

1 International Criminal Court

2 Trial Chamber I

3 Situation in the Democratic Republic of Congo - Case ICC-01/04-01/06

4 Hearing - Open Session

5 Thursday, 29 January 2009

6 The hearing starts at 9.38 a.m.

7 COURT USHER: All rise the International Criminal Court is now in
8 session. Please be seated.

9 PRESIDING JUDGE FULFORD: Good morning. We are in public session
10 in the absence of the witness who began his testimony yesterday.

11 Ms. Bensouda, if I can address the bar through you, pursuant to
12 Article 68 and particularly subparagraphs (1) and (4) which set out the
13 Chamber's responsibility for the protection, safety, physical and
14 psychological well-being of victims and witnesses, and under (4) the
15 opportunity which the Victims and Witnesses Unit has to advise the Court
16 on appropriate protective measures, we have this morning had a very short
17 conversation with representatives of the Victims and Witnesses Unit so
18 that we can have the up-to-date position as to what is appropriate in
19 terms of today's proceedings.

20 The advice that we have received which reflects the burden of the
21 conversation which has just taken place is that in the assessment of the
22 Victims and Witnesses Unit it would be inappropriate for us today to seek
23 to continue with the evidence of this witness. In the view of the
24 Victims and Witnesses Unit, two particular things have emerged. First,
25 the witness needs an opportunity to regain a certain sense of stability,

1 which is not in existence today; and secondly, a review needs to take
2 place as to the conditions and circumstances in which he is to give his
3 evidence.

4 Now, we will hear submissions in a moment as to whether or not it
5 is in those circumstances generally agreed that no attempt should be made
6 to proceed with his evidence today and whether the Court should
7 investigate appropriate ways in which his evidence can be received
8 hopefully in the relatively near future.

9 I think it needs to be remembered that particularly for those who
10 are not used to court proceedings, coming into this room with the number
11 of people who are present and the particular procedures that are used in
12 order to receive the evidence of a witness can be extremely intimidating,
13 and we're going to need to look at this not only for this witness but in
14 relation to other witnesses who may be similarly placed.

15 Now, the proposal that the Bench wish to make so that we can
16 receive submissions on it is that the first step that we should take
17 today is to work out what measures, if any, need to be taken in relation
18 to Witness one, and that should be our first priority and first concern.
19 Once everything has been done that can be done to facilitate the
20 continuation of his evidence, we can then move to Witness two.

21 That is the proposal. Is there anything that you would wish to
22 say about it?

23 MS. BENSOUDA: Mr. President, your Honours, we were going to make
24 an application ourselves that Witness one testimony be suspended because
25 we have also received some information, albeit a bit scanty and under the

1 circumstances without any access to the witness, and I understand that
2 the investigation into this particular witness is still ongoing, and we
3 as a Prosecution need to have informed information to be able to take
4 strategic decision about this witness. So in a way, Mr. President, we
5 are very handicapped in even taking that decision whether we proceed with
6 the witness or not, but we were going to make this application that this
7 witness's testimony be suspended until we can look into the circumstances
8 of his security, of his protective measures, which is crucial to -- to
9 his testimony, Mr. President.

10 PRESIDING JUDGE FULFORD: Right. Now, that's helpful,
11 Ms. Bensouda, but before you, as it were, leave the floor, you've
12 indicated that albeit in an incomplete form you are in possession of some
13 information in relation to the -- to relevant circumstances as regards
14 this witness.

15 Now, we have got to look this morning at the position of this
16 witness in the round. Do you wish to impart that information to us now
17 so that it can form part of our overall consideration, or do you need
18 more time so that you can put that information forward on a more secure
19 basis?

20 MS. BENSOUDA: Mr. President, as I have indicated, we are
21 completely reliant on the VWU --

22 PRESIDING JUDGE FULFORD: Right.

23 MS. BENSOUDA: -- and the legal representative, and for obvious
24 reasons, for the legal representative, he cannot give us any details of
25 his conversation with the witness because of privilege, and the VWU, I

1 think, will be more appropriate to speak to the Bench for details of
2 whatever has taken place. So what we have is really very, very scanty
3 and I do not think will be very helpful --

4 PRESIDING JUDGE FULFORD: Right.

5 MS. BENSOUDA: -- if both the VWU and probably the legal
6 representative, if he so wish, can communicate this the Chamber. But for
7 us, Mr. President, we really would be -- wish to have the opportunity, if
8 this is possible, and taking into account your statement of yesterday,
9 and I'm here referring to both page 44, line 21, and page 45,
10 line 1 to 3, that where the -- where the Chamber said yesterday that we
11 seek clarification from this Chamber -- we want to seek clarification
12 from the Chamber where the Chamber said that the Prosecution can have
13 time to investigate so long as there is no communication of any kind with
14 the witness about the subject matter of his evidence, and I think the
15 Defence had no objection to that.

16 We, Mr. President, were very reluctant to take it to mean that we
17 could directly, of course, approach the witness, but I -- I think if the
18 circumstances confirm it, we would prefer to also have direct contact
19 with the witness, preferably the investigator who met with the witness
20 and took his statement. We think that, first, this can be comforting to
21 the witness to see that -- a familiar face.

22 Mr. President, we are all very aware of the circumstances in
23 which when this witness came, the intimidating circumstances. I do not
24 need to repeat it. I think the Chamber has already put it in -- in --
25 has explained it very clearly --

1 PRESIDING JUDGE FULFORD: Ms. Bensouda, please forgive me
2 interrupting you. It's rude but on this occasion I'm going to do so.

3 One of the difficulties that's been brought to our attention is
4 the possibility, and I put it no higher than that, that the witness has
5 been simply overwhelmed by the number of different people who have been
6 speaking to him and the amount of information that's been provided to
7 him. We understand, therefore, that you're making an application that at
8 some stage you would wish for the investigator to have an opportunity to
9 speak to him.

10 Can I give a preliminary indication that that will not occur
11 until we have discovered from an appropriate expert, be it within the VWU
12 or elsewhere, as to what at this point in time is actually best for this
13 witness so as to put him in a position where he is able to continue
14 assisting the Court, and it would be precipitous at this stage for us to
15 consider an application for yet another person to become involved in the
16 process of speaking to him prior to his evidence. So this isn't a
17 refusal of your application, Ms. Bensouda, but on a preliminary basis I'm
18 going to adjourn it because I think it is too early for us to be
19 considering such a course. But thank you for make the indication.

