

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
5 Saleh Mohammed Jerbo Jamus - ICC-02/05-03/09
6 Presiding Judge Joyce Aluoch, Judge Fatoumata Dembele Diarra and
7 Judge Silvia Fernández de Gurmendi
8 Status Conference
9 Tuesday, 19 April 2011
10 (The hearing starts in open session at 2.34 p.m.)
11 THE COURT USHER: All rise. The International Criminal Court is now in session.
12 Please be seated.
13 THE COURT OFFICER: Good afternoon. Your Honours, we are in open session.
14 PRESIDING JUDGE ALUOCH: Good afternoon, everybody. Court officer, for the
15 record please call out the case.
16 THE COURT OFFICER: Yes, Madam President. Situation in Darfur, Sudan, in the
17 case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed
18 Jerbo Jamus, case reference ICC-02/05-03/09.
19 PRESIDING JUDGE ALUOCH: May I welcome everybody. And I'll start with the
20 Prosecution team, please will you introduce yourselves.
21 MR OMOFADE: Good afternoon, your Honours. The Prosecution this afternoon is
22 represented by Ms Alice Zago, trial lawyer; Mr Victor Baesu, associate trial lawyer;
23 Mr Pubudu Sachithanandan, associate trial lawyer; Ms Desiree Lurf, associate trial
24 lawyer; Biljana Popova, case manager; and myself Ade Omofade, trial lawyer.
25 Thank you, Madam.

1 PRESIDING JUDGