

1 International Criminal Court
2 Trial Chamber I - Courtroom 1
3 Presiding Judge Adrian Fulford, Judge Elizabeth Odio
4 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 Tuesday, May 11, 2010
9 (The hearing starts at 2.30 p.m.)
10 (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 afternoon. Witness,
14 please.
15 (The witness enters the courtroom)
16 WITNESS: ALBERT ADUBANG'O CANUNG'IYO (On former oath)
17 (The witness answers through interpreter)
18 PRESIDING JUDGE FULFORD: Good afternoon, sir, and
19 welcome back.
20 THE WITNESS: Good afternoon.
21 PRESIDING JUDGE FULFORD: Can I remind you, sir, that
22 you're still under oath, and please remember what I said last
23 week about not speaking too quickly and allowing a pause between
24 any question that's put to you and the answer that you give.
25 And a similar instruction to you, Mr Sachdeva. Thank

1 you very much. Please continue.

2 MR SACHDEVA: Thank you, Mr President.

3 QUESTIONED BY MR SACHDEVA:

4 Q. Good afternoon to you, sir. Last week when we left
5 off we were just about to discuss the meeting you had with
6 Mr Nyona - Eric Nyona - in Logo and also where Mr Mbuna was
7 present. Do you remember that?

8 A. Yes. When Mr Dieudonné Mbuna joined me at the school,
9 we went to Mr Eric Nyona's residence in Logo and we found him.
10 He was ailing, but he came out anyway and we had a discussion
11 with Mr Mbuna.

12 Q. And was it at that meeting where Mr Mbuna said to
13 Mr Nyona in your presence that somebody had assumed the identity
14 of his son?

15 A. He had asked whether Mr Nyona had a son and Mr Nyona
16 answered by saying, "Well, there is somebody who has assumed the
17 identity of my son," and he assumed the identity of the son, or
18 in fact the father, but he is not in fact the father of this
19 boy. He is the paternal uncle. So, the true father is called
20 Ukunya Bertin. That's what I heard.

21 Q. And may I just be clear? Who was it that said this?

22 A. It was Eric who was explaining to Mr Nyona that he was
23 not the father of the boy in question. He was the paternal
24 uncle. He was the paternal uncle of -- of Thonifwa, but with
25 regard to his identity it had been believed that he was the

1 father of Thonifwa, but the truth be told he is not the father.
2 He is the maternal uncle of Thonifwa. So, Thonifwa's father is
3 called Ukunya Bertin. He was not there when we arrived in Logo,
4 so Eric told us that he could be found in Mahagi.

5 Q. And did you say anything during this meeting?

6 A. No, I did not say anything, or maybe I might have
7 forgotten.

8 Q. If I'm right in understanding, this is the first time
9 that you were briefed or were informed as to the nature of
10 Mr Mbuna's visits and you didn't say anything?

11 A. Upon our arrival I merely explained to Mr Eric that
12 there had been a visitor who'd come to my school, first and
13 foremost, and that on his second visit he had visited the
14 junior seminary where I was working and he had brought me with
15 him. That's what I said to Mr Eric. And I said, "He'd like to
16 have a conversation with you." I quite simply helped
17 Mr Dieudonné by taking him to see Mr Eric and, if I did so, it
18 is because I studied with Mr Eric at school. We were
19 contemporaneous at secondary school and that is how I came to
20 meet him.

21 Q. Did you then take Mr Mbuna to meet with Bertin?

22 A. Yes, on the next day we continued on our way to
23 Mahagi. Mr Eric told us that Mr Bertin was working at the
24 subdirectorate, or subdivision, and in view of the fact that I
25 knew some of the members of the subdivision we went to the

1 subdivision and we found Mr Bertin, who was also ailing. He was
2 at home and a secretary said that if we followed such and such a
3 path we would manage to reach his house, and that's what we did.

4 Q. And when you reached the house and you met with Bertin
5 and Mr Mbuna, did Mr Mbuna explain to Bertin what he had
6 learned?

7 A. When we found Mr Bertin, he initially asked whether he
8 was the father of Thonifwa and Mr Bertin said that, yes, he was
9 Thonifwa's father. Because Mr Bertin did not know Mr Mbuna, I
10 said, "Well, we went to visit your family and your elder brother
11 told us that we might find you here in Mahagi, so I brought him
12 here because he does not know the area and this is how we came
13 to your house. So, I believe that now you can tell us what
14 happened on your journey." And this is how Mr Bertin received
15 him, and they talked. And whilst they were having a discussion
16 I had come by motorbike and I needed to put it away, and I came
17 back into the house and found them there.

18 And Mr Mbuna had asked whether he could see the boy;
19 Thonifwa, that is. His father said, "Yes, he is here, but they
20 are undergoing training in a school of apprenticeship with a
21 view to becoming a driver." Now, Mr Mbuna asked whether we
22 might go to find them where they were, at the location where
23 they were, and that's precisely what we did. We went to the
24 location where they were to be found.

