

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 Thursday, June 17, 2010
9 (The hearing starts at 9.32 a.m.)
10 *(Closed session) Reclassified as Open session
11 THE COURT USHER: All rise. The International
12 Criminal Court is now in session. Please be seated.
13 PRESIDING JUDGE FULFORD: Good morning. Witness,
14 please.
15 (The witness enters the courtroom)
16 WITNESS: DRC-OTP-WWW-0581 (On former oath)
17 (The witness answers through interpreter)
18 PRESIDING JUDGE FULFORD: Good morning, sir.
19 THE WITNESS: Good morning, Mr President.
20 MS SAMSON: Let's try public, please, your Honour.
21 PRESIDING JUDGE FULFORD: Public session, please.
22 (Open session at 9.34 a.m.)
23 THE COURT OFFICER: We are in open session,
24 Mr President.
25 PRESIDING JUDGE FULFORD: Yes, Ms Samson.

1 MS SAMSON: Thank you.

2 QUESTIONED BY MS SAMSON: (Continuing)

3 Q. Sir, have you had a chance to review your records
4 overnight?

5 A. Yes, indeed, I did have the opportunity to look over
6 my documents.

7 Q. And can you tell the Court the month and year in which
8 Claude Ndjango arrived in Kinshasa?

9 A. Claude Ndjango arrived in Kinshasa at the beginning of
10 March 2008.

11 Q. And are you able to say the month and year in which he
12 left Kinshasa?

13 A. He left Kinshasa towards the end of the month of July
14 of 2008.

15 Q. I would like to show you one document that you were
16 shown during your examination by the Defence.

17 I wonder whether there is a binder still available for
18 the witness.

19 PRESIDING JUDGE FULFORD: There must be. Usher, where
20 is the binder please? Thank you. To the witness.

21 MS SAMSON:

22 Q. Sir, may I ask you, please, to turn to tab 17 in the
23 binder. And may I ask you, please, to go to the very last line
24 on the first page of the document and, for the sake of the
25 record, the document I am referring to is DRC-D01-0003-2083. I

1 believe it's already been assigned an EVD number. So, sir, in
2 the very last line, can you see the words in French, "Fait à"
3 and then "BIA" and then a date, "16/09/2008". Do you see that?

4 A. Yes, I do indeed see that.

5 Q. The words "BIA," in your experience, do you know what
6 that place refers to?

7 A. The word "BIA" refers to Bunia. It is an abbreviation
8 of the town of Bunia.

9 Q. And if the card was issued in September 2008 and
10 Claude Ndjango travelled to Kinshasa earlier in March 2008, do
11 you think this is the card that you looked at, or perhaps it was
12 a different card?

13 A. It is difficult for me to respond to that question
14 precisely. The card that I saw in Kinshasa when Mr Claude
15 Ndjango came to Kinshasa, it bore the name Claude Ndjango Arabe,
16 as I said, but I do not recall and I cannot say precisely -- I
17 cannot say precisely with reference to the issuance of the card
18 itself. I cannot recall, but I do remember the identity of the
19 individual, as I said, Ndjango Arabe; at least that was written
20 on the document that he presented to me.

21 Q. And you've indicated that Claude Ndjango returned to
22 Kin -- to Bunia, pardon me, in end of July 2008. In September
23 2008, was he receiving assistance from the Court?

24 A. At that moment in time I believe not because, when I
25 met him myself at the beginning of the month of August, I was in

1 Beni during that period. I believe that it was precisely on
2 2 August that I met him whilst he was on his return journey; his
3 return journey to Bunia, that is. I met him on 2 August, if I'm
4 not mistaken, and I handed to him a certain sum of money that I
5 had been instructed to give to him. The sum of money is what we
6 refer to as the SIT fund, which is -- or the SID fund, which is
7 a sum of money that we give to witnesses or to people who have
8 been under our auspices and who we are separating. This money
9 is given to the individual to enable them to return to their
10 previous life and to organise their life. So, subsequent to
11 that meeting, I do not remember whether Mr Ndjango was still
12 under our care, that is to say under the care of the OTP, so all
13 forms of collaboration had ceased and at the time any form of
14 collaboration had ceased. He was no longer under the care of
15 the OTP.

16 Q. Following this meeting in early August, on 2 August,
17 did you yourself meet with Claude Ndjango to provide him with
18 any further assistance?

19 A. The answer to that, Madam, is no. After that date I
20 no longer -- or, I did not meet him again. I do not recall
21 having met him again. I do not recollect that. As I just said
22 to you, from that date on all forms of collaboration -- well,
23 he'd gone home. We no longer had any interactions with him.
24 The final decision had been taken and I do not recall having
25 entered into contact with him after that date.

1 Q. Turning to a different topic now, sir. You indicated
2 in your responses to questioning by the Defence that the
3 interviews that were conducted in November and December 2007
4 were conducted in a second interview location for reasons of
5 discretion. Can you explain to the Court how, in your
6 experience, discretion is important to the investigations that
7 are conducted?

8 A. In the light of my experience, when investigators
9 arrive in a location in order to fulfil their mission, that is
10 to say meet the witnesses and listen to what they have to say,
11 it is entirely in keeping with the situation that the work be
12 undertaken in an environment where people's comings and goings
13 do not draw attention to what's going on. Now, I was in Bunia,
14 if I can name the town, and it was difficult for us to establish
15 such conditions there.

16 Now, according to my experience, I believe that the
17 impression that I had had been noted by other people as well:
18 Everyone knows everybody. Everyone is aware of what's going on.
19 People talk and, when you arrive in a town of that size, it's
20 small, everyone knows that you are there. Now, the impression
21 that I have of that town, having gone there myself, is that
22 everyone knows what's going on.

