

Status Conference

(Open Session)

ICC-02/05-03/09

1 International Criminal Court
2 Trial Chamber IV - Courtroom 1
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh
5 Mohamed Jerbo Jamus - ICC-02/05-03/09
6 Presiding Judge Joyce Aluoch, Judge Silvia Fernández de Gurmendi and Judge Chile
7 Eboe-Osuji
8 Status Conference
9 Tuesday, 29 January 2013
10 (The hearing starts in open session at 9.33 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE ALUOCH: Good morning and a Happy New Year.
15 For the record, court officer, please call out the case.
16 THE COURT OFFICER: Yes, your Honour. Situation in Darfur, Sudan, in the case
17 of The Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh Mohamed
18 Jerbo Jamus, case number ICC-02/05-03/09.
19 PRESIDING JUDGE ALUOCH: Thank you.
20 May I welcome the Prosecution team, the Defence team, the Common Legal
21 Representatives' team, the team from the Registry and I also welcome the interpreters
22 and court reporters.
23 Prosecution, would you quickly introduce your team, please?
24 MR OMOFADE: I'm grateful, your Honours. Good morning, your Honours. The
25 Prosecution this morning is represented by my colleague, Mr Manoj Sachdeva, trial

1 lawyer; Mr Pubudu Sachithanandan, associate trial lawyer; Biljana Popova, case
2 manager; Mariana Tiholaz, legal assistant; and, your Honours, I am Adebowale
3 Omofade, trial lawyer.

4 PRESIDING JUDGE ALUOCH: Thank you.

5 Defence team, please introduce yourselves, thank you.

6 MR KHAN: Good morning, Madam President, your Honours. Mr Banda and
7 Mr Jerbo are represented by Mr Nicholas Koumjian, co-lead counsel; Anna Katulu to
8 my left, who is the case manager; behind me the three legal assistants, Mr Anand
9 Shah, Ms Leigh Lawrie and Mr Aidan Ellis; and at the back Ms Brooke Steadman,
10 who is with us for a few months, pro bono legal assistant. Your Honours, my name
11 is Karim Khan.

12 PRESIDING JUDGE ALUOCH: Thank you.

13 The Common Legal Representatives' team?

14 MS CISSÉ: (Interpretation) Good morning, your Honour. Good morning, your
15 Honours. The team today is represented by Ms Evelyne Ombeni, case manager, and
16 myself, Héléne Cissé, lead counsel. Thank you.

17 PRESIDING JUDGE ALUOCH: Thank you.

18 And the Registry, please introduce yourselves.

19 MR DUBUISSON: (Interpretation) Good morning, your Honours. With me
20 today representing the Registry is Ms Wang and Alexander Khodakov, Special
21 Adviser to the Registry for External Relations and Co-operation. I am Marc
22 Dubuisson, Director of Court Management Services. I am representing the Registrar,
23 Ms Arbia.

24 PRESIDING JUDGE ALUOCH: Thank you very much.

25 The Chamber convened this status conference by Order 439 of 18 January 2013 and as

1 per the agenda circulated via order 429 of 14 December 2012. The status conference
2 will focus on additional submissions, if any, on a possible date for the commencement
3 of the trial in the present case.

4 Following the Defence's request 436 of 16 January 2013, which was granted by the
5 Chamber, this status conference is scheduled only for the morning. Therefore, the
6 parties' and participants' submissions need to be focused in order that there is
7 sufficient time to hear a full exchange of views.

8 Before hearing the submissions, and as a preliminary matter, the Chamber wishes to
9 address the issue of victim participation at trial. The Chamber is currently seized of
10 the Common Legal Representatives' request asking for the issuance of a decision on
11 victims' participatory rights during trial proceedings. This is filing 414 of
12 7 November 2012.

13 The Chamber is mindful of both parties' responses that such a request is premature as
14 long as no trial date has been fixed. This is document 425 of 28 November 2012 for
15 the Defence's responses and document 426 of 29 November 2012 for the Prosecution's
16 responses.

17 The Chamber will deal with the issue of victim participation as a whole once the trial
18 date is set.

19 Now, with regard to the trial date, by its decision on the Defence's request for a
20 temporary stay of proceedings at page 72, point Roman (iii), the Chamber directed
21 the parties and participants to file by 19 November 2012 written submissions on a
22 possible date for the commencement of the trial.

23 Both parties and the Registry filed public redacted versions of their submissions and
24 these are the documents that should be referred to at this public status conference.

25 However, should the parties or the Registry wish to address issues in a confidential

1 or confidential ex parte status conference, they should state so at the earliest
2 opportunity to enable the Chamber to factor such a request in.
3 Before we start hearing submissions I would like to remind the parties and
4 participants to please speak slowly, as I'm doing now, and to observe the five second
5 rule between the interventions, questions and answers. In addition, the
6 Chamber urges the parties to be concise in their oral submissions.
7 For the record, the Chamber wishes to briefly recall the dates for the commencement
8 of the trial as suggested by the parties, participants and the Registry. The
9 Chamber will do this without going into reasons advanced -- advanced in support of
10 the dates proposed, as the details of the submissions are set out in the written filings
11 which the Chamber has read very carefully.
12 I'll begin with the Prosecution. The Prosecution submitted that the trial should start
13 at the earliest by the end of March 2013, or shortly thereafter. This is Filing 421-Red
14 paragraph 2. This is reiterated in its seventh report on translation issues, in which it
15 is anticipated that all incriminatory evidence will be translated into Zaghawa by the
16 end of March 2013. This is Filing 440 of 21 January 2013.
17 The Defence on the other hand submitted that the trial could start on 6 October 2014,
18 which is according to the Defence "realistic and reasonable." (Filing 442-Red.)
19 Without revealing any confidential information, the Chamber notes that the
20 Defence also submitted that the earliest time when the trial could start is in
21 October 2013, taking into account the constraint of the rainy season in Darfur which is
22 publicly known as being from June to September.
23 The Common Legal Representatives submit that the trial could start in April 2013.
24 This is their Filing 418, paragraphs 10 and 11.
25 And finally the Registry submitted that the trial cannot start before the autumn of

1 2013, and reasonably in mid-2014, because of inter alia the persistent lack of Zaghawa
2 interpreters, but also because of the required time for negotiations with the Host State
3 on the conditions of stay of the accused persons during the trial. This is Report
4 434-Red of 25 January 2013.

5 On this last point the Chamber is aware of the request made by the Registry in its
6 public report 362 of 28 June 2012, which was submitted in preparation for the July
7 hearing and status conferences.

8 At that time, the Registry submitted as follows, and I quote from their report: "It
9 would be very useful for the Registry to be informed of whether the Chamber intends
10 to attach conditions to the appearance of Mr Banda and Mr Jerbo during the trial
11 proceedings. On the basis of these conditions, the Registry will be in a position to
12 start the consultations with the Host State regarding the conditions of stay of the two
13 accused persons in the Host State."

14 In this respect, the Chamber recalls the conditions that were attached to the public
15 summonses to appear, (i), these were the conditions that were attached: to refrain
16 from discussing issues related to either the charges which form the basis of the
17 present summonses or the evidence and information presented by the Prosecutor and
18 considered by the Chamber;

19 Condition (ii) that was attached to the summonses: To refrain from making any
20 political statements while within the premises of the Court, including the location
21 assigned to them;

22 Third condition was not to leave without specific permission of the Chamber and for
23 the whole period of stay in The Netherlands, the premises of the Court, including the
24 location assigned to them.

25 The fourth condition was to comply, in any case, with all the instructions of the

1 Registrar for the purposes of their appearance before the Court, and a breach of any
2 of these conditions by either accused persons would have had -- would have had as a
3 consequence the issuance of a warrant of arrest.

4 Now, the Chamber would now appreciate any additional observations of these
5 conditions that could be made, or that can be made in public, and I'll start with the
6 Prosecution. Any of this that -- any additional observations in this particular respect
7 that what you can make in a public hearing, such as this sort? In other words, if
8 someone says to appear, these conditions still apply, or not any more, or any
9 additions? Is there anything you can say as you stand here today right now?

10 MR OMOFADE: Your Honours, Madam President, I'm grateful. The Prosecution
11 would suggest that the conditions that were imposed at the time of the initial
12 appearance subsist should the accused persons appear for the trial proceedings as
13 well, because we think those conditions are reasonable.

14 Of course, any additional submissions might be entirely dependent on the
15 submissions made by the Registry as regards the criteria by which the accused
16 persons would be appearing before the Court and any submissions made by the Host
17 States. So, from the Prosecution's point of view at least, the submission -- the
18 conditions that are currently in place should remain. We leave the door open to
19 additional conditions, subject to submissions from the Registry.

20 The Defence may well have a view on this as well, but we think the conditions
21 currently in place ought to remain.

22 PRESIDING JUDGE ALUOCH: Thank you. I'll come to the Defence in a minute.
23 What about the Common Legal Representatives, do you have any contribution at all
24 on this respect?

25 MS CISSÉ: (Interpretation) No, not on this point, your Honour.

1 PRESIDING JUDGE ALUOCH: Thank you. I'll come to the Defence now.

2 MR KHAN: Madam President, your Honours, we're grateful, first of all, for the
3 opportunity to address the Court, and personally also I'm much obliged to the
4 kindness and accommodation of the Bench to reschedule the hearing from this
5 afternoon to this morning. So my appreciation should be noted, and the
6 co-operation of my learned friends for the Prosecution and the victims also to assist in
7 that regard.

8 Your Honours, we have put in very detailed submissions regarding the
9 commencement date, and we of course rest upon those, but a few observations do
10 need to be made.

11 PRESIDING JUDGE ALUOCH: Maybe, Mr Karim Khan, if I can remind you that we
12 have specific questions that we are going to pose to all parties. At the moment,
13 I would just want your contribution, if at all, on this particular topic. I'll be coming
14 on with several questions. The conditions, for now, it's just that.

15 MR KHAN: Yes, Madam President, we're content with that, and I think it's only fair
16 for those conditions to agree. That said, there's been a little difficulty, for the reasons
17 that we will discuss in a confidential ex parte aspect of today's hearing, to actually
18 communicate with the clients recently, but your Honours, in principle and with
19 confidence I can say that those would be definitely acceptable.

20 PRESIDING JUDGE ALUOCH: Thank you for your answer, Mr Karim Khan. Can
21 I assume that you'll be asking for a confidential ex parte, which you are indicating at
22 the earliest opportunity?

23 MR KHAN: Yes. In relation to this issue of communication, if your Honours wish
24 to have further submissions, that will have to be done not in public session and with
25 the absence of the legal representatives of the victims, at the very least.

1 As far as the earlier invitation, there are issues regarding this matter that would need
2 to be dealt with ex parte, Defence and Prosecution only, and of course the
3 representatives of the Registry it goes without saying.

4 PRESIDING JUDGE ALUOCH: Thank you very much for that early indication.

5 Now, Registry, based on the previous discussions with the Host State or the previous
6 experiences that you have gathered in securing the appearance of individuals before
7 the Court in other cases, what conditions would need to be amended, and do you
8 anticipate that the Chamber should consider any additional conditions?

9 MR DUBUISSON: (Interpretation) Thank you, your Honour.

10 Well, in fact, of the four conditions that you mentioned, I'd like to focus on the fourth
11 one, which was repeated by you, namely, complying with all instructions from the
12 Registry. We must remember that with regard to the earlier appearance the right, as
13 free men, of the two suspects at the time, and who are now accused, their rights were
14 restricted. Insofar as the Defence does not have any major problem with a number
15 of restrictions placed upon their rights, there is no problem for the Registry.

16 Asking someone to remain on the premises of the Court for several months is a
17 different thing, a different matter, than remaining on the premises for a few days.

18 So that is my take on the situation. The Defence will have to come to its conclusions,
19 and I really have nothing further to add. Thank you.