20 MS. BENSOUDA: Thank you, Mr. President.

21 PRESIDING JUDGE FULFORD: Maitre Mabilille, you will undoubtedly
22 have listened carefully to the exchange that's just taken place. We've
23 made a proposal as to how the Chamber should proceed in general terms.
24 Do you have any submissions that you would wish to make on it?

25 MS. MABILLE (interpretation): Could the Chamber give us some

1 time to respond to what has just been said? I would like to consult the
2 other members of the Defence. Could we have ten minutes?

3 PRESIDING JUDGE FULFORD: You certainly can, Maitre Mabilille. The
4 one thing that I would like the Chamber to get on with in the -- and to
5 enable us to use the time sensibly is to continue the conversation that
6 we started before we came into court with the Victims and Witnesses Unit
7 so that we can formulate in our own minds a proposal, a full proposal,
8 for the parties to consider as to what should happen now with this
9 witness.

10 Do you have any objections to us continuing that conversation
11 with the Victims and Witnesses Unit whilst you consult with your
12 colleagues?

13 MS. MABILLE (interpretation): No, President. The Defence is
14 also very concerned about the welfare and well-being of the witness. So
15 we don't have any problem with it. Thank you.

16 PRESIDING JUDGE FULFORD: Thank you very much.

17 Therefore, Ms. Bensouda, in these circumstances we will rise
18 now -- or in a moment. There's one ingredient in this which does need to
19 be canvassed and that is the invitation that I put to you yesterday as
20 regards what the Prosecution say is the position in law in the DRC as
21 regards whether or not those under a particular age are, in any event,
22 liable for prosecution based on anything that they may say in this court.

23 Are you in a position to -- to help us with that?

24 MS. BENSOUDA: Yes, Mr. President. May I invite Manoj Sachdeva
25 to address the Court.

1 PRESIDING JUDGE FULFORD: Certainly. Yes, Mr. Sachdeva.

2 MR. SACHDEVA: Good morning, Mr. President and your Honours. On
3 that issue I think it's most appropriate to commence with Article 19 of
4 the agreement on the privileges and immunities of International Criminal
5 Court, and I refer your Honours to Article 19 (c) in referring to
6 witnesses, and I quote: "Witnesses shall have immunity from legal
7 process of every kind in respect of words spoken or written and all acts
8 performed by them in the course of their testimony which immunity shall
9 continue to be accorded even after their appearance and testimony before
10 the court." And the --

11 PRESIDING JUDGE FULFORD: I'm going to interrupt, Mr. Sachdeva.
12 There seems to be a problem.

13 MR. SACHDEVA: I understand, Mr. President.

14 And I would say that the Democratic Republic of the Congo has
15 ratified this law.

16 PRESIDING JUDGE FULFORD: You've got to slow down, Mr. Sachdeva.
17 You've got to slow down.

18 MR. SACHDEVA: The Democratic Republic of the Congo has ratified
19 this law as domestic law, and therefore in our submission there is no
20 prospect of former child soldiers being prosecuted on what they have --
21 what they may say in court here. And of course Ms. Bensouda referred
22 your Honours to Article 26 yesterday in respect of prosecution within the
23 court, so in our submission there is sufficient security for witnesses to
24 appear here and to testify freely without the -- the provision of an
25 assurance, especially for former child soldiers.

1 PRESIDING JUDGE FULFORD: That seems to be a very neat and short
2 answer to the problem, Mr. Sachdeva. Thank you very much.

3 Anything on this, Maitre Mabilille? No.

4 Ms. Massidda.

5 MS. MASSIDDA: Thank you, Your Honour.

6 PRESIDING JUDGE FULFORD: Part of your general role as the OPCV.
7 Any thoughts on this?

8 MS. MASSIDDA (interpretation): I believe that my Congolese
9 learned colleagues should interrupt me if my reading of Congolese law on
10 this issue isn't correct, but I believe that Congolese law provides for
11 the possibility of a criminal proceedings being held against anybody from
12 16 years onwards, 16 years being the age when the facts -- or the crimes
13 were committed.

14 I would like my Congolese colleagues to check this information.
15 I looked it up yesterday in the code, but I believe that the
16 Congolese Criminal Code states that 16 years is the age from which
17 somebody may be prosecuted for crimes in the Democratic Republic of the
18 Congo. Moreover, the new law for the implementation of this Rome Statute
19 in the Democratic Republic of the Congo provides that for war crimes
20 somebody has to be 18 to be able to be prosecuted in the
21 Democratic Republic of the Congo.

22 And I want to also raise a concern I have since yesterday
23 following the decision of the Chamber stating that legal representatives
24 have to inform their clients -- client witnesses concerning the
25 implications of Rule 74 of the Rules of Procedure and Evidence. I talked

1 about this issue with my clients in 2007 already, because the first
2 question they asked me when I met them was, "Could I possibly be arrested
3 in The Hague or in the Democratic Republic of the Congo following my
4 statement before the Judges of the International Criminal Court?" So
5 this is a major concern for my clients and continues to be so. And I
6 respectfully submit that, in my opinion, it is not necessary at this
7 stage in the proceedings to proceed according to the instructions given
8 by the Chamber during the oral decision yesterday for children who come
9 and testify as former child soldiers.

10 Thank you.

11 PRESIDING JUDGE FULFORD: Well, Ms. Massidda, I have to say the
12 first part helpful, the second arguably less so. Given the provisions of
13 Rule 74(1) which says that: "The Chamber shall notify a witness of the
14 provisions of this rule before his or her testimony."

15 Now, if you're going to submit that that can broadly be avoided
16 because there's been a discussion in the DRC between you and the witness
17 with dual status some many months or years ago, we're going to need
18 detailed submissions as to why you say it can be avoided. Inconvenience,
19 I'm afraid, simply didn't get close to the threshold, but thank you.