23 So this other town, Madam Samson, that you are
24 referring to, I believe that it is a town where people who went
25 there were not known to others. Our colleagues who came there

1 would come to spend a brief period of time there and they were
2 not very well known there, they weren't very noticeable and, if
3 when we needed to travel around in our vehicles in that town,
4 our vehicles were not known to others. So that second town was
5 far more discreet and it guaranteed more discretion for our --
6 the unfolding of our tasks. We did not really draw so much
7 attention to ourselves there and we could work in peace, and I
8 believe that if my superiors at the office chose that town, that
9 was for the very -- they chose it for that very reason.

10 Q. And to your knowledge, what role, if any, did this --
11 did the discretion play in the decision to have you introduce
12 yourself as a member of an NGO rather than as a member of the
13 ICC?

14 A. I have not quite grasped your question, the beginning
15 of it, Mrs Samson. Could you please repeat your question?

16 Q. Certainly. What role, if any, did discretion have in
17 the decision to have you introduce yourself as a member of an
18 NGO to the children rather than as a member of the ICC?

19 A. As I said previously, in Bunia, whenever we arrived
20 there - you know, we came and went on numerous occasions - I
21 believe that it is possible that people already knew who we were
22 in that town. And it is possible - I cannot confirm this, but
23 it is possible - that, when we introduced ourselves to the
24 children as members of an NGO, this was with a view to retaining
25 this level of discretion and were we to reveal -- or the action

1 of revealing who we were was to be done at a later stage, as I
2 said in my previous statements.

3 MS SAMSON: Thank you very much, sir.

4 Thank you very much, Mr President. I have no further
5 questions.

6 PRESIDING JUDGE FULFORD: Thank you very much,
7 Ms Samson.

8 Anything else, Maître Mabilille?

9 MS MABILLE: (Interpretation) Yes, indeed, and I
10 thank you, Mr President.

11 QUESTIONED BY MS MABILLE: (Interpretation)

12 Q. Good morning, Witness.

13 A. Good morning, counsel.

14 Q. I would like to hark back to the subject of the 11
15 children that you met in Bunia and I would like to put a
16 question to you, a very specific question.

17 Can you tell us -- of those 11 children, can you tell
18 us which ones went to Beni? And, if you don't mind, I would
19 like to go through these children one-by-one and ask you whether
20 they went to Beni or not.

21 PRESIDING JUDGE FULFORD: But beforehand,
22 Maître Mabilille. Yes, Ms Samson.

23 MS SAMSON: Thank you, your Honour. It's simply that
24 we're in, of course, public session and the, in my submission,
25 totality of the question ought to be redacted and perhaps we

1 should move into private session.

2 PRESIDING JUDGE FULFORD: Do you agree,
3 Maître Mabilille?

4 MS MABILLE: (Interpretation) I do apologise. I had
5 not seen the little red light.

6 PRESIDING JUDGE FULFORD: Redaction for
7 Maître Mabilille's question. Private session, please.

8 *(Private session at 9.51 a.m.) Reclassified as Open session

9 THE COURT OFFICER: We are in private session,
10 Mr President.

11 PRESIDING JUDGE FULFORD: Yes.

12 MS MABILLE: (Interpretation)

13 Q. Mr Witness, there are two names that we mentioned
14 yesterday that I believe are not ambiguous in any way, (Redacted)
15 (Redacted) and (Redacted), who went to Beni; did they
16 not?

17 A. Yes, indeed.

18 Q. So I would like to now go through the other names in
19 order to ascertain which of those other names or those other
20 individuals also went to Beni, with the exception, of course, of
21 those two children whom we have already mentioned. The first
22 name is (Redacted)

23 THE INTERPRETER: Mr President, spelling is too fast.

24 PRESIDING JUDGE FULFORD: Now, Maître Mabilille, I'm
25 going to ask you to do that again slower. You've caused panic

1 in the interpretation booths.

2 MS MABILLE: (Interpretation) I shall repeat.

3 Q. The first name is (Redacted), and then
4 (Redacted). Do you know whether this individual went to
5 Beni or not?

6 A. Yes, counsel, I have understood your question. I was
7 going to suggest something to you, if you don't mind. I shall
8 give you the names of the people I remember off the top of my
9 head, those we selected and those that we entered into contact
10 with subsequently, because I remember them, I remember their
11 names, and then you can take them off your list and you will
12 then give me the names -- the remaining names, if that's all
13 right with you.

14 Q. No problem at all. The aim is just to identify those
15 who went to Beni and those who did not, so there's no problem
16 with doing it in such a manner, and I thank you.

17 PRESIDING JUDGE FULFORD: Thank you, sir. Please do
18 so, not too quickly, because the interpreters have got to hear
19 the names. So can you speak them slowly and clearly. Thank
20 you.

21 THE WITNESS: I thank you very much, Mr President.

22 So we have 297, who left and who was selected; that is
23 (Redacted), whom we know and whom we have already mentioned.
24 Then we have 213, whose name you gave at an earlier stage;
25 that's (Redacted). Then we have 294, whose name is

1 (Redacted); I remember that he was selected. Those are the
2 three names I remember because we had selected them and we
3 entered into contact with them subsequently. There's no problem
4 there.