20 PRESIDING JUDGE ALUOCH: Yes, Mr Karim Khan.

21 MR KHAN: Madam President, as far as that's concerned, there has already been
22 some communication, more than a year or a year-and-a-half ago, with the Prosecution,
23 and they indicated at least an acknowledgment that the modalities of the accused stay
24 in The Netherlands during the duration of the trial would need to be varied. But,
25 your Honours, I didn't think that would be an appropriate matter to discuss in detail

1 in the public aspect of the hearing because, for obvious reasons, what my learned
2 friend Mr Dubuisson says is quite correct.

3 Obviously, any individual has a right to exercise, fresh air, and I think, in formal
4 discussions with the Prosecution, they indicated, for example, that they would not
5 object to a condition that the individuals not leave The Hague. So, in other words,
6 they wouldn't be confined, cooped up like chickens, for the whole period of the trial.
7 So that kind of common sense, fair realisation of their co-operation with the Court,
8 the lack of reasons to curtail their liberty more than is necessary could be included in
9 any conditions that the Court thought appropriate. But, your Honours, as far as any
10 specific or more specific recommendations are concerned, perhaps that should be
11 done in private session.

12 PRESIDING JUDGE ALUOCH: Thank you. Now, in order to guide further
13 discussions, the Chamber has the following specific questions and requests for
14 clarification, to be addressed first by the Prosecution.

15 For Prosecution, this is the first point: On the issue of lifting redactions on eight
16 Prosecution witness statements - this is in paragraph 6 of the Defence filing
17 422-Red - the Chamber does not have before it any request for lifting redactions to
18 these statements. Prosecution, the Chamber would like to know the status of inter
19 partes discussions on this issue.

20 MR OMOFADE: Your Honours, to start with, I speak off the top of my head. I do
21 recall, and I hope I'm correct, that the redactions that your Honours refer to are those
22 redactions that would be captured by the protocol that your Honour has -- your
23 Honours have to issue regarding the contacts with witnesses of the opposing party.
24 A protocol has not yet been issued by this Chamber. What the Prosecution had said
25 previously was that once that protocol is in place, the redactions would be lifted and

1 disclosure, re-disclosure, of the relevant witness statements made to the Defence.

2 So, subject to a protocol being issued by the Chamber, the Prosecution has been
3 unable to disclose less redacted applications to the Defence.

4 PRESIDING JUDGE ALUOCH: But, Prosecutor, you know that the principle, really,
5 is to have statements in full. Redactions are just temporary measures really, but I'll
6 give the floor to my colleague, Judge Eboe-Osuji, for a minute.

7 JUDGE EBOE-OSUJI: Thank you, Madam President.

8 I just wanted to reconcile something I'm yet to understand in the submissions of both
9 Prosecution and Defence counsel. If you look at paragraph, I believe 12, of the
10 Prosecution's submission and also paragraph 6 of the Defence's submissions, are we
11 talking about the same thing here? The Prosecution paragraph 12 speaks of some
12 material, some redactions, a number of individuals whose statements arguably
13 contain information that falls under Article 67(2), and then you speak about protocol
14 now that you are expecting to be laid down.

15 If we looked at footnote 14 of paragraph 12, it indicates eight witnesses, 304, 305, 306,
16 312, 314, 433, 441 and 466, and -- but if we looked at paragraph 6 of the
17 Defence submission, we have eight, different eight people also indicated. They are
18 not the same as the eight persons the Prosecution have indicated. I want to know
19 whether these have any relationship. Is there any connection between the
20 submissions in this regard? Thank you.

21 PRESIDING JUDGE ALUOCH: I just want to say that I hope that both parties are
22 looking at the same documents as my brother Judge is looking at. I hope you're
23 looking at the same documents.

24 MR OMOFADE: Your Honours, the Prosecution at the moment is looking at its
25 filing 421 of 19 November, and I presume His Honour Judge Eboe-Osuji was referring

1 to paragraph 12 of that filing. And your Honour quotes it correctly when you say
2 that we referred to a certain number of witness statements in footnotes 14 to
3 paragraph 12, and then I can only reiterate my earlier submission, if your Honours
4 look at the closing two paragraph 12 of the Prosecution's 421 filing, and I quote from
5 the filing, "In this regard the Chamber is already seized of filings from the
6 Prosecution, Defence and the Victims and Witness Unit, on proposals for a protocol
7 on the handling of information and contacts by a party with witnesses of the other
8 party for investigation purposes. The Chamber's approval of the protocol will allow
9 for the Prosecution's prompt disclosure of these persons' identities to the Defence."
10 Now, the redactions that your Honours refer to relate to information regarding the
11 identities of the witnesses we are talking about in paragraph 12. In some instances,
12 those redactions relate to their names; in other instances, it relates to material that
13 could well identify them, either by virtue of their location or persons that they might
14 have interacted with.
15 So those are the witnesses that the Prosecution referred to, and those are the
16 witnesses that we say, subject to this protocol being issued, we should be in a position
17 to disclose their full statements to the Defence. I have to say that the statements
18 themselves have been disclosed, albeit in a redacted form. We should be in a
19 position to disclose them in a far less redacted form once this protocol is in place.
20 JUDGE EBOE-OSUJI: I understand that explanation. What I'm trying to point out
21 here is that you have, in paragraph 12, indicated a list of 12 witnesses to whose
22 statements redactions have been made, and in paragraph 6 of the Defence's own
23 submissions they also indicated separate eight persons whose statements redactions
24 have also been made. I'm trying to see if we are talking about the same people
25 because otherwise we'll be talking about 16 witnesses. You think eight, they think

1 eight, but eight do not match. So I'm trying to see if we can -- is there any help
2 coming from either of you?

3 Thanks.

4 MR OMOFADE: Your Honour, I see my friend on his feet. He might have some
5 conditions. I have some further submissions I might be able to make on this.

6 MR KHAN: I'm grateful. Your Honours, perhaps I can assist. There's a massive
7 problem of disclosure. In relation to paragraph 12 of the Prosecution filing, it's
8 correct in their footnote 14. The identity of these eight witnesses have not been
9 disclosed. That's problem one.

10 In our paragraph 6, various witnesses pseudonyms are given. Your Honours have
11 given orders that are detailed in these footnotes and we have now the identity of
12 these witnesses. Despite that order of the Chamber, the Prosecution have failed to
13 give us unredacted statements. The protocol that they pray in aid as a justification
14 for their non-disclosure is absolutely irrelevant, absolutely irrelevant, because the
15 protocol applies to a different issue.

16 Your Honours have determined we have the right for the identity of these witnesses,
17 we have the identity of these witnesses, and despite that, and despite requests, not
18 one but multiple to the Prosecution, they have failed to give us unredacted
19 statements.

20 PRESIDING JUDGE ALUOCH: Prosecution, if I may add one more point and just
21 say that the eight witnesses that I'm talking about right now are incriminatory
22 witnesses. These are Rule 76 witnesses, if that might help. I just wanted to point
23 that out.

24 MR OMOFADE: Your Honour, it does help, and that was the clarification I was
25 going to provide before my friend rose. The Prosecution -- the only obstacle to the

1 Prosecution's ability to disclose the Rule 77 and 67(2) witnesses is the protocol.
2 As regards the incrim, the incriminatory witnesses, the Prosecution has disclosed the
3 identities of those witnesses. Now it may well be that there is information in those
4 witnesses' statements, and I don't have all the details to hand, it may well be that
5 there is certain information in those witnesses' statements that hasn't yet been
6 disclosed to the Defence. We're able to provide some further information on that,
7 probably in a subsequent filing.

8 Can I just mention in passing, your Honours referred to the 14 December decision
9 from the Chamber and did mention that there was meant to be an agenda. We did
10 not receive an agenda so there's limit to the information I actually brought along to
11 Court, particularly relating to witnesses, and bearing in mind that this was meant to
12 be a public session. Should the Chamber require further information on this, we're
13 happy to provide it, possibly in closed session or possibly by way of a filing.

14 MR KHAN: Madam President.

15 PRESIDING JUDGE ALUOCH: Yes, very briefly on that point, yes.

16 MR KHAN: Yes. Madam President, it's correct about the agenda, but I think all
17 parties knew that the thrust of today's hearing was issues relating to the filing and the
18 commencement date of the trial. The questions posed by the Bench really are
19 matters that do not require an adjournment to bring documents because the parties
20 have already reduced their thoughts and their submissions into writing and so the
21 material should really be accessible at the finger-tips of prosecuting counsel and the
22 prosecuting counsel filed this submission to be able to answer the question of the
23 Bench regarding the state of play for the case that he has conduct of.

24 PRESIDING JUDGE ALUOCH: I must say that in a way you are right, because these
25 questions that the Chamber is posing, we are posing these questions after reading

1 very, very carefully all the submissions that were filed. We are not just picking these
2 questions from the air, so to speak. But I'll move on.

3 MR KOUMJIAN: Your Honour, could perhaps -- I may be able to shed a little light
4 on Judge Eboe-Osuji's question. The list mentioned by the Prosecution are all eight
5 witnesses that they intend to call for trial. In the Defence motion, in that paragraph
6 6, we were referring to information about persons of interest to the
7 Defence investigation. I don't want to go further than that in open session, but this
8 included information that was from statements of people the Prosecution has
9 indicated it intends to call and from people that they do not intend to call. So that is
10 why the lists are not exactly the same. It's a different set although there is an
11 overlap.

12 PRESIDING JUDGE ALUOCH: Thank you for that clarification.

13 Now, I'm still posing further questions to the Prosecution. On the Defence request
14 for additional disclosure by the Prosecution, paragraph 8 of Defence filing 422-Red,
15 the Chamber has recently rejected the Defence request in the decision 443 of
16 23 January this year. However, the Chamber has encouraged the Prosecution to
17 consider disclosing the requested material to the extent possible without protective
18 measures. This is our decision 443 at paragraph 23 and 26.

19 Prosecution, in light of the recent Chamber's decision aforementioned, does the
20 Prosecution anticipate maintaining their proposed date for the start of the trial?

21 MR OMOFADE: Your Honours, I believe one of the alternative suggestions that
22 your Honours also made was that the Prosecution consider exploring the possibility
23 to agree on facts relating to one of the issues that was raised by the Defence.

24 In light of your Honours' decision, this is something that we are looking at internally.
25 We are also looking at the issue of possibly disclosing material that's relevant to the

1 issues raised by the Defence, or combining that with certain agreed facts.
2 Your Honours might be aware that we disclosed certain agreed facts to the
3 Defence more recently. This is one such issue that we might be able to consider also.
4 Now, as regards the impact of that on the proposed date of trial, the Prosecution had
5 previously said the end of March was a foreseeable date for the commencement of
6 trial. We based that on a number of issues, one of them obviously being a decision
7 from your Honours on the request for disclosure made by the Defence.
8 Since then the Prosecution has also been privy to a filing that has been made by the
9 Registry citing certain logistical concerns that may well also impact on a
10 commencement date for the trial. So taken together, the Prosecution would say that
11 the date of the end of March, whilst it was the position of the Prosecution at the time,
12 it may well be that more time is required to revisit a number of issues that were
13 raised by your Honours in the decision.
14 What we do say, however, is we do not anticipate that the rather distant date of
15 October 2014, which was proposed by the Defence, we do not think that that date is a
16 feasible date in terms of its -- in terms of the length of time.

17 PRESIDING JUDGE ALUOCH: Thank you.

18 I'll want to give the floor to Judge Eboe-Osuji.

19 JUDGE EBOE-OSUJI: Thank you, Madam President.

20 Mr Prosecutor, one thing that troubled me about your submissions is the idea, to
21 begin with, that the Prosecution could ever consider that the end of March was a
22 realistic date to start the trial. Quite apart from the Bashir arrest warrant issue that
23 you just spoke about, and the logistical issue indicated by the Registry, if you looked
24 at your own submissions it indicates that there are Rule 76 materials yet to be
25 disclosed by you regardless of any external factors that may get in the way of you

1 doing so.

