

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 Wednesday, 28 January 2009

6 The hearing starts at 9.35 a.m.

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

9 PRESIDING JUDGE FULFORD: Good morning. This is our oral
10 decision in relation to various matters which are related to the issue of
11 self-incrimination.

12 The terms of Rule 74(1) of the Rules of Procedure and Evidence
13 are stark and clear: the Chamber is obliged to "notify" a witness of the
14 provisions of this Rule before his or her testimony. The only
15 "exception" is when a State Party, under Article 93(1)(e), facilitates
16 the voluntary appearance of persons as witnesses before the Court and
17 when the Court made the request for assistance it annexed an instruction
18 concerning self-incrimination and the operation of Rule 74 to be provided
19 to the witness in question in a language that the person fully
20 understands and speaks.

21 The "exception" does not apply to any of the witnesses to whom
22 this provision relates in this case.

23 Accordingly, for the current trial this is a requirement of
24 general application, save that it will not arise with witnesses such as
25 experts and others who, for instance, by the nature of their evidence are

1 self-evidently not the subject of the provision.

2 The first question that arises is what is meant by the expression
3 "the Chamber shall notify." Does this mean that in each instance the
4 Judges must undertake this task once the witness has been called into
5 court to give evidence, or can it be delegated in appropriate
6 circumstances to a suitably qualified and independent person?

7 This question is easily answered. The "exception" (viz. the first part
8 of Rule 74 subrule (1)) envisages notification to the witness by way of
9 a written notice attached to an annex which is in a language the person
10 fully understands and speaks. Therefore, it was clearly contemplated by
11 those who framed this rule that notification does not have to be in a
12 formal court setting delivered by the Bench. In the judgement of the
13 Court, that approach is in accordance with common sense, and it is in the
14 interests of fair proceedings. Rule 74 is a long and complicated
15 provision, and for any witness - and particularly young former child
16 soldiers who are unlikely previously to have been inside a courtroom - it
17 would be extremely difficult to understand and thereafter to react
18 appropriately to a judicial explanation of the operation of this Rule
19 given in formal surroundings at the commencement of their evidence.

20 The Bench is of the view that notification of the provisions of
21 Rule 74 should be given by a suitably qualified lawyer, and particularly,
22 that individual must be familiar with the provisions of the Rome Statute
23 framework and the operation of the relevant criminal law in the DRC. For
24 those with dual status, this should be undertaken by their current
25 lawyers. Indeed, advice of this kind falls well within the role of a

1 lawyer representing someone who is due to give evidence in criminal
2 proceedings but whose evidence may reveal involvement in an offence or
3 offences. The Bench will therefore assume that this advice has been
4 given and that no difficulties are anticipated unless the matter is
5 raised by the representative or the witness. The representative will be
6 asked to certify at an appropriate stage that notification of the
7 provisions of Rule 74 has been given and this should be done in writing.

8 We emphasise observations from the Bench yesterday that this
9 process must not trespass into the area of witness proofing which itself
10 has been the subject of a number of decisions by this Court.

11 The Registrar, as a matter of urgency, is to ensure that a lawyer
12 fulfilling the criteria set out above is available to provide
13 notification to all other witnesses who are unrepresented. Although this
14 procedure could undoubtedly be undertaken by someone who does not speak
15 Swahili or Lingala through the use of interpreters, it would be
16 preferable if the lawyer is fluent in one of those languages. The
17 Chamber is fully aware that this will involve not insignificant
18 expenditure, but this is likely to be low in comparison with the cost
19 that will follow from the adjournments and misunderstandings that are
20 otherwise likely to result.

21 The Chamber makes this order under Article 64(6)(f) which
22 provides that: "In performing its functions prior to trial or during the
23 course of a trial, the Trial Chamber may, as necessary ... rule on
24 any ... relevant matter."

25 It is to be noted that under Article 55(2), where there are

1 grounds to believe that a person has committed a crime within the
2 jurisdiction of the court and that person is about to be questioned
3 either by the Prosecutor or by national authorities pursuant to a Part 9
4 request, he or she is entitled to legal assistance of their choosing, and
5 where this is not applicable to have legal assistance assigned whenever
6 the interests of justice so require and without payment for those without
7 sufficient funds to pay for it.

8 In the view of the Chamber, this protection during the
9 investigation which is afforded to those who may have committed crimes is
10 equally, if not more, important during the trial itself. If the risk of
11 self-incrimination under oath arises in the course of the court
12 proceedings, it is in the interests of justice that the witness should be
13 able to consult with a lawyer in the circumstances which we have detailed
14 above. Under Article 64(6)(f), the Chamber therefore makes an order
15 which ensures that Article 55(2), protection for witnesses, continues
16 where appropriate during the trial.

17 In case the issue of self-incrimination arises in the course of
18 the witness's evidence, the relevant lawyer must be immediately, and we
19 stress that word, immediately available to provide legal advice under
20 Rule 74 subrule (10).

21 If the Prosecution seeks to suggest that an assurance from the
22 Court under Rule 74(2) and (4) is appropriate, an application must be
23 made in good time (preferably before the day the witness is due to
24 testify), in order for an ex parte hearing to take place and to enable
25 the Chamber to reflect on the position.

1 Finally, the lawyers undertaking the Rule 74 notification shall also inform
2 the witness of the offence defined in Article 70(1)(a) for the purposes
3 of Rule 66 subrule (3). In the view of the Bench, it would be wholly
4 inappropriate at the beginning of a witness's testimony (many of whom may
5 be nervous) for the Judges to issue a warning of the possibility that
6 they could be charged with an offence of giving false testimony if they
7 do not tell the truth. Rule 66 subrule (3) does not require the Judges to
8 inform the witness of the offence defined in Article 70(1)(a), and in our
9 judgement, it is preferable for this procedure to be undertaken by
10 lawyers outside of court and in calmer circumstances.

11 In order for a lawyer appointed by the Registry to advise those
12 witnesses who do not have dual status, he or she will need to have been
13 provided with the relevant witness statements and interviews of the
14 witnesses to whom this ruling applies. If there are any difficulties
15 that are apprehended in relation to the Prosecution providing that lawyer
16 with this material, the concerns are to be brought to our attention at
17 the earliest opportunity.

18 That concludes this oral ruling.

19 Now, Mr. Walley, this immediately raises an issue in relation to
20 the very first witness who, as I understand it, is said to be a former
21 child soldier who may have himself committed offences. It is probably
22 unlikely that you have by this point in time or at this point in time
23 given the advice to him that we have just outlined in the oral decision
24 that we've just delivered, but can I ask you whether in fact you have or
25 not done that.

1 MR. WALLEYN (interpretation): Mr. President, I gave some
2 information, but I don't think I was as exhaustive in giving that
3 information to include the rule which you have just mentioned.

4 PRESIDING JUDGE FULFORD: Mr. Walley, in our view this needs to
5 be done, as it were, coolly and quietly and in an unhurried way. These
6 concepts are difficult enough for lawyers and judges, but for civilians
7 who have no familiarity with court proceedings, they require some
8 explanation and some time to understand them. So subject to any
9 observations by anyone else, before the first witness is called we
10 propose to give you such reasonable time as you need to explain these
11 matters to the first witness.

12 And of course you're now on notice, as are other legal
13 representatives, that this is something that needs to be done with the
14 dual-status witnesses to come. So when we rise in a moment, do not feel
15 under any pressure of time, and only indicate to the Court Officer that
16 you are ready for us to proceed once you are confident that the first
17 witness has understood these things and has had the opportunity to
18 reflect on them sufficiently long to make informed decisions as to what
19 he should do.

20 Now, before that process is undertaken, I want to have a look
21 with Ms. Bensouda at the actualite.

22 Ms. Bensouda, if one, under this Rule 74, if one goes down the
23 road of providing formal assurances, the - what I'm going to describe as
24 the downside, for the public, is that it means what in reality would be
25 either the entirety or the major part of the evidence of the witness

1 would be delivered in closed session and the public would be completely
2 excluded. I would imagine that certainly for those with dual-status and
3 maybe for other witnesses that would not be in their best interest to
4 have this trial turn into, as it were, a private affair for those who are
5 in court.

6 Obviously assurances will have to be given where they're
7 necessary. There's no doubt about it. But there are -- there is a
8 position which falls short of formal assurances, and by that I'm
9 referring to the position of the Office of the Prosecutor and the power
10 that the Office of the Prosecutor has either to bring charges or not in
11 relation to individuals.