5 Apart from those three names, there is also another
6 child who introduced himself as being (Redacted) at a later
7 stage of 297 - (Redacted)
8 (Redacted)
9 (Redacted). (Redacted)
10 (Redacted). As I said in my
11 statement, to the best of my recollection, I believe that he
12 introduced himself to me once the screening had been completed
13 and once he'd arrived in that other town. As I said, I wasn't
14 quite sure. I was hesitating between two names. It was, I
15 think, (Redacted). I might have forgotten, but I
16 believe that it was between those two names.

17 So those are four individuals straight up, and maybe
18 counsel could give me the two other names and then I shall see
19 whether I can remember. It is quite a difficult exercise for
20 me.

21 MS MABILLE: (Interpretation)

22 Q. Thank you. Well, if we calculate from what you've
23 just told us, six names are remaining. I am going to cite them.

24 Now, do you remember (Redacted). I shall spell:
25 (Redacted).

1 A. I remember this child only too well, having screened
2 him, but I cannot tell you for sure whether he was -- whether he
3 went to this other town to meet the investigators but I believe
4 that, with the names that I gave you at an earlier stage, we
5 have already established four -- the name of four individuals
6 who went to that other town. I'm very sorry, I really can't
7 tell you precisely whether he left or not. I really can't say.
8 I might be wrong. Maybe if we can continue with our list.

9 Q. In respect to the name that you're hesitating about,
10 we had two names, (Redacted), and (Redacted)
11 (Redacted), so we have understood that you
12 are hesitating between those two names, but is there -- of those
13 two names that I have just given you, did one of those two
14 individuals go to Beni?

15 A. Indeed, this is what I'm saying. I would have liked
16 for you to have continued with your list with the other names
17 that you have and in that way I might be able to remember
18 exactly whom.

19 PRESIDING JUDGE FULFORD: Can we do that,
20 Maître Mabilille, the full list?

21 MS MABILILLE: (Interpretation) Yes, the full list,
22 your Honour.

23 Q. The next name is (Redacted).

24 A. That name, I don't think so. I don't think that
25 person went to our town -- to the other town, as well as I can

1 remember.

2 Q. The next one (Redacted)

3 (Redacted).

4 A. To the best of my recollection, that person as well
5 was not on the list of the people who went, to the best of my
6 recollection, counsel.

7 Q. The next name is (Redacted)

8 (Redacted).

9 A. No, that person did not go to the other town.

10 Q. The next name is (Redacted)

11 (Redacted)

12 A. Yes, I am hesitating but, to the best of my
13 recollection, no. To the best of my recollection, no. I am
14 hesitating somewhat but, to the best of my recollection, no.

15 Q. The next name is (Redacted)

16 (Redacted)

17 A. That person I think -- I think he was part of the
18 trip. I think, if I remember correctly. I think so.

19 Q. The next name is (Redacted).

20 A. No, I don't think so. No.

21 PRESIDING JUDGE FULFORD: Is that the end of the list,
22 Maître Mabilille?

23 MS MABILLE: (Interpretation) Absolutely, your
24 Honour.

25 PRESIDING JUDGE FULFORD: Sir, you've expressed some

1 hesitation in relation to some of those names. Would you have
2 records somewhere which would confirm one way or the other the
3 answer in relation to which you are unsure?

4 THE WITNESS: Yes, I think that the old emails that
5 date back to that period of time, if they could be found, could
6 shed light on the matter, I do think so, but I don't remember.
7 I'd have to look at the dates, but the old emails may - may -
8 provide us with some information on that.

9 PRESIDING JUDGE FULFORD: What I'm going to ask to
10 happen, therefore, is that you are provided with the relevant
11 part of the transcript of today where Maître Mabilille has given
12 you the list of the names and I'm going to ask you, please, at a
13 convenient moment, either today or tomorrow, after you've
14 finished your evidence, to have a look through the emails and,
15 if there's any information within them that helps on the
16 question, can you please give it to counsel for the Prosecution,
17 who will then make a decision as to whether or not it should be
18 disclosed to the Defence. Thank you very much.

19 Yes, Maître Mabilille. Please continue.

20 THE WITNESS: Thank you, your Honour.

21 MS MABILILLE: (Interpretation)

22 Q. Witness, you spoke to us a few moments ago about what
23 you called a SIT fund or a SID fund. Could you tell us what the
24 amount of money was? Was there some kind of rule? Do you know
25 that?

1 A. The amount that was provided at that time early in
2 August 2008 was \$109. This amount of money, as I explained
3 earlier, in relation to a number of expenditures that we had,
4 I'd received instructions from headquarters from the desk
5 officer to provide this money to the person. There are rules,
6 of course, for setting the various amounts that may be termed as
7 SID fund, but I think that the desk officer is in a better
8 position than I to reply. He asked me to provide that exact
9 amount to the person as a SID fund. I was going through that
10 area and so I did provide that money to the person.

11 Q. I've understood that the desk officer was the person
12 who could give us all the information on this point, but do you
13 know at least whether the amount was not the same for each
14 witness? Were there variations in the amount? Were there
15 parameters, even though you're not aware of these parameters?

16 A. I don't know what the parameters were for setting the
17 amounts. Once again, I can't tell you with certainty because I
18 don't see -- I don't remember because, as I was saying, there
19 are many of us in this unit carrying out the orders that come
20 from our higher-ups. As far as I'm concerned, to the best of my
21 recollection, it was just one time, only once did I have to give
22 this amount of money as SID fund to someone, and so I couldn't
23 tell you whether the sum was the same each time. As far as I'm
24 concerned, I believe that was the only time I had to hand over
25 such an amount of money. Well, there you have it. That's all I

1 know.

2 Q. Witness, for a moment I'd like to hark back to the
3 witnesses who were heard by you and who were not sent to Beni.
4 Do you know whether they were contacted at a later date by
5 someone from the OTP after they were not chosen to go to Beni?