20 Any submissions in relation to Congolese law, please? Yes.

21 MR. DIAKIESE (interpretation): President, we would like to
22 slightly vary on what was said earlier by our learned colleague
23 Ms. Massidda, because the Congolese law unequivocally provided for the
24 criminal responsibility for crimes committed by children between
25 16 and 18. This is a decree that dates back to the colonial period

1 concerning youth delinquency. This decree has not been abrogated up
2 until now, has not been -- is still in force, and therefore the Congolese
3 law applies a principle according to which no Congolese law will become
4 obsolete. It has to be -- there has to be an enactment to do so, and
5 therefore, you can look into more recent laws that have more
6 appropriate -- or provide for more appropriate mechanisms, but as long as
7 the former law has not been cancelled there are contradicting forces at
8 work. And often the counsel themselves have to raise objections before
9 the courts in order to have an appropriate application of the law, and
10 there has to be a decision on the -- whether or not the text is
11 constitutional before the Supreme Court, and thereafter, if necessary,
12 have the law annulled. But this decree on youth delinquency still is in
13 force even though there are other constitutional acts and subsequent laws
14 that have been passed since. And therefore, it is not -- it is not wrong
15 to think that a young person who might have committed crimes when aged 16
16 could be prosecuted in the Democratic Republic of the Congo for these
17 crimes.

18 However, in our opinion, there is more. If a person is covered
19 for the testimony before the court pursuant to the agreement on
20 privileges and immunities, their protection will only cover the statement
21 made before the court, but the crimes committed by these people that
22 isn't concerned by the statement could still be prosecuted in the
23 Democratic Republic of the Congo.

24 Those were my submissions. Thank you.

25 PRESIDING JUDGE FULFORD: Mr. Diakiese, do we -- thank you very

1 much for that. That's extremely helpful.

2 Do we take it from your submission, therefore, that for those
3 under 16, so 15 or below at the time that the acts took place, are immune
4 from prosecution under Congolese law and that what you're referring to is
5 a group between 16 and 18 at the relevant time?

6 MR. DIAKIESE (interpretation): That's right, Mr. President.
7 With regard to criminal responsibility liability is set at 16, age of 16
8 in the Democratic Republic of the Congo. Below that age there is
9 exoneration from criminal responsibility on account of the fact that
10 persons are -- they are minors at that stage.

11 PRESIDING JUDGE FULFORD: Don't worry, Mr. Sachdeva, I've seen
12 you.

13 Your submission, Mr. Diakiese, therefore, would be that for those
14 who are 15 or below, one could say with a particular degree of certainty
15 that anything that they say in this court is not going to result in
16 criminal -- in a criminal prosecution hereafter in the Democratic
17 Republic of Congo. For those who are between 16 and 18, it may well be
18 that Article 19(c), referred to by Mr. Sachdeva, provides a complete
19 answer in relation to anything that they say in this courtroom, although
20 there remains the possibility that wholly independently of anything they
21 say in this courtroom they could, nonetheless, be prosecuted in the
22 Democratic Republic of Congo for those offences, but the -- perhaps the
23 critical ingredient is that the words that they say in this courtroom
24 couldn't found the basis of a Prosecution. Is that right?

25 MR. DIAKIESE (interpretation): I think that we can reasonably

1 believe that, Mr. President.

2 PRESIDING JUDGE FULFORD: Now, Mr. Sachdeva.

3 MR. SACHDEVA: I apologise for being insistent but it may help
4 the discussion. Our understanding is that for war crimes and crimes
5 against humanity committed in the DRC, only the military tribunals and
6 courts have jurisdiction and that jurisdiction does not extend to persons
7 under the age of 18. That's my understanding of the law in the Congo, in
8 the DRC.

9 Secondly, there is amnesty law that will not prosecute children
10 and adults alike for having committed crimes during the period
11 20th August 1996 to 30th June 2005.

12 PRESIDING JUDGE FULFORD: Right.

13 MR. SACHDEVA: In our submission that provides further security
14 to former child soldiers --

15 PRESIDING JUDGE FULFORD: Right.

16 MR. SACHDEVA: -- and also other witnesses coming to the court.
17 I stand to be corrected but that's our information, Mr. President.

18 PRESIDING JUDGE FULFORD: Now, Mr. Sachdeva, what I'm going to
19 ask is this: All of this information that we've heard over the last ten
20 minutes or so is potentially highly relevant to the decision as to
21 whether or not Rule 74 bites at all; and if it does bite, the terms in
22 which any kind of advice needs to be given to the individual, because it
23 may be, although 74, strictly speaking, needs to be brought to the
24 attention of the witness, the -- the chances of there being a prosecution
25 are so low that that can inform the advice that's given.

1 Can a member of your team, and I'm pleased to see there are a
2 number present today, sit down and condense your submissions, what we've
3 heard from Mr. Diakiese, and, as it were, generally put this on two sides
4 of a four so that can have from the Prosecution, those representing the
5 victims, the OPCV, and, if necessary, the Defence, an agreed position as
6 regards the liability for prosecution for those between 16 and 18 and
7 those who are 15 and below? Can that be done?

8 MR. SACHDEVA: That can be done, Mr. President.

9 PRESIDING JUDGE FULFORD: Good. And as soon as possible, please.
10 Right. We will rise so that we can continue with our discussions
11 with the Victims and Witnesses Unit and so Maitre Mabilille can discuss
12 these issues with the other members of her team.

13 So as not to ask you unnecessarily to wait in the courtroom and
14 so that we can progress sensibly this morning, we will sit again at
15 11.00, by which time we hope that greater clarity will be able to be
16 thrown on the position of Witness one.

17 Ms. Bensouda, without bringing him down to the courtroom, can you
18 ensure, please, that Witness two is in a position, if called upon, to
19 give evidence this morning.

20 MS. BENSOUDA: Very well, Mr. President.

21 PRESIDING JUDGE FULFORD: Thank you very much. Eleven o'clock
22 then.

23 COURT USHER: All rise.

24 Recess taken at 10.08 a.m.

25 On resuming at 11.32 a.m.

1 COURT USHER: All rise. Please be seated.

2 PRESIDING JUDGE FULFORD: Maitre Mabilille, having had a little
3 time, is there anything you'd wish to say about the issues that I
4 canvassed this morning?