12 In the right circumstances, you, I imagine, would be able to give
13 an assurance that on the basis of the material revealed to you in the
14 witness statements and in the interviews it is inconceivable that the
15 Prosecution would bring charges hereafter against the witnesses who are
16 to be called. Now, of course that isn't a complete answer because the
17 Office of the Prosecutor can only bind itself. It cannot bind the
18 authorities in the DRC. But that would, if it's appropriate, undoubtedly
19 provide a real measure of reassurance to those who are receiving this
20 advice.

21 Mr. Walley and the other lawyers who are representing
22 dual-status victims, and I hope the lawyer who will be representing other
23 witnesses -- "representing" isn't the right word but who will be giving
24 advice to witnesses in these circumstances, will, I hope, have a clear
25 idea as to what the position is in the DRC. And of course I know not

1 what advice is appropriate, but the Chamber has noted that no charges to
2 date have been brought against any of the witnesses who are to give
3 evidence in this trial, and that may be relevant as to the advice which
4 ought to be given as to whether or not there is any real risk of
5 prosecutions arising hereafter founded on the material which is
6 anticipated the witnesses will talk about in court. But by saying that,
7 I'm not in any sense trying to give an indication from the Bench as to
8 what is appropriate for the DRC authorities. That is for them, not for
9 us.

10 Now, in relation to the witnesses who you are going to call and
11 who fall in this category, would you like to have a little time to
12 reflect on whether you are able to say for the reassurance of the
13 witnesses that it is, for all intents and purposes, inconceivable that
14 charges would be proffered by the Office of the Prosecutor in relation to
15 the evidence which is disclosed in the witness statements or interviews
16 or are you able to say that now or will you never be able to say it?

17 MS. BENSOUDA: Mr. President, in respect of this first witness
18 who, as you have rightly said, is a former child soldier, the Prosecutor
19 will not be needing time to give that reassurance. And I just would want
20 to refer to the Bench to Article 26, for exclusion of jurisdiction over
21 persons under 18 years.

22 PRESIDING JUDGE FULFORD: So although age doesn't come into it
23 for all of the witnesses in this character, for this particular --

24 MS. BENSOUDA: For this --

25 PRESIDING JUDGE FULFORD: -- witness, Mr. Walley can properly

1 bring Article 26 to his attention against the background of what you've
2 said in any event, but I think Article 26 is the end of it, really, for
3 the Office of the Prosecutor.

4 Well, that's very helpful, Ms. Bensouda. Thank you very much
5 indeed.

6 MS. BENSOUDA: Thank you.

7 PRESIDING JUDGE FULFORD: Now, the proposal, then, is that we
8 should rise at this stage so that Mr. Walley, without engaging in any
9 form of witness proofing, can focus on the two issues which I, on behalf
10 of the Bench, have just outlined. But before this happens,
11 Maitre Mabilille, I think you may have something you'd like to say.

12 MS. MABILLE (interpretation): President, the Defence would like
13 to inform the Chamber about something that happened yesterday. We were
14 able to verify this.

15 In Bunia a large television screen was set up for the inhabitants
16 to follow the trial, especially the opening statements. So the opening
17 statements of the Office of the Prosecutor and Legal Representatives of
18 Victims were broadcast. However, the screen remained switched off
19 yesterday when the Defence took the floor.

20 We have the following concrete information for you: It wasn't
21 because of a technical problem. A decision was taken not to broadcast
22 the opening statements of the Defence.

23 We want to be very careful about the type of information we give
24 you, and therefore the only information we can provide is that that is
25 what happened, that the opening statements of the Defence weren't

1 broadcast in Bunia.

2 To make sure that the information was true, we called the
3 relevant services within the court, and they confirmed that it was true
4 that the opening statements of the Defence hadn't been broadcast in
5 Bunia. I don't have any other comments on this issue today, but that is
6 what happened in practice in Bunia concerning this trial which we would
7 like to be a public trial, and we want the voice of the Defence to be
8 heard.

9 Those are my observations. Thank you.

10 PRESIDING JUDGE FULFORD: Thank you very much, Maitre Mabilie.
11 What you raise is undoubtedly a matter of proper concern to the Defence
12 and to the Bench. Until we've had an explanation, it is probably best if
13 we say nothing at this stage, but I undertake that we will investigate it
14 immediately, and I require, as soon as we have risen, for the appropriate
15 person from the Registry to come to see the Judges so that we can be
16 provided with an explanation as to what happened as regards the live
17 broadcast of the Defence opening statement. And, Maitre Mabilie, I will
18 undertake that we will revert to this issue with you as soon as we can.

19 Now, to save the Court coming in and out before the first witness
20 is called, there is at least one other issue that needs to be resolved.
21 An application has been made by Mr. Walley, which was communicated to
22 everyone late last night, for somebody to accompany the first witness
23 during the course of his evidence.

24 Maitre Mabilie, I'm first going to ask whether in fact that
25 e-mail has yet come to the attention of you, Mr. Biju-Duval, and

1 Mr. Desalliers. I became aware of it this morning, I think it was,
2 having received it at about 11.00 last night.

3 MR. DESALLIERS (interpretation): President, I saw the e-mail
4 this morning too. It could be that it was sent yesterday, but I was
5 only -- I only saw it this morning.

6 PRESIDING JUDGE FULFORD: Without going into the detail of it,
7 what is set out in the e-mail is that for particular reasons which are
8 founded both in the history that's relevant to this witness going back
9 over two or three years, together with his experience of the last few
10 days and weeks, it is considered that his evidence would be enhanced and
11 his position improved if there were to be somebody with him who he has
12 some confidence in and who speaks his language. Of course that
13 individual would not in any way affect the detail of the evidence that
14 the witness gives. It is simply so that there is a familiar face by him
15 to provide reassurance and to intervene, if necessary to assist if the
16 witness becomes upset.

17 Are there any objections to this person accompanying this witness
18 for the reasons that have been set out? And Maitre Mabilie indicates no.
19 Thank you very much indeed.

20 In the absence of any objections, Mr. Walley, the preliminary
21 view that had been formed by the Bench is that this is well-founded and,
22 accordingly, we grant the application.

23 MR. WALLEY: Thank you, Mr. President.

24 PRESIDING JUDGE FULFORD: Right. Otherwise, the protective
25 measures which have been ordered are that there should be voice and face

1 distortion, and the witness should be referred to by means of a
2 pseudonym.

3 Over the first two, that is a matter for the technicians who are
4 assisting the Court. As regards the latter, counsel, please, should
5 remember that identity, therefore, is protected as regards the public,
6 and if for some reason there is a need for the identity of this witness
7 to be explored or if matters that may reveal the identity of the witness
8 are to be explored, the Court must be notified at an appropriate stage so
9 that we can go into closed session.

10 I am told that as a result of decisions that were made last week
11 that can happen very rapidly, and so there is no need for all of the, as
12 it were, confidential issues to be dealt with in one go at the beginning.
13 They can be dealt with at the appropriate stage during the questioning of
14 whoever is asking questions.

15 Accordingly, what will happen is that the -- in due course, after
16 Mr. Walleyne has spoken with the witness, the witness -- the Judges will
17 sit. The court will go into closed session so the witness can be brought
18 in. We will then go into open session so that the witness can take the
19 solemn undertaking or the oath. We will then go into closed session but
20 without the blinds going down so that the witness can identify himself,
21 and once that has happened, we will revert into open session so that
22 Ms. Bensouda can begin her questioning of the witness.

23 That is the proposal we make. Does anybody envisage any
24 difficulties with it? Silence reigns. All right.

25 In a moment, Maitre Mabilille.

1 Therefore, Mr. Walley, if as a result of your discussions with
2 the witness you are confident that he is ready to proceed and the
3 warnings have been given, subject to anything that Maitre Mabilille says
4 now, when we next sit it will be for the commencement of this witness's
5 evidence. However, if there are any enduring problems, please have a
6 message sent to us through the legal advisor to the division, Ms. Godart,
7 so that we can decide on how best to resolve these issues in advance of
8 the witness being brought into court.

9 What I am -- what we are determined to avoid is the witness being brought
10 down just outside the door of the court to give evidence, for there then
11 to be a hiatus which prevents him from coming in. Nothing could be more
12 guaranteed to destabilise a witness who may be feeling nervous. So if
13 there is to be any application, any observations made before the evidence
14 begins, we are to be told about it in advance. Otherwise, we commence
15 with the witness.

