ask
 23 "Little Keta" to tell his name, and you will note that they often hesitate to give their
 24 names. And why is it that they hesitate? Well, in our research centre, our experience
 25 is as follows: If you ask a young girl what her name is, and she says, my name is

1 (indiscernible), or Coco or Paloma, why is that? Well, because she or he fundamentally
 2 believes that if one easily gives one's name to an individual, they can take that name
 3 and go and conduct evil activities with it.

4 So, when the Civil Registry asks this child what their name is, they will say
 5 "Pamela," for example. And so you will not be surprised to see that a lot of children
 6 call themselves Pamela in the register, and they sign their name as Pamela. And a street
 7 child will then grow up with that name, the Shégué will grow up with such a name. You
 8 see what confusion arises when these children then get married. It is total confusion,
 9 counsel.

10 MR KETA: (Interpretation) Mr President, I have no further questions.

11 PRESIDING JUDGE FULFORD: Very good. Mr Walley. n.

12 MR WALLEYN: (Interpretation) Thank you, Mr President. I only have two further
 13 questions.

14 QUESTIONED BY MR WALLEYN: (Interpretation)

15 Q. The first of which, Mr Expert, covers the last point of your report with regard
 16 to the date of -- with regard to the question of birth. You said that in a civilisation
 17 such as the Congolese situation, they know their date of birth quite well; but in other
 18 civilisations, this is rendered rather difficult. Now, in a rural area and in a context
 19 of civil war, et cetera, might one come up against a situation where a child does not
 20 quite know what his own date of birth is, or parents who have a number of children no
 21 longer remember what the date of births for their various children are?

22 A. Well, those children who are born within a context of war, within a context
 23 of chaos or children who are born in the street in the bush, well, they don't even remember
 24 what the day is at times of war, whether it is Monday or Tuesday, but a child is born
 25 and it is difficult for a date to be retained for this child.

1 Now, when I talk about modern civilisation, in cities, well, there are a number
2 of documents that are drawn up. Maternities are very well-organised. And when one goes
3 to register one's child one refers to the document compiled at the maternity, and the
4 child is proud of knowing his date of birth, his name at birth, and his last name, and
5 one is proud to bear such names.

6 However, in the oral tradition, it is a difficult situation. It is difficult
7 to say that a child is born on such-and-such a day of such-and-such a year. The child
8 might come up with this information, but if the child goes to be educated elsewhere far
9 afield, and has walked for four or five days before getting there, it might be difficult
10 for them to come up with this information. So one is not surprised to see that a lot
11 of people invent such details. Really, they do.

12 And my example, well, I left my place of birth in the Kasai and it was written
13 that I was born in July, and it was only when my father came and said, "No, you were
14 not. You were not born on 15 July, you were born on 1 June," and he showed to me the
15 baptism card signed by a Protestant missionary and this document, well, I was very proud
16 to see it.

17 But if one were to add to that situation the situation of war, well, this complicates
18 matters. A child which is born aboard a ship, and if this boat comes from Kinshasa to
19 le Saleh, and were the boat to come to a stop because, for example, the water level has
20 dropped, and a child is born, well, we don't know what the day is, we don't know what
21 the date is, and one might then invent such a date. The most important thing is that
22 there is a date. I think it is very complicated. I hope I have answered your question.

23 Q. Indeed. I have one final question: You talked about mistakes which are committed
24 in the civil status registry which might be rectified and you said that people often
25 hesitate to correct such mistakes. Is it merely a question of ascribing importance to

1 such things, or is it also a monetary issue, a financial issue? Is this costly?

2 A. Well, I can say that it does not cost much money. It is not costly. You arrive
3 at the civil status registry office and you say, "Well, my name was badly taken down,"
4 and they might look at you askance, but then they will realise that you are serious,
5 and then this matter becomes of importance and it does not cost a lot of money. Now some
6 people might say, "Well, it is not important to change my name. I can change it at a
7 later date." Some people will note that my primary school leaving certificate bears a
8 mistake, a spelling mistake, and when one goes university for example, I will give you
9 another easy example.