5 MS. MABILLE (interpretation): My colleague Mr. Jean-Marie
6 Biju-Duval will speak, Mr. President.

7 MR. BIJU-DUVAL (interpretation): Thank you, Mr. President.
8 First of all, I think it will be useless to keep insisting that the
9 Defence is very concerned, and we would like the testimony to be given
10 under the best possible conditions. I don't think it's also necessary to
11 state that the Defence has no doubt, no doubt at all, about the
12 well-founded intentions of the Chamber with regard to the conditions
13 under which this testimony should be given.

14 That said, the problem we are facing raises certain difficulties
15 for the Defence. A testimony was given and exceptional precautions were
16 taken prior to the testimony being given and even while the testimony was
17 being given because the witness was able to consult his counsel. These
18 are conditions which we have never seen applied in any other court of
19 this nature. We all know that giving testimony before a court is always
20 difficult, but one thing is certain, and it is that this testimony was
21 given under the best possible conditions. And with all such precautions
22 taken, the witness at the beginning of the questioning by the Prosecutor
23 and without showing any -- any signs of being particularly upset, he
24 said, "I am going to tell you the truth, and the truth is that what I
25 told the Prosecutor earlier is wrong or is false."

1 At that time his testimony was interrupted. The Defence did not
2 wish to intervene at that juncture because we did not want to upset the
3 witness further, but we think that the witness should have carried on
4 with his testimony to give additional information with regard to the
5 truth which he wanted to tell the Court.

6 That testimony was interrupted, and this raises a difficulty. It
7 was interrupted as if the mere fact that the witness said, "I would like
8 to change what I said earlier." The witness said, "I lied earlier, and I
9 would like to tell the truth now," and it would appear as if we are
10 trying to interpret this as a sign that the witness was upset, as if this
11 change of testimony can be interpreted as improper, and we do not find
12 such interpretation satisfactory. The testimony was being given under
13 the best possible conditions, and now we are having concerns about how we
14 are going to carry on with this testimony.

15 I would like to make two observations. The first is that a
16 testimony was given under the best possible conditions and should
17 therefore be taken into consideration by the Chamber.

18 Now, with regard to the continuation of this testimony, we think
19 that it would be important that this testimony should not be postponed
20 for reasons which are not legitimate. Why? Because we think it would
21 not be proper for us to find ourselves in a situation where the witness
22 would have the impression that he did not say what he actually wanted to
23 say, that we are punishing him, as it were, for changing his word. And
24 so our action would not be viewed as precaution as to ensure the
25 integrity of the testimony. Postponing the testimony could be

1 interpreted as the witness - and this is just an assumption - it could be
2 interpreted as the -- by the witness as a form of pressure we are putting
3 on him. And I apologise for using this word which is a bit strong, but
4 we should avoid this. We should avoid it for this witness, and we should
5 avoid it for future witnesses. Some of them may appear before the Court
6 earlier and say, "We wish to change what appears in our statement because
7 we want to tell the truth."

8 I agree that the solemnity of an appearance in a courtroom, the
9 taking of an oath in a courtroom can, in certain cases, make the witness
10 to decide to tell the truth, and this can be a reason for a change of a
11 statement given by a witness. When we have a witness take an oath, we're
12 not doing it as a mere formality, Mr. President.

13 Those are the clarifications we would like to give on this point,
14 Mr. President. Once more, we have no doubt about the well-founded
15 intentions of the Chamber and of the other parties and participants, but
16 we think that these intentions and these precautions should not yield
17 results that are inconsistent with the objectives of this Chamber.

18 Thank you, Mr. President.

19 PRESIDING JUDGE FULFORD: Thank you, Mr. Biju-Duval.

20 (The Trial Chamber confers)

21 PRESIDING JUDGE FULFORD: Earlier today the Chamber indicated
22 that we have been provided with a report from the Victims and Witnesses
23 Unit that Witness one, who commenced his evidence yesterday, is not in an
24 appropriate condition to continue giving evidence this morning or indeed
25 today at all. We generally canvassed with the parties and the

1 participants as to what is, in these unusual circumstances, the best
2 approach to be taken.

3 Mr. Biju-Duval, on behalf of the accused, having had an
4 opportunity of discussing this matter with other members of the team to
5 which he belongs has essentially advanced three points. First, it is
6 submitted that the accused [sic] gave evidence yesterday in what is
7 described by the Defence as being the best possible circumstances.

8 Second, it is submitted that the evidence of the witness should
9 not have terminated at the point that it did following an application by
10 Ms. Bensouda to be given time so that she could reflect on the
11 appropriate course to be taken.

12 And third, and possibly most importantly as regards our decision
13 now, it is submitted that rather than adjourning the evidence of this
14 witness he should be brought back into court so that his evidence should
15 continue.

16 It is important in considering the way that the Court should
17 proceed to bear in mind the exact history as to what occurred yesterday
18 and the situation with which we are faced this morning.

19 During the course of the witness's evidence he appeared to say
20 that the original statement that he had provided to the investigator who
21 interviewed him was untrue. Faced with that statement, unsurprisingly,
22 in our judgement, Ms. Bensouda for the Prosecution asked for time so that
23 she could reflect on what the appropriate stance would be for the
24 Prosecution when faced with that evidence. That led to the interruption
25 in his evidence and the adjournment that has then led to us revisiting

1 the position this morning.

2 As a result of consideration of his general welfare, the clear
3 information provided to us by the Victims and Witnesses Unit is that it
4 would be against his interests for us to attempt to continue with his
5 evidence today. The unequivocal view of the Victims and Witnesses Unit
6 is that he is simply not in an appropriate state to deal with the
7 pressures of continuing his evidence in the immediate future.

8 It therefore seems to us that the submission of Mr. Biju-Duval
9 that we should bring him back into the courtroom for him to continue
10 forthwith with his evidence would be the wrong approach to adopt and
11 indeed would be in breach of our statutory obligation to protect the
12 welfare of witnesses who appear before this court.

13 The evidence of this witness will be adjourned. Not only will it
14 be adjourned, but we are going to request of the Victims and Witnesses
15 Unit a report which provides us with all necessary information as regards
16 the most conducive circumstances that can be adopted by this Chamber to
17 enable the witness to continue to give evidence without feeling under
18 undue pressure.