16 Now, Maitre Mabilille.

17 MR. DESALLIERS (interpretation): President, with your leave, the
18 Defence had raised a question concerning the testimony of both the first
19 two witnesses. We had raised the issue last week. We haven't been given
20 an answer yet. Maybe measures have been taken, but we just wanted to
21 check whether that was the case. We would like to know whether both
22 first witnesses will be separated during the whole of the first
23 testimonies and whether they won't have access to each other's
24 statements.

25 PRESIDING JUDGE FULFORD: You're absolutely right,

1 Mr. Desalliers. You raised the question, and I immediately take
2 responsibility for it being an oversight on my part that you were not
3 given the answer. The Judges knew what the answer was, but we forgot to
4 communicate it, and the reason for this is I -- we made an order that the
5 ex parte decision that we gave should be made publicly available with
6 appropriate redactions. However, before it can be published it was
7 necessary for both the OTP and the VWU to ensure that we hadn't -- we
8 weren't going to include in the public version matters that properly
9 should remain private, and I'm afraid that's taken slightly longer than
10 we expected.

11 In short form, the concerns which you raise have been taken on
12 board, and the separation which you requested has been and will be
13 instituted.

14 Yes. Two further matters. Thank you very much.

15 Mr. Walley, this is another of our mild observations, and I say
16 that because particularly for all representatives of victims at this
17 stage we are aware of the historical difficulties you've been labouring
18 under. So this is put mildly. However, the request made at about
19 11.00 p.m. last night doesn't so much cause difficulties for us, but it
20 does cause difficulties for the Victims and Witnesses Unit, and if there
21 are to be additional protective measures requested for any of those with
22 dual status, whilst we recognise that of course sometimes things arise at
23 the last moment, and if they do, they have to be dealt with at the last
24 moment, but insofar as they can be anticipated in advance, please can we
25 have, and particularly can the Victims and Witness Unit have longer

1 notice.

2 MR. WALLEYN: You're right, Mr. President.

3 PRESIDING JUDGE FULFORD: Thank you. We raised yesterday the issue of
4 whether or not applications to participate during the evidence of
5 witnesses should be dealt with by way of filings or e-mail, and,
6 Mr. Walley, I asked you to liaise with everyone concerned in this, to
7 come back with a proposition. Can I slightly anticipate this and make
8 this observation for your consideration: Applications of this kind are
9 undoubtedly an important element of the trial process, and it is
10 therefore necessary, it would seem to us on a preliminary basis, for this
11 to be done by way of formal filings. However, sometimes, for
12 understandable reasons, an application can only be made late, and it may
13 be the application will be made orally to the Chamber. That, of course,
14 is permitted. However, if there is to be an oral application which is --
15 which because of lateness could not be made the subject of a formal
16 filing, there should be e-mail warning of the proposed oral application
17 so that at the very least everybody is put on notice that the oral
18 application is to be made. So in that way we would preserve the
19 necessity for formal filings unless, exceptionally, an oral application
20 can be justified.

21 Now, I don't know how far your discussions have progressed,
22 Mr. Walley, but does that proposal in any way reflect any kind of
23 consensus view that you had achieved?

24 MR. WALLEYN (interpretation): President, we had contact with the
25 Defence about this issue. It was very brief. We didn't come to an

1 agreement, but I believe that we can probably get in touch to consider
2 what you have just said and the time limits, for instance, which we
3 believe to be appropriate.

4 PRESIDING JUDGE FULFORD: Well, Maitre Mabilie, on this subject
5 could I ask you, together with your team, to consider that possibility.
6 We understand that filings should be the default position, that that is
7 the way this should happen, but of course the Chamber must recognise that
8 sometimes things, exceptionally and for good reason, have to be done
9 orally, and if that is to occur, you should have been given notice.
10 Could you reflect on that and let us know in due course whether that is
11 an acceptable approach.

12 MS. MABILLE (interpretation): The only disagreement between the
13 legal representatives and us concerned the formal filing, because that
14 was, we believe, how the application should have been made. However, we
15 are realistic, and we accept that these applications be made by e-mail in
16 exceptional circumstances, cases. The other issue is a time limit. We
17 believe that eight days would be reasonable. However, we could envisage
18 prolonging it if it is not possible to do so in some cases. However, we
19 stick to the formal rule. We accept that there are exceptional
20 circumstances at times, but as regards the time limits we have no real
21 concerns. Thank you.

22 PRESIDING JUDGE FULFORD: Well, I think, Mr. Walley, we can take
23 it slightly further forward then. The proposition, therefore, is that
24 these applications should be made in writing by way of a proper filing.
25 Generally, they can be made up until eight days before the relevant

1 testimony, and to the extent that that involves abridging time, we can do
2 that generally.

3 Even if the eight-day time limit isn't met, any filings after
4 that -- any applications after that should still be made in writing by
5 way of a written filing. If it is so late that there's no time to submit
6 a written filed application, the application can be made orally, but at
7 the very least there should have been e-mail communication to everyone
8 that the application is going to be made and the grounds on which it is
9 going to be made, and in due course there should be a written filing as
10 well.

11 Now, that's the proposal. Don't give a definite answer now.
12 Reflect on it, and if that's acceptable, we will in due course make that
13 the subject of a formal order.

14 MR. WALLEYN (interpretation): President, we will discuss this
15 among ourselves, but I can already say or suggest to make this rule enter
16 into force within 15 days, because we have a lot of other issues to deal
17 with. Just now, for instance, our case manager still doesn't have access
18 to the e-court. We received some documents. However, we are in
19 difficulty. We have difficulty analysing and consulting documents. We
20 hope that this will improve in the coming days. However, we would ask
21 for your patience. And it's also why I had to ask you to forgive us for
22 being late yesterday.

23 PRESIDING JUDGE FULFORD: Reflect on it, Mr. Walley, and come
24 back in due course, please, with a -- with a firm written proposal both
25 for the long term and for the short term. Thank you very much.

1 Now, Maitre Mabilie, I think you indicated there was something
2 else you want to raise, or have we now dealt with all matters prior to
3 the calling of the first witness? Good.

4 MS. MABILLE (interpretation): No other observations,
5 Mr. President.

6 PRESIDING JUDGE FULFORD: Mr. Vaatainen, thank you for your
7 attendance this morning. It had occurred to us that these were matters
8 which, certainly in part, are of concern to you, and we thought it would
9 be helpful for you to be here. Is there anything that you would wish to
10 add or to make observations on in relation to those issues that we have
11 covered which touch upon the work of the Victims and Witness Unit?

12 MR. VAATAINEN: Mr. President, your Honours, nothing to add. Thank you.

13 PRESIDING JUDGE FULFORD: Good. Thank you very much.

14 All right. We'll rise. I cannot stress too strongly,
15 Mr. Walley, that you take the time properly that you need and let us
16 know in due course as to whether or not we can proceed straight with the
17 witness or whether there are other matters that need to be resolved.
18 Thank you.

19 COURT USHER: All rise.

20 Recess taken at 10.21 a.m.

21 On resuming at 11.16 a.m.

22 COURT USHER: All rise. Please be seated.

23 PRESIDING JUDGE FULFORD: All well, Mr. Walley?

24 MR. WALLEY (interpretation): I think everything is fine now,
25 Mr. President. I was able to address the request of the Court.

1 PRESIDING JUDGE FULFORD: So I can explain to the public in case
2 any of you were not present earlier, the blinds are now going to go down
3 and the court very briefly is going to go into closed session so that the
4 first witness in the case can be brought into court. Thereafter we will
5 go into public session so that the oath can be taken. We will then go
6 back into private session but with the blinds open for the purposes of
7 the witness identifying himself and for any other associated and relevant
8 information to be given and we will then return to public session for the
9 beginning of Ms. Bensouda's questioning of this witness.

10 Right. So let us implement it. Closed session, please, blinds
11 down, and cut the live feed.

12 *(Closed session) Reclassified as Open session

13 PRESIDING JUDGE FULFORD: Are we now in closed session? Right.
14 I'm told by the Court Officer we are.

15 Witness in, please.

16 (The witness entered court)

17 WITNESS: WITNESS DRC-OTP-WWW-0298

18 (Witness answered through interpreter)

19 PRESIDING JUDGE FULFORD: Now, the first thing I'm going to ask, can you
20 ensure, please, that the witness can hear over the headphones what
21 I'm saying. Can you ask him whether he's able to hear what I'm saying.
22 Madam, could you ask him the question. He is receiving the
23 interpretation. Right.