6 A. As far as I'm concerned, the people who were not
7 chosen, there was no question of contacting them again. As far
8 as I'm concerned, I was not in contact with them, but if you are
9 asking me whether other people or other colleagues from the OTP
10 contacted them later, I couldn't tell you but, to the best of my
11 knowledge, I don't think so. To the best of my knowledge, I
12 don't think so. Myself, I did not do so.

13 Q. Just to conclude on this particular point, the
14 children who were not in Beni. Now, since you met with them as
15 a person from an NGO, they never knew that they might have been
16 chosen to work for the -- correction, to give testimony before
17 the International Criminal Court?

18 A. The answer to this question, counsel, seems quite
19 clear. At our level we did not tell them that we were from the
20 International Criminal Court, so they did not know who we were.
21 So, really, the question is irrelevant.

22 Q. Thank you. Two last questions. Is it correct that in
23 Bunia -- well, Bunia being a town of 300,000 inhabitants and
24 many of the tribes are represented there, one could say that it
25 is a cosmopolitan town. Would you be in agreement with that

1 statement?

2 A. A cosmopolitan town? Well, I don't know. Yes, it
3 could be described in that way, but really I have no objective
4 way of stating that. It could be said that statement could be
5 made, that it is cosmopolitan. Yes, I suppose that could be
6 said.

7 Q. And with regard to Beni, to the best of your
8 knowledge, is it not a town where there is only one ethnic
9 group?

10 A. Once again, it is difficult for me to say so.
11 Certainly, there are several members from other tribes in the
12 town but it is difficult to say with certainty whether a
13 particular group forms the majority or not. There's no -- I
14 really have no objective element to say so. I haven't seen any
15 studies about this, so I really couldn't tell you with any
16 certainty. One can speculate, but it's difficult to say
17 anything of that ilk with certainty. I would say, yes, there
18 are several tribes in that town, which is normal.

19 Q. To the best of your knowledge, Beni is not a town with
20 one particular group that forms the majority, the Nande group?

21 A. Yes, there is -- yes, it is true that that tribe is
22 found there. It is their town. It is possible, yes, they do
23 form the majority. Many people from that tribe are to be found
24 in that town.

25 MS MABILLE: (Interpretation) Just a moment, with

1 your indulgence, your Honour.

2 I have concluded, your Honour.

3 PRESIDING JUDGE FULFORD: Sir, thank you very much
4 indeed for your assistance. That now concludes your evidence
5 before this Court. It doesn't need for me to say that it is
6 critical that all relevant witnesses are prepared to come to
7 give evidence so as to enable us to discharge our obligation of
8 finding the truth in this case, and you are therefore thanked by
9 this Court for your assistance and participation.

10 When you leave now, can I ask you please to do the
11 small piece of research that I indicated a little while ago and,
12 if possible, before 4 p.m. tomorrow let Ms Samson know whether
13 or not you've been able to unearth any relevant emails. Thank
14 you very much indeed.

15 Closed session, please.

16 THE WITNESS: Thank you very much, your Honour. Thank
17 you for this opportunity that I've had to speak before this
18 august Bench and to provide my own modest contribution to the
19 determination of the truth. Thank you.

20 *(Closed session at 10.17 a.m.) Reclassified as Open session

21 THE COURT OFFICER: We are in closed session,
22 Mr President.

23 PRESIDING JUDGE FULFORD: Thank you very much. Thank
24 you, usher.

25 (The witness is excused)

1 PRESIDING JUDGE FULFORD: Public session, please.

2 (Open session at 10.18 a.m.)

3 THE COURT OFFICER: We are in open session,

4 Mr President.

5 PRESIDING JUDGE FULFORD: On 14 June 2010, the
6 Registrar filed ex parte, only available to the Registry, its
7 fifth report to Trial Chamber I on victims' applications under
8 Regulation 86(5) of the Regulations of the Court, along with the
9 applications of 15 individuals wishing to participate in the
10 current proceedings. Following this Chamber's decisions of 6
11 May and 16 May 2008, the Registry is ordered to transmit the
12 applications for participation to the Prosecution and the
13 Defence, in confidential redacted form, whereby any information
14 which may lead to the identification of the applicants and their
15 whereabouts have been redacted, no later than Monday, 21 June
16 2010 at 4 p.m.

17 Pursuant to Rule 89(1) of the Rules of Procedure and
18 Evidence and Regulations 34 and 35 of the Regulations of the
19 Court, the Chamber orders the parties to file responses on the
20 15 applications by 4 p.m. on 2 July 2010. The legal
21 representative of the 15 applicants may file any further
22 submissions that he or she deems appropriate by 9 July 2010.

23 The Defence has submitted a second request for
24 admission of documents; document 2484 dated 16 June 2010. This
25 application relates to four documents. Ms Samson, or

1 Mr Sachdeva, can I ask whether as far as you're aware you intend
2 to respond to the application and, if you do, what is the
3 shortest reasonable timetable that we can impose on you?

4 MS SAMSON: Your Honour, we do intend to respond and
5 we propose Monday at 4 p.m.

6 PRESIDING JUDGE FULFORD: Certainly. Thank you very
7 much.

8 Legal representatives?

9 MR SUPRUN: (Interpretation) Your Honour, we too wish
10 to respond to this application and, if possible, within the same
11 time frame as the OTP.

12 MR KETA: (Interpretation) And that holds true for my
13 team as well, your Honour.

14 PRESIDING JUDGE FULFORD: Thank you very much. Then
15 we accept those proposals. They seem realistic to us in the
16 circumstances. Thank you very much, indeed.