19 We wish to emphasise in the most profound way possible that the
20 interest of this court is in nothing but the truth, and we wish to ensure
21 that this witness is put in the best possible position to tell the
22 Chamber the truth whatever that may be.

23 Those from the Victims and Witnesses Unit who will be speaking to
24 him over the next little while are under a strong injunction from us to
25 ensure that they do not engage in conversations which will impact on the

1 evidence that this witness in due course, we hope, will be able to give.
2 He must be free, unimpeded by outside influence, in coming before this
3 court under oath to give his evidence so that -- so that it reflects what
4 is in his view the truth of the situation.

5 We hope to be in possession of this report by Monday, and it is
6 at that stage that we will be able to liaise further with the parties and
7 the participants as to exactly what, if anything, needs to be instituted
8 to enable his evidence to continue.

9 On your discrete application, Ms. Bensouda, for the investigator
10 to speak with the witness, the view at the moment of the Victims and
11 Witnesses Unit, which we accept, is that the number of people who have
12 dealings with the witness should be kept to an absolute minimum, and
13 therefore, at this stage we consider it inappropriate for there to be yet
14 another person going in to speak with him.

15 Mr. Walley, subject to the matter that we've had a very brief
16 indication that you wish to raise with us which may in any event have an
17 impact on your professional position in relation to one or both of
18 Witnesses one or two, although we do not wish in any way to interrupt the
19 proper relationship that should exist between a client and his or her
20 lawyer, the spirit of our decision today is that to the maximum extent
21 reasonable and possible additional people are likely to be unhelpful in
22 the immediate future in terms of stabilising the witness, and whether or
23 not there is contact between you and him over the next few days and your
24 decision in that regard should please be informed about the observations
25 that we have just made. I repeat, we are not going to stand in the way

1 of there being meetings between you because there is a relationship of
2 lawyer and client, but we would ask you to make your decision as to
3 whether or not they should occur against the backdrop of the observations
4 that have just been made.

5 Now, Ms. Bensouda, this then takes us to the issue of where we
6 should go from here. Our preliminary view is that subject to being able
7 to resolve the issue of what warnings, if any, need to be given to
8 Witness two, in order to ensure that this trial maintains momentum and
9 given that he is at court ready to give evidence and given there is no
10 contact between him and Witness one, so they cannot affect each other's
11 evidence, we are of the view that we should continue with his evidence,
12 but we would be grateful for your submissions and those of Maitre Mabilie
13 on that proposal.

14 MS. BENSOUDA: Mr. President, given the circumstances of the
15 relationship between Witness one and Witness two and knowing their family
16 situation even in (Expunged), the Office of the Prosecutor wants to request
17 that the investigations that are being carried out in respect of
18 Witness one, if possible, be extended to include Witness two, because,
19 Mr. President, we cannot conclusively say at this stage that whatever --
20 and I'm not saying that the witness has received threats but it is a
21 possibility, that whatever threats Witness one has received, we cannot
22 conclusively say that Witness two has received given the circumstances of
23 both their relationship, family relationship.

24 PRESIDING JUDGE FULFORD: Ms. Bensouda, we need to make it clear
25 that within the information that has been brought to our attention which

1 has informed us as to the current instability of Witness one, external
2 threats have not featured at all. Now, if you are suggesting that we
3 should adjourn Witness two as well because there's a possibility of
4 threats, that submission is going to have to be put on some kind of
5 evidential basis. So if you are saying to us that there are reasonable
6 grounds for believing that either Witness one or Witness two or both have
7 been threatened, we're going to need chapter and verse, please.

8 MS. BENSOUDA: Mr. President, my submission is that I do not
9 think that Witness one's situation can be taken in isolation.

10 PRESIDING JUDGE FULFORD: I understand that, Ms. Bensouda, but
11 your -- the foundation of your submission is threats, and you're saying
12 that they should be looked at together, because if one has been
13 threatened, they both may have been threatened. Now what's the
14 foundation for suggesting there have been threats?

15 MS. BENSOUDA: Mr. President, at this moment since our
16 investigations are still going on, because we are doing that, and I also
17 think the VWU is doing their investigations, none of the investigations
18 has been concluded, I do not think we should at this moment conclusively
19 say that this is not a possibility.

20 PRESIDING JUDGE FULFORD: All possibilities exist, Ms. Bensouda.
21 But if it's to be suggested that this trial should come to a halt for an
22 indefinite period of time because of threats, there has to be some
23 evidential foundation for this.

24 Now, is it just that this is speculation, in fact, and you wish
25 it to be investigated to see whether it exists, or do you have prima

1 facie evidence of it that we should be informed about?

2 MS. BENSOUDA: Mr. President, as I indicated, just because our
3 investigations are not yet conclusive, I cannot tell the Court now that
4 we have prima facie proof which I can present. It would be
5 irresponsible, Mr. President, on my part to do that. But I am requesting
6 that the investigations that are being carried out in respect of
7 Witness one be extended to include Witness two. And that does not mean,
8 Mr. President, that the trial is going to halt. The Prosecution is in a
9 position to proceed with other trial witness if that is what the Chamber
10 orders, but I merely think that it is prudent on our part to extend these
11 investigations to include Witness two.

12 PRESIDING JUDGE FULFORD: Now, what would your proposals then be,
13 Ms. Bensouda, in relation to other evidence that can now be called so
14 that the trial progresses?

15 MS. BENSOUDA: Mr. President, if I may just consult. I'll be
16 back.

17 PRESIDING JUDGE FULFORD: Certainly.
18 (Prosecution counsel confer)

19 PRESIDING JUDGE FULFORD: Ms. Massidda, not appropriate.
20 Yes, Ms. Bensouda.

21 MS. BENSOUDA: Mr. President, once the familiarisation of
22 Witness three is completed, we're ready to start with Witness three. I
23 think tomorrow morning if that is acceptable to the Chamber, we're ready
24 to proceed. We've also been informed that Witness four is now ready to
25 come. So we can take also Witness four on Monday.