24 Now, I'm going to say good morning. I'm going to do all I can
25 now to ask you, please, not to be nervous and not to worry about the

1 questions that are about to be asked. All right? Listen very carefully to
2 the questions and take your time in giving the answers. All right? Okay.

3 Can we now have the blinds up again, please, so that the oath can
4 then be administered to the witness. So we're now returning to public
5 session.

6 (Open session)

7 PRESIDING JUDGE FULFORD: If we are now back in -- good. We are
8 now back in public session. The first witness has come into court, and
9 I'm going to ask the Court Officer to administer the oath.

10 THE WITNESS (interpretation): (No interpretation)

11 PRESIDING JUDGE FULFORD: Now, what has come up on the screen is
12 'no interpretation' can I ask please what the problem was.

13 THE INTERPRETER: There was no interpretation. The microphone
14 was off. The speaker's microphone was off, so the interpreters could not
15 hear the speaker. Thank you.

16 PRESIDING JUDGE FULFORD: We have had a problem with
17 interpretation, so, madam, I'm going to ask you, please, to ask the
18 witness to read the oath out again. I'm sorry we've got to do this
19 twice, but it's to make sure that the interpreters are able to carry out
20 their function. So could the oath please be read out again.

21 THE INTERPRETER: The interpreters are sorry, we cannot hear the
22 witness here in the booth.

23 MS. BENSOUDA (interpretation): Mr. President, it seems - (Microphone not
24 activated)

25 PRESIDING JUDGE FULFORD: We are going to test this. I'm going to ask the

1 Usher or Court Officer, please, to go over to the microphone and to read out
2 the oath as if he is the witness taking the oath. I want to make sure that
3 this is working before the witness is asked to do this for a third time.

4 COURT USHER: I solemnly declare that I will speak the truth, the
5 whole truth, and nothing but the truth.

6 RESIDING JUDGE FULFORD: I'm sorry, not helpful to do it in English
7 because I understand that this is an interpretation problem. Can you
8 do it please in French.

9 COURT OFFICER (interpretation): I solemnly declare that I will
10 tell the truth, the whole truth, and nothing but the truth.

11 PRESIDING JUDGE FULFORD: Thank you very much.

12 I'm extremely sorry, but I'm going to have to ask you to take the
13 oath one last time. Could you read it out again, please, from the card
14 in front of you.

15 THE INTERPRETER: The witness is speaking in Swahili.

16 THE WITNESS (interpretation): I solemnly swear to tell the
17 truth, the whole truth, and nothing but the truth.

18 PRESIDING JUDGE FULFORD: Good. Success. Thank you very much
19 indeed.

20 Can we now leave the blinds up but go into closed session so that
21 the sound is interrupted as far as the public is concerned.

22 *(Private session) Reclassified as Open session

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

24 PRESIDING JUDGE FULFORD: Wait, Ms. Bensouda. Sorry. Right. Ms. Bensouda,
25 can you now then ask the identifying questions of the witness, and can

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1 you please explain to him the way in which we're going to be referring
2 to him during the course of his evidence. Thank you very much.

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

4 Questioned by Ms. Bensouda:

5 Q. Mr. Witness, good morning.

6 WITNESS: No interpretation.

7 Q. My name is Fatou Bensouda. You will recall when you
8 just arrived I came to introduce myself. This morning, Mr. Witness,
9 I'm just going to ask you a number of questions. I will be referring
10 to you as "Mr. Witness" because your identity is protected.

11 Do you understand so far, Mr. Witness, what I am saying? I'm
12 going to be asking you these questions in English, and as has already
13 been done, it will be translated to you in Swahili.

14 Now, Mr. Witness, I would like you to be answering yes or no to
15 the questions that I will be asking. I also want you -- want to just
16 make a few remarks before I start the question, Mr. Witness. It is very
17 important, Mr. Witness, that you understand the question that I'm asking.
18 If you do not understand the question, please let me know and I will try
19 to rephrase it. Also, Mr. Witness, if you do not know the answer, you
20 can simply say you don't know the answer. And again, Mr. Witness, can
21 you please say yes or no to the questions that I will be asking. I mean,
22 to speak and to speak into the mike.

23 PRESIDING JUDGE FULFORD: Ms. Bensouda.

24 MS. BENSOUDA: Yes.

25 PRESIDING JUDGE FULFORD: I'm going to interrupt for a moment.

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1 Although the Bench has approved for the initial stages of the examination
2 the use of leading questions, the witness should not be artificially
3 restricted to only answering yes or no. So although you can lead, the
4 witness should be -- is entitled to give a fuller answer than yes or no
5 if it is necessary.

6 MS. BENSOUDA: Absolutely, Mr. President. Perhaps I should have phrased
7 it better. I just want the witness to say yes by using his voice, that's
8 what I mean, or no, but to speak and not to nod or shake his head.

9 Q. And finally, Mr. Witness, I would also urge you to speak slowly
10 when you are responding to questions, because the interpreters will have
11 to know what you're saying to interpret it.

12 PRESIDING JUDGE FULFORD: Yes, Mr. Desalliers.

13 MR. DESALLIERS (interpretation): Mr. President, I am sorry to take the floor
14 take the floor at this juncture. With regard to the instructions given by my
15 esteemed colleague to the witness, I think that the first questions that she
16 is putting to him are leading questions. If I remember well, the instructions
17 you gave at the last hearing were that without anticipating what would
18 be said by the Defense, the introductory questions in witness examination
19 be formulated as leading questions. We have had to discuss these points
20 could with the Office of the Prosecutor, and we have stated to them that
21 questions relating to civil status, questions relating to family status,
22 in other words, leading questions to define a certain context have to be
23 discussed with the Defence and double-checked during cross-
24 examinations. So instead of rising
25 up after each question, I wish to bring this to your attention from the

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1 onset to make you understand that we have already made it known to the
2 Office of the Prosecutor that we will not caution any leading questions.

3 PRESIDING JUDGE FULFORD: Mr. Desalliers, I - on
4 behalf of the Judges, gave a very clear preliminary indication as to what
5 we, on an initial basis, felt was appropriate in relation to leading
6 questions, leaving for this to be discussed between the parties prior to
7 the beginning of the evidence. I hope that those conversations have
8 taken place, that there is agreement and understanding between the
9 Prosecution and the Defence as to what should be leading and what
10 shouldn't, and that Ms. Bensouda will abide by the results of those
11 discussions given that she has not raised the issue with us. So leading
12 counsel for the Prosecution will understand what her obligations are and
13 will only ask those leading questions where it is appropriate.

14 MS. BENSOUDA: Mr. President, your Honours, yesterday we did have
15 a discussion with the Defence, and they have made it clear to us that
16 even relating to identity of the witnesses they may not allow leading
17 questions to be made.

18 PRESIDING JUDGE FULFORD: Well, I very much regret that this has
19 been brought to our attention for the first time whilst the witness is in
20 the room. I had asked on a number of occasions for all preliminary
21 matters to be dealt with before he was brought down to the courtroom.
22 Whether or not the Defence are entitled to insist that there are no
23 leading questions as to identity when no issues have been raised on this
24 subject hitherto is a question that may have to be resolved certainly as
25 regards other witnesses. But given that this witness is now in court and

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1 given this hasn't been raised with us, I'm afraid, Ms. Bensouda, you will
2 have to proceed on the -- on the basis that has been advanced to you by
3 the Defence, but we will review this again before any other witnesses are
4 called. Thank you very much.

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

6 Q. Mr. Witness, I'm going to ask you a few questions about your
7 identity and to assure you that the public will not get to know this. So
8 you can just answer freely.

9 Can you give the Court your name.

10 A. My name is (Redacted).

11 Q. Are you known by any other names apart from (Redacted)
12 (Redacted)

13 Witness, did you hear my last question? Are you known by any
14 other name apart from (Redacted)?

15 A. (Redacted).

16 Q. Witness, where were you born?

17 A. I was born in (Redacted).

18 Q. What is your father's name?

19 A. My father's name is (Redacted)

20 Q. Do you know your father's last name?

21 A. No, I don't know.

22 Q. Do you know your father's full names?

23 A. No, I don't know my father's other names.

24 Q. What languages do you speak, Witness?

25 A. I speak Swahili, Lingala, Kilendu, and a bit of French.

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1 Q. Which of these languages can you read and write?