10 You are registered as Kambayi Bwatshia and the University of Montreal will say
11 to you, "Bwatshia is your first name," so they will start writing this on my documents,
12 on my diploma, as Bwatshia Kambayi. Well, no, that is not the situation. So when I go
13 to then request a visa at the embassy, and I say Kambayi Bwatshia, they will say, "No,
14 your name is Bwatshia Kambayi, you are not one and the same," so it is important to rectify
15 or correct those mistakes, not only on a family level but also on an international level.
16 Thank you, counsel.

17 MR WALLEYN: Yes, thank you, Mr Expert. I have no further questions,
18 Mr President.

19 PRESIDING JUDGE FULFORD: Thank you, Mr Walley. Mr Desalliers?

20 Questioned by Mr Desalliers: (Interpretation)

21 Q. Good morning, Witness.

22 A. Good morning.

23 Q. My name is Marc Desalliers. I am a counsel, and I am going to ask you a number
24 of questions for the defence of Mr Thomas Lubanga. You indicated at page -- at the bottom
25 of page 4 and the beginning of page 5 of your report --

1 A. Page 11?

2 Q. -- end of page 4, beginning of page 5 --

3 THE INTERPRETER: Overlapping of microphones. Impossible to interpret two
4 speakers at once.

5 MR DESALLIERS:

6 Q. You said that the process of providing identity cards was based on an empirical
7 method that was very unreliable and you said on page 6 of your report - and I quote - "One
8 can understand the origin of confusion in spelling which can be put down to pronunciation,
9 and this is aggravated when one has to use a number of names, post-names or first names,
10 for a number of reasons. When one has for example an extensive criminal record, when
11 one wishes to obtain a passport or any other important document."

12 Now, my question specifically targets an individual who wants to avoid being
13 controlled when they have an extensive criminal record. Are you talking here about an
14 individual who would be attempting to dissimulate or hide their identity? Is this what
15 you are saying?

16 A. Not on an individual basis, no, but experience has shown that when people go
17 to Court in Kinshasa for example, or elsewhere, a person who bears a myriad of names,
18 and when he knows that he has committed an offence somewhere his name is Mulenda Ndo
19 (phon) and when he is caught he, and one knows that he has been caught, he might say
20 to you, "I am not Mulenda Ndo. I am Ndo Mulenda" and he might also say to you, "I am
21 Bomul (phon)." He might say I am "Ndo Mul (phon)." He might say, "I am not Mulendambo
22 (phon), I am Mul Ndo (phon)." So this complicates matters. That is according to our
23 experience and this situation does exist, counsel.

24 Q. Thank you. With regard to the date of birth, with regard to what has been said,
25 I am not referring specifically to a part of your report here. I wanted to put a question

1 to you because in answer to one of my learned friend, Mr Walley's, questions, you said
 2 that in the context of war it could be difficult for some individuals to - who were born
 3 during the war notably - to note their, or to know their precise date of birth. Should
 4 one understand, therefore, that an individual who is born during a time of peace, and
 5 who has gone to school in a normal fashion might, generally speaking, be in a position
 6 to know their date of birth?

7 A. Indeed; affirmative, counsel.

8 MR DESALLIERS: Thank you, Witness. I have no further questions, Mr President.

9 PRESIDING JUDGE FULFORD: Sir, we are extremely grateful to you for your
 10 contribution to this trial. You have come to give evidence at the request expressly made
 11 by the Judges, and so we have a particular reason for thanking you for the detailed
 12 consideration that you gave to these matters before you came to court, and for the careful
 13 and considered answers that you have given during your evidence. We are in your debt
 14 and you leave here with our thanks. Thank you very much indeed. If you - you can now
 15 please leave the court with the assistance of the usher. Thank you very much indeed.

16 THE WITNESS: (Interpretation) May I say before I leave, your Honour,
 17 Mr President, as I said yesterday in my introduction, in the introduction to my report,
 18 that I was really very satisfied to be invited to such an august environment, and I would
 19 like to extend my warm feeling of thanks to you, and I remain at your entire disposal
 20 and I thank you.