1 PRESIDING JUDGE FULFORD: Ms. Bensouda, there was an order from
2 the Bench earlier this week that if the expert was to be called out of
3 order, and the expert at the moment is Witness three, that there needed
4 to be a written submission justifying that course of action. Now, when I
5 came down from my room at the beginning of the day, there was no written
6 application of which I am aware. At the moment, Witness three is
7 Mr. Prunier, but I anticipate that he doesn't need familiarising,
8 Ms. Bensouda.

9 Now, why hasn't there and a written application.

10 MR. SACHDEVA: Mr. President, if I may. The application is, in
11 fact, going to be submitted today. I apologise for that. And the
12 information that we have been receiving is that, again for circumstances
13 beyond our control, the dates of the expert's testimony are being changed
14 or he's available one moment and not available at another, and so that's
15 why there had been some slight delay in putting forward that application.
16 But the last information that we have is that he is indeed ready to
17 testify on Monday, the 2nd of February. We just wanted to confirm that
18 before we put in the application.

19 PRESIDING JUDGE FULFORD: Well, it's not a very happy situation
20 given the very clear indication that we gave quite some time ago, but
21 let's leave it there for a moment -- for the moment. You're suggesting,
22 therefore, that we move to civilian Witness three rather than the expert.
23 That's your proposal?

24 MR. SACHDEVA: That's the proposal, Mr. President.

25 PRESIDING JUDGE FULFORD: Good. Thank you.

1 Maitre Mabilille.

2 MS. MABILLE (interpretation): Mr. President, as concerns
3 Witness two, I would like to say that I find it difficult to understand
4 the position of the Office of the Prosecutor. We are dealing with a
5 witness who is an adult for whom -- well, we are dealing with somebody
6 who is an adult. We should bring him to the courtroom, and we should
7 together try to see -- find out from him if there have been any threats,
8 because I find it difficult to understand how we are going to proceed.

9 If a witness changes part of his or her statement at any time and
10 we suspend the proceedings and the Prosecutor says that there was a
11 change of statement because of threats, then I wonder how we're going to
12 proceed. I think we need some concrete proof here.

13 I think that saying we should not take the testimony of
14 Witness two because he allegedly received threats, I would like to say
15 that this is an adult we're dealing with, and we can call him and ask him
16 if he received any threats, and so I don't understand why we should not
17 take the testimony of that witness.

18 Can I move to a second point, Mr. President, which relates to the
19 testimony of Witness two? Yesterday evening, at the invitation of the
20 Chamber, we reviewed the transcripts of yesterday's hearing --

21 PRESIDING JUDGE FULFORD: (Previous translation continues) ... due
22 course. I think it's a separate subject as to whether or not there -- I
23 think it's a separate subject as to whether or not there were problems
24 with interpretation. I'd quite like to sort out first the order of play,
25 but I promise you you'll be given time to deal with interpretation

1 problems.

2 MS. MABILLE (interpretation): Actually, President, I was linking
3 up the two issues, because if the Chamber decides to hear the number two,
4 I wanted to make observations about Witness number one so we all have the
5 same information when Witness two comes. That's why I had linked up both
6 issues, but I am available to speak about it later if necessary.

7 PRESIDING JUDGE FULFORD: Yes. I'd prefer for us to deal with
8 this later.

9 Ms. Bensouda, I'll return to you in a moment.

10 Mr. Walley, I want to ask you a question at this point. We were
11 told just before we came into court that there's a matter you wish to
12 raise as regards your professional position which may have an impact on
13 all of this. Now, is this something that you're able to reveal in open
14 court, or is there something about it which requires for a different
15 course to be adopted?

16 MR. WALLEYN: (Microphone not activated) -- in open court, and if
17 not, only in an ex parte position.

18 PRESIDING JUDGE FULFORD: Make sure I understand this fully. Are
19 you saying that there's a problem which you're not able to reveal to
20 anyone, or is there a problem which you would wish to address the Judges
21 on alone?

22 MR. WALLEYN: It's a problem I wish to address the Judges alone.

23 PRESIDING JUDGE FULFORD: And -- and this, so that there's no
24 misunderstanding, this relates to your professional position rather than
25 you seeking a hearing in which you are in any way going to be dealing

1 with the evidence that's been given in court or which may be given in the
2 future.

3 MR. WALLEYN: Your understanding is right, Mr. President.

4 PRESIDING JUDGE FULFORD: Thank you.

5 Now, Ms. Bensouda, you were about to stand up.

6 MS. BENSOUDA: Just to indicate that the Office of the
7 Prosecutor, if the Chamber should so decide, is ready to proceed with the
8 second witness. We're actually ready to proceed with the witness, but we
9 thought we'd put this on the record. And if the Chamber decides that we
10 proceed, we're ready to proceed and we will proceed with the second
11 witness.

12 PRESIDING JUDGE FULFORD: Thank you very much, Ms. Bensouda.

13 Now, there's a further ingredient in all of this, and I had
14 originally intended to put this question to you, Mr. Walley, but it may
15 now be inappropriate for me to do so, and can you just indicate yes or no
16 as to whether or not this is something you can deal with.

17 If, and I give that a heavy underlying, if we proceed with
18 Witness two, the very first question that we will have to address is the
19 extent to which, if at all, he needs to be warned by someone as to the
20 possibility of self-incrimination. He is clearly in a different position
21 to Witness one because he's an adult.

22 Now, are you in fact still able to provide us with assistance in
23 relation to this or have events changed the position so that you are no
24 longer in a position to advance submissions on his behalf in that regard?

25 MR. WALLEYN: I think, Mr. President, that I gave the client the

1 information the Court wished to be given, and he was seeking indeed to
2 have some ensurance on that point.

3 PRESIDING JUDGE FULFORD: And were you able to answer the
4 questions he put in that regard, Mr. Walleyne?

5 MR. WALLEYN: Mr. President, I'm in a very delicate --

6 PRESIDING JUDGE FULFORD: Say no more. Thank you. All right.
7 So -- but what we can take from this is that the issue of
8 self-incrimination was raised --

9 MR. WALLEYN: Yes.

10 PRESIDING JUDGE FULFORD: -- and you gave him your professional
11 advice.

12 MR. WALLEYN: Yes.

13 PRESIDING JUDGE FULFORD: Thank you.

14 Now, Mr. Sachdeva, on your analysis of the law, given two
15 factors, one, the agreements which exist between this court and the DRC;
16 and two, the immunities -- or the immunity that was referred to by
17 counsel earlier today, is it the Prosecution's view that Witness two
18 requires, in those circumstances, to be warned as to the risks of
19 self-incrimination, or is that -- or is any -- or are any criminal
20 proceedings such a remote likelihood, if not an impossibility, that he
21 doesn't need the warning?