25 Q. Did you travel from the DRC to The Hague with

1 Mr Nyona?

2 A. When we left Mahagi, Mr Mbuna joined me in the company
3 of a lady and they came to my residence. They explained to me
4 that they were going to Mahagi with a view to picking up
5 Mr Nyona -- or, I'm sorry, not Mr Nyona, Mr Ukunya. Nyona is
6 the elder brother of -- Nyona is the name of their father and
7 Eric Nyona also inherited the name of his father. He's the
8 elder brother of Ukunya. So, Mr Mbuna said to me that they were
9 leaving with a view to going to pick up Mr Ukunya in Mahagi and
10 he told me that I should wait, which is what I did until they
11 returned.

12 And when they arrived in a vehicle they picked me up,
13 and once we reached the main road there is a road that enters
14 the seminary and there's also a road that goes off in the
15 direction of the trading centre. It's called Ngote (phon). We
16 left and, when we reached the roundabout, I found that there was
17 another vehicle. I was in a separate vehicle and I could see
18 from a distance, but we did not speak with him. He was in
19 another vehicle and I was in a separate vehicle.

20 Q. What I'm interested in is your travel to The Hague to
21 give testimony, and my question is simply this: Did you travel
22 with Mr Bertin Nyona? Did you travel together with him when you
23 came here to The Hague?

24 A. When I was at the airport in Kinshasa, I was alone. I
25 did not see him. And even arriving -- upon arriving in Nairobi,

1 I did not see him there either, and I have not seen him here to
2 date either.

3 Q. Did you, at any point during your travel here -- after
4 Nairobi on the plane, did you see Mr Bertin Nyona, "Yes" or
5 "No"?

6 A. I do apologise. I said it was Ukunya Bertin. Nyona,
7 I'm sorry, I apologise, is the elder brother. So, Bertin, well,
8 when we were at the office in -- well, no, in Kinshasa, yes, I
9 did see him there, but we didn't speak to him because I was part
10 of a group that was -- when we went to the ANR office, I was in
11 the company of two policemen and he was also moving about, but
12 in a separate group. I did not speak to him, but I did see him.
13 So he was in Kinshasa, yes.

14 Q. Did you see him on the plane over here to The Hague?

15 A. No, I did not see him on the plane.

16 Q. And when you arrived here, did you see him?

17 A. No, I did not see him either.

18 Q. Did you, at any point in time, have discussions with
19 him about your testimony here?

20 A. I did not meet him, because I was in Vida and he was
21 in Mahagi. So from Mahagi to Vida it's a distance of
22 approximately 25 kilometres, so it was not easy for me to chance
23 upon him. I did not have any contact with him.

24 MR SACHDEVA: Mr President, may we move into private
25 session for a question, please?

1 PRESIDING JUDGE FULFORD: Certainly. Private session,
2 please.

3 *(Private session at 2.46 p.m.) Reclassified as Open session

4 THE COURT OFFICER: We're in private session,
5 Mr President.

6 PRESIDING JUDGE FULFORD: Yes.

7 MR SACHDEVA:

8 Q. Sir, you're aware of somebody called (Redacted)
9 (Redacted) (phon), aren't you?

10 A. (Redacted) --

11 Q. (Redacted)

12 A. No, I do not know him.

13 Q. Are you sure he's never been a teacher at the Beju
14 institute?

15 A. He might have been before I arrived, but whilst I was
16 there, no, and this is the first time that I have heard this
17 name.

18 Q. So do I take it, then, that your evidence is you have
19 never met him?

20 A. Never.

21 Q. If I were to -- well, let me put it this way. Are you
22 sure that he was not present when you had that phone call with
23 Pakuba on 5 or 6 November 2009?

24 A. With whom? Could you please repeat your question?

25 Q. Last week you told us that you had a telephone call

1 from (Redacted) - and what I'm suggesting to you is that, when
2 you had that telephone call, you were present with (Redacted).
3 Do you agree with me, or not?

4 A. I'm either person to have said that? No, I never gave
5 the name of (Redacted). I did not say that. Whatever the case may
6 be, somebody by the name of (Redacted), well, I do not know them.

7 Q. In fact it's right, isn't it, that you didn't receive
8 a phone call from (Redacted)? You, in fact, telephoned (Redacted)?
9 You initiated the contact?

10 A. With Mr (Redacted)? He is the one who called me, but I
11 was taken by surprise that I was being called and I merely
12 interpreted it as being contact that was established with the
13 nurse. We had gone for a visit and I believe that it was that
14 nurse who actually contacted Mr (Redacted). Now, Mr (Redacted)
15 then called me, but I did not call him.

16 Q. You gave evidence that Mr Mbuna had come to your
17 school to enquire about records from years where you weren't
18 present. You knew that (Redacted). You initiated the
19 contact, didn't you?

20 A. Well, (Redacted) -- I apologise, I think I should have
21 made this more brief. It was he who had initially (Redacted)
22 (Redacted) and he was the one who (Redacted) it for some time,
23 and after that a (Redacted) or a (Redacted)
24 (Redacted) and he was the one who went about trying to
25 find me.

1 Q. And what I'm suggesting to you is that, because
2 Mr Mbuna was interested in records from the years 2003, 2004 and
3 2005, you telephoned (Redacted) to get information?