2 A. I can write a bit of French, Swahili, Lingala, and Kilendu.

3 Q. Did you go to school, Witness? Witness, did you go to school?

4 A. Yes, I have gone to school.

5 Q. Where did you go to school, Witness?

6 A. I attended school in Fataki.

7 PRESIDING JUDGE FULFORD: Ms. Bensouda, we're going to have to
8 live and learn a bit as this goes on. I'm told that whenever you have
9 finished your question you must turn off your microphone and then turn it
10 on for the next question. I don't know why, but it causes difficulties.
11 All right? And you will, of course, remember that for now we're only
12 dealing with the matters that must be dealt with in private and that we
13 should move back to public session as soon as we've passed the
14 identifying features.

15 MS. BENSOUDA: Thank you, Mr. President. In fact, I'm about my
16 last question for the closed session. I will soon be asking to move to
17 public session.

18 Q. Witness, you said you went to school in Fataki. Do you remember
19 the name of your school?

20 A. Yes, I remember the name of my school.

21 Q. What is the name of your school, Witness?

22 A. (Redacted)

23 Q. Witness, I'm going to ask you further questions about your
24 school, but we're finishing this closed session and discussing your
25 identity.

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1 MS. BENSOUDA: And, Mr. President, if we can move to the open
2 session now.

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

4 Can we please now restore the live feed to the public.

5 (Open session)

6 PRESIDING JUDGE FULFORD: Good. Ms. Bensouda, you can now
7 proceed, please. We're now back in public session.

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

9 Q. Mr. Witness, at this school in Fataki where you went to, until
10 what grade did you attend?

11 A. I attended school from the 1st grade right up to the 6th year of
12 primary school.

13 Q. Do you remember what year you were in the 5th year of primary
14 school?

15 A. Much time has elapsed since then; I do not remember.

16 Q. Very well. Did you finish the 5th grade of primary school?

17 A. I didn't understand.

18 Q. I will rephrase the question, Witness. You said you were -- you
19 went to school in Fataki up to the 5th grade. At that year when you were
20 in the 5th grade, did you finish your studies at the 5th grade?

21 A. No, I was not able to complete the 5th grade.

22 Q. Why were you not able to complete the 5th grade, Witness?

23 A. I was not able to complete my studies because at that time a war
24 broke out.

25 PRESIDING JUDGE FULFORD: Ms. Bensouda, you're forgetting your

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1 microphone in between questions. I'm sorry, it's artificial but it must
2 be done, I'm afraid.

3 MS. BENSOUDA: I will do my best.

4 Q. Witness, what war broke out? Can you tell the Court?

5 A. Yes, I can tell the Court.

6 Q. Please go ahead, Witness.

7 A. A war broke out between the Lendus and the Gegeres.

8 Q. And, Witness, how did that affect your completing the 5th grade?

9 A. When the war broke out the Lendus were killing the Gegeres, and
10 so there were certain school pupils who were recruited, who were taken
11 away, and that's why I could not complete my education.

12 Q. Amongst these school people who were taken away, were you one of them?

13 A. Amongst those who were taken to the training camps?

14 Q. Yes, Witness.

15 A. Yes, I was one of those who were taken to the camps.

16 Q. When were you taken to the camp, Witness?

17 A. I went there because I wanted to see my friends. They were bigger,
18 but we were younger and school was already finished. That's how I arrived
19 at the camp*.

20 Q. Witness, I want you to recall how you were taken to the military
21 camp, and if you can remember when you were taken to the military camp
22 with your friends, as you have said.

23 A. I cannot remember. I was very young, and so I can't remember the
24 date, but I know very well what happened. It happened while we were
25 returning home in Fataki.

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1 Q. You were returning home. Where were you coming from, Witness?

2 A. I was leaving school.

3 Q. And who were you with, Witness? And be careful to -- the names
4 you mention who you were with when coming from school to go home.

5 A. I only had my friends with me.

6 Q. How many of them --

7 PRESIDING JUDGE FULFORD: Ms. Bensouda, I'm going to interrupt.
8 I think the question that you asked a few moments ago really placed the
9 witness in a difficulty. You must either ask for the names and expect an
10 answer to them or not, but you can't ask the witness to be careful about
11 the names because it places him in a completely impossible position.

12 Now, if you need the names, Ms. Bensouda, and you think it would
13 help, and I can understand why you would, we need speedily to go into
14 private session and we can come out of it again. So can you make
15 decisions of that kind, please, as we go along rather than leaving it for
16 the witness to choose what to say in open court and what not.

17 MS. BENSOUDA: I perfectly understand, Mr. President, and maybe
18 for the purposes of the witness naming his friends we would need to go
19 to -- into closed session.

20 PRESIDING JUDGE FULFORD: Fine. Let it be.

21 Can we for a moment, then, please, leave the blinds up and turn
22 into -- go into closed session.

23 *(Private session) Reclassified as Open session

24 PRESIDING JUDGE FULFORD: Good. When you're ready, Ms. Bensouda, you
25 can ask the question again.

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1 MS. BENSOUDA:

2 Q. Witness, you said that you were coming home from school with your
3 friends. How many of your friends were with you?

4 A. There were five and myself, so six in total.

5 Q. Do you remember the name of your friends?

6 A. Yes, I remember some names. The others I forgot because I have a
7 lot of worries on my mind.

8 Q. Witness, can you tell us the name of your friends that you
9 remember?

10 THE INTERPRETER: The witness is speaking with such a soft voice
11 that the interpreter couldn't really understand.

12 MS. BENSOUDA:

13 Q. Witness, I know you've just given us the name of your friends
14 that you were with, but can you please speak a bit louder so that the
15 interpreter can hear you properly.

16 A. (Redacted)

17 Q. I think there was a fourth name mentioned, I believe.

18 A. (Redacted)

19 Q. Now Witness, you said that you were very young --

20 PRESIDING JUDGE FULFORD: Ms. Bensouda, I'm sorry to interrupt you again.
21 I'm going to only do this when it's absolutely necessary. We're still in
22 closed session, and I think if you've now completed the names we need to
23 return to public session.

24 MS. BENSOUDA: That's correct, Mr. President.

25 PRESIDING JUDGE FULFORD: Good. Can we then resume public

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1 session, please.

2 (Open session)

3 PRESIDING JUDGE FULFORD: We're now back in public session.

4 Please resume.

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

6 Q. Witness, you said when you were taken away to the training camp
7 you were very young. How young were you?

8 A. I'm not sure how old I was.

9 Q. Witness, do you know your date of birth?

10 PRESIDING JUDGE FULFORD: Ms. Bensouda, are you happy for this
11 answer to be given in open court?

12 MS. BENSOUDA: Mr. President, out of abundance of caution, I'm
13 sorry, closed session.

14 PRESIDING JUDGE FULFORD: Now, I want to make it clear this is
15 very much a matter for the Prosecution, and although I'm not going to say
16 I will never again ask you whether you're happy or not for matters to be
17 raised in closed or open session, you're not going to find there are many
18 interventions of this kind from the Bench. So this is very much your
19 responsibility to make the choice as to whether or not information is
20 given in open or closed session.

21 Now, did the witness answer the question or not? No.

22 Into closed session, please.

23 *(Private session) Reclassified as Open session

24 PRESIDING JUDGE FULFORD: We're now in closed session. Can you
25 put the question, again, please, Ms. Bensouda, and we'll then revert to

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1 open session.

2 MS. BENSOUDA:

3 Q. Mr. Witness, what is your date of birth?

4 A. I can't remember correctly. I was very young.

5 Q. Can you remember, Witness, the year you were born?

6 A. No, I can't.

7 Q. That's fine, Witness. We'll now go back to the time that you
8 were going with your friends and you were taken away.

9 PRESIDING JUDGE FULFORD: And we'll now back into open --

10 MS. BENSOUDA: We'll now go back to open session.

11 PRESIDING JUDGE FULFORD: -- to open session.

12 (Open session)

13 PRESIDING JUDGE FULFORD: Good. Please carry on with your
14 questions, Ms. Bensouda.

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

16 Q. Witness, you said you were going with your friends, and you were
17 taken, and you've given us the name of your friends. Who took you? Who
18 came to take you with your friends while you were going home from school
19 on that day to the training camp?