17 Maître Mabilille, outstanding is an issue as to whether
18 or not transcripts in relation to Defence Witness 16 can be
19 provided in non-redacted form for the purposes of the interview
20 with intermediary 316. Any difficulties?

21 MS MABILLE: (Interpretation) My colleague,
22 Mr Biju-Duval, will be responding on that point.

23 MR BIJU-DUVAL: (Interpretation) Yes, your Honour,
24 one observation and one concern. The observation is that, to
25 the best of our knowledge, this is the first time that the OTP,

1 as part of the hearing of a witness coming under 55(2), wishes
2 to forward to this witness, or submit to this witness, various
3 aspects of evidence that serve as a foundation for a number of
4 suspicions in his or her regard, so they are basing themselves
5 on 55(2) of the Statute.

6 In actual fact, it's a matter of providing to
7 intermediary 316 the testimony of Defence Witness 16 and
8 Prosecution Witness 15, and this raises a particular issue which
9 of course is of importance not just for this case but generally
10 speaking for the scope of Article 55 because, if the Chamber
11 were to authorise transmission to the witness heard under 55 of
12 items of evidence on which suspicions are based, this would give
13 quite a broad scope to the rights recognised of suspect
14 witnesses.

15 This is not just a procedural detail, but truly this
16 is an issue which will have a direct bearing on the scope - on
17 the consequences - of Article 55 of the Statute, namely the
18 extent of rights -- the rights enjoyed by a witness heard under
19 55, and we do note that this is the first time that the
20 Prosecutor has asked for this opportunity, to the best of our
21 knowledge. So far 55 witnesses were just informed of the
22 existence of possible -- of a suspicion.

23 Now, what is the Defence's position on this matter,
24 which raises an issue relating to the rights of the Defence
25 benefitting an Article 55 witness? In terms of principle --

1 PRESIDING JUDGE FULFORD: Please forgive me
2 interrupting, rude on my part, but to see if I can shorten this.
3 Isn't the essence of the point you're making that under 55(2)(a)
4 all it says is that the individual has a right to be informed
5 that there are grounds to believe? There is nothing within the
6 article that indicates that, as well as being informed of there
7 being grounds, that the evidence backing up the grounds has to
8 be provided to the person in question. Now I think that is, as
9 it were, fairly clear from the article.

10 I had assumed - and Ms Samson will tell me if I'm
11 wrong - that this wasn't really being suggested simply on the
12 basis of Article 55. It was rather to ensure that 316, in
13 advance of giving evidence, was -- is fully aware of what has
14 been said so that he can deal with it; so a more general basis.

15 But before you proceed any further, I'm going to ask
16 Ms Samson whether my understanding is right, or Mr Sachdeva
17 whether my understanding is right or wrong, because I don't want
18 us to deal with this on a limited narrow statutory basis if in
19 fact the Prosecution's proposal is a wider one. So forgive me.

20 Yes, Mr Sachdeva?

21 MR SACHDEVA: Thank you, Mr President. That is,
22 indeed, correct. In addition, I did -- the Prosecution has
23 stated that it is important for the precise allegations to be
24 given to counsel instructed by 316, so counsel can advise 316 if
25 need be during a further interview. If 316 does not retain

1 counsel, then he should also be provided the precise allegations
2 so he can properly answer those questions.

3 And also, in our submission, under Article 54(1) the
4 Prosecution -- it's incumbent upon the Prosecution to know
5 precisely what 316 is going to say in respect of his allegations
6 before he is -- he comes to testify. That is our obligation, in
7 our submission, and therefore we need to know what his response
8 is to the precise allegations that have now been properly
9 ventilated in court and that is why in our submission a further
10 interview is required.

11 PRESIDING JUDGE FULFORD: That's absolutely clear.
12 Thank you.

13 So, Mr Biju-Duval, I just want to make sure that we
14 are not proceeding on a false basis. You are absolutely right
15 that 55 has been mentioned, it's on the table, but it is wider
16 than that. In order for this witness to give meaningful
17 evidence before the Chamber, what the Prosecution wish to do
18 generally speaking is to inform him of the allegations that have
19 been made and the evidence that has been given so that he has
20 got an opportunity of reflecting on them in advance and then
21 reflecting that material in both the evidence that he gives and
22 I anticipate a statement that's taken from him before he gives
23 evidence.

24 Now, if it is put on both bases, Mr Biju-Duval, is
25 there in reality a proper foundation for objecting to this

1 happening?

2 MR BIJU-DUVAL: (Interpretation) Mr President, if you
3 will allow that I paraphrase a famous Irishman, I would say that
4 in terms of the rights of the Defence we have very simple
5 tastes. We are always happy with the very best. That is to say
6 that in respect of the Defence, the rights -- the Defence rights
7 of the witness who is due to testify, yes, we do agree that he
8 should be fully informed of the allegations levelled against
9 him.

10 The position of the Defence is, therefore, that it is
11 not opposed to the fact that his statements be submitted to the
12 witness. We just wanted to draw the Trial Chamber's attention
13 to the fact that this procedure has a more general scope with
14 reference to the interpretation and -- possible interpretation
15 of Article 55.

16 Now, lastly, the Trial Chamber is aware of the fact
17 that Defence Witness 16 raised concerns with regard to
18 Witness 316. The Trial Chamber is also aware of the fact that
19 to date what distinguishes him from Prosecution Witness 15 is
20 that he does not benefit from the protection programme. So, we
21 shall make sure that he is protected with the relevant section
22 and, were it to be necessary, it might be useful for us to
23 revert to the Chamber on the matter so that -- but we will try
24 and deal with this matter with the Witness Protection Unit.
25 This is what the Defence wanted to submit to you with regard to

1 this concern.