21 PRESIDING JUDGE FULFORD: We wish you a safe journey home.

22 (The witness stands down)

23 PRESIDING JUDGE FULFORD: Maître Mabilille, *ex parte*, or *no ex parte*?

24 MS MABILLE: (Interpretation) Mr President, I do not believe that it is
 25 necessary for us to hold an *ex parte* hearing. I would just say publicly that our concern

1 is that we have drawn up our list of witnesses with an order of appearance that appears
2 to us to be of importance; notably, with regard to the manner in which we intend to introduce
3 our evidence. So our main concern, when receiving the mail that we forwarded to you,
4 is that this list has been amended without us being able to be involved, and this is
5 due to the obtention of passport difficulty.

6 Now, if we are told that there are no problems and that this order of appearance
7 with regard to the first five witnesses will be respected, I do not believe that there
8 is any reason for us to hold an *ex parte* hearing immediately. That is what I wanted to
9 say to the Chamber.

10 PRESIDING JUDGE FULFORD: Thank you very much. Therefore, I ask whoever is
11 responsible for this in the Registry immediately to consider what Maître Mabilille has
12 just said and to inform me by email, by half-past-11, if there are any difficulties in
13 calling the first five witnesses in the order which the Defence has indicated it would
14 prefer. Point one.

15 Maître Mabilille, point two is that you have requested - I think there have been
16 two separate requests wholly understandable - additional information in relation to the
17 participating victims who are going to be coming to give evidence. The course of action
18 that we propose is that at half-past-11 a representative of the VPRS should be in court
19 so that the Defence can indicate, in general terms, what the particular areas of interest
20 are that you would wish for additional information on. We will then ask the VPRS immediately
21 to review the relevant documentation so that they can provide, if possible, additional
22 information to you and to the Chamber and we will then, as it were collectively, look
23 to see whether that satisfies your request or whether further information needs to be
24 scrutinised to see whether it can be safely divulged. Would that be a satisfactory way
25 of proceeding?

1 MS MABILLE: (Interpretation) Indeed, Mr President.

2 PRESIDING JUDGE FULFORD: Third, I shall in the next ten minutes circulate to
3 everyone a rather daunting proposed calendar. I want to make it clear that at the moment
4 this is a proposal that is essentially Registry generated, for obvious reasons, and it
5 doesn't at the moment bear any kind of final sanction from the Judges. It is a proposal
6 for everyone to think about and, if it is possible to make any representations if there
7 are any, at half-past-11, that would be helpful. If it is not possible, we can deal with
8 it next week.

9 Next, there have been five recent new applications for reparations that need
10 to be communicated to the Defence team. The proposal that we make is that in future
11 applications for reparations are automatically communicated to the Defence once any
12 necessary redactions have been implemented. If either the VPRS or the Defence wish to
13 suggest an alternative method of proceeding, could you please do so before close of play
14 on Wednesday of next week but, in the meantime, we order that the five new applications
15 are notified forthwith.

16 So the proposal is that we sit again at half-past-11 at the very least to deal
17 with the Defence application for additional disclosure as regards the participating victims.

18 Finally, I need to say that it will be clear now that we will not be sitting
19 on Monday of next week, but we will be commencing the evidence of the participating victims
20 on Tuesday. Is there anything that anybody else wishes to raise at this stage? Yes,
21 Mr Keta.

22 MR KETA: (Interpretation) Thank you very much for allowing me to address the
23 Court, your Honour, and I would like to speak on behalf of three participating victims
24 who will be testifying next week, unless I am mistaken.

25 I do have an application to prepare and I would like to ask for a hearing - an

1 *ex parte* hearing - with the UVT, because during the familiarisation process yesterday
2 one of my clients said that he was traumatised, and I asked him to explain the problem
3 to the VWU, but he wanted to explain the problem to the Judges. Now, I don't know whether
4 you would find that there is a difficult -- any difficulty with that? I am speaking of
5 Witness 0270. Now, I know he did have some health problems and he hesitated before coming
6 here, and I had to be very diplomatic to get him to come, but yesterday, when I met with
7 him, he really was traumatised and he would like to explain the problem to you. I don't
8 know whether that is possible? Would it be possible to have an *ex parte* hearing with
9 him for a few minutes? That was my first concern.