20 A. UPC soldiers.

21 Q. Witness, what do you understand by "UPC"?

22 A. As far as I know, the UPC meant the Union des Patriotes
23 Congolais.

24 Q. And how do you know that they were UPC soldiers?

25 A. Because they had UPC uniforms, and they were Thomas Lubanga's

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1 soldiers, so from the UPC.

2 Q. And how were they dressed, Witness?

3 A. They had camouflage uniforms, plastic boots, berets, and weapons.

4 Q. What kind of weapons, Witness?

5 A. Rifles of the brand CMG [as interpreted].

6 Q. And how many of them came to take you?

7 A. I can't remember how many, but I know that they came with their
8 chief who was among them.

9 Q. Do you recall the name of their chief who came with them?

10 A. At the time I didn't know what his name was, but afterwards I
11 found out his name was Christian.

12 Q. Witness, you said you don't remember how many came to take you.
13 Do you recall whether there were up to ten?

14 A. No, I don't remember correctly.

15 Q. Do you remember whether there were more than you and your friends
16 or less?

17 A. There were more of them than my friends and me together.

18 Q. You said they were armed with these SMG. Were all of them armed?

19 A. All had weapons except for their chief who had an escort.

20 Q. When they came to get you, Witness, when they approached you, did
21 they tell you anything?

22 A. Yes.

23 Q. What did they tell you, Witness?

24 A. They said that the country was in trouble and that young people
25 must mobilise to save the country.

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1 Q. And did you respond when they said this?

2 A. Yes.

3 Q. What did you say, Witness?

4 THE INTERPRETER: The witness said that they were so very small
5 that there were older people with them, that were still there.

6 MS. BENSOUDA:

7 Q. Witness, I'm going to ask you what you mean by that.

8 A. Sorry, I didn't understand you correctly.

9 PRESIDING JUDGE FULFORD: Yes, Mr. Desalliers.

10 MR. DESALLIERS (interpretation): I have an objection.

11 Questions -- I have an objection. Questions can be about what the
12 witness said but not really on what he meant to say or the meaning. The
13 witness is here to testify on the facts, but if the Office of the
14 Prosecutor doesn't understand the answers, they may ask him to
15 repeat.

16 I myself am not sure I understood the words pronounced as such
17 very well either, but to ask "What you mean by your answer" is a
18 different matter. I don't think that that type of question can be asked.

19 PRESIDING JUDGE FULFORD: I'm sorry, Mr. Desalliers, that is
20 ill-founded. The thoughts of the witness may well not be a proper area
21 for evidence, although in certain circumstances even the thoughts will be
22 admissible. The Prosecution is undoubtedly -- whoever is calling a
23 witness is undoubtedly entitled to ask if an answer hasn't been clear
24 what the witness is in reality saying during the course of the answer
25 that they have just given, thereby giving the Court a fuller account, a

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1 fuller explanation, of the evidence that has already partially been given
2 by the earlier answer, and so, Ms. Bensouda, you are entitled to ask the
3 witness to elaborate on the answer previously given, which is what I
4 understood you to be doing. Please continue.

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

6 Q. Witness, you told us that when they asked to go with you, that
7 the country is at war, and you said that you were young -- let me put it
8 correctly, that there were older people. I want to understand what you
9 mean by that.

10 A. I didn't understand.

11 PRESIDING JUDGE FULFORD: Try again, Ms. Bensouda.

12 MS. BENSOUDA:

13 Q. Witness, when you said -- when you responded to the UPC soldiers
14 who came to get you and your friend -- friends, you said to him you were
15 very small and there were older people with them, that they were still
16 there. I want to understand what you mean when you say that.

17 A. So, it means that we were children, how could it be that other
18 people arrived there? *

19 Q. Very well. We'll come back to that. Now, Witness, did you go
20 with these UPC soldiers?

21 A. Now, as I swore before God that I would tell the truth, the whole truth,
22 your question puts me in a difficult position with regards to my truth,
23 because I said that I must tell the truth. *

24 Q. Witness, I just want to know whether you went with the UPC
25 soldiers or not on this day that you said they came to you.

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1 * A. No, I did not go with them.

2 MS. BENSOUDA: Mr. President, if I may just ask --

3 PRESIDING JUDGE FULFORD: Try again.

4 MS. BENSOUDA: Yes.

5 Q. Witness, before you answer the question, can you tell
6 us what you mean by you find yourself in a delicate
7 position and that you've taken the oath?

8 A. Yes. I find it difficult because I gave an oath to
9 say the truth, the whole truth, and only the truth before
10 the Court.

11 Q. Witness, we only want you to tell the
12 truth before this Court, so
13 is there anything that is stopping you from telling the truth now?

14 A. The questioning is giving me problems.

15 PRESIDING JUDGE FULFORD: Right. Ms. Bensouda, I may be right, I
16 may be wrong, but the initial answer which the witness gave, and in
17 particular the reference to being in a delicate position, either quoting
18 exactly or to paraphrase, leads me to believe that we may be in the
19 territory of Rule 74(10). We are, therefore, going to suspend for
20 however long is necessary so that Mr. Walleyne can speak with the witness
21 on this subject.

22 Mr. Walleyne, you will --

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

24 PRESIDING JUDGE FULFORD: Thank you. Mr. Walleyne, you will well
25 understand that the -- the ethical position or the ethical niceties of

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1 the position that you're now in have got to be observed with particular
2 rigor given that the witness is now in the middle of his evidence. You
3 are, of course, wholly free to speak with him about and give him advice
4 in relation to the two matters that were the subject of the ruling that
5 we gave earlier today, but we know and we are confident that you will not
6 in any way engage in any kind of discussion with the witness outside of
7 that topic in relation to the evidence that he's given. It is critical
8 at this point in time that no such discussion takes place, and we of
9 course have complete trust in you to fulfil that obligation honourably.

10 As before, you are to take as long as it needs. Of course you
11 will know, and it needs to be stressed to the witness, that giving his
12 account in full is certainly what would be in the interests of this Court
13 and in the interests of the proceeding, but you have obviously got to
14 look at this from a number of different angles. But the ability of the
15 witness to give a full account as to what happened is clearly desirable
16 to all of those involved in these proceedings. Thank you.

17 We will now go into closed session so that the witness can
18 withdraw, and the court will sit again -- I think the best course now
19 given that it is half past 12.00, rather than coming back for a very
20 short session only to adjourn again for lunch, is if we were to break for
21 lunch now and that will give you the fullest amount of time necessary,
22 Mr. Walley. We will assume that we're going to be able to recommence
23 with this witness's evidence at 2.00 p.m. If there are any enduring
24 difficulties, please give us as much warning in advance as you can,
25 Mr. Walley.

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1 MR. WALLEYN: I understand, Mr. President.

2 PRESIDING JUDGE FULFORD: Thank you very much.

3 All right. We will now go into closed session so that the
4 witness can withdraw. Can the blinds please come down, and can the sound
5 to the public gallery please be cut.

6 *(Closed session) Reclassified as Open session

7 PRESIDING JUDGE FULFORD: (Redacted) thank you very much. We're now
8 going to break for lunch, and Mr. Walleyne is going to come and have a
9 short conversation with you. As I said earlier on, do not be worried
10 about anything, and don't be nervous about what is happening in court.
11 Thank you very much.

12 Can the witness then please be taken back to the witness
13 waiting-room.

14 (The witness withdrew)

15 PRESIDING JUDGE FULFORD: Two o'clock, please.

16 COURT USHER: All rise.

17 Luncheon recess taken at 12.32 p.m.

18 On resuming at 2.55 p.m.

19 (Open session)

20 COURT USHER: All rise. Please be seated.

21 PRESIDING JUDGE FULFORD: Can I inquire whether we're in public
22 session. We are. Good.

23 Mr. Walleyne, I want to try to avoid potential artificiality. As
24 a result of your discussions, do you anticipate we are going to be able
25 to proceed with the evidence or are we likely to encounter further

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1 problems in the immediate future?

2 MR. WALLEYN: I can confirm, Mr. President, that the witness is
3 ready to testify, and if I -- if it took some time, it was because I
4 wanted that all guarantees could be obtained that the integrity of the
5 evidence is granted.