4 A. Well, it was he who said that he had just learned that
5 I had received a visit from somebody from Bunia and, when he put
6 the question to me, I did not hide the fact. I said, "Yes, I
7 have just received a visit from an individual." And when he put
8 the question to me, I did quite know what had happened in the
9 (Redacted) between (Redacted) and the (Redacted). I did not
10 know anything about that. I merely answered, because I had
11 received the authorisation from my coordinator who had requested
12 that I receive Mr Dieudonné within the walls of our school.

13 And when Mr P -- Mr P called, I did not hide the fact.
14 I said, "Yes, indeed, I have received a visit from somebody."
15 And he said, "Well, what did he want?" And I said, "He wanted
16 documents", and I said that he had such and such a document in
17 his possession. And then he said, or asked me, whether two of
18 the children whose names I have already provided previously,
19 notably Mr Bedijo Jean-Paul and Thonifwa, whether those names
20 were to be found in those documents.

21 And I said, "Well, he should wait", because I was on
22 my way home. And I told him to be patient, because I did not
23 have those documents with me. I had hidden them at school. And
24 I often -- I said I often went to school on Fridays and
25 Saturdays and I said that, when I go back to school, I will be

1 able to show or find the documents that I showed him and I will
2 be able to ascertain whether the names of those two children
3 figure in those documents.

4 So, on the day when I was supposed to go to school, I
5 did say to him -- when he called me, he asked me whether I was
6 at school. I said, "Yes." And he said, "Are those two names
7 there?" And I had leafed through the documents and found those
8 names. And I said, "Yes, those names are indeed present amongst
9 those documents." I confirmed this fact to him.

10 THE INTERPRETER: Mr President, could the witness
11 please be requested to slow down. Thank you.

12 PRESIDING JUDGE FULFORD: Sir, you're giving very full
13 and helpful evidence, but can I ask you to make sure that when
14 you give slightly longer answers you don't speed up. It's
15 important that the speed of delivery is reasonably slow so that
16 the interpreters and transcribers can keep up with what you say.

17 Good. Do we need to remain in private session,
18 Mr Sachdeva?

19 MR SACHDEVA: Mr President, we can move into open
20 session.

21 PRESIDING JUDGE FULFORD: Open session, please.

22 (Open session at 2.55 p.m.)

23 THE COURT OFFICER: We are in open session,
24 Mr President.

25 MR SACHDEVA:

1 Q. Sir, do you know an organisation or association called
2 APEC? A-P-E-C, that's the acronym.

3 A. I found -- amongst the documents pertaining to some
4 pupils I found this abbreviation, but I was not aware of it
5 previously.

6 MR SACHDEVA: Mr President, that's the
7 cross-examination.

8 PRESIDING JUDGE FULFORD: Thank you very much indeed,
9 Mr Sachdeva.

10 Anything else, Maître Mabilles?

11 MS MABILLE: (Interpretation) We have nothing
12 further, Mr President.

13 PRESIDING JUDGE FULFORD: Thank you very much. Sir,
14 this now concludes your evidence and, before you leave court, I
15 want - as with all other witness in the case - to express the
16 thanks of the Judges for the time and trouble that you have
17 taken to come to this country to give evidence in this trial.

18 In order for us to find the truth in this case it is
19 critical that witnesses such as yourself are prepared to give
20 evidence to assist us on the relevant issues in this case, and
21 we are aware that this will certainly have been inconvenient for
22 you and possibly it may have involved some personal risk. You,
23 therefore, leave us now in order to go home with our thanks.

24 Usher, could you please assist the witness back to the
25 witness waiting room?

1 THE WITNESS: I thank you.

2 (The witness is excused)

3 PRESIDING JUDGE FULFORD: The court officer is now
4 going to give the up-to-date position as regards EVD numbers for
5 the documents put to this witness.

6 THE COURT OFFICER: Thank you, Mr President. All the
7 documents that were shown and submitted by the parties and
8 participants to this witness will receive the following EVD
9 numbers as agreed by the parties and participants.

10 So tab number 1, which is document DRC-D01-0003-2736,
11 will receive EVD number EVD-D01-00138. Tab 2, which is
12 MFI-D00177, will be now EVD-D01-00139. Tab 3, which is
13 MFI-D00160, will now be EVD-D01-00140. Tab number 4, which is
14 MFI-D00172, will now be EVD-D01-00141. Tab number 5 remains
15 EVD-D01-00095. Tab number 6, which is MFI-D00171, will now be
16 EVD-D01-00142. Tab number 7, which is MFI-D00178, will now be
17 EVD-D01-00143. And tab 8 will remain EVD-D01-00137. Thank you.

18 PRESIDING JUDGE FULFORD: Maître Mabilie, is there
19 anything that you'd like to say about the Prosecution's
20 application to re-interview Witness 3 alone? And do take a
21 moment to speak with Mr Desalliers and Mr Biju-Duval, if you
22 wish to.