10 My second is he would like to explain to the Judges whether some documents could
11 be provided to him that he could use as an aide-memoire. When he was in the DRC he didn't
12 have an opportunity to download them through an email, so the documents were sent to
13 my inbox but, as you know, I am no longer allowed to meet with him and provide documents
14 to him. So, he would like to explain to you what kind of documents he needs to refresh
15 his memory and that would require the approval of the Chamber.

16 Thank you.

17 PRESIDING JUDGE FULFORD: Thank you, Mr Keta.

18 (The Trial Chamber confers)

19 PRESIDING JUDGE FULFORD: Mr Keta, thank you very much for bringing those points
20 to our attention. On the first issue, given that there appears to be a question over
21 the, let me put it loosely, emotional state of this particular participating victim,
22 we are of the view that it would be far more preferable if you and that individual were
23 to have a conversation that focuses on whatever it is that is upsetting this particular
24 person. I think that is likely to be far less stressful than having to come into court
25 to explain whatever it is to three completely unfamiliar Judges. So we give you leave

1 to have a conversation with your client, but obviously focusing on whatever it is that
2 is upsetting him, rather than a more general discussion on the evidence that is to be
3 given.

4 As regards the documents that he wishes to rely on, could you please download
5 them and, if the application is that they should be used as an aide-memoire, in the first
6 instance we need to see copies of them so that we can consider whether or not this is
7 an appropriate course of action. There are potential issues to be considered, such as
8 whether or not they become disclosable if he relies on them during the course of his
9 testimony, and we would need to address that issue as well, but the first point is that
10 they need to be downloaded, you have leave to do so and could you please provide them
11 to the Judges as soon as possible.

12 Returning for a moment to the first issue, if there is a real issue over this
13 individual's emotional stability, you need immediately to engage the assistance of the
14 Victims and Witnesses Unit. There may be real support and assistance that they can give
15 to help solve whatever the problem is. So that is our guidance, I hope it helps and please
16 come back to us if you need any other assistance. Good.

17 We shall therefore sit again at half-past-11. Thank you.

18 THE COURT USHER: All rise.

19 (Recess taken at 10.37 a.m.)

20 (Upon resuming at 11.30 a.m.)

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

22 PRESIDING JUDGE FULFORD: Maître Mabilille, thank you very much for providing
23 the list by email, sent by Ms Buteau. That is extremely helpful and I think that makes
24 very clear what the particular items are that you are interested in. Is there anything
25 else that you would wish to say about the matter?

1 MR BIJU-DUVAL: (Interpretation) Mr President, nothing in particular. I
2 simply want to point out that we had consultations with my learned colleague, Keta, on
3 this issue. I stand to be corrected, but he told me that there are no difficulties with
4 those non-redacted documents being disclosed to us, except of course they may need to
5 redact the particular points relating to the current residence or phone numbers, which
6 are of no use to us of course, but the documents themselves are important, they deal
7 with identities, places and events that are important for us to be able to examine the
8 witnesses who are going to appear.

9 PRESIDING JUDGE FULFORD: Well, thank you very much for indicating what appear
10 to be satisfactory results of the discussions between the Defence and the relevant counsel
11 for victims. Unless Mr Keta has anything additional to say, it would seem to us that
12 at this stage this is best resolved by effectively a three-way discussion between the
13 Defence, the VPRS and Mr Keta, with the VPRS having an opportunity of being able to consider
14 independently any security or confidentiality concerns, but we would wish to indicate
15 in a general sense that we understand - and I repeat in a general sense - your interest
16 in these particular documents, given some of the issues that the Defence has raised during
17 the course of the trial. So we would encourage, to the extent that is possible, cooperation
18 in relation to providing the Defence with this material.