6 PRESIDING JUDGE FULFORD: We are very grateful to you,
7 Mr. Walley, for taking the time and the trouble to resolve the problems.

8 MR. WALLEYN: Thank you, Mr. President.

9 PRESIDING JUDGE FULFORD: Can we then please move in briefly to
10 closed session so the witness could be brought into court.

11 *(Closed session) Reclassified as Open session

12 (The witness entered court)

13 PRESIDING JUDGE FULFORD: (Redacted)
14 very much. We'll now return to giving your evidence, and can the court
15 now please return to open session.

16 (Open session)

17 PRESIDING JUDGE FULFORD: We're now in open session, resuming the
18 evidence of the first witness.

19 Yes, Ms. Bensouda.

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

21 Q. Mr. Witness, good afternoon.

22 A. (No interpretation)

23 Q. Mr. Witness, before we went on break we were at a point where you
24 were telling us about the UPC soldiers coming to take you and your
25 friends. You also told us that you were from school going home with your

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1 friends when this happened.

2 A. No, that's not the case.

3 Q. What is the case, Witness? Can you tell the Court?

4 A. With all due respect, I will tell the chief that what I said
5 previously is not the same as what I am going to say now. *

6 Q. Thank you, Witness. That will be very helpful. Can you please
7 repeat what you said earlier?

8 A. Yes.

9 Q. Please go ahead, Witness.

10 * A. What I said previously did not come from me. It came from someone else.
11 They taught me that over over three and a half years. I don't like it. I
12 would like to speak my mind as I swore before God and before everyone.

13 Q. Witness, I want you to know that we're only interested in what
14 happened to you and the truth. So please go ahead and tell us.

15 A. I was in Ituri. I had completed my studies in mechanics, then I
16 repeated the first year of secondary school. * An NGO which helps troubled
17 children arrived and called the children. I went and my friends did too.
18 They promised us clothing and lots of other things. They took down our
19 addresses and our IDs. Then I went back home. *

20 Q. Thank you, Witness. Before this happened, did you go to any
21 training camp?

22 A. A. I didn't go. They taught me those things. They really deprived me... I
23 couldn't follow my mind. I told myself that I would do what they wanted, but
24 in coming here I told myself that I would say what I know to be the truth.*

25 Q. So, Witness, go ahead and tell us whether you attended. Now I'm

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1 not asking about what the NGO told you. I'm asking you to tell us now
2 whether you attend a training camp or not.

3 A. No.

4 MS. BENSOUDA: Mr. President, just one moment.

5 (Prosecution counsel confer)

6 MS. BENSOUDA: Mr. President, your Honours, if I may ask for ten
7 minutes' break, if that is possible. Mr. President, I'm asking this
8 because obviously I think that what happened earlier on has had some form
9 of impact on the witness. I may be wrong, but I think, Mr. President,
10 either we can have a break or maybe we go into closed session to explain
11 some information that we also were able to receive and which probably may
12 need other parties to validate.

13 PRESIDING JUDGE FULFORD: You can certainly have a break,
14 Ms. Bensouda, but before we have a break I want to make sure that the
15 position as of now is completely clear. So please have a seat for a
16 moment.

17 I'm going to ask a question directly so that we can understand
18 the position.

19 This morning you told the Court about a time when you were going
20 home from school when some soldiers from the UPC came and took you and
21 your friends away. Was that story from you true or false?

22 THE WITNESS (interpretation): That's not true.

23 PRESIDING JUDGE FULFORD: You can have a break, Ms. Bensouda.
24 Let us know, please, when you're ready. I'm not going to tie you to ten
25 minutes. Please inform the Court as and when you're ready to proceed.

1 Thank you.

2 MS. BENSOUA: Thank you, Mr. President.

3 PRESIDING JUDGE FULFORD: We'll now go into closed session so the
4 witness can withdraw. We're going to have a break now.

5 *(Closed session) Reclassified as Open session

6 PRESIDING JUDGE FULFORD: I'm going to ask the court, please, to
7 remain silent until the witness has withdrawn. Thank you.

8 Madam, could you please take the witness back to the
9 waiting-room. Thank you very much.

10 (The witness withdrew)

11 PRESIDING JUDGE FULFORD: We'll rise. Let us know when you're
12 ready, Ms. Bensouda.

13 Recess taken at 3.13 p.m.

14 On resuming at 3.59 p.m.

15 (Open session)

16 COURT USHER: All rise. Please be seated.

17 PRESIDING JUDGE FULFORD: Yes, Ms. Bensouda.

18 MS. BENSOUA: Thank you, Mr. President. Mr. President, as I
19 indicated in my -- just before we went for the break, I'm requesting to
20 have a closed session again to discuss the protective measures, some
21 protective measures that I think are crucial at this point, to know the
22 sequence of events of what took place today and especially the concerns
23 that the witness has for certain security and protective measures for him
24 and what guarantees the witness has received regarding his testimony
25 after, regarding after he gives his testimony and returns home. I think

1 it would be important, Mr. President, to invite the Victims and Witnesses
2 Unit, with all parties present, to discuss these issues. We are convinced,
3 Mr. President, that it has an effect on the testimony that the witness is
4 giving now.

5 PRESIDING JUDGE FULFORD: Let's just break this down then
6 slightly, Ms. Bensouda. A closed session with parties and participants
7 present, public excluded. All right. Now, do you want that to happen
8 straight away, or do you wish for further investigations to be carried
9 out by the Victims and Witnesses Unit? Do I understand from what you're
10 saying that you are satisfied that they are already in possession of the
11 relevant information?

12 MS. BENSOUDA: Mr. President, we would prefer to have more time
13 with Victims and Witnesses Unit to further investigate this issue before
14 we go into closed session with all parties and participants, if need be.

15 PRESIDING JUDGE FULFORD: Well, if need be. That then begs the
16 question, Ms. Bensouda. I think you're saying that there is a need.

17 MS. BENSOUDA: Indeed, Mr. President. Indeed.

18 PRESIDING JUDGE FULFORD: Right. I think it is certainly
19 preferable that we are in possession of all of the relevant facts in
20 relation to this rather than you starting now and then asking us to
21 postpone so that you can present a fuller picture tomorrow morning. I
22 think it's better to do it all in one go.

23 All right. Well, that's your application. We'll -- I'll hear
24 from Maitre Mabilille in a moment.

25 Before I turn to her I want to raise an entirely separate issue

1 with you. The Bench, of course, has absolutely no idea as to why the witness
2 changed his account as he seemingly did. One possible contributing factor,
3 self-evidently, is that shortly before he came into court to give
4 evidence Mr. Walleyne had to, at our invitation, go through the process of
5 explaining to him the consequences and the way that Rule -- the
6 consequences of and the way that Rule 74 works.

7 We would like your considered view tomorrow, please, on the
8 extent to which the Rule 74 warning needs to be given to former child
9 soldiers who were young people at the time of the events which they
10 describe. Under the ICC Statute, they could not be prosecuted. The
11 question, therefore, arises as to whether there are criminal or
12 quasi-criminal proceedings that they could face in the DRC on their
13 return should they say things without an assurance that indicates that
14 they committed criminal offences under the age of 15.

15 Now, I think at the moment we're not in possession of any kind of
16 evidence at all as to what the actual position is in the DRC on this
17 subject. Up until this point in time, up until this point in time the
18 Bench had taken the view that it was better to be cautious in this regard
19 rather than to waive the requirement of Rule 74 in the absence of any
20 detailed information.

21 Given what's happened today, I think we would be assisted by a
22 proper considered approach to this presented, please, by the Prosecution.
23 Now, can you supply that to us tomorrow.

24 MS. BENSOUDA: We will be able to do that tomorrow,
25 Mr. President.

1 PRESIDING JUDGE FULFORD: Thank you very much. Well, so be it.

2 Thank you.

3 Maitre Mabilille, the application, therefore, by the Prosecution is
4 that we should suspend the testimony of the present witness so that they
5 can find out whether something has happened during the course of today
6 which has - I'm going to put this generally - destabilised or upset the
7 witness in such a way as to make him deviate from the evidence which the
8 Prosecution had anticipated he was going to give. Do you object to the
9 Prosecution having time to investigate that so long as there is no
10 communication of any kind with the witness about the subject matter of
11 his evidence?