23 (Counsel confer)

24 MS MABILLE: (Interpretation) The Chamber will not be
25 surprised to hear that there have been discussions and we are

1 opposed to the idea of not being present. We carefully read the
2 email from the Prosecution and the reasons that were set out to
3 indicate that the Defence should not be present are not really
4 very clear to us. We would like to be there. We would like to
5 be present at that hearing of Witness 003, so there are my
6 observations, your Honour, regarding this application from the
7 Prosecution.

8 PRESIDING JUDGE FULFORD: Thank you very much.

9 (Trial Chamber confers)

10 PRESIDING JUDGE FULFORD: Witness 3, who was not
11 called by the Prosecution because he decided not to testify, was
12 born in 1980 and is, therefore, outside the scope of the
13 charges. In his statement he maintained that he voluntarily
14 joined the Hema militias following a visit to Mr Lubanga's
15 house. Since he provided potentially exculpatory material, his
16 statement was disclosed to the Defence.

17 It is to be noted, first, that Witness 3 was
18 originally interviewed by the Prosecution as a suspect
19 (sometimes accompanied by counsel) and, second, at least with
20 his statement of April 2005 he objected to any audio or video
21 recording. As a result, the Prosecution took a written
22 statement.

23 Having refused to cooperate with the Prosecution, and
24 since he provided information of potential use to the accused,
25 the Court ordered that the Prosecution reveal the relevant

1 materials to the accused, since he is one of the witnesses whose
2 identity it was possible to disclose to the Defence (see
3 preliminary and final decisions on the group of potential court
4 witnesses, document 1986, 25 June 2009, paragraphs 32 and 33).

5 However, in recent months, considerable steps have
6 been taken to organise a further interview with him.

7 On 9 February 2010 he was spoken to by a
8 representative of the Registry and he agreed to speak with the
9 Prosecution in the presence of a representative of the Registry
10 and possibly someone from the Defence. Critically, the
11 representative of the Registry indicated that the questions to
12 be put to Witness 3 will be directed at the intermediaries he
13 met. It is to be observed that in its written application to
14 contact this witness, amongst a group of potential court
15 witnesses, the Prosecution at that stage simply indicated that
16 it wished to prepare for cross-examination (document 2144, 2
17 October 2009, paragraph 39 et seq).

18 The witness agreed to an interview but not over the
19 telephone.

20 As a result the Chamber, on 18 February 2010, by
21 email, ordered that a face-to-face interview is arranged with
22 the following conditions:

23 (1) The meeting should include the Defence, if
24 possible, and so must be organised in consultation with the
25 Defence.

1 (2) The meeting must be video or audio recorded.

2 (3) The Chamber and the Defence, regardless of
3 whether the latter can attend or not, must be provided with a
4 transcript of the meeting.

5 (4) The VWU acts as an observer with the right to
6 intervene if something genuinely troubling or inappropriate
7 occurs, having satisfied itself as regards the security
8 implications and the witness's mental and emotional stability,
9 including the psychologist who wished to be present during the
10 interview of Witness 3.

11 (5) The Registry staff who met with the witnesses may
12 be present during each interview.

13 (6) If Witness 3 wishes to have counsel present, such
14 counsel needs to be found for him. This may entail counsel
15 having some time to familiarise him or herself with the file and
16 to have a telephone conversation with Witness 3 before the
17 interview.

18 On 6 May 2010, the Chamber was informed that the
19 interview is to take place on 17 May 2010 in The Hague to allow
20 the Prosecution and the Defence to be present.

21 Yesterday, 10 May 2010, the Prosecution applied by
22 email to interview the witness alone in the absence of the
23 Defence. It is suggested that the Prosecution's preparatory
24 investigations for cross-examination are usually conducted in
25 private and nothing relating to this witness justifies a

1 departure from that approach.

2 This afternoon Maître Mabilille, in succinct
3 submissions, argued that the Defence should be present during
4 the course of this interview, and she set out her general
5 opposition to the proposal that had been made.

6 The Chamber is concerned that the questions that it is
7 intended should be put to Witness 3 concerning intermediaries
8 may involve Witness 3 revealing identities which the Defence are
9 not entitled to and who may require protection. However, in
10 light of the present evidence which the Court is hearing
11 concerning intermediaries, it is critical that the Defence
12 receives early and comprehensive disclosure.

13 The Chamber, therefore, orders:

14 (1) The Prosecution may interview Witness 3 in the
15 absence of the Defence, but in the presence of a representative
16 of the Registry and anyone else who the VWU deems it appropriate
17 should attend.

18 (2) The interview is to be audio or video recorded,
19 unless the witness (as before) does not give his consent. In
20 that event, a sufficiently full written transcript is to be
21 prepared.

22 (3) Immediately after the interview, the Defence is
23 to be provided with any material that relates to the position of
24 intermediaries, save that the identities of intermediaries who
25 are not the subject of a disclosure order from the Chamber are

1 to be redacted. Additionally, any other disclosable material is
2 to be provided to the Defence at this stage; namely, immediately
3 after the interview (once the process of redactions has been
4 attended to).

5 (4) The Defence may then, with the consent of the
6 witness, interview him in the absence of the Prosecution, but in
7 the presence of a representative of the Registry and any other
8 individual who the VWU considers should be present. Again, this
9 interview should be recorded in the manner set out above.