19 Now, is there any difficulty in you contributing to that process, Ms Bonnet,
20 to the extent that you feel able to?

21 MS BONNET: (Interpretation) Good morning, Mr President, your Honours. Of
22 course we have no difficulty in assisting the parties and the participants in transmitting
23 the unredacted versions of those documents. The difficulty is that the documents referred
24 to by the Defence are additional documents that had been disclosed to them in an unredacted
25 form, because Mr Keta had asked on 14 July 2009 to maintain certain redactions and the

1 documents were semi-redacted, but without the additional documents.

2 The difficulty for the Registry right now in assisting the legal representative
3 to disclose those unredacted documents is that the Chamber did not yet take a decision
4 on the application for maintaining certain redactions, so Mr Keta had decided to disclose
5 the documents with the redactions in place and so this issue will arise again with the
6 additional documents that are supposed to be transmitted to the Defence.

7 PRESIDING JUDGE FULFORD: Well, Ms Bonnet, I have to say I am unaware of there
8 being an outstanding decision that we are being expected to take in this regard. I am
9 completely unaware of that and I would, after today's hearing is concluded, ask you to
10 provide us by email, please, an indication of what filing or filings there are that you
11 say the Chamber has overlooked to deal with.

12 We need to cut through the Gordian Knot on this. It is clear that the representative
13 of the relevant victim, or victims, does not object to this material being handed over
14 in full form, so without redactions, and if that is the case, unless there are particular
15 objections from the VPRS, this needs to be effected as quickly as possible do as to ensure
16 that the Defence can conduct their questioning next week.

17 Mr Keta, is there anything you want to add?

18 MR KETA: (Interpretation) Thank you very much, Mr President. Indeed, there
19 was a problem related to the fact that my filing of 14 August 2009, in which I applied
20 for permanent redactions, we do not have a decision on that yet. In light of that, I
21 received messages from the Defence asking me to disclose those materials and so I came
22 up against a difficulty. I could not disclose certain documents without them being
23 unredacted, so on 20 November I disclosed to them some of the documents with the redactions
24 that I deemed to be necessary and so I cannot respond to the application of the Defence
25 asking us to disclose fully unredacted documents when we do not yet have the decision

1 of the Chamber.

2 PRESIDING JUDGE FULFORD: Well, first of all I am very troubled that it is said
3 that there is a filing dating back as far as August of last year that hasn't been dealt
4 with by the Chamber. I repeat I am completely unaware that there is an application that
5 hasn't been dealt with and I will have this investigated immediately. If this is the
6 case, it would perhaps have been helpful gently to have reminded the Chamber at some
7 stage that amongst the blizzard of papers that are circulated in this case that one had
8 possibly been overlooked, but there we are.

9 I am afraid I don't see the problem in relation to the position today. Irrespective
10 of whether or not there has been an application in the past, if the position today is
11 that this material can be handed over in unredacted -- in non-redacted form, I don't
12 see how any other application need stand in the way of that.

13 Now, Mr Keta, is the position that you are today content to provide this material
14 to the Defence without redactions?

15 MR KETA: (Interpretation) I will transmit not only to the Defence but all the
16 parties and participants the documents, while maintaining the necessary redactions pending
17 your decision on my filing of ICC-01/04-01/06-2077, confidential and *ex parte*. So, I
18 can give you the references of the filing. So I am going to disclose not only to the
19 Defence, but to all the other parties and participants the semi-redacted versions of
20 those materials.

21 PRESIDING JUDGE FULFORD: Well, Mr Biju-Duval, going back to your introductory
22 submissions, where you said that there were no difficulties with those non-redacted
23 documents being disclosed to you, that doesn't appear to be correct. As I understand
24 it, what is being suggested is that you are going to get redacted versions.

25 MR BIJU-DUVAL: (Interpretation) I think that in principle we are in agreement.

1 The Defence accepts without any difficulty that the current residence of the
2 victim, or his current phone number and information such as those should be and remain
3 permanently redacted. I think Mr Keta can confirm that. But with regard to the rest,
4 I believe that what I understood was that the redactions could be lifted. So, I believe
5 that in reality we agree that the redactions that Mr Keta wants to maintain are very
6 limited specifically to current residence and maybe others that he may want to specify.