2 In other words, your own decision to review your material and make the disclosure
3 that need to be made, and you suggested that trial date with -- you'd be able to do
4 those disclosures as of the end of March and then you also say the trial could start at
5 the end of March, that's what rather surprised me. So I'm not sure we can now
6 blame it on logistical issues. There are issues all around, so let's just defer on that. I
7 just thought I'd make that point on the record. Thanks.

8 PRESIDING JUDGE ALUOCH: Yes, Mr Karim Khan.

9 MR KHAN: Yes, Madam President, I'm in fact very much obliged to your learned
10 brother's intervention and comment on this issue. Your Honour, I am always very
11 slow to allege bad faith, but it is for your Honours to pierce what I say is the pretense
12 of the Prosecution's submissions. It is all well and good in a public hearing to tell
13 the public that the party opposite is well prepared for the commencement of trial and
14 to avoid the inconvenient truth that the Prosecution's tardy, consistently tardy,
15 consistently dilatory approach to this case is continuing to cause the
16 Defence significant prejudice.

17 Your Honours, in which reasonable Prosecutor anywhere in the world would in good
18 faith say that the Defence, being officers of the Court, not striving to get a conviction
19 but being ministers of justice, which reasonable Prosecutor in which Court in the
20 world, never mind this Court set up on the high principles that it was, would say that
21 the Defence should start to answer a case the same day that they finish doing what
22 they should have done years ago, which is to translate the document containing the
23 charges? I mean, that's a staggering submission by the Prosecution.

24 Your Honour, in relation to the scope of paragraph 8, it is of course wider than simply
25 the request for the Bashir materials. I will say, your Honours, later today we will be

1 filing for your consideration an application for leave on that decision.

2 But, your Honours, when it comes to the issue of agreed facts, again one is taken
3 aback because before we troubled the Bench seeking a mandatory order to the
4 Prosecution to agree that in this case that they have asserted in the Bashir case, before
5 we did that, before we asked them to agree what the Prosecutor has said to the
6 Security Council, before we did any of that we put forward agreed facts that were
7 verbatim culled from the arrest warrant in the Bashir case and from the Prosecutor's
8 statements.

9 And we didn't do that a month ago, or two months ago. We did that on
10 2 September 2011. That reasonable request was given short shrift by the party
11 opposite and they rejected it, and that's why reluctantly we put forward this request
12 of an order to the Bench. So now, November 2012, more than a year-and-a-half later
13 or so, for the Prosecution to say they are considering some kind of agreed facts of
14 course is welcome, but it's also rich.

15 Your Honour, that's my submission on that issue.

16 PRESIDING JUDGE ALUOCH: Thank you.

17 I'll come back again to you, the Prosecution. On the issue of unredacted victims'
18 applications for dual status individuals, that's paragraph 9 of the Defence Filing 422,
19 the Chamber states that this issue will be dealt with by a Chamber's decision in due
20 course.

21 On the issue of expert materials, the Chamber recalls that the Prosecution submitted
22 in its Filing 389-Red at paragraph 8 that there would be no expert witness. However,
23 the Defence inquires whether Witness 445 will be called as an expert witness, or not.
24 Prosecution, can you clarify this point please?

25 MR OMOFADE: Your Honours, your Honours recall correctly. Witness 445 was a

1 witness at the pre-trial proceedings in the Abu Garda case and was also a witness
2 whose evidence, whose statement, was relied on at the confirmation stage of these
3 proceedings. This is a witness that also remains on the Prosecution's list of
4 incriminatory witnesses now.

5 We have not chosen to give this witness any label. He has certain expertise. He
6 was involved in the situation in Darfur generally, but also spoke to this particular
7 case. We present him as an incriminatory witness. He has certain expertise, but we
8 do not see him as an expert witness.

9 Those are our submissions on that.

10 PRESIDING JUDGE ALUOCH: Yes, the Defence?

11 MR KHAN: Madam President, once again this is really unfortunate. Firstly this
12 answer could have been given before today, because I will say that a lot of my team's
13 efforts are expended in chasing up previous unanswered requests only to have those
14 follow-ups left unanswered by the party opposite. This is a case in point.

15 In addition to the previous correspondence on issues and the filings, on
16 14 September 2012, in addition to the filings, we formally requested the party
17 opposite to say whether or not they wished to call Witness 445. There was no
18 response and so we sent a reminder on 12 October. Now, we all had Christmas
19 holidays, but starting from September is a bit long for anyone. Your Honour, there
20 is no reason why the Prosecution didn't respond before today.

21 Your Honour, the Prosecution have said in one breath they are ready for trial to start
22 in March. They think that's fair in discharge of their ethical obligations to tell the
23 Court what they think is honestly true. They think March, and yet they say that they
24 don't know a witness that they called as an expert about three years ago in Abu
25 Garda and who is on their witness list is coming as an expert, or as a witness, or as,

1 you know, just to give us delightful company. That is not good enough.

2 Your Honours have a right to demand, and your Honours we say our clients have a
3 right to expect, to know the evidence that the party opposite wishes to call, and
4 whether or not an individual comes as an expert or comes as a lay witness is of
5 fundamental importance.

6 This individual was not an eye-witness, he was called previously as an expert and I
7 do say that the party opposite's response to the very legitimate and sincere inquiry
8 from the Bench is nothing other than lamentable.

9 PRESIDING JUDGE ALUOCH: I believe, Prosecution, you have made it clear this
10 morning that he is -- you are not calling him as an expert?

11 MR OMOFADE: Well, my friend appeared to either have misunderstood what I
12 said, or mischaracterised it.

13 PRESIDING JUDGE ALUOCH: Then clarify what the position is once and for all.

14 MR OMOFADE: Witness 445 will be called. We have chosen not to give any label
15 to this witness. He has certain expertise. He will be called to testify.

16 In previous filings before your Honour, and I believe also before one of the status
17 conferences, the Prosecution made it quite clear categorically that we do not propose
18 to call an expert witness in this case.

19 I believe my learned friend, Mr Koumjian, at the last status conference was almost
20 insistent that we ought to call an expert witness. It's a matter for the Defence. If
21 they think that an expert witness relating to the conflict generally in Darfur is
22 relevant to this case, it's a matter entirely for the Defence if they want to call one, or if
23 they want to request the Court to call a Court-appointed witness.

24 As for the Prosecution, we see no relevance to the instant case of an expert witness in
25 this regard.

1 MR KHAN: Madam President --

2 PRESIDING JUDGE ALUOCH: Very briefly, Mr Karim Khan, yes.

3 MR KHAN: Yes. Madam President, with the greatest of respect to my learned
4 friend, we know how to run a Defence case. Guidance there will always be listened
5 to, but I don't think it's needed. The question here is whether or not the Prosecution
6 know their own case.

7 Your Honour, there was no misrepresentation by me. I thought I tried to be quite
8 clear. It's not clear whether or not - and I maintain it - if on the day of testimony this
9 individual will come as an expert, a lay witness or for delightful company. I think
10 they were my almost verbatim comments.

11 What does the Prosecution say? He said they're not assigning a label. What is that
12 other than a licence to seek to mold, reclassify or change the capacity for which they
13 are calling a witness?

14 So I would ask that, you know, a degree of clarity be given. On what basis then are
15 they calling this witness? Is he simply going to be called, or are they going to seek to
16 call him in the same capacity as any other witness; for example a live witness who
17 attested to certain issues? If that's the case, of course there are issues there on the
18 grounds of relevance.

19 But, your Honours, I am left in the dark legitimately because this individual did not
20 see the events, he was called previously as an expert based upon his very long and
21 distinguished career and working in multiple theatres and, your Honours, there is a
22 change, a molding it seems, between the capacity in which he was called previously
23 and under which he was considered at confirmation in Abu Garda and even in
24 Banda/Jerbo and the capacity in which the Prosecution seek to call him now.

25 He is a witness -- let me be quite frank about it, he is a witness I would like to speak

1 to informally and I will make an application to the Prosecution that we'd like to have
2 our own interview with him, and we think he's a witness that it is in the interests of
3 justice that the Court hear from because in this issue, having an independent expert
4 that the Prosecution have used not only in Abu Garda and not only in Banda/Jerbo,
5 but in other cases and in other situations before this Court, will we say be of
6 significant value to your Benches in the difficult task you will have to adjudicate this
7 case.

8 And, your Honours, he is an important individual, but I am lost as to how a witness
9 used as an expert in all other cases and in this very situation is now -- the Prosecution
10 are rather vague about attaching a label.

11 PRESIDING JUDGE ALUOCH: Thank you, Mr Karim Khan. Your concerns are
12 noted.

13 Yes, Judge Eboe-Osuji has a comment.

14 JUDGE EBOE-OSUJI: Mr Prosecutor, in relation to paragraph 8 of your written
15 submissions, there is prior testimony of three witnesses, 416, 445 and 446 in
16 pre-trial - I take it pre-trial is confirmation - and then 445 again in the Bemba trial.
17 What volume of material are we looking at here? Do you have a rough estimate?
18 The reason I ask is so -- well, remember we are here to plan and appraise a realistic
19 trial date, and part of this is to know what remains to be done in order to enable us to
20 see when a realistic trial date may be set. Prior testimonies, what is the volume of
21 material we are looking at here approximately? Do you know, or if not that's okay?

22 MR OMOFADE: Your Honours, perhaps I should break the witnesses down.
23 Witnesses 416 and 446, their prior testimonies are already available to the Defence.
24 In this paragraph we refer to those prior testimonies only in the context of translating
25 them into Zaghawa and then disclosing that for the purposes of Rule 76(2). It's in

1 that same regard that we refer to the prior testimony of Witness 445.
2 Why Witness 445 was slightly different and why we chose to mention him
3 specifically is because he also testified in another case quite well apart from the Banda
4 and Jerbo case and the Abu Garda case, both of which my learned friend was counsel
5 in.
6 Now, in the Bemba case - and I can be slightly specific as regards volume - his prior
7 testimony in that case ran to about 286-odd pages. Of that testimony, the
8 Prosecution -- and there had been discussions inter partes between the Prosecution
9 and the Defence previously in order to identify what aspects of prior testimonies
10 need to be translated.
11 So this is not disclosure for the purposes of the Rule 76 per se, because the English
12 versions of these transcripts have been disclosed in their entirety. It's disclosure for
13 the purposes of translation into Zaghawa, because of the language difficulties that
14 we've had in this case.
15 Now, the prior testimony of Witness 445 in the Bemba case came up to about 286
16 pages. Of those, we have identified about 80 pages --
17 JUDGE EBOE-OSUJI: Eight-zero?
18 MR OMOFADE: Eight-zero pages, yes, that we think are relevant and ought to be
19 translated into Zaghawa. We propose to share that with the Defence. I believe my
20 case manager made an electronic version available to the case manager of the
21 Defence this morning, identifying in highlights those relevant portions and seeking
22 contribution from the Defence as regards whether all of that indeed needs to be
23 translated, or whether some of it can be reduced.
24 I'm not sure if that's already been provided? I'm being told, your Honours, that will
25 be provided after the session.

1 So, but that's -- and I have to emphasise this, the volume of material that's referred to
2 in paragraph 8 here only relates to audio translation into Zaghawa, not to disclosure
3 per se, and all of this has been taken into account when the Prosecution came to the
4 conclusion that the translation process into Zaghawa would have been completed by
5 the end of March.

6 JUDGE EBOE-OSUJI: One more, Madam President. One more question on this.
7 Relating to 445, whether or not to call the witness as an expert, I think the difficulty
8 was when the OTP indicated they would not be calling an expert, but instead they
9 put in issue the matter of the characterisation of any particular witness.