10 (5) Conditions 3 to 6, as set out above, apply to
11 both interviews.

12 Now, regrettably I think that brings to an end the
13 available evidence for this week. At the moment we are hoping
14 that the Chamber will be able to sit to commence the evidence of
15 the next witness on Monday, but I see, Maître Mabilille, you're
16 about to get to your feet.

17 MS MABILLE: (Interpretation) Your Honour, just to
18 ensure that everything is clear regarding the previous witness
19 that we have just heard from, is it clear that the originals of
20 the documents can be given back to him without any difficulties,
21 because the Prosecution had -- I believe at the beginning of the
22 examination had made a number of, or had a number of,
23 reservations?

24 PRESIDING JUDGE FULFORD: Well, Maître Mabilille, no
25 application has been made in relation to any individual document

1 that it needs to remain in The Hague for identified forensic
2 analysis, but I will pause for a moment to see whether
3 Mr Sachdeva gets to his feet.

4 MR SACHDEVA: Mr President, there are no applications
5 in that regard.

6 PRESIDING JUDGE FULFORD: Thank you very much. They
7 can -- all of the originals can be returned to the witness,
8 Maître Mabilille.

9 MS MABILLE: (Interpretation) Thank you, your Honour.

10 Now, the second problem that I would like to submit to
11 the Chamber is Witness 29. This morning we took possession of
12 the 20 kilograms of documents and I would like to make sure with
13 the Chamber that there are not any problems. Well, the first
14 problem that we have is the documents are school records, there
15 are various books and the last pages of these books are blank.
16 We would like to avoid having to scan the last pages, or the
17 blank pages, once we have made quite sure that the rest of the
18 document is truly blank. We'll make sure that we don't miss the
19 possibility of one blank page and then other pages with
20 material. We just wanted to make sure with the Chamber that
21 that approach is not a problem.

22 PRESIDING JUDGE FULFORD: Does anybody suggest that
23 blank pages should be scanned into the Court records? No, all
24 right.

25 MS MABILLE: (Interpretation) Let me be clear. All

1 these documents - the originals - will be shown to the
2 Prosecution and to the legal representatives and they will be
3 able to inspect all the documents in our offices.

4 PRESIDING JUDGE FULFORD: Mr Sachdeva?

5 MR SACHDEVA: Just to make the point, Mr President,
6 that usually those documents are scanned even if there's nothing
7 on them.

8 (Trial Chamber confers)

9 PRESIDING JUDGE FULFORD: It may well be that, as a
10 matter of general procedure, it is better for documents to be
11 scanned into the Court records in their entirety, for reasons
12 that I needn't develop, but in this instance, given the quantity
13 of materials and given the time constraints under which we are
14 operating, it seems to us that Maître Mabilille's suggestion is
15 pragmatic and sensible.

16 And so to the extent to which this constitutes an
17 exception to general procedure, Maître Mabilille, you may proceed
18 in the way you've suggested and we rely on you to ensure that,
19 once blank pages start, there aren't later pages which have,
20 well, anything written on them. Good.

21 I think you just made it first, Mr Sachdeva.

22 MR SACHDEVA: Mr President, thank you. Just in
23 relation to the documents Defence Witness 35 brought, at the
24 moment there are indeed no applications but, should it become
25 necessary with questioning of Defence Witness 29, for example,

1 we would like to leave open the possibility of securing those
2 originals if need be.

3 PRESIDING JUDGE FULFORD: Well, I suspect,
4 Mr Sachdeva, he's about to go back to the DRC and when he goes
5 back I imagine he wants to take the documents with him.

6 Now, what we have are - I'll make no bones about it -
7 what seem to me to be extremely good photocopies which exactly,
8 or as near exactly as machinery is capable, reproduce what you
9 see on the written page. So unless some obscure forensic test,
10 such as an ESDA test or some kind of fingerprint test, is
11 envisaged by the Prosecution, I can't for the moment see the
12 advantage in retaining the originals in The Hague.

13 Now, if you want this to happen, you're going to have
14 to be more specific as to what you have in mind as being the
15 advantage of retaining them certainly until the end of Witness
16 29's evidence.

17 (Counsel confer)

18 MR SACHDEVA: It's correct, Mr President, that at this
19 stage we are not sure. It may be that during questioning of
20 Witness 29 certain aspects of the materials, if we decide to
21 show it to Defence Witness 29, will become relevant, for example
22 the stamps -- a stamp of which the witness himself has said he
23 doesn't recognise, and that's why I can't give you a proper
24 explanation at this stage, but we would like to leave open the
25 possibility.

1 Now, of course, for the comfort of the witness if it
2 can be taken back and reasonably brought to The Hague in an
3 expedient fashion then that's also permissible in my view, but
4 we would like to leave open the possibility.

5 (Trial Chamber confers)

6 PRESIDING JUDGE FULFORD: Maître Mabilille, can you ask
7 Witness 35 for the next six weeks to keep those documents
8 together in one place and to do all he can to make sure that he
9 doesn't mislay them, so that, should they become relevant later,
10 somebody can bring them to The Hague for us.