2 PRESIDING JUDGE FULFORD: Very helpful, Mr Biju-Duval.

3 Thank you. I think therefore that, having alerted us to a
4 potential problem over the interpretation of Article 55(2) and
5 as it were politely warning the Chamber that we may wish to
6 reflect on the scope of any order that we make under
7 Article 55(2), having done that, you in fact do not resist the
8 Prosecution's application that the transcripts of Witness 16
9 should be shown to 316. Good, I see you nod. Thank you very
10 much indeed.

11 (Trial Chamber confers)

12 PRESIDING JUDGE FULFORD: We are extremely grateful to
13 Mr Biju-Duval for having alerted us to a potential problem that
14 exists as regards the proper ambit of Article 55(2). We
15 consider it to be well-founded that there may be - and I
16 underline at this stage the word "may" - there may be a
17 limitation on the extent of the material that should be provided
18 to an individual in relation to whom there is a belief that he
19 or she has committed a crime.

20 Having had that potential difficulty brought to our
21 attention, there is no need for this Chamber to resolve the
22 matter because the Prosecution's application is brought not only
23 under Article 55(2) but also under Article 54, and freestanding
24 we are of the view that under Article 54 it is right, proper and
25 necessary for intermediary 316 to be shown the non-redacted

1 transcripts of the evidence of Defence Witness 16 so that a full
2 and comprehensive statement can be taken from him and so that
3 he, prior to giving evidence, is aware of the issues that he
4 should address, in part, during the course of his testimony.
5 So, that resolves that matter.

6 (Trial Chamber confers)

7 PRESIDING JUDGE FULFORD: Maître Mabilille, we are aware
8 that you have indicated, as a result of an invitation that I
9 made, that you have indicated that you would wish to enter oral
10 submissions, to make oral submissions in relation to the
11 Prosecution's filing which addresses a number of issues, but
12 including the individual referred to by the name of Cordo. We
13 are not at the moment going to trouble you in relation to that
14 matter. The Chamber wishes to reflect on the filing further.
15 If necessary, we will ask for submissions from you when the
16 Chamber next meets, but it may not be necessary for us to call
17 on you to address the matter. So we're not going to ask for
18 submissions today is the short answer.

19 Now, as I indicated yesterday, the Chamber, for
20 important and unavoidable reasons, is not able to sit again
21 until 9.30 on Thursday of next week. Apart from an ex parte
22 hearing which we are about to commence requested by the Defence,
23 is there anything else in open session that either the
24 Prosecution, the Defence or the participating victims wish to
25 raise with us at this point in time?

1 Ms Samson, I see you nod.

2 MS SAMSON: Thank you, Mr President. It's -- the
3 Prosecution wishes simply to provide an update to the Chamber in
4 relation to its decision 2471. It's a decision in which the
5 Chamber instructed the Prosecution to provide transcripts of
6 certain testimonies that took place in this case to the Defence
7 team in the Katanga and Ngudjolo case and, of the four
8 transcripts that have been ordered to be disclosed without
9 redactions or with limited redactions, two will be disclosed
10 without redactions; two will be disclosed with the same
11 redactions as had been disclosed previously.

12 So, for the moment, we in fact won't be re-disclosing
13 those two. We will be making an application to the Chamber for
14 authorisation for those redactions and this week we're seizing
15 Trial Chamber II so that the same conditions of disclosure can
16 take place within that Chamber and we anticipate that the two
17 fully unredacted transcripts will be disclosed before Friday in
18 accordance with the decision.

19 PRESIDING JUDGE FULFORD: Thank you very much,
20 Ms Samson. As you will be aware, Trial Chamber II is keen on
21 that process being effected as quickly as possible, and I'm sure
22 you've dealt with it as quickly as you have been able to. But
23 thank you very much indeed.

24 While you're on your feet, can I ask you whether we
25 have managed to deal with disclosure of the corrected version of

1 the table indicating contacts between intermediaries and
2 witnesses?

3 MS SAMSON: The short answer is no, it hasn't been
4 disclosed as yet. Mr Sachdeva can provide some more details to
5 the Chamber.

6 PRESIDING JUDGE FULFORD: Thank you.

7 MR SACHDEVA: Thank you, Mr President. We have had
8 inter partes discussions and the Prosecution is currently
9 working on updating the schedule. As submitted last week, we
10 had not initially looked through all the statements and
11 testimony which, in our submission, is in the possession of the
12 Defence to glean further contacts, but we are now conducting
13 that exercise. It is a huge resource-intensive exercise and in
14 our inter partes discussions we have attempted to suggest
15 Tuesday morning as a deadline for the submission of an updated
16 schedule.

17 However, work is carrying on at the moment and perhaps
18 it may be extended but, in our submission, we need to be as
19 exhaustive as possible to do this review. But I do stress that
20 the Defence does have this information. They have them in the
21 statements, they have them in the evidence, and we feel that we
22 are conducting in a sense an exercise that the Defence can do
23 themselves.

24 Having said that, we are working on the table, but I
25 just make the point that if Tuesday morning is not -- if we do

1 not submit the form by Tuesday morning, we would ask for a
2 further extension of that deadline.

3 And one further point, Mr President. We have
4 prioritised the contacts between the intermediaries and the
5 contacts between the intermediaries and trial witnesses. If we
6 were to embark on an exercise of contacts between the
7 intermediaries and Rule 77 and 67(2) witnesses, that would take
8 a further one to two weeks, if not more.