7 PRESIDING JUDGE FULFORD: Let us -- I go back to what I said earlier. There
8 clearly needs to be a three-way conversation to make sure that these documents, in terms
9 of the substantive information, is given to the Defence today. If there are a few items
10 such as current addresses or current telephone numbers that in the view of Mr Keta and
11 possibly the VPRS should not be distributed, that is unlikely to cause any difficulties.
12 So let's look at the substance, rather than the technicalities of this, and I invite
13 the three interested parties, participants or representatives of the Registry, to sit
14 down together as soon as we have risen to make sure that the substance of this is distributed
15 immediately. If there are any outstanding problems, please bring them to our attention
16 first thing on Tuesday morning.

17 MR SACHDEVA: Excuse me, Mr President, just to note that the Prosecution would
18 echo the request of the Defence in that we would also like to receive the unredacted
19 versions of the materials and the documents contained therein.

20 PRESIDING JUDGE FULFORD: Have you spoken to Mr Keta about this?

21 MR SACHDEVA: We have, yes.

22 PRESIDING JUDGE FULFORD: Good. Any difficulties, as you understand it, with
23 you receiving them?

24 MR SACHDEVA: At this stage no, but just --

25 PRESIDING JUDGE FULFORD: Good. All right. Join in the discussions then, please.

1 Thank you.

2 Right. Mr Keta, you have kindly provided us with the documents which at least
3 one of the victims wishes to use as an aide-memoire. I think these are the redacted versions
4 of the documents. I may be wrong, but on a quick look through them they appear to be.
5 If they are the redacted versions, it would seem that the best way of proceeding would
6 be for them to be distributed to the Prosecution and the Defence and any other interested
7 participating victims so that submissions can be made, if necessary, on whether or not
8 it is appropriate for them to be used as documents to assist the witness when he gives
9 evidence next week. Is there any difficulties with that approach being taken?

10 MR KETA: (Interpretation) Yes, Mr President, I would like to suggest that all
11 those documents be handed to my client and it is up to him to decide on what would be
12 necessary for him. The documents relate to three of his clients participating in the
13 process and he would like to refresh his memory. That is all he told me. So, he sent
14 me a mail asking me what he wanted and in the DRC he was unable to download the documents.
15 So I believe I downloaded what he asked, but it is up to him to decide which of the documents
16 he wishes to use.

17 PRESIDING JUDGE FULFORD: I had misunderstood. Certainly, let him be provided
18 with the documents at the earliest possible opportunity. He can obviously refresh his
19 memory before giving evidence from them and can you please explain -- can you have explained
20 to him or explain to him yourself when you see him that if he wants to rely -- to have
21 any of the documents with him when he gives evidence could he please identify precisely
22 which documents he wishes to bring into the witness box so that we can ensure that that
23 is an appropriate course to be followed. But in the first instance he can of course see
24 these documents before coming into court. Does that deal with the point for the time
25 being, Mr Keta?

1 MR KETA: (Interpretation) Yes, Mr President.

2 PRESIDING JUDGE FULFORD: Maître Mabilille?

3 MR BIJU-DUVAL: (Interpretation) I am sorry, Mr President, maybe my
4 intervention is inappropriate, but we really do not know which specific documents are
5 being referred to. Maybe this witness is going to be provided, or this victim is going
6 to be provided with statements of other witnesses. We have no objection to his refreshing
7 his memory with his own statements, but there would be serious difficulties if he had
8 to refresh his memory with the use of other witnesses, even if those witnesses are close
9 to him, and particularly if that is the case.

10 PRESIDING JUDGE FULFORD: That must be right, Mr Biju-Duval. I have made the
11 assumption, Mr Keta, that the documents that this individual wishes to rely on are his
12 documents, i.e. documents that have been compiled by himself rather than them being for
13 instance applications to participate compiled by other witnesses, or other victims. So
14 it needs to be clear that, for instance, if he is to be shown an application to participate,
15 the application to participate is his application, rather than someone else's; is that
16 clear?