11 MS MABILILLE: (Interpretation) Absolutely, your
12 Honour. I will do so.

13 I have another application to provide to the Chamber
14 also regarding Witness 29. This witness came with some
15 documents that we have never seen before and we would like to
16 ask the Chamber for leave to meet with this witness.

17 We are well aware of the ruling that was made
18 regarding witness proofing, a ruling from your Chamber, but we
19 are all clear on the fact that this witness has provide -- has
20 come with only documentary evidence. We need to meet with him
21 to review a number of documents with him that we are seeing for
22 the first time, and I must say to the Chamber that perhaps to
23 save some hearing time, since we will be able to prepare things
24 upstream, this will save us a great deal of time and work during
25 the actual hearing. The work will proceed much more smoothly,

1 and this witness is only a witness who is coming with
2 documentary items. So, to better organise the work and to try
3 to ensure that things are as easy as possible, this is why we
4 are making this suggestion.

5 PRESIDING JUDGE FULFORD: Mr Sachdeva?

6 MR SACHDEVA: Mr President, we would oppose that
7 application. The Defence have put this witness down on their
8 list, as I understand it, from August last year. They have had
9 enough opportunity to discuss matters with this witness. They
10 have known all along that the main -- the main point of this
11 witness's evidence is to discuss documents. If they haven't
12 done their investigation at this stage, then it should not be an
13 excuse for them to meet with the witness at The Hague in
14 violation of the proofing ban.

15 Now, it's probably the case that Prosecution witnesses
16 came here too with materials that we would have liked to have
17 discussed with them, but of course the proofing ban was in
18 existence and so I don't see why there should be disparity in
19 the way the decision is applied.

20 Now, if in the alternative the Chamber is minded to
21 grant the Defence's application, we would insist that we would
22 be present, of course along with a member of the Victims and
23 Witnesses Unit, but only under those circumstances in our
24 submission should that meeting take place, may it please the
25 Court.

1 PRESIDING JUDGE FULFORD: I think you meant strongly
2 suggest, rather than insist, Mr Sachdeva.

3 MR SACHDEVA: I did, and I apologise.

4 PRESIDING JUDGE FULFORD: Thank you.

5 (Trial Chamber confers)

6 PRESIDING JUDGE FULFORD: Maître Mabilille, great care
7 needs to be taken with this. The Chamber appreciates that what
8 you are addressing are documents hitherto unseen by you or
9 members of your team and that therefore this does not constitute
10 witness proofing, but instead it is an investigation by the
11 Defence for the first time in relation to a body of new
12 material.

13 Now, we are going to permit those discussions, albeit
14 with some reluctance, but you have to scrupulously apply the
15 direction that we have given as regards witness proofing and
16 that involves the Defence avoiding all of the areas previously
17 discussed between a representative of the Defence team and the
18 witness.

19 The reason we are going to grant this application is
20 that given the particular circumstances that relate to this
21 individual, who is simply producing documents, this will avoid
22 what would otherwise probably be an unnecessary extended piece
23 of evidence on his part with you having to investigate for the
24 first time in open court which documents are relevant and which
25 are not and, for those that are relevant, the reasons for that

1 conclusion.

2 You will, please, additionally furnish to the
3 Prosecution and any interested participant a short description
4 of any additional documents that you propose to rely on
5 following this discussion, together with an explanation as to
6 why the document, or parts of the document, are said to have
7 sufficient relevance to justify referring to it during the
8 course of this witness's testimony.

9 We're going to take this stage by stage. Once that
10 process is complete, if the Prosecution or any participants
11 require either additional time or access to the originals, we
12 are likely to consider those applications sympathetically. This
13 should not be seen as any kind of deviation from the Chamber's
14 clear stance as regards witness proofing.

15 Anything else?

16 MS MABILLE: (Interpretation) Just to say that we
17 have begun this work today at 10.30 and we are concerned about
18 the amount of time that this work will take. Consequently, even
19 though we will do all we can to scan these documents as quickly
20 as possible, our proposal would be to begin next week on Monday
21 with Witness 297, which will allow us to gain some time, and
22 then we will be really -- we'll really be up to date when it
23 comes to these various documents.

24 Furthermore, on this particular point, I believe there
25 is a discussion underway with the OTP because the Defence would

1 like to begin examination of 297, and I believe that the
2 Prosecution has not yet made known his position to us in this
3 regard, and perhaps he could deal with that before the witness
4 arrives to give testimony on Monday.

5 MR SACHDEVA: Mr President, Ms Samson will address
6 this point.

7 PRESIDING JUDGE FULFORD: Yes, Ms Samson.

8 MS SAMSON: Thank you, Mr President. It's indeed the
9 case that the Defence has indicated that they would like to
10 commence examination of Witness 297 next week. In our view, the
11 Chamber's already determined that the order of witnesses will be
12 as it is -- as it was with Witness 15 and the Prosecution
13 commence that examination, and we would like to commence the
14 examination of 297 as well.