9 PRESIDING JUDGE FULFORD: Mr Sachdeva, we trust you,
10 of course, implicitly to undertake this work as speedily as you
11 can. We are extremely reluctant to micromanage this from the
12 Bench. We leave it to inter partes discussions. If particular
13 difficulties arise, please alert us to them if it is felt that
14 we can assist.

15 MR SACHDEVA: Thank you, Mr President.

16 PRESIDING JUDGE FULFORD: Thank you.

17 MR SACHDEVA: I do have one more application --

18 PRESIDING JUDGE FULFORD: Certainly.

19 MR SACHDEVA: -- with your leave. Of course, this
20 depends on the ruling in respect of witnesses we had asked to be
21 called for the abuse of process and intermediaries. However, if
22 Witness 38 is permitted to testify - and we have suggested via
23 video link - we would make an application pursuant to Rule 68
24 for his statement to be tendered in evidence in lieu of an
25 examination-in-chief, perhaps reading out a paragraph or two as

1 was done with respect to Witness 293 and Witness 43, and of
2 course the witness is available for cross-examination. In our
3 submission, that would save valuable court time.

4 PRESIDING JUDGE FULFORD: Now, the statement is not
5 the original statement, but a recent statement?

6 MR SACHDEVA: Indeed, it is a statement that was taken
7 in September last year, specifically in request -- in relation
8 to 316.

9 PRESIDING JUDGE FULFORD: Right. So not the
10 "original" original statement taken from the witness, but one
11 designed to address the particular issue?

12 MR SACHDEVA: Precisely.

13 PRESIDING JUDGE FULFORD: Right. I'll ask
14 Maître Mabilie to respond to that in a moment but, Mr Sachdeva,
15 again, whilst we are addressing the issue of witnesses, you have
16 indicated that Witness 551 is now gone, I think.

17 MR SACHDEVA: That's right, Mr President.

18 PRESIDING JUDGE FULFORD: 555 still remains as a
19 proposed witness. I see you nod. 496, as I understand it, the
20 parties have agreed to the admission of 496's statement and
21 ditto for 497; is that correct?

22 MR SACHDEVA: That's indeed correct. That's our
23 understanding at least, yes.

24 PRESIDING JUDGE FULFORD: Then I think, Mr Sachdeva,
25 that covers, doesn't it -- 555 I have just dealt with; 496 I

1 have just dealt with. I'm just looking back through your
2 application. 38 you've just mentioned.

3 In terms of those that you have raised in your
4 application, the only others are 316 and 321 in relation to whom
5 there is, as I understand it, absolutely no dispute; 582 and
6 583, who again I'm sure the Defence positively wish to be
7 called; 581, who has just given evidence. Well, I strongly
8 suspect that apart from possibly the video link issue, there
9 really isn't any dispute here, Mr Sachdeva.

10 MR SACHDEVA: I would hope not, at least in respect of
11 the witnesses that we have identified. We would make the point,
12 however, given the ruling your Honours have made yesterday in
13 respect of the scope of the abuse of process questioning and
14 application, it may be -- and I am not saying that we have a
15 definite decision. It may be that the witnesses may be extended
16 in terms of the abuse of process and intermediaries.

17 PRESIDING JUDGE FULFORD: If that's a proper
18 consequence of the approach we've taken, Mr Sachdeva, so be it.

19 MR SACHDEVA: Thank you.

20 PRESIDING JUDGE FULFORD: Thank you very much.

21 Maître Mabilille, I suspect - and this is one of the
22 reasons why the Chamber wanted to reflect on the Prosecution's
23 Cordo submission as it were - that most of it is in fact agreed
24 inter partes for the reasons that I have just identified with
25 Mr Sachdeva, putting the Cordo issue to one side.

1 I think the only outstanding substantive issue is
2 whether or not you agree (a) that Witness 38 should give
3 evidence via a video link and (b) that his September statement
4 of last year should form his evidence in-chief with further
5 questions being permissible thereafter. Any response?

6 MS MABILLE: (Interpretation) Yes, Mr President,
7 Jean-Marie Biju-Duval will respond to that question.

8 MR BIJU-DUVAL: (Interpretation) Yes, Mr President.
9 With regard to Witness 38, we are not opposed to being heard
10 over video link, of course. However, we are opposed to the fact
11 that his statement, his written statement, being tendered into
12 evidence is actually a substitution for the evidence in-chief.

13 Now, we would like to call upon Rule 68, which
14 provides for an exception that we think should be respected
15 here; that is to say the principle of the oral testimony being
16 heard before the Trial Chamber in addition or as part of the
17 examination in-chief. We believe that this should be respected
18 because this witness will be giving evidence on a subject that
19 is particularly sensitive, particularly sensitive.

20 We are not saying that a witness that we heard a few
21 months ago now -- the subject here is quite sensitive and so for
22 that reason we believe that the fundamental principle of hearing
23 the witness orally should be respected. So we are opposing, or
24 voicing our opposition, to the rule.

25 Now, with regard to the other witnesses, Witness 555,

1 for example, the Defence today is opposed to him testifying
2 quite simply because we know absolutely nothing about either his
3 identity or the possible contents of his testimony or substance
4 thereof. What is more, the brief items of information we have
5 received with regard to his possible testimony is that he might
6 be providing us with general information as to the existence of
7 a climate of intimidation. We think this is of extremely
8 limited relevance and probative value with respect to specific
9 allegations. So --

10 THE INTERPRETER: Interruption.

11 PRESIDING JUDGE FULFORD: I take it, therefore, that
12 disclosure of the statement taken in April has not yet taken
13 place. Is that right, Mr Sachdeva?