10 I think it is a fair question. If you have said you are not going to call an expert
11 witness, unless you are changing your mind about that, it's a fair question to say,
12 "Okay, what is -- in what capacity is 445 coming?"

13 I'm not sure that question is answered by saying, "There will not be any label attached.
14 The witness who will be called, but no label attached to it," because that engages a
15 question, "What is the significance of an expert witness in the proceedings? Is there
16 anything that rides on it, on all that? If not then so be it, but I think the question is in
17 my view fair.

18 MR OMOFADE: Your Honours, there's a history to the issue of experts in this case.
19 As far back as probably two years ago, one of the major questions that your Honours
20 posed was, firstly, whether any of the parties proposes to call an expert in this case,
21 and if so, whether the parties are able to agree amongst themselves on a common
22 expert to be jointly instructed.

23 Now, there was a degree of inter partes communication between the Prosecution and
24 Defence on this issue. There was also some update provided to your Honours on
25 discussions that were currently taking place. Indeed, I believe there was an

1 exchange between myself and my friend, Mr Koumjian, even proposing the name of a
2 certain expert and the parameters of the expertise of that individual. I don't know if
3 we went as far as discussing the parameters of the expertise, but the idea was mooted
4 at the time, and this is where the whole issue of whether or not an expert was going
5 to be instructed came up.

6 In the end, there was no need, at least, the Prosecution didn't see any need to call an
7 expert in this case. That is what we communicated to the Chamber.

8 As regards the list of Prosecution witnesses that we intend to call for the trial, that list
9 has been made clear from as far back probably also as two years ago, and it has
10 always included Witness 445.

11 Now, what I have said in the court this morning is that Witness 445 does have certain
12 expertise. We do not call him as an expert per se, and I say this guardedly because
13 I don't want to give the impression that when we were talking about experts
14 previously before this Chamber and in the inter partes discussions that have
15 transpired between my friends and the Office of the Prosecutor, we gave a label to
16 this witness as "the expert" that we propose to call in this case. His statement has
17 been made available, his prior testimony is made available. If the Defence wants to
18 speak to him, we will approach him and I have no doubt that he will speak to the
19 Defence.

20 JUDGE EBOE-OSUJI: If I may interrupt? To cut it short, you will be calling this
21 witness as a fact-based witness; is that it?

22 MR OMOFADE: That's the case, your Honour, but he does have certain expertise.

23 MR KHAN: Madam President, with your leave, I think the question still has been
24 unanswered. I can't say more than this: It is not an individual who is an
25 eye-witness to any of the events. Normally, an individual is either a live witness, a

1 viva voce witness, an overview witness or an expert witness - it's very clear - and
2 there are evidential and procedural issues that follow from each. For example, an
3 expert obviously is allowed to give opinion evidence based upon that expertise.
4 Your Honour, it is unsatisfactory for the reasons I have given, but there is another
5 matter. In whatever capacity that individual is called, and we say he is eminently an
6 expert, as the Prosecution agreed at the time of Abu Garda and the Banda/Jerbo
7 confirmation hearing, we are entitled to not only his previous testimony, I say, but
8 also his previous expert reports that were commissioned and paid for by the
9 Prosecution in other cases before this Court. Those have not been disclosed, and
10 I would ask that an order be given that those be disclosed, those expert reports be
11 disclosed, without delay.

12 As far as the transcript testimony that the Prosecution served a few days ago, only
13 less than a week ago, and the highlighted portions that they have marked up for
14 agreement that only those portions be translated, your Honours, as the history of this
15 case shows, we've tried our best to limit unnecessary expenditure of the Court and
16 undue translations, and we will review that testimony, those transcripts, in good faith
17 and we'll respond accordingly.

18 There is another matter that's relevant to 445, and that is that, as the party opposite
19 knows, he has testified as again an expert, always as an expert, in other international
20 courts. I don't think it is giving the game away, it's before the Special Court for
21 Sierra Leone. Your Honour, we don't have those expert reports, number one, or
22 those transcripts. And again, if this individual is going to be called by the party
23 opposite, we would ask that good faith inquiries be made; they obtained those
24 documents and they'd be served upon us.

25 PRESIDING JUDGE ALUOCH: Thank you, Mr Karim Khan.

1 MR KHAN: I'm most grateful.

2 PRESIDING JUDGE ALUOCH: I think you have made your point. Thank you.

3 I would like to continue with questions for the Prosecution, because I have lots of
4 questions for the Defence, too. On the issue of the facilitation of interviews of
5 Prosecution witnesses 305, 439 and 442, who consented to be interviewed by the
6 Defence, Prosecution, do you have any update or comments on the Defence's request
7 at paragraph 13 of the Defence filing of 422? As you can see, the questions the
8 Chamber is posing are definitely from these written submissions.

9 MR OMOFADE: Your Honours, I see. I just refreshed my memory from the
10 Defence filing. Your Honours might recall that Witness 439 was a witness that we
11 had already contacted. This witness is, and I say this reservedly and because we are
12 in open session, this witness is available to speak with the Defence and that can be
13 arranged imminently.

14 As regards Witness 305, there are certain submissions that we made before your
15 Honours. He has consented in principle to speak with the Defence. One of the
16 difficulties is that the Defence don't even know who he is. He's a PEXO Rule 77
17 witness, rather than an incriminatory witness. He's also one of the witnesses to
18 whom the protocol that we are awaiting from your Honours relates.

19 So in terms of logistics in arranging whether the Defence can actually meet with the
20 witness, without being able to disclose his identity, those logistics can't yet be put in
21 place.

22 As regards Witness 442, who is the final witness on the list, the Prosecution expressed
23 previously the difficulties in being able to contact this witness, not because he has
24 chosen not to speak to us - we've had a fairly good rapport with him - but there have
25 been difficulties in contacting him more recently. We continue to do that. In

1 principle, he was happy to be questioned by the Defence. It's a question of being
2 able to contact him and arrange that logistically.

3 MR KHAN: Madam President, if I can assist.

4 PRESIDING JUDGE ALUOCH: Very briefly, Mr Karim Khan.

5 MR KHAN: Yes. Your Honour, I do think it's important, because it goes back to
6 what I said earlier about the requirement of the Bench to pierce the veil of pretense,
7 because I do say that it seems when my learned friend stands up that the OTP are
8 running very fast, but they are not moving forward, and I say that for reason. We
9 made these requests a long time ago, and out of the ten individuals we sought to
10 speak to, the Prosecution said three agreed. One we were informed on
11 6 June 2011 - 2011 - and two we were informed in September 2011, that they were
12 willing to speak to us.

13 We then wanted to move forward, and we have silence from the Prosecution. I
14 mean, I don't know -- now today, that's the reason of course for status conferences,
15 there's nowhere to hide, but today the Prosecution say that can be imminently
16 arranged. Well, your Honours, not only in 2011, but on 12 October 2012, we also
17 sent a chaser letter about these witnesses. We have not been able to speak to them.
18 The Prosecution now say they can. Why couldn't they do what is courteous, what is
19 professional and what I say is professionally and ethically necessary, which is to
20 respond to Defence communications in an inter partes fashion? Otherwise, your
21 Honours, when opposing party stands up and says there's a whole variety of inter
22 partes contact, it looks like everything is fine and dandy. It is not.
23 There is a systemic failure in the OTP, in this and other cases, to respond to the
24 Defence as an equal party. We are viewed as a hurdle to be overcome, not as an
25 equal party trying to assist the Court to determine the truth, and that is what I

1 maintain the fundamental malady that is afflicting the OTP at a policy level and,
2 actually, at a case level that we are encountering today, and, your Honours, it does
3 require, I do humbly suggest, a very stern and rigorous intervention from the Bench
4 to ensure that the fair trial rights of our clients are properly respected. I'm grateful.

5 PRESIDING JUDGE ALUOCH: Thank you. OTP, you have noted the comments
6 from your colleague. You're both parties, so you need to respond to each other's
7 queries. I think that's a genuine point, if that is what is going on.

8 Finally, Prosecution, the Chamber is aware that its decision on the protocol on
9 handling confidential information is pending, and you have referred to it this
10 morning. Now that the request for temporary stay has been rejected and that the
11 trial proceedings are moving forward, a decision will be issued in due course by the
12 Chamber.

13 Prosecution, considering your earlier responses to the Chamber's questions and
14 clarifications, you have the floor for additional submissions on the trial date, if any.
15 If any.

16 MR OMOFADE: Your Honours, I --

17 PRESIDING JUDGE ALUOCH: Just one minute, please. Prosecution, how much
18 time do you anticipate you will require to decide all the relevant evidence? How
19 much time do you require? To be very realistic, please, how much time? Given
20 what we have discussed this morning, how much time do you really require?

21 MR OMOFADE: Your Honours, Madam President, I'm grateful. I think it ties into
22 also submissions on the proposed dates for the commencement of trial.
23 Once your Honours issue the protocol --

24 PRESIDING JUDGE ALUOCH: Sorry, maybe I wasn't clear. How much time do
25 you require to disclose all the relevant evidence? I think the key word here is to

1 "disclose" all the relevant, yes.

2 MR OMOFADE: Then again, your Honours, I'm able to project and say that the
3 cut-off date of the end of March 2013 is the same date that we propose. It's entirely
4 dependent now on the date that the protocol is issued, particularly because we might
5 need to apply redactions and disclose those Rule 77 and 67(2) statements to the
6 Defence. The Rule 76 disclosure, and when I say Rule 76, I refer mainly to the audio
7 translation of witness-related material into Zaghawa, that disclosure also we've
8 provided repeated filings before your Honours proposing the date of the end of
9 March 2013. So as regards that as well, we anticipate we'll be able to conclude by
10 that date.

11 It then brings me to the final issue as to what we propose is a reasonable
12 commencement date for the trial proceedings. Now, we're not entirely unreasonable
13 in this regard. Only last week we received the redacted version of a filing made by
14 the Registry. That information was not available to us prior to last week, nor was a
15 lot of the information relating to discussions that took place ex parte between the
16 Defence, your Honours and the Registry. A lot of that information feeds into a more
17 realistic projection of any proposed trial dates.

18 What we do say is what I said earlier: A date of October 2014 is entirely unrealistic.
19 Even by the Registry's proposals, it does appear that a trial can commence well before
20 that date.

21 So I say again, whilst we have projected that we are able to complete our disclosure
22 obligations, bar any unforeseen circumstances, by the end of March, any date
23 thereafter that takes into account the logistical concerns that the Registry has raised,
24 that feeds into some of the investigative needs that the Defence itself might have, as
25 well as logistical needs, we are entirely reasonable as regards those suggestions also.

1 What we do say, however, is this can't possibly be a trial in October 2014. I wonder
2 if that helps your Honours?

3 PRESIDING JUDGE ALUOCH: You are saying there can't. What about can? You
4 are saying no for October 2014. What about can? Just make yourself very clear to
5 understand, please.

6 MR OMOFADE: It's somewhat difficult because even the Registry's filing that I
7 referred to proposes a number of nuanced dates by which certain activities can be
8 carried out. I hesitate, your Honours, and I know I'm being probably difficult, but I
9 hesitate to suggest a particular date, but I do want to accommodate all the concerns
10 and, indeed, the rights of the Defence, but what we do say is taking all these into
11 account, including the readiness of the Prosecution, be that when it may be, the end
12 of March or shortly thereafter, we suggest that certainly October 2014 is unrealistic.

13 PRESIDING JUDGE ALUOCH: Thank you. Thank you.

14 Yes, I was coming on to the legal representatives because I think at 11.00 we will need
15 to have a break for our interpreters and court reporters. So immediately after that
16 break, it will be your turn now, the Defence. So just save that point.

17 Common Legal Representatives, now you have the floor on the possible trial date you
18 proposed, in addition to what you have already submitted in writing and also on the
19 dates suggested by the parties and the Registry.