12 MS. MABILLE (interpretation): We have no objections, President.
13 However, we have a new problem. Can we mention it now? A problem with
14 the translation, President, which is very serious as if it's the case
15 that our client who is the only one in the room to know the witness's
16 language and if what he says is correct, some very important points were
17 not translated. As I don't want to go into a hypothetical translation of
18 what my client has said but also very worried about the fact that we
19 weren't given this information.

20 We asked at 1.00 for a Swahili version, not Lingala, I beg your
21 pardon, a Swahili version, and we need to know because we can't go on
22 like this. This is an application to the Chamber. We would like there
23 to be a thorough verification of what has been translated this evening.

24 When I say it's very serious, it's because there are four points
25 which my client heard, including one on the statement of the young man

1 explaining how the NGO -- explaining to him how to make the statement
2 today, and we looked at the transcript and I didn't see anything about
3 that in it. So our application is the following: To take what was
4 written in Swahili and to review it properly, because if we continue this
5 way it's going to make the trial very difficult.

6 PRESIDING JUDGE FULFORD: Subject to any technical problems,
7 Maitre Mabilille, that would appear to be a perfectly reasonable request
8 that you should have available to you what was originally said in Swahili
9 so that you are in a position to establish whether or not the French and
10 the English interpretation was accurate. I'm just going to check with
11 the Court Officer as to whether there are any difficulties with this.

12 (Trial Chamber and Court Officer confer)

13 PRESIDING JUDGE FULFORD: Thank you. Maitre Mabilille, I
14 understand from the Court Officer that you have already been provided
15 with something. I will ask if you would please liaise with him as soon
16 as we have risen so that you can, as it were, be confident yourself that
17 what you are going to be provided with this evening is sufficient for
18 your purposes. We will linger in our room outside for five minutes so
19 that we can have reassurance that you have received all that you need.
20 All right?

21 MS. MABILLE (interpretation): I'm sorry, President. Maybe I
22 wasn't clear. It's not about receiving the documents, but what we're
23 saying is that today somethings that the young man was -- that the
24 witness said was translated and what appears didn't correspond or only
25 partially corresponds to what he said. So what I'm saying is that some

1 or part of the translation wasn't carried out.

2 PRESIDING JUDGE FULFORD: (Microphone not activated)

3 THE INTERPRETER: Microphone, please. The Judge didn't have his
4 microphone.

5 PRESIDING JUDGE FULFORD: I had fully understood that,
6 Maitre Mabilille. What you need, as I understand it, is a verbatim copy of
7 what was said in Swahili so that you are in a position to check whether
8 the translation that has been given is accurate. And the indication that
9 I'm giving to you is that with the assistance of our Court Officer you
10 will be provided with a verbatim copy of what was said in Swahili, so
11 together with your client, you can sit down and establish whether or not
12 the interpretation was accurate.

13 Now, I don't see that there's anything more this evening that the
14 Bench can possibly do to assist you. But if that's not satisfactory,
15 could you please explain to me what else we could do?

16 Mr. Biju-Duval.

17 MR. BIJU-DUVAL (interpretation): Just another detail. Would it
18 be possible on top of the verbatim Swahili version for the court
19 interpretation services tonight to revise the provisional transcript? In
20 that way, the possible errors or omissions will be highlighted. And I
21 say that this is if there are omissions and mistranslations, because we
22 have no way of verifying that ourselves today.

23 PRESIDING JUDGE FULFORD: Mr. Biju-Duval, the Court Officer tells
24 me that it is possible for us to ask the interpreters to make themselves
25 available so that you can discuss with them the parts of the transcript

1 which you consider at the moment to contain faults; and in light of those
2 discussions, the interpreters can be asked to consider whether or not it
3 would be appropriate to revise the draft LiveNote record which is
4 currently on our screens. So that will happen, with your assistance,
5 immediately after we have risen tonight.

6 Now, is there anything else that you would ask for us to do or to
7 order this evening? No. Good.

8 Can I -- yes, Ms. Bensouda.

9 MS. BENSOUDA: Mr. President, I'm afraid the Prosecution is also
10 facing similar problems, and we were in fact going to make the same
11 application either to have the records available to the Office of the
12 Prosecutor, because we can identify at least two instances in which we do
13 not think that the record is adequately reflected.

14 PRESIDING JUDGE FULFORD: The interpreters may be detained this
15 evening for slightly longer than, Ms. Bensouda. Can you please -- can
16 you try and make -- make it clear in a readily understandable way which
17 passages you have difficulties with, what you consider to be the true
18 interpretation, and then discuss this with the interpreters to see
19 whether agreement can be reached?

20 MS. BENSOUDA: Very well, Mr. President. And if I may, and
21 please, Mr. President, if it's not the appropriate time to raise it
22 please do let me know, but I also want to renew the Prosecution's
23 application to have the witness testify from another room if this is
24 possible, and if the Bench can consider this overnight.

25 PRESIDING JUDGE FULFORD: I think we need to ensure that the cart

1 doesn't go before the horse, Ms. Bensouda. Don't we first need to deal
2 with the original application you made, namely to adjourn so that
3 investigations can take place as to precisely what happened, and
4 depending on the answer to those questions we'll then consider whether
5 further protective measures are needed.

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

7 PRESIDING JUDGE FULFORD: Thank you. But thank you for putting
8 us on notice as to an application that may be made.

9 Maitre Mabilille, before we rise, I need to return to the issue
10 that you raised this morning of the lack of broadcast of your opening
11 address and that of Mr. Biju-Duval yesterday.

12 We have, as I undertook, investigated this fully with all of
13 those within the Registry who are involved in this process and the
14 position as far as the Court is concerned is absolutely clear. I am
15 told, we are told, that there was no distinction drawn as far as the
16 Court's broadcast is concerned between the Prosecution, the participants,
17 or the Defence. All speeches equally were transmitted in full subject to
18 the 30-minute delay, and there was no interruption from the court of any
19 of the opening addresses by anyone.

20 The difficulty, which as I understand it has already been
21 explained or I hope has already been explained to the Defence, is not an
22 interruption by anyone associated with the court, but it is an
23 interruption in what is broadcast on television in the Democratic
24 Republic of the Congo over which this court has absolutely no control.

25 The screen which you have referred to where the speeches were

1 broadcast is not under the control of the court, and whether or not your
2 speech was broadcast was a decision that was taken not by us but by
3 someone in the Congo, whether it's in the government or in the television
4 company or both we know not, who decided that not only your speech but,
5 as I understand it, some of the speeches of the participants would be
6 interrupted.

7 Over those matters, Maitre Mabilille, unless you can tell us of
8 some power of which I am unaware, we, I fear, have no control.
9 Regrettable it may well be, but as far as the Court's concerned, we
10 have -- or, rather, the Registry has ensured that your speech was relayed
11 to the appropriate satellite where it is then dependent on the television
12 company as to whether or not they broadcast it.

13 Now, if there are further steps that you would wish us to take,
14 please either now or tomorrow let us know, but at the moment I cannot see
15 anything that we can do to, as it were, interfere with decisions taken by
16 television broadcasters in a country in the centre of Africa.

17 MS. MABILILLE (interpretation): Thank you very much for all the
18 information you are giving us, President. When we spoke about this
19 problem this morning, the Defence at no point suspected that it was the
20 court that had decided not to broadcast. We were just informing you of
21 the established facts, the fact that our intervention was not broadcast.
22 And actually, I thank you because now we know that it was actually the
23 Democratic Republic of the Congo that decided to broadcast the opening
24 statements of the Prosecutor but abstained from doing the same and
25 respect an adversarial discussion by broadcasting our own opening

1 statements. Thank you for your help.

2 PRESIDING JUDGE FULFORD: Let's make it clear, Maitre Mabilie,
3 that it was someone in the Democratic Republic of the Congo who seemingly
4 took that decision. Who that was, we do not know, and it would be wrong
5 for us to speculate as to who it was. It just needs to be emphasised
6 that it was nobody associated with the court.

7 We will sit tomorrow at 9.30 and hope to resolve these issues.
8 Thank you all very much.

9 COURT USHER: All rise.

10 The hearing ends at 4.22 p.m.

11 RECLASSIFICATION REPORT

12 Pursuant to Trial Chamber I's email instruction dated 4th January 2012,
13 the transcript is reclassified as public after the indicated redactions
14 have been implemented as ordered by the Chamber. All private and closed
15 sessions (*) are now available to the public with the exception of the
16 portions of the transcript that have been redacted.

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