14 MR SACHDEVA: That is right. However, we can disclose
15 the statement today or tomorrow. And the witness, if leave is
16 granted, is supposed to testify on 28 June, so in our submission
17 that provides enough time for the Defence to prepare.

18 PRESIDING JUDGE FULFORD: Mr Biju-Duval, I think we'll
19 adjourn this objection. I think, as I said on an earlier
20 occasion, it's much better if you make your submissions based on
21 knowing exactly what it is that the witness is -- it is proposed
22 the witness should say rather than speculating about it.

23 Yes, Mr Sachdeva.

24 MR SACHDEVA: Mr President, may I just come back on
25 one point Mr Biju-Duval has made in respect of Witness 38?

1 In other ad hoc tribunals statements that do contain
2 material that is critical to a case have been tendered in that
3 fashion, as long as the witness is available for
4 cross-examination. In our submission, the testimony will be
5 oral, the Defence have the possibility to cross-examine the
6 witness on all aspects of the statement. It is just a matter of
7 saving time which, in our submission, is valuable in this Court.

8 PRESIDING JUDGE FULFORD: Could you send by email a
9 reference or two to the ad hoc jurisprudence on that point,
10 Mr Sachdeva.

11 MR SACHDEVA: I absolutely can. In fact, I could
12 state now that Rule 92 ter, at least in the ICTY Rules of
13 Procedure and Evidence, does permit that type of examination.

14 PRESIDING JUDGE FULFORD: Well, if there are any
15 particular cases which analyse the use of that provision, it
16 would be interesting to have them. Thank you very much.

17 So, 555 adjourned, or -- yes, 555 adjourned. Anything
18 else, Mr Biju-Duval?

19 MR BIJU-DUVAL: (Interpretation) Yes, Mr President.
20 I do not want to enter into an academic discussion here with
21 regard to the jurisprudence of the various tribunals, but the
22 Trial Chamber will note that the texts are different. The
23 instruments are different and the jurisprudence is different.
24 And the instruments of the ICC are far more exigent with regard
25 with regard to the testimony.

1 Now another point, if the Chamber will allow, which
2 does not concern the witnesses. Well, this is with regard to
3 the testimony to come of Witness 321 and, generally speaking,
4 the other witnesses as well. The Defence needs to know what was
5 the role and the involvement of 321 and 143 in the requests for
6 participation of the victims.

7 The Trial Chamber is aware that one of the aspects of
8 the application that we intend to file is to do with the link
9 between the intermediaries of the Office of the Prosecutor and
10 the participating victims in the case, so it is important for us
11 to know whether 143 and 321 have participated in the requests
12 for participation on the part of the victims at the same time as
13 they were working as intermediaries for the Office of the
14 Prosecutor, and we can only ascertain this if the redactions in
15 respect of their names are lifted in the requests for
16 participation.

17 This is why we are today, if we have not previously
18 done so, making a request for the lifting of the redactions --
19 I'm sorry, I'm saying the opposite to what -- I am asking for
20 the lifting of the redactions in respect of the names of 143 and
21 321 in the requests for participation, and 316 as well.

22 PRESIDING JUDGE FULFORD: Thank you, Mr Biju-Duval.
23 We will investigate whether or not there is anything that in
24 fact needs to be resolved in relation to that application, but
25 it's clearly made. Thank you.

1 Ladies and gentlemen, anything else? Yes, Mr Keta?
2 Oh, yes, Mr Keta, thank you. There was an application I think
3 from you earlier today in relation to the possible revelation of
4 information before Trial Chamber II. Can I immediately reassure
5 you that your concerns as regards public use before Trial
6 Chamber II of confidential material are in fact ill-founded.
7 The order for disclosure has been made on a basis that clearly,
8 and I hope irrevocably, means that without a further order from
9 us there cannot be the kind of public use of that material in
10 Trial Chamber II that you are concerned about.

11 So, thank you for the application. There is no need
12 for you to advance it further, because I hope that what I am
13 saying now will be communicated to anyone who is concerned by
14 this. There simply should not be public use of that information
15 before Trial Chamber II because it would breach the order for
16 disclosure that we made.

17 Anything else, Mr Keta?

18 MR KETA: (Interpretation) Yes, I am reassured by
19 that, Mr President. So, my application is now void and I am
20 satisfied. Thank you.

21 PRESIDING JUDGE FULFORD: Sorry to take the wind from
22 your sails, Mr Keta. Right, unless -- ah, yes.

23 MR SUPRUN: (Interpretation) I am sorry, Mr President,
24 the Defence has just applied for disclosure of information with
25 respect to the request for participation. Are we supposed to be

1 answering this application?

2 PRESIDING JUDGE FULFORD: Not at the moment. Thank
3 you.

4 MR SUPRUN: Thank you very much.

5 PRESIDING JUDGE FULFORD: Therefore, unless we hear
6 from Ms Bensouda that the next witness is not able to commence
7 his evidence on Thursday, we will sit at 9.30 on Thursday
8 morning to commence the evidence of the first intermediary. We
9 will now rise for half-an-hour and there will then be an
10 ex parte Defence only hearing. Thank you all very much.

11 (The hearing ends at 11.00 a.m.)

12 RECLASSIFICATION REPORT

13 Pursuant to Trial Chamber I's email instruction dated 7th
14 December 2011, the transcript is reclassified as public after
15 the indicated redactions have been implemented as ordered by the
16 Chamber. All private and closed sessions (*) are now available
17 to the public with the exception of the portions of the
18 transcript that have been redacted.