15 PRESIDING JUDGE FULFORD: Do you oppose that,
16 Mr Biju-Duval?

17 MR BIJU-DUVAL: (Interpretation) Your Honour, Defence
18 has understood that the general instruction given by the Bench
19 is that the status of Witness 297, in general terms, would be
20 that of Witness 15, and we're aware of the ruling, the order,
21 handed down by the Bench as regards that matter. But as regards
22 Witness 297, that witness is in a somewhat different procedural
23 situation.

24 Witness 15, the Prosecution Witness 15, was called by
25 Prosecution in the context of presentation of evidence and we

1 are quite simply continuing that hearing following the normal
2 order; in other words, Prosecution and then Defence.

3 Witness 297 was called by the Defence in the context
4 of submission of evidence by the Defence, but that witness
5 having specific status as recalled by the Chamber. Bearing in
6 mind the procedural situation, we think it would be natural and,
7 indeed, perfectly legitimate for Defence counsel to go ahead
8 with the examination-in-chief according to the rules laid down
9 by the Chamber and then for the Prosecution, for the OTP, to
10 pursue subsequently. That is the way in which the Defence would
11 like to proceed as regards Witness 297.

12 (Trial Chamber confers)

13 PRESIDING JUDGE FULFORD: Ms Samson, we're going to
14 take 10 minutes to think about this, but before we do, I just
15 want to make sure I've got the history correct.

16 Originally a Prosecution witness not called in the
17 main because of certain - and I'm going to put this in inverted
18 commas - "problems" that he had, then the subject of a certain
19 amount of discussion, now considered by the VWU to be in an
20 appropriate state to give evidence, and so at this stage now to
21 be called. Now, do you say he's a Prosecution witness? Or is
22 he a Defence witness? Who's calling him?

23 MS SAMSON: Your Honour, the history that your Honour
24 has cited is absolutely correct. The question as to whether or
25 not he's a Prosecution witness or a Court witness is one that

1 has never been clearly answered. He's certain not a Defence
2 witness.

3 When the Defence met with this witness in December of
4 2009, they did so with a view to determining, I assume, whether
5 or not they would call him themselves. Subsequently, they
6 applied to the Court and said specifically that they will not be
7 calling him as a Defence witness, but that the Court should call
8 him as a Court witness because he, in the main, provides
9 incriminating information, given that he maintains that he was a
10 UPC child soldier. The difficulty with what the witness has
11 said in this Defence interview is that he has said a few things
12 that go contrary to the Prosecution's position vis-à-vis the
13 intermediary.

14 In that instance, the Defence requested that the Court
15 call the witness so they could cross-examine him, and
16 subsequently the Prosecution requested that should he come
17 either as a Prosecution witness, as Witness 15 or a Court
18 witness, that we be able to also ask non-leading questions --
19 sorry -- leading questions of the witness, at least on
20 particular topics. So the Chamber hasn't specifically
21 articulated in what capacity he's returning, either as a Court
22 witness or as Prosecution witness, but he's one of those two,
23 and for that reason I believe, for the reason that his evidence
24 is in the main incriminating, the Court had decided that he
25 should be questioned in the same manner as that of Witness 15

1 who had been called as a Prosecution witness but then gave
2 evidence that was contrary to the Prosecution's interest and
3 treated as hostile.

4 Witness 297 will not be treated as hostile, but the
5 Chamber generously provided the Prosecution with an opportunity
6 to ask leading questions in certain areas. In this context, in
7 our submission, he should be treated as Witness 15, and given
8 that the Defence has conceded that his evidence is in the main
9 incriminating, the Defence could have called him, had they felt
10 he was really more of a Defence witness, and that's not the
11 position that they took. So, in our submission, again we
12 reiterate our request to examine him first.

13 PRESIDING JUDGE FULFORD: Can I rewind slightly?
14 Let's travel in time for a moment.

15 If we were at this position with Witness 297 during
16 the course of the Prosecution's presentation of its evidence,
17 with you knowing that there are now one or two things that the
18 witness may say which tends to go against the general thrust of
19 the Prosecution case, would you nonetheless have sought to call
20 him, possibly with the rider that on those issues where he
21 contradicts the Prosecution's case, you should have leave to use
22 non-neutral questioning? And you may want to -- if you want to
23 have time to discuss that with Mr Sachdeva, do.

24 (Counsel confer)

25 MS SAMSON: Thank you, your Honour, for the

1 indulgence.

2 The witness was on the Prosecution's list in order to
3 come and give evidence for the Prosecution. Due to
4 circumstances beyond our control, he wasn't able to come. As it
5 turns out now, his evidence is even increasingly important given
6 the evidence of Defence witnesses who have testified against his
7 very -- in contradiction to evidence he -- or information he
8 gave The Office of the Prosecutor. Certainly, today we're very
9 interested in hearing what the witness has to say, and we hope
10 that the Chamber's interested in hearing what the witness has to
11 say as well that will be in line with the Prosecution's
12 interests.

13 That's a long way of saying that we are going to be
14 eliciting from him evidence that will be helpful to the
15 Prosecution and hopefully dealing with the areas that had -- in
16 at least one or two had not been very helpful to the
17 Prosecution, but we will be eliciting evidence in our favour
18 during his examination.