20 MS CISSÉ: (Interpretation) Thank you, Madam President. Am I to understand
21 that I can also make additional observations regarding the date of commencement of
22 trial; that is, additional observations that I could not have included in our submission
23 because we had not received the Defence proposals? And also, additional
24 observations following from the discussion this morning? So do you grant me leave
25 to make those observations relating to the Defence and Prosecution observations?

1 PRESIDING JUDGE ALUOCH: Yes, I grant you ten minutes before we go to the
2 break. Thank you. Yes, yes.

3 MS CISSÉ: (Interpretation) Ten minutes. Thank you, madam. Okay, I will try
4 to be brief. I want to make some additional observations relating to the concerns of
5 the victims, particularly in relation to the date proposed by the Defence for the
6 commencement of trial.

7 Regarding the impact on the victims and their rights, and I refer to my submission of
8 19 December 2012, but as a result of the discussions of this morning and the proposals
9 made by the Defence, I would like to express here the concerns of the victims relating
10 to such a far out date as has been proposed by the Defence.

11 After examining all the facts of the case, the victims feel that no elements proposed by
12 the Defence can, in fact and in law, justify such a far off date as October 2014. The
13 victims consider that Article 67(1)(d) relating to the preparation of the Defence, it
14 should be placed within the overall context of a fair and impartial as well as
15 expeditive trial.

16 This -- this relates to the idea of the overall fairness of the trial, and this means that
17 the time and facilities necessary for the Defence includes preparation prior to the trial,
18 but also a continuing preparation throughout the duration of the trial. And I believe
19 that the -- this approach has guided the Chamber, and I refer particularly to
20 paragraph 59 on its decision on the Defence request for temporary stay. This overall
21 appreciation also expresses the constant settled law.

22 I would like to refer to the ICTY, when they stated that the fair character of the
23 proceedings does not mean that the Defence has to examine all the disclosures of the
24 Prosecution before the commencement of a trial. The fair nature of the trial is not
25 systematically affected, even if the Defence is not in a position to interview all

1 Prosecution witnesses before the beginning of trial.
2 This settled law was confirmed by the Vlastic (phon) case. The Defence cannot ask
3 to complete all preparations before beginning trial. The process of disclosure and
4 preparation of the Defence is an ongoing procedure. The Chamber has discretionary
5 powers to take any measures necessary in the course of the trial to guarantee the
6 rights of the Defence. So consequently, nothing justifies the fact that the
7 Defence should have completely prepared itself before the beginning of the trial.
8 The Defence is aware of that because on one of the points that they raised for their
9 request, that is the disclosure of evidence in the Al-Bashir case, they - the
10 Defence - raised an interlocutory appeal because the Chamber had granted them that
11 leave to express themselves regarding the continuing violence in Darfur.
12 This shows independently of a strategic interest that the Defence believes that they
13 can in fact commence a trial without having fully completed all the issues relating to
14 investigations in Darfur.
15 I would also like to refer to the discretionary powers, and these powers can apply to
16 all the issues that have been raised this morning and, based on that, in no case can the
17 Defence need one-and-a-half more years to complete their preparations.
18 The second important point is that the assessment of the time and the facilities
19 necessary for the accused to prepare their Defence must be carried out within the
20 specific context of this case, and this is consistent with international jurisprudence,
21 whether it is the ICTY, the European Court of Human Rights and other institutions.
22 Regarding the disclosure procedure all the issues raised by the Defence can be dealt
23 with before and during the trial. As the Prosecutor has mentioned, and the
24 Chamber mentioned in its decision of 3 January 2013, the facts are restricted and
25 concern a single attack; that is the attack of 29 September 2007.

1 It has been stated that the alleged link advanced by the Defence between the attacks
2 in Darfur and mens rea have not been justified because -- because the crimes alleged
3 concern only the attacks in the Haskanita base.

4 Secondly, the link between the AMIS Statute and the failure to comply with its
5 obligations, that is by the Government of Sudan, that non-compliance by a belligerent
6 party have no impact on international standards, that is regarding the protection of
7 the AMIS Statute.

8 Thirdly, the Chamber recalled that regarding the link between the potential witnesses
9 that might be called, and the fact that those witnesses can prove that the AMIS base
10 was used as a military asset, because information was transmitted from there to the
11 Sudan government, that link is actually inexistent. Consequently, we believe that
12 none of the reasons advised by the Defence can justify a commencement of trial in
13 October 2014, and that undermines the necessity for the expeditiousness of the trial.

14 Regarding the possibility of the Defence to have their own witnesses, relating to the
15 translation of the documents into Zaghawa, the Defence claims that they cannot
16 commence their own investigations before the completion of the translations, but in
17 Annex H of their previous document they actually drew up a list of individuals, and
18 this list could not have any substantial effect on the Defence of the accused, and the
19 Defence has also mentioned other lists. It means that the Defence is perfectly able to
20 begin their investigations before everything is translated into Zaghawa.

21 In July 2011, during a status conference, the Defence stated that nothing -- there was
22 nothing to justify that the accused could speak and understand Arabic.

23 I would like to add that in the confidential agreement between the Defence and the
24 Prosecutor, it is clearly stated that Abdallah Banda, one of the accused, is a trader, a
25 businessman in Nigeria, Libya and other countries, and I doubt that he can be such a

1 businessman while understanding only Zaghawa.
2 During that status conference the Defence stated that they had met the accused
3 regarding the confirmation of the charges and that the accused had understood the
4 scope of those charges, and given the volume of that document we wonder in what
5 language the Defence explained the document to the accused?
6 We fully respect the necessity to respect the rights of the accused, but regarding
7 translation into Zaghawa we believe that those rights have been complied with
8 because there are elements that show that the accused can perfectly understand one
9 of the languages of the Court, that is Arabic.
10 So, in a nutshell, Madam President, those were the additional observations that I had
11 to make following the suggestions of the Defence.
12 And once again, I would like to respectfully request the Chamber to take on board the
13 interests of the victims in relation to this issue. And lastly, I would like to say that
14 lack of co-operation with the ICC is a crime. When it comes to the Sudan
15 government, for example, the Defence has submitted documents indicating that there
16 is a crime in international law, but if you read the document that they have submitted
17 you will realise that this document has absolutely nothing to do with co-operation
18 with the ICC.
19 And for the six months that the Defence is asking for to arrange the appearance of the
20 witnesses, there are no details at all. We have -- we know nothing about the
21 potential witnesses, and there is no indication at all. So how can the Defence ask for
22 six months?
23 So, so we believe that September 2013 seems to be a fairer date in light of the
24 submissions of the Registry. That is a new element that was raised that led us to
25 modify our proposal.

1 PRESIDING JUDGE ALUOCH: Thank you. Thank you very much. We have
2 heard your submissions and the modification of your proposal. I think we have to
3 take a break now for 30 minutes. Immediately we come from the break, the floor
4 will be for the Defence, followed by the Registry. Thirty-minutes break. We'll
5 resume at 11.30. Thank you very much.

6 THE COURT USHER: All rise.

7 (Recess taken at 11.02 a.m.)

8 (Upon resuming in open session at 11.39 a.m.)

9 THE COURT USHER: All rise.

10 Please be seated.

11 PRESIDING JUDGE ALUOCH: Welcome back, everybody.

12 It's time now to pose specific questions to the Defence, but before I do that I think
13 there's one point that I would like to clarify.

14 It came up this morning, especially in the submissions by the Prosecution, and this is
15 on transcript page 16, beginning from line 8, when the Prosecutor said, "14 December
16 decision from the Chambers," and did not mention that there was meant to be an
17 agenda. We did not receive an agenda.

18 I just want to clarify that in the Chamber's decision in the scheduling order, public
19 order scheduling a status conference, this is 429, document 429, of 14 December 2012,
20 this is very, very -- it was a very brief order and I would like to read it, "Having
21 reviewed the parties' and participants' submissions on a possible date for the
22 commencement of the trial, and in accordance with Rule 132(1) of the Rules of
23 Procedure and Evidence, the Chamber will hold a status conference on
24 29 January 2013, starting at 3 p.m." Subsequently this was corrected to read,
25 "29 January, starting at 9.30."

1 So the issue of an agenda to follow, it was never an issue and I just wanted that to be
2 corrected. It was very clear that we were relying on parties' and participants'
3 submissions, and the questions that I have posed to the Prosecution so far and the
4 ones that I am now going to begin posing to the Defence come from the submissions.
5 So I believe the Defence you are ready, yes?

6 MR KHAN: Yes, Madam President. Before you ask -- put specific questions, I
7 wonder if you'll allow us to respond to the submissions of the Prosecution and the
8 Defence -- Prosecution and victims? I think that was anticipated before the break.

9 PRESIDING JUDGE ALUOCH: I was hoping that I could pose the questions and
10 then towards the end, once the questions are over, then you can make the responses,
11 if that will -- if that is all right with you?

12 MR KHAN: Madam President, I'm in your hands.

13 PRESIDING JUDGE ALUOCH: Please, just put down your questions. I believe
14 your assistant is putting them down - she's sitting next to you - and then you can
15 come on. I think we have specific questions that we need answers for from you, the
16 Defence, please, and the Registry.

17 Now, without revealing any confidential information with regard to the
18 Defence investigatory work and contacts with Defence witnesses, at paragraph 4 of
19 the Defence's submissions 422 the Defence estimates that the negotiations with Third
20 States may take at least six months and refers to its experience in this respect.

21 Defence, why do you estimate six months? Why particularly six months? What is
22 so magical about six months, please?

23 MR KOUMJIAN: Your Honour, we would need to address that in -- I believe it
24 would be safer in a confidential session, ex parte.

25 PRESIDING JUDGE ALUOCH: Thank you very much. And just to remind you,

1 parties and participants, that we will be stopping at 1 o'clock. We cannot sit beyond
2 that, beyond 1 o'clock, so that if the questions -- if this public hearing is over by then,
3 then we'll have to sort out what we do with the -- how we handle the confidential
4 status conference, because this status conference is only for the morning hours today.

5 All right. I'll move on, Defence. The Chamber is aware that all audio translations
6 into Zaghawa of the witnesses' statements would need to be shared with both
7 accused persons for their review. (See paragraph 12 of Filing 422.)

8 Defence, again without revealing any confidential information, how long would this
9 process take once all audio translations have been disclosed to the Defence?

10 MR KOUMJIAN: Your Honour, you know, this situation can change daily, but just
11 to get the material to the accused, not counting the time for them to listen to, it can
12 vary greatly, but I think at a minimum we would ask a couple months. We would
13 hope we certainly could do it within a couple months. I think a minimum, if we're
14 very lucky, would be one month, but it would be more realistic to say two months,
15 and if you want, I can explain in private why that is a very optimistic projection.

16 PRESIDING JUDGE ALUOCH: Thank you. If you're as concise as you are now,
17 then I believe that we might finish all this before 1 o'clock.

18 Now, at paragraph 23 of the Registry's public redacted report 434, the Registry
19 declares, and I quote, "It does not consider that the trial should start only when all
20 Defence witnesses are relocated and thus available before the Court."

21 Defence, do you have any comments to the Registry's position that you can talk about
22 publicly?

23 MR KOUMJIAN: Yes. Your Honour, we feel very strongly on this point. First of
24 all, it's fundamental to our case to know what the Prosecution case is and to know
25 what evidence we have available. Before we cross-examine the Prosecution

1 witnesses, we need to know exactly what evidence is available to us and information
2 that we expect to learn from persons we haven't yet spoken to, that we can then
3 challenge the testimony of Prosecution witnesses, or these Prosecution witnesses we
4 hope will confirm this information.