22 MR. SACHDEVA: Mr. President, in my submission, I think the
23 latter is applicable. I understand, as Mr. Walleyne has submitted today,
24 what has taken place, and under those circumstances the latter, as
25 Mr. President as suggested, is applicable for this witness.

1 PRESIDING JUDGE FULFORD: Right. So the Prosecution's position
2 therefore is that the combined effect of the immunity in the DRC and the
3 agreements between this court and the DRC render any future prosecution
4 highly unlikely, if not inconceivable. And in addition to that, this is
5 somebody who has already received professional advice on the point. Now,
6 does that or does that not reflect the Prosecution's position?

7 MR. SACHDEVA: It does, Mr. President. I just stress that of
8 course I underline highly unlikely. Of course I can never guarantee
9 that.

10 PRESIDING JUDGE FULFORD: Mr. Diakiese, I'm going to come back to
11 you, if I may, fulfilling something of an amicus role on this issue. The
12 immunities that you referred to earlier today, do they apply -- or does
13 this apply to former combatants generally or former child soldiers only?

14 MR. DIAKIESE (interpretation): Your Honour, we spoke about the
15 general position of the law because the law applies to general
16 situations. However, following peace agreements in the Democratic
17 Republic of the Congo there was a decision for no decrees to be taken by
18 the president. That was the amnesty decree. However, this amnesty
19 doesn't cover war crimes, crimes against humanity, and genocide. This
20 amnesty is only for acts that happened during the war.

21 As regards the specific case of children, there is no specific
22 law on child soldiers. However, there is a law on minors' criminal
23 liability before military courts and tribunals which have jurisdiction
24 for crimes which up until now have been under the jurisdiction of the
25 court but which in the DRC are within the jurisdiction of military courts

1 and tribunals, and these do not try people under the age of 18.

2 So it appears, and this is also the opinion of the Office of the
3 Prosecutor, that it would be very rare for a person who had been a child
4 soldier to have been at the time of the crimes of an age which would
5 enable him to be prosecuted by the military courts and tribunals at
6 present.

7 Now, as regards the crimes within the jurisdiction of these
8 military courts and tribunals, they aren't crimes which a normal law
9 would cover, because they should have been at least 16 years old, which
10 would have enabled the judges to prosecute them. But I can't say this in
11 very definite terms, but it is very likely that a child who was 16 at the
12 time of the crimes, it is very unlikely they would be prosecuted by the
13 regular judges.

14 So to date, Congolese law provides that in the cases of crimes
15 within the court -- jurisdiction of the court, only children who were age
16 18 at the time of the crimes could be prosecuted in these Congolese
17 courts and tribunals.

18 MR. WALLEYN (interpretation): There was another point I wanted
19 to raise, President. We have witnesses within a protection programme,
20 and therefore it is not only the laws of the DRC that could apply.
21 Theoretically they could be resettled in a third country, and this
22 country could request the information that was given to the court. These
23 countries in some cases also have provisions under national law which
24 provide for the prosecution of war crimes or crimes against humanity
25 committed abroad, and therefore I believe that it would be useful to tell

1 this witness that what he will say before the court won't only not be
2 used against him by the Office of the Prosecutor but that the information
3 won't be provided to third States either.

4 PRESIDING JUDGE FULFORD: Thank you.

5 (The Trial Chamber confers)

6 PRESIDING JUDGE FULFORD: There are in reality two options as to
7 how we should now proceed. Given that we have decided that Witness one
8 and his testimony will be adjourned for the immediate future, we either
9 move straight to Witness two or, in conformity with the submission of
10 Ms. Bensouda, we move, as it were, to a different area altogether and
11 have the individual who has been described as Witness three, who is also
12 a civilian, called next.

13 We wish to stress at this point in time we are wholly
14 uninfluenced by the suggestion by Ms. Bensouda that there may have been
15 threats. There is simply no evidence before us that threats have been
16 made to either Witness one or Witness two, and it would be wholly
17 inappropriate for an unsubstantiated allegation to inform our thinking on
18 the issue.

19 However, there is a clear difficulty in relation to Witness two
20 in that he is at the moment represented by Mr. Walley, and Mr. Walley
21 has certain professional problems which have got to be set out to the
22 Bench and investigated by us. In addition to that and irrespective of
23 those professional problems, there is an undoubted issue that needs to be
24 resolved by the Chamber, and carefully, as to the exact nature of the
25 warning, if any, which is given to witnesses who are former child

1 soldiers or adults as regards self-incrimination. This, in the
2 experience of the last 24 hours, has revealed itself, happens to an
3 extent unexpectedly, as an issue of potentially very considerable
4 importance.

5 Therefore, putting all those matters together, it seems to us
6 that the most certain basis on which we can proceed is to say that there
7 will be no evidence this afternoon, which is to be used, please, by the
8 Prosecution in liaison with representatives of those for the victims who
9 can give considerable assistance in this regard in putting together an
10 analysis for us as to the precise position in relation to those both over
11 16 at the relevant time and those under 16 at the relevant time as
12 regards the risks for them in the DRC or elsewhere being prosecuted on
13 the basis of evidence which they give in this court. That, please, to be
14 provided to us by 8.00 tomorrow morning.

15 Because of Mr. Walley's ethical problems which we will
16 investigate in a moment ex parte, unless Maitre Mabilille has objections to
17 that course being taken, which I'll hear in a moment, we think it safest
18 and most likely to put the position -- put the Chamber in a position
19 where it can continue with evidence tomorrow if we turn next to
20 Witness three rather than Witness two.

21 Accordingly, that is the order that will be taken. We will deal
22 with Witness three tomorrow, and the two outstanding issues then for this
23 morning are, firstly, whether we can hear Mr. Walley ex parte on his
24 professional difficulty, steering well clear of anything to do with the
25 evidence of any of the people he represents; and secondly, we must deal

1 with the concerns of Maitre Mabilille as regards interpretation.