17 MR KETA: (Interpretation) The three documents are actually related to children
18 that he was representing; he was their guardian. I asked him the question and he simply
19 told me that it was important for him to have those documents to testify comfortably
20 so those were not his own personal documents.

21 PRESIDING JUDGE FULFORD: Who compiled the documents, Mr Keta?

22 MR KETA: (Interpretation) Those were documents, or rather applications for
23 participation from those three victims and other documents annexed to it, so these documents
24 went through VPRS. With regard to the substance of the documents, I think these were
25 resource persons that took the statements of the victims; it was not him personally.

1 (The Trial Chamber confers)

2 PRESIDING JUDGE FULFORD: Mr Biju-Duval, if at the moment we limited it to any
3 documents prepared by this participating victim, would you have any objections to him
4 having sight of those before he comes to give evidence?

5 MR BIJU-DUVAL: (Interpretation) For things to be really clear, let me state
6 that we have no objection for this witness to consult his own application to participate
7 as a victim, as well as the additional information that he provided and his own personal
8 statements. We have no objection to that.

9 The Chamber is aware that the two other witnesses are linked or related to this
10 one and what we would like to avoid, and that was even the reason why we asked for their
11 separation, we would like to avoid a situation in which this witness is able to consult
12 the applications for participation and other information related to other witnesses,
13 even if for legal reasons he at one time could have signed those documents as legal
14 representative, for example.

15 (The Trial Chamber confers)

16 PRESIDING JUDGE FULFORD: Mr Keta, at the moment - and we are grateful to you,
17 Mr Biju-Duval, that is a very helpful intervention - at the moment it seems to us that
18 the memory-refreshing documents should be restricted in the way that Mr Biju-Duval has
19 described. Is there anything that you would wish to say about it?

20 MR KETA: (Interpretation) In light of the discussions, I do not have much else
21 to say. I defer to the Chamber.

22 PRESIDING JUDGE FULFORD: Thank you. Then it is probably fortunate, going back
23 to your original submission, that he was unable to download the documents in the DRC
24 because, otherwise, he would in fact have had access to them.

25 Right. Our order, therefore, is that there can be memory-refreshing documents,

1 but they are to be restricted to those described by Mr Biju-Duval in his closing submission
2 a moment ago, which I will not attempt to summarise.

3 On mature reflection, I think we will leave discussions about agenda until Tuesday.
4 The Bench wants to reflect on it carefully, and I imagine that the parties and the participants
5 will as well, save to say that we will sit - I think it is marked as being Tuesday of
6 next week. Maître Mabilille?

7 MS MABILLE: (Interpretation) I am sorry, but I simply wanted to tell the Chamber
8 that we really do not like having *ex partes*, but we will really need an *ex parte* Prosecution
9 and VWU to discuss with the Chamber the issues that we have already discussed in the
10 Defence and Prosecution *ex partes* only in December. I am going to send an email to the
11 Chamber to elaborate on the reasons for that *ex parte*, but for purposes of your own
12 organisation I simply want to inform you that we will really need to discuss with the
13 Chamber on problems that really have to be resolved. And regarding the schedule, we will
14 need to have that discussion before the Defence witnesses are called to appear, because
15 those discussions actually concern the Defence witnesses. Thank you, Mr President.

16 PRESIDING JUDGE FULFORD: Do I understand you to say, therefore, that you don't
17 want that *ex parte* today, but at some convenient time next week once you have sent an
18 email?

19 MS MABILLE: (Interpretation) Absolutely, Mr President. It is not urgent.
20 The only urgency is before the date of the arrival of our own witnesses.

21 PRESIDING JUDGE FULFORD: Obviously, the fuller the information that we receive
22 in advance the better. So, if the problems could be fully described in an email communication,
23 that would be very helpful. Thank you very much.

24 Thank you all for your assistance. We will meet again then on Tuesday of next
25 week and I see from the agenda that it says 9.30 so, 9.30 it is.

1 (The hearing ends at 11.55 a.m.)