5 Until we get the information, and until we know the witness not only has talked to us
6 but is available, it varies our strategy tremendously. For example, if we have a
7 witness, let's say, who has talked to one of the Prosecution witnesses and the
8 Prosecution witness says, "Yes, I knew that the Government of Sudan had an agent
9 inside the base giving targeting information," well, we need to know if that witness is
10 going to be available to us before we can conduct our cross-examination, before we
11 can construct our entire argument in the case.

12 I'm being very specific now about one possible, but there are many, many
13 possibilities that we need to know about.

14 And secondly, there is another factor in this case that is very important. First,
15 obtaining any witnesses, it's not a normal case where, for example, the last case I did,
16 we had a list of Prosecution witnesses of 90 some witnesses, and every witness we
17 wanted showed up. It wasn't difficult. The arrangements were made for them to
18 come from Africa.

19 In our case, the arrangements are extremely, extremely complicated, for reasons I will
20 explain further in private session, but we've already made your Honours aware of.

21 So it's very hard for us to project who's coming, and thirdly, as we've discussed in the
22 very beginning of this hearing, your Honours talked about the conditions of the
23 clients' stay in The Netherlands. Regardless of how we finally work that out, in
24 essence, our clients are suffering a severe deprivation of their liberty, very likely,
25 during their stay.

1 So, we do not feel this is the kind of case where you can say, "Let's put on the
2 Prosecution case and let's break for six months and see how the Defence investigation
3 goes." That would be a denial both of our right to a fair trial in challenging the
4 Prosecution case and it would be a denial of our clients' rights, who are presumed
5 innocent and who have voluntarily appeared before the Court, to be deprived of their
6 liberty, or in the alternative, to go through extremely difficult logistical exercises to
7 have them come back in that situation. So for that reason, we feel in this particular
8 case it's essential that the Defence be allowed to complete its investigation before the
9 case begins.

10 MR KHAN: Madam President, just one additional point in relation to paragraph 23
11 of the Registry's filing. If one reads the Defence submissions on the start date, we
12 have never said at any point that all the witnesses that the Defence wish to rely upon
13 need to be relocated before trial starts. We say something quite different.

14 PRESIDING JUDGE ALUOCH: Thank you for that clarification. Now, Defence, as
15 you are now in court, when do you anticipate that you will be ready to start referring
16 witnesses to the VWU? Is that feasible right now?

17 MR KOUMJIAN: We have started.

18 PRESIDING JUDGE ALUOCH: Thank you for being very brief. Now,
19 perhaps -- I was going to ask the Defence, do you have any final submissions on a
20 possible trial date and perhaps you can also use this opportunity also to make the
21 responses that you wanted to, very briefly? Yes, Mr Karim Khan. Yes.

22 MR KHAN: We'll divide it between submissions by myself and then, at closing, my
23 learned friend, Mr Koumjian.

24 In answer to the Prosecution's contention that a trial can fairly start in March, we refer
25 to our own submissions, but it is pertinent to note, we say, that when one is referring

1 to the utility of the Registry's very careful and very considered submissions, one
2 needs to understand what the Registry was doing.

3 It was saying that a trial, contrary to the Prosecution, could not start in March, but
4 September 2013, limited to their information based upon modalities, host country
5 co-operation, witness transfer. They very properly, very rightly, did not seek to
6 trespass upon the other issue when a trial can start consistent with the fair trial rights
7 of Mr Banda and Mr Jerbo.

8 Your Honours, that is of fundamental importance, given your Honours' reasoning in
9 rejecting the stay application, given the exceptional circumstances, the unheralded
10 difficulties that we face in this case.

11 Your Honours, the jurisprudence of Strasbourg, of the European Court of Human
12 Rights, on adequate time and facilities and reasonable preparation makes only one
13 thing clear: Everything is focused on the particular facts and circumstances of a case.
14 There is no one size fits all formula, and that is brought, we say, into the starkest
15 relief in the very unique situation of this case, in which challenges that are novel and
16 difficult are faced not only by the Defence - of course, most acutely by the
17 Defence - but not only by the Defence, but also by the Prosecution and the Registry
18 trying to make this trial go forward, not at all costs but in a fair manner. Your
19 Honour, I am perturbed at the Prosecution's insistence that March is a fair and
20 appropriate day to start in light of the Registry's submissions, but also in light of what
21 is outstanding.

22 Your Honours, Article 54 should not be rendered as a dead letter article devoid of
23 substance. Your Honours, in your own filings, have said that one of the means
24 perhaps to mitigate the difficulties that are encountered by the Defence is the
25 Prosecution's own duties to do what the Statute says is required of them.

1 Your Honours, there are several third-party applications that are outstanding, not
2 only issued by the Defence to those third parties, with the assistance of the Registry,
3 but the Prosecution's own third-party requests apparently have been unanswered.
4 So, in light of that, if Article 54 is to be given meaning and if your Honours' injunction
5 that the Prosecution somehow, in some way, can, or should, mitigate the difficulties
6 in this case, again, one would say that the start date is preposterous. Your Honours,
7 it gives me no pleasure to say that whilst my learned friend talks about the rights of
8 the Defence, the actual response, in our submission, shows that they are paying only
9 lip service to the rights of the Defence in real and meaningful terms.

10 Your Honours, my learned friend, Ms Cissé, as always, in her passionate and
11 eloquent submissions, makes a number of points. I'm not going to deal with them in
12 detail. We've put our submissions down.

13 The right to a fair and expeditious trial is a right of an accused, not a stick to beat an
14 accused with; it is a right of an accused, and there is a fundamental right to adequate
15 time and facilities to prepare a case. Your Honours, investigations are needed, and
16 speaking to Defence witnesses are needed, to know -- to trigger further investigations
17 and to know how to cross-examine a Prosecution witness. Unless we've spoken to
18 witnesses, how on earth can we be expected to cross-examine Prosecution witnesses
19 that are brought into this witness box?

20 The submission that somehow it's fair to start -- to start a trial before the Defence has
21 read or assimilated all the evidence, which was the submission of the victims'
22 representative, is really without basis in law, we say.

23 Your Honours, there is a distinction in international courts between the obligation of
24 the Prosecution to give rolling disclosure, even in the course of trial, largely
25 exculpatory or evidence that may be material to the preparation of the defence, and

1 new evidence that the Prosecution then will seek or could seek to rely upon. In the
2 latter scenario, of course the remedy always, subject of argument, but in the event in
3 principle is admitted and was not available at the time, the remedy is an adjournment.
4 So there's no basis at all, we say, for the submission that we should be asked to start
5 without reading all the information.

6 Your Honours, there are a lot of matters that are outstanding. They appear both in
7 our written filings, but let me give you an example. 19 July 2011, we requested
8 various items in annex A of that filing, 19 July, and, your Honour, there's been no
9 progress at all since 30 September 2011, and that's despite chases by the Defence.

10 Your Honours, P471 hasn't been disclosed to us even yet, despite chases on
11 12 October. Your Honour, we also sent a request more recently in December asking
12 the Prosecution to disclose. They've said they've been in contact with an expert.
13 They haven't -- it seems they are not intending to rely upon that expert. One
14 wonders why. And we've asked them in their interactions with that expert, is there
15 any evidence that that expert gave that would be material to the preparation of the
16 defence or potentially exculpatory? And no answer to that request either.

17 Your Honour, the list could go on and on, but I think hopefully you've got a gist of
18 what I'm saying regarding what we say is the reasonableness of the Defence request.
19 It is not enough, it is not sufficient, for the Prosecution to dig its heels in and to cry
20 "October 2014 is unreasonable" without saying why. There are unique difficulties in
21 this case. We are trying to hobble along to have a fair trial, but the right of a fair trial
22 is something that cannot, no court of law, can sacrifice, and we say trying to make our
23 good faith efforts to speak to witnesses, to do what is necessary, should not count
24 against the accused. The opposite, in fact, should be the case.

25 Your Honours, with your leave, my learned friend Mr Koumjian may have some

1 additional submissions in this regard.

2 PRESIDING JUDGE ALUOCH: Yes.

3 MR KOUMJIAN: I'll be brief because I think it was covered. Your Honours, the
4 ability of the Defence to really announce "ready" on this case does not depend solely
5 on the Prosecution, there's issues with our investigation, but it certainly hasn't been
6 helped by the fact that we have disclosure requests outstanding for more than a year,
7 for a year-and-a-half, to the Prosecution yet unanswered.

8 It doesn't help for the Prosecution to come to the Court this morning and, in answer
9 to your Honours' question, say that a witness that agreed to be interviewed by us, oh,
10 they can set that up imminently, when this has been pending for over a year. Well,
11 can we talk to him this week? When can we begin, because these are necessary for
12 our investigation?

13 Nothing has been done by the Prosecution to further this case. We understand their
14 interests. I personally would love to try the case this year. It's not possible to give
15 our clients a fair trial this year. And for the Prosecution to say the case can be ready
16 by 1 April, I thought it was an April Fool's Day joke. There's no way it will be ready
17 by 1 April this year. We will be lucky if the translations are available for our clients,
18 to be taken to our clients; it's going to take time to accomplish.

19 So, in our submission, there's another very important issue that your Honours relied
20 upon in the stay, and that is there are documents that entities have, international
21 entities have, that clearly the Prosecution acknowledges are relevant to our
22 investigation, and we have not yet been updated. The Prosecution told your
23 Honours -- your Honours urged them to continue efforts to obtain those documents,
24 and as far as we know, nothing has been accomplished, which we also think is key to
25 our investigation.

1 The Trial Chamber exercised patience, allowing the Prosecution, our clients appeared
2 in June 2010, their translations are going to be ready by 1 April 2013, so almost three
3 years to translate the statements that are required by law in this Court. Three years.
4 So what we're asking for may sound on first blush to someone, that's a long time,
5 14 October, but not when we cannot go to the country the witnesses are located, when
6 we have to co-operate with the Registry to obtain the co-operation of third States to
7 ask witnesses to risk severe -- take severe risks in order to meet with us in conducting
8 an investigation that really involves an intelligence operation by the Government of
9 Sudan.

10 So given three years that the Prosecution took almost to translate the material, we
11 think that the request that we've made is in good faith, honest and reasonable. We
12 hope that we can be ready and we will look forward to meeting the Prosecution case
13 in October 2014.

14 Thank you.

15 PRESIDING JUDGE ALUOCH: Thank you.

16 I don't -- Prosecution, do you want to make a very quick response, because I want to
17 give the floor to Judge Eboe-Osuji, who has a question for the Defence.

18 MR OMOFADE: Your Honours, indeed, your Honours, my response is very brief.
19 The Prosecution struggles to understand why, in response to your Honour's question,
20 how soon can the translations that have been disclosed to the Defence, how soon can
21 they be made available to the accused persons? Now, the Defence have gone on
22 quite extensively this morning arguing that there hasn't been disclosure. Now, in
23 the real sense of the word, disclosure of the Rule 76 material had been made to the
24 Defence almost two years ago. We have disclosed witness statements in English to
25 the Defence.

1 Now, the audio translations in Zaghawa, the language which the accused persons
2 profess to understand and speak, those disclosures started some time in March 2012,
3 to the best of my recollection. We have made approximately 12 batches of disclosure
4 to the Defence since then.

5 Now, in response to your Honour's question this morning, they have asked for two
6 months to be able to disclose the completed audio translations to the accused persons.

7 The question is: Why haven't they been able to disclose, in batches at least, or share
8 that information with the accused persons? Are they going to wait until we fully
9 translate everything at the end of March 2013, which is a full year before they
10 commence sharing that information with their clients?

11 Now, the problem here is, and it's all right for the Defence to sit there and accuse the
12 Prosecution of delays, but if we're going to move proceedings forward, it is really
13 down to the Defence to proactively share some of the information with their clients as
14 well. That's the only way we can move things forward. So the Prosecution would
15 like a response at least as to why there is difficulty in at least sharing some of that
16 information with the accused persons prior to the completion of Rule 76 disclosure.