19 PRESIDING JUDGE FULFORD: I hope you're not turning
20 into a politician, Ms Samson. I don't think you answered my
21 question.

22 The question was: If we were back during your case,
23 knowing what we know now, would the Prosecution have called him?
24 So, would you have put him in the witness box, possibly having
25 asked the Chamber leave to ask non-neutral questions on those

1 issues in relation to which you're not entirely comfortable?

2 MS SAMSON: Thank you, your Honour.

3 I think I hadn't answered that question precisely.

4 And the answer is, yes, the witness is one that we maintain has
5 information that's of relevance to the Court, and we recognise
6 now that we have to deal with other aspects of his evidence.

7 PRESIDING JUDGE FULFORD: Clear. Thank you. Anything
8 else, Mr Biju-Duval?

9 MR BIJU-DUVAL: (Interpretation) Just one thing, your
10 Honour. We're trying to keep things simple. The general
11 principle is that it is the party calling the witness that
12 carries out the examination-in-chief.

13 As for Witness 297, we had at least one certainty; and
14 that is that the party that requested that the Court order that
15 witness to appear was the Defence. The Defence submitted that
16 request because it feels that the testimony of Witness 297 is
17 entirely - or, in part - a part of the submissions of the
18 Defence. It fits in with the submissions of the Defence. So,
19 from a procedural point of view, it's perfectly logical that the
20 Defence be able to carry out the examination-in-chief.

21 Let me add - obviously, this needs to be checked, but
22 if I'm not mistaken - I recall that the OTP objected to the
23 appearance of Witness 297. I stand corrected if necessary. I
24 might have got it wrong, but I think that's what I recall. It
25 would be rather strange if that were to be the case, if now the

1 Prosecutor were to say that it was he who called that witness.
2 Once again, though, I'm not entirely certain as regards the
3 latter point.

4 PRESIDING JUDGE FULFORD: Thank you. This is clearly
5 a very popular witness. We're going to reflect on his position
6 and we'll return in 10 minutes' time. Thank you very much.

7 THE COURT USHER: All rise.

8 (Recess taken at 3.44 p.m.)

9 (Upon resuming at 4.03 p.m.)

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

11 PRESIDING JUDGE FULFORD: Witness 297 is to be called
12 next week on Monday, and both the Prosecution and the Defence
13 have applied to be permitted to question him first. The
14 relevant part of the history is as follows:

15 297 was originally one of the witnesses whom the
16 Prosecution intended to call. He was on their list and, on 19
17 February 2009 the Prosecution applied to be allowed to call him
18 as the last of the former child soldiers.

19 On 8 April 2009 the Chamber was informed that he would
20 not be called because he was unwell. His ill-health has been
21 investigated quite extensively since that announcement because,
22 as indicated by the Defence on 1 October 2009, they wished to
23 explore in evidence with him certain particular improper
24 behaviour.

25 We have been informed, in the relatively recent past,

1 that he is now sufficiently well to give evidence.

2 On 24 March 2010 the Chamber indicated in an oral
3 ruling that the same approach should be applied to 297 as to
4 Witness 15 with the result that he would be questioned by the
5 Prosecution first.

6 Witness 15 and Witness 297 are both the subject of a
7 direction from the Chamber that non-neutral questions on
8 relevant issues can be utilised by both the Prosecution and the
9 Defence, and that course has already been adopted with
10 Witness 15.

11 In our view, this is a witness who was essentially,
12 indeed, who is essentially a Prosecution witness who was only
13 not called earlier in the trial because of his ill-health. Now
14 he has recovered and there is an application that he should be
15 called at this stage.

16 In our judgment, doing the best we can, we consider
17 that the fairest approach is for him to remain as he would have
18 been if he had been called by the Prosecution; namely, someone
19 who was questioned by the Office of the Prosecutor first. That,
20 therefore, is our decision on this application.

21 We would wish to remind both the Prosecution and the
22 Defence that, for reasons that we needn't go into, it may well
23 be particularly necessary with this witness to use an
24 appropriately soft, although not necessarily neutral, form of
25 questioning. Counsel must utilise or display, rather,

1 appropriate sensitivity in their questioning of this witness.

2 Anything else, Maître Mabilles?

3 MS MABILLE: (Interpretation) We have nothing
4 further, Mr President.

5 PRESIDING JUDGE FULFORD. Earlier on I referred to a
6 particular test during, I think, an exchange with Mr Sachdeva.
7 I referred to the ESDA test, for the benefit of the
8 transcribers, which is E-S-D-A in capitals, and could that
9 please be inserted in the right part of the transcript when it
10 is edited.

11 We will sit, therefore, on Witness 297 at 9.30 on
12 Monday morning. Thank you all very much.

13 THE COURT USHER: All rise.

14 (The hearing ends at 4.09 p.m.)

15 RECLASSIFICATION REPORT

16 Pursuant to Trial Chamber I's email instruction dated 12th
17 January 2012, the transcript is reclassified as public after the
18 indicated redactions have been implemented as ordered by the
19 Chamber. All private and closed sessions (*) are now available
20 to the public with the exception of the portions of the
21 transcript that have been redacted.