2 Could I ask you to take them in that order, please,

3 Maitre Mabilille. Well, I have called on Maitre Mabilille. Is there

4 something that has to be said before she takes the floor, Mr. Sachdeva?

5 MR. SACHDEVA: Mr. President, I apologise. I think so, if I may.

6 It won't be very long. But I just wanted to clarify that the --

7 Witness three is in fact somebody that was in the military, so in other

8 words, not a civilian witness, and indeed he is one of the witnesses that

9 we had identified as a possible potential witness for which Rule 74 could
10 be applicable.

11 PRESIDING JUDGE FULFORD: By civilian I was only seeking to
12 distinguish between experts and non-experts, Mr. Sachdeva, given that the
13 course that we proposed is seemingly not going to be followed. I was
14 wishing to make it clear that I was referring to a third witness who was
15 not an expert.

16 MR. SACHDEVA: Thank you for the clarification. I just wanted to
17 be absolutely sure.

18 PRESIDING JUDGE FULFORD: Thank you. Maitre Mabilille.

19 MS. MABILILLE (interpretation): No observations. No, as regards
20 the ex parte, no concerns.

21 PRESIDING JUDGE FULFORD: Before I ask Maitre Mabilille to deal
22 with interpretation, protective measures for Witness three. Anything in
23 addition -- anything in addition to your written application,
24 Mr. Sachdeva?

25 MR. SACHDEVA: Nothing further, Mr. President.

1 PRESIDING JUDGE FULFORD: Thank you. On protective measures for
2 Witness three, Maitre Mabilille, you've put in a filing setting out your
3 objection to what is proposed. Is there anything you'd wish to add to
4 that filing?

5 MS. MABILILE (interpretation): No, nothing, President.

6 PRESIDING JUDGE FULFORD: The protective measures sought,
7 Mr. Sachdeva, are distortion face and voice.

8 MR. SACHDEVA: And a pseudonym, Mr. President.

9 PRESIDING JUDGE FULFORD: And pseudonym. Those three. The basis
10 being that threats have been made?

11 MR. SACHDEVA: Mr. President, it's our understanding that he has
12 been intimidated or that he feels intimidated, yes.

13 PRESIDING JUDGE FULFORD: Right. Well, that's what I meant.
14 So -- right. So feels intimidated so that begs the question then as to
15 whether there have actually been threats. Has he been intimidated or
16 does he feel intimidated?

17 MR. SACHDEVA: Mr. President, may I ask Ms. Samson to answer on
18 this. Thank you.

19 PRESIDING JUDGE FULFORD: Certainly.

20 MS. SAMSON: Thank you, Mr. President. As we had set out in the
21 application, this particular witness had experienced threats in 2007, at
22 which time the Office of the Prosecutor in consultation with the VWU
23 relocated him. The threats at that stage had ceased. More recently, he
24 has felt intimidation that has not reached the stage of an actual threat,
25 but he has felt intimidation in relation to his testimony here at the

1 court. On the basis of the information he provided to us we made the
2 application with full details contained therein.

3 We did contact the witness prior to his arrival in The Hague in
4 order to confirm whether or not he felt comfortable with an open
5 testimony. The witness confirmed that he was grateful for our efforts to
6 secure additional protective measures for him; however, he indicated that
7 he would proceed in the way in which the Chamber directed his testimony
8 should be taken.

9 PRESIDING JUDGE FULFORD: Thank you. We will reflect on this and
10 deliver our decision first thing tomorrow morning. Thank you very much.

11 MS. SAMSON: Thank you.

12 PRESIDING JUDGE FULFORD: Mr. Biju-Duval.

13 MR. BIJU-DUVAL (interpretation): Thank you, President. I just
14 wanted to say something following on from what the Office of the
15 Prosecutor was just saying about the issue of the witness's security and
16 possible intimidation. The Defence is only informed of what they have
17 been told, what we know and what has been said by the witness protection
18 section.

19 So firstly, the witness protection section has said that they
20 have their doubts concerning the sincerity of the witness as regards
21 their security situation. That was the first point.

22 Secondly, having studied the situation of this witness, the unit,
23 Victims and Witnesses Unit, decided that it wasn't necessary to give this
24 person additional protection or to put them in a protection programme, or
25 at least that is what appears in the report that was given to us by the

1 section for the protection of witnesses. So we are surprised concerning
2 the Prosecution's allegation about these intimidations happening in
3 practice, in reality.

4 PRESIDING JUDGE FULFORD: Thank you, Mr. Biju-Duval. We'll weigh
5 those observations carefully in arriving at our decision.

6 Maitre Mabilille, given that we have decided to move away from
7 Witness one and Witness two and given that the Registry's report on
8 interpretation was only received a little bit after half past 10.00 this
9 morning, and as I understand it, it hasn't yet made its way to all of the
10 parties and the participants, would it be more helpful to deal with your
11 concerns over interpretation at a stage during tomorrow when everyone has
12 had an opportunity of considering the report?

13 MS. MABILLE (interpretation): Yes, absolutely. I actually
14 contacted the legal representatives and Office of the Prosecutor and
15 realised they hadn't been given the report. So I believe it would be
16 useful for everybody to have it before I make my observations. Thank
17 you, President.

18 PRESIDING JUDGE FULFORD: Thank you very much.

19 (Trial Chamber and legal officer confer)

20 PRESIDING JUDGE FULFORD: I think, Ms. Bensouda, that covers
21 everything that we possibly can today. We will hope, therefore, to be
22 able to commence the evidence of Witness three, as I'm now going to call
23 him, tomorrow morning. Of course there may be some kind of hiatus
24 because we're going to have to address the issue of self-incrimination
25 before he is actually called, but if we have the document that we've

1 requested in good time, that should shorten, I hope, the length of the
2 delay.

3 Thank you all very much for your assistance. We will sit
4 tomorrow at 9.30 in the morning.

5 COURT USHER: All rise.

6 PRESIDING JUDGE FULFORD: Mr. Walley, we'll hear your concerns
7 now as soon as the court is clear, ex parte.

8 The hearing ends at 12.31 p.m.

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