17 MR KOUMJIAN: Your Honour, I think that's a fair question. I can answer it very
18 quickly. And perhaps it was my ineloquence. We have been disclosing in batches
19 the material. It's not easy, but some material has been transmitted to the clients. So
20 what I understood your Honour's question is, we don't have all the material yet, once
21 we get the last bit of material, how much longer to transmit that? What we have
22 been able to deliver, we have delivered, and the clients do have some of the material.

23 PRESIDING JUDGE ALUOCH: Thank you for that clarification. Yes?

24 MR KHAN: Just to be clear, Madam President, whatever we had at the time of that
25 mission has been given. What everything we had has been given. Nothing has

1 been withheld. So we have been discharging our responsibilities from the outset
2 absolutely as efficiently as possible and submissions to the contrary really have no
3 basis in fact.

4 PRESIDING JUDGE ALUOCH: Well, it's much clearer now. This -- the last
5 submission you are making is much clearer. I will give the floor to Judge Eboe-Osuji
6 who has a question for the Defence.

7 JUDGE EBOE-OSUJI: Two questions, really. One of them is a pro forma question,
8 the other one is more substantive. The pro forma one first.

9 When I was reviewing your submissions, the written, I noticed that Annex A is
10 entitled "Affidavit," but I looked for the oath, the commissioner's certification, I didn't
11 see it. Did it drop off? Because the affidavit needs to be sworn before somebody
12 authorised to give an oath. If it isn't, then we can clear it up, because what I see is a
13 written statement only signed. That's the first question.

14 The second one really is the more substantive, is -- stems from this matter of
15 relocation of people and the logistical considerations that attach to it. In paragraph
16 45, for example, you do allude to human rights law, but there is no reference to any
17 authority, and I wanted to know what it is that human rights law precisely says and
18 what authority it is we are thinking about? And included in that is the content
19 of -- the normative content of whatever it is that human rights law says in this regard,
20 does it also include that a trial may not start, (Redacted)

21 (Redacted)

22 (Redacted)

23 Thank you.

24 MR KHAN: Well, your Honour, in relation to the first issue, it wasn't -- it's labelled
25 an affidavit. It was filed confidentially, but perhaps I can say this much: It's a

1 statement. So if the Court need it sworn, it can be sworn, but your Honours will
2 have sight of who gave it, and it may be that a statement is sufficient for the purpose
3 of the Defence, but if your Honours, that needs to be sworn, it can be done but it's an
4 error from us perhaps labelling it an affidavit.

5 In relation to the second matter, your Honour, that's again a confidential matter that
6 will impact the security, and I would not wish to address that at all in open session
7 and ask for a redaction.

8 PRESIDING JUDGE ALUOCH: Thank you very much. That concludes the
9 Chamber's questions for the Defence for now. I think we'll turn to the Registry.
10 The Chamber seeks the following clarifications with regard to the issue of possible
11 relocation of Defence witnesses. Only what you can answer in public session.
12 On the issue of witness protection, the Registry submitted that the individual security
13 assessment of each set of five witnesses would take two months. However, the
14 VWU does not operate in Sudan and the interview of these security assessments
15 would need to be carried out in a third State.
16 The Registry further submits that co-operation of such a third State would take
17 approximately four months. The VWU would then need an additional six months in
18 case of permanent relocation.

19 To the extent that the relevant information can be mentioned in this public session,
20 the Chamber would like to know exactly how long the VWU would need per witness,
21 if all of them estimated 15 Defence witnesses, are to be temporarily and subsequently
22 permanently relocated?

23 To the extent that you can talk about at this public session, please.

24 MR DUBUISSON: (Interpretation) Thank you, your Honour. Indeed, the ICC
25 operates in a specific way, and I am not going to disclose any confidential

1 information here, but I'm referring to the manner in which we proceed in all cases.
2 First, we need to know where we can meet a witness, and that is why it is
3 indispensable that we work together with the party calling the witness, whether it be
4 the Prosecution or Defence. Once we agree on the location at which we can meet the
5 witness, either to assist him cross borders or something else, then we need to meet
6 that witness. We have interviews with the witness in terms of protection and
7 psychological interviews. These all have to take place in the witness's own
8 environment, and were that not possible, which happens to be the case at hand, then
9 we need to move the witness. And when we talk about a witness, we are referring
10 to the witness and his family or any other person who may be put in a situation of
11 danger.
12 I'm therefore talking about a situation where we have to relocate a witness to another
13 country and have those interviews and discussions with them. Once we conclude
14 those interviews, then a report is submitted to the Registrar for a decision.
15 We have had the previous experience in this area of the world that such interviews
16 can be conducted, and it took us quite some time to do this, and we have a
17 background against which to make the assertion that if we work in three groups of
18 five witnesses then we can relocate the families, take them out of their location and
19 have interviews and discussions with them and thereafter, if need be, and where it is
20 identified that they are in danger or need to be protected, then we need to find a State
21 that can host those witnesses temporarily. This would require about two months,
22 including issues of logistics, co-operation and what have you, with a view to
23 determining this temporary relocation.
24 Then we have to deal with the issue of co-operation with other States in order to
25 envisage a more extended relocation, and that would be the second phase, which

1 would take an additional four months. Now --
2 (Trial Chamber confers)
3 MR DUBUISSON: (Interpretation) Thank you, your Honour. Our experience in
4 that area, or that region, has been the following: We provided for a four-month stay
5 for witnesses, and then four years after these witnesses were able to find permanent
6 relocation. That is the experience we have had so far. When we talk about terms,
7 about time rather, in the context of international co-operation, we are looking at two
8 months within which we can manage five witnesses and add up in the end to about
9 30 people because we are mindful of the cultural background, which includes
10 extended families, rather than the classical understanding of families which may
11 involve five to six persons. So we are looking at larger numbers in terms of the
12 definition of the family.
13 We must be mindful of the dignity of these people, and that is why we need two
14 months to deal with these initial issues and then four months to relocate temporarily,
15 and then there is a two-month period for the assessment of the first five group and
16 then the second segment of five and then -- and so on and so forth. That is why in
17 total we need a total of about six months, plus an additional four months, and if we
18 come to an assessment of all of those dealings with witnesses and their relocation,
19 then you see that we need at least ten months to deal with these situations.
20 The best scenario we can offer, therefore, based on our previous experience, is that it
21 took four months over a four-year period to come to a final picture about what had
22 been decided. So for ten months today, as we say, ten months would be the
23 minimum requirement for addressing one of the problems at hand.
24 Now, this is only dealing with one of the problems at hand, and I hope that I have
25 answered your question without delving into any matters that may be confidential.

1 Your Honour, do you want me to deal with the other aspects of the problem now?

2 PRESIDING JUDGE ALUOCH: Do you feel you can deal with it now or --

3 MR DUBUISSON: (Interpretation) Yes, I can raise the four problems all in one
4 shot and we may be able to proceed faster because we need to save time here.

5 Now, that's the issue of witnesses. The other problem we have is with the accused
6 persons.

7 MR KOUMJIAN: Can we ask that this be done confidentially, in a private session?

8 PRESIDING JUDGE ALUOCH: Well, I do not know what he was about to say.

9 MR KOUMJIAN: Well, he's discussing obviously the accused persons' appearance
10 and we think that that should be confidential.

11 PRESIDING JUDGE ALUOCH: Mr Dubuisson, yes? Maybe it's an issue you can --

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted) other issues relating to protection. Once those persons are here there
21 is a risk of a heightened level of threat, and that is why we need to be careful enough
22 and we have to be able to manage that problem.
23 I cannot assume that the interviews will result in such-and-such a conclusion, it's not
24 for me to determine how all of those things will work out, but technically we have to
25 be able to look at issues relating to protection in a very specific manner and I know

1 clearly that there will be problems in that area for the host country. That is why we
2 need to work together to find solutions to the protection issues.

3 So there are a number of issues relating to the protection of the accused persons, and
4 I'll conclude on the problem of language; language for the trial. In the preparatory
5 phase for this trial, we were able to retain the services of interpreters for the Court.
6 They are still available, although they may not be within the Court facilities as such.
7 What we intend to do is to continue to be ready and to have these persons handy and
8 available to the Court as need be, but all of that requires some time as well.

9 So if we took these three questions together, then you would see that for the Zaghawa
10 not earlier than September, and so we can put it at about October; that is before
11 December. As for the witnesses, if we say six weeks for 15 witnesses and four
12 months for the last set, that will be a minimum of ten months. Now, for the accused
13 persons we have a six-month period to deal with. So for these three different
14 problems we have three different time frames.

15 Now, let me talk to the last problem - major problem - which is specific to our
16 institution and that will be the resources that give our institution the capacity to
17 proceed. We have a budget in place, but we also have to resort to the contingency
18 funds. It's a technical issue, a financial issue, which may be quickly settled, but it
19 also has an impact on the trial. We may need to recruit people and that takes
20 between three to six months. That is what it takes to recruit someone.

21 And you're fully aware that the Court calendar today includes the Bemba case and
22 two other possible cases that may come up in April, so we have to be mindful of the
23 Court's ability to handle all these cases. We have two courtrooms, and I think that
24 we need from today some three to six months to be able to arrange the necessary
25 resources that will make it possible for the Court to proceed. It is an option to

1 proceed using consecutive interpretation, but I think that the option is also there for
2 simultaneous interpretation.

3 That's an overview of the problems which I felt should be brought to the attention of
4 the Bench, so we believe that it will be difficult to start the trial before the month of
5 October.

6 That will be all, your Honour.

7 MR KOUMJIAN: May I make one clarification, or request, for the Registry to
8 clarify?

9 As I understood, Mr Dubuisson correctly stated that it would be two months for the
10 Registry to make the witness assessment. That, as I understood, he did not take into
11 account the travel of the witness to the Third State where the Registry could make
12 that assessment. Your Honour, in the conditions in this case that can easily take a
13 couple months. It can take longer depending upon weather conditions and fighting.
14 So even the estimate that Mr Dubuisson gave did not take into account the possible
15 lengthy period for a witness to travel, witness and family, to the place where the
16 assessment would take place.

17 PRESIDING JUDGE ALUOCH: Would you like to respond to that, please?

18 MR DUBUISSON: (Interpretation) I do not intend to engage in any polemics
19 whatsoever. We need two to three days for interviews with witnesses, I think that's
20 the case, and that information can be brought back to the Court and a report filed to
21 the Registrar. That doesn't require two months, but just a few days, maybe two
22 weeks.

23 Therefore, whether we include or do not include the travel time, whether we think in
24 terms of two or three months, I think the point is that the answers I have given are
25 approximations and therefore I believe that within a framework of two months you

1 also cover some of the time that the first five witnesses will need to travel.
2 So I don't know what else to say. You see, if you decide to relocate or move persons,
3 our experience has been that we have been able in one transaction to move 17
4 witnesses, including all the logistics about travel, availability of craft and what have
5 you, but when there is need the Court can, should I say, be extremely efficient in its
6 proceedings.

7 MR KOUMJIAN: I certainly wasn't criticising in any way the Registry. I just
8 wanted to add that clarification. We very much appreciate the submissions of the
9 Registry.

10 PRESIDING JUDGE ALUOCH: Thank you.

11 I have one more question to the Registry. At paragraph 39 of your report 434, you
12 mention that an additional language assistant is required. Can you clarify whether
13 this is required to start the trial, or at what stage is this additional language assistant
14 required?

15 MR DUBUISSON: (Interpretation) What we need to bear in mind is that we need
16 resources to have an interpretation booth. So what I can say is that we need a
17 number of months to be functional, or operational, and if that were done then the
18 issue of a language assistant does not really arise as such. I don't think we need to
19 focus too much on that point.

20 We have talked about time frames, 2013/2014, and I think we have said that we
21 would make the efforts to be ready by October 2013 and I don't think that the
22 language assistant issue should really be a problem as such.

23 PRESIDING JUDGE ALUOCH: I'll give the floor to Judge Fernández, please.

24 JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

25 Just a point of clarification and maybe you said it, but I'm a little bit lost now with the

1 numbers. The interpreters, if I understand correctly you have identified and you
2 have already trained, almost totally or partially, three interpreters, but you have not
3 identified a fourth interpreter, is that correct, and you absolutely need four
4 interpreters to start the trial?

5 MR DUBUISSON: (Interpretation) Yes, thank you, your Honour. That is a very
6 important question that you raise. We can work with a smaller number of
7 interpreters, but we will need shorter sessions so that the interpreters may have their
8 appropriate breaks, particularly when working in a very difficult language.
9 Now, regarding the language assistant, if the language assistant is not available
10 immediately, then one of the booth interpreters would be asked to do the
11 familiarisation work. You see, that is why we need interpreters of a certain level to
12 be able to interpret in court. The court proceedings are very demanding, justice
13 itself calls for good work, and so when it comes to familiarisation tools we do not
14 necessarily need to have people of the calibre of court interpreters and that's why a
15 language assistant can do that job.

16 In that context therefore, and in the initial phase to allow proceedings to go forward,
17 we may ask one of the interpreters to service the familiarisation exercise, but that
18 would also reduce the capacity of work for the interpreters during proceedings
19 proper. That's an arrangement that can be made, and that is why we may opt to
20 start with three interpreters working two-hour sessions. We could also choose to
21 wait until we have the four interpreters and then proceed according to the normal
22 working hours.

23 JUDGE FERNÁNDEZ DE GURMENDI: I thank you. That clarifies my problem a
24 lot. So, and I understand that so far you have not been able to identify a fourth
25 interpreter.

1 MR DUBUISSON: (Interpretation) That is correct, your Honour.

2 JUDGE FERNÁNDEZ DE GURMENDI: And you are still trying to find one?

3 MR DUBUISSON: (Interpretation) Yes, your Honour. This is an extremely rare
4 language. It is an unwritten language and that makes the problem even more
5 difficult.

6 JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

7 PRESIDING JUDGE ALUOCH: Prosecution, yes, before we wind up the public
8 status conference, you have some comments?

9 MR OMOFADE: Your Honour, I rise just to make two clarifications.

10 PRESIDING JUDGE ALUOCH: Yes.

11 MR OMOFADE: The first, the Defence mentioned a request from 19 July 2011 for
12 certain materials within the possession of the Prosecution. Just to clarify that,
13 following that request it triggered a wholesale review of material in our possession
14 and certain disclosure was made on a regular basis to the Defence in that regard.
15 Certain requests were also made to the Chamber by way of filings that triggered
16 further disclosure and further requests for material previously redacted to be
17 unredacted, and those have also been disclosed to the Defence. So, just to clarify to
18 the Defence that the request they made has triggered a whole raft of disclosure that's
19 been made to them. It may well be that in certain instances it's not entirely clear that
20 it relates to the request itself, but your Honours will be aware of the filings that we
21 have made in this regard.

22 PRESIDING JUDGE ALUOCH: And would the Defence not be aware of these same
23 filings, or what do you mean?

24 MR OMOFADE: The Defence would be aware of requests for redactions to be lifted
25 that we have made. There are certain filings relating to Article 54(3) material that

1 the Defence might only be aware of in redacted form, but your Honours might
2 already have more information than the Defence have.

3 MR KHAN: Well, Madam President, in that regard, all I'll say is this. Certain items
4 were disclosed. The Prosecution indicated that a number of other matters were
5 under review, but what is inescapable is the fact that since 30 September 2011 we
6 have not -- had no additional progress and no additional information from the
7 Prosecution regarding those outstanding matters that they said they were keeping
8 under review. That is the reality.

9 PRESIDING JUDGE ALUOCH: Did you want to respond to that?

10 MS CISSÉ: (Interpretation) No, Madam President. No, before closing the public
11 session, I simply wanted to ask you for leave to make observations, either by written
12 submission or orally, in response to some -- an issue raised by the Defence and which
13 seems to us to be crucial; that is the link between the protection of the AMIS Statute
14 and the fact that the Defence is saying that the witnesses that they intend to meet can
15 prove that Sudanese agents were transmitting information.

16 I believe this is linked to the fundamental issue of this case, that is, alleged
17 involvement of the members of the peacekeeping mission and the fact that in that
18 base there were representatives of the rebels and of the government, and so as a result
19 when the Defence says that all the witnesses that they will meet can prove that they
20 were government agents providing information who were at that base, this is a
21 crucial issue. Both the government -- if the government and the rebels were using
22 their agents to transmit information, this is totally different from the using of AMIS
23 equipment in a deliberate way to favour one of the two belligerents.

24 This is important, because in light of the Defence submissions, we have the
25 impression that AMIS was infiltrated only by government agents, whereas the truth

1 is that there were rebel representatives, and we can provide evidence of that later.

2 Regarding the personal -- the use of personal resources by these people, that is
3 different from a peacekeeping mission getting involved and which would mean that
4 they lose international protection.

5 Those of us legal representatives, we do not have access to confidential annexes.

6 The Chamber said that they explored with the Defence to find out whether those
7 present at that base could establish those facts, and the result was "No." So we
8 would like to ask whether it is possible to have access to that list, because we don't
9 have access to it, and the impact on the commencement date would be enormous.
10 So it is crucial for the victims to be sure whether there is actually a link between these
11 issues, and we do not have access to that information.

12 So, if the Chamber could do that exploratory work, to establish the relevance of the
13 evidence that the Defence wishes to adduce from those new witnesses, that would be
14 very important. And we have received different information, and so we would like
15 to ask for leave to make further submissions so that the Chamber should be able to
16 determine which -- what really happened, that is in relation to the issues in dispute.
17 That is what I wanted to respectfully submit to the Chamber. We have to refocus on
18 the crucial issues relating to the international protection of peacekeeping missions.
19 Thank you.

20 PRESIDING JUDGE ALUOCH: Your concerns and requests have been noted, and
21 preliminarily all I can say is that access to confidential information by Common Legal
22 Representatives will be addressed in the victims' decision, in the decision that we are
23 yet to file. That's what I can say preliminarily.

24 MR KOUMJIAN: I apologise to the Court --

25 PRESIDING JUDGE ALUOCH: Yes.

1 MR KOUMJIAN: -- but this is a matter of timing. The Defence, in the interest of
2 erring on the side of the security of individuals, request redactions at page 63, line 11,
3 page 65, line 1, from the video that's being transmitted on a half-hour delay. Excuse
4 me, from page 63, line 11, through page 65, line 1.

5 PRESIDING JUDGE ALUOCH: Your request is noted. We are still in the public
6 status conference. This is the session that we have to wind up by 1 o'clock. Shall I
7 assume that there are no further comments from the Prosecution? Prosecution, are
8 you paying attention to what I'm saying? Yes?

9 MR OMOFADE: Your Honour, I was multitasking, I was conferring with my
10 colleagues as well as listening to your Honours. The only thing the Prosecution
11 wants to raise is, as regards the issue of commencing of trial dates, to make it quite
12 clear, we have said that we are able to complete our disclosure obligations around
13 about the end of March 2013.
14 Now, having had regard to the filings made by the Registry, which we only became
15 privy to last week, as well as the submissions by the Registry today, and
16 counter-balancing that against the rights of the accused persons, it's based on that that
17 we say that perhaps there might be room for considering a trial date that commences
18 differently from the date we originally proposed.
19 What we do say, however, is that a trial date of October 2014 is unrealistic. Now, I
20 know that the Defence have alluded to certain investigative difficulties that they have,
21 but our position is quite clear on this, and indeed I believe the jurisprudence of the
22 international tribunals backs us up on this. There is nothing that precludes the
23 commencement of a trial prior to completion of disclosure by the Prosecution.
24 There are provisions for rolling disclosure, for instance, as long as there is no real
25 prejudice, and your Honours can determine that there is no prejudice to the

1 Defence even if there are certain disclosure difficulties or even if the Defence haven't
2 completed investigative activities. There is nothing, we say, that precludes the
3 commencement of a trial. Those are our submissions, your Honours.

4 PRESIDING JUDGE ALUOCH: Both my colleagues have points to raise.

5 (Trial Chamber confers)

6 PRESIDING JUDGE ALUOCH: Sorry, Defence requested for redactions, and I think
7 we ordered that. I ordered that, yes. I thought it was understood in that way, yes.
8 Judge Eboe-Osuji has a comment or a question, yes.

9 JUDGE EBOE-OSUJI: Quickly, Madam President. Prosecutor, the difficulty with
10 that submission, one can see in principle what you are driving at, but as you know
11 there are some things special about this case. The decision dismissing the request
12 for stay was what it is. It wasn't a failure to acknowledge the difficulties which even
13 the Prosecution themselves did not dispute, in fact. I think we need to keep all that
14 in mind when we talk. I don't believe the Defence needs to respond to this.
15 Thanks.

16 MR OMOFADE: Your Honours, I bear that in mind. I only rise because your
17 Honour was addressing me.

18 PRESIDING JUDGE ALUOCH: Shall I, therefore, assume that there are no further
19 comments, no further submissions?

20 Now, the Defence had requested for a confidential status conference, Defence,
21 Prosecution, Registry only. It is now -- yes?

22 MR KOUMJIAN: Well, actually, I believe I said confidential, but what I wanted to
23 discuss is some aspects of the Defence investigation. So I would ask for it to be ex
24 parte, without the Prosecution or victims present.

25 MR KHAN: Madam President, can I just say, you've had the filings and you've

1 heard both today and previously various submissions from the Defence. I'm content
2 that this hearing be concluded now, unless your Honours have additional specific
3 questions of us, of the nature of which you're aware, your Honours are aware that
4 need to be dealt with confidentially.

5 If your Honours don't have additional questions, we have no further submissions.
6 I think that's fair to say.

7 PRESIDING JUDGE ALUOCH: Yes, the questions were coming from you. If you
8 feel that we have -- yes?

9 MR KOUMJIAN: May we have one moment, your Honour?

10 (Defence counsel confer)

11 MR KHAN: Your Honours, I never like wasting court time. I know your Honour
12 thinks I go on and on, but I really don't.

13 Your Honours, we can go ex parte, or if you give us leave, we can file a very short ex
14 parte document on that one issue, just for your information. Either option is fine
15 with us.

16 PRESIDING JUDGE ALUOCH: Yes, I've consulted quickly with my colleagues, and
17 I think we would allow you to file very short, very brief, because your submissions
18 are really detailed.

19 MR KHAN: I'm grateful, your Honours.

20 PRESIDING JUDGE ALUOCH: When can you do this by, please?

21 MR KHAN: Your Honour, end of the week, if that's all right. The end of this week,
22 if that's okay.

23 PRESIDING JUDGE ALUOCH: The end of this week is Friday. Is that what you
24 mean?

25 MR KHAN: Yes, yes, indeed, by Friday, 4 o'clock.

- 1 PRESIDING JUDGE ALUOCH: By Friday, 4 o'clock. Thank you.
- 2 That, therefore, concludes the status conference, the public status conference, and by
- 3 Friday we will receive your very brief filing on a point that you could not discuss at
- 4 this public status conference.
- 5 It is now quarter-to-1, and I would like to thank the Prosecution team, the
- 6 Defence team, Common Legal Representatives. I think I have been very generous, I
- 7 have given everybody an equal chance this morning. The team from the Registry,
- 8 thank you very, very much, and we must not forget our court reporters and
- 9 interpreters. We wouldn't have the transcripts without them. I thank you very
- 10 much.
- 11 And that, therefore, concludes this public status conference. Thank you very much.
- 12 THE COURT USHER: All rise.
- 13 (The hearing ends in open session at 12.46 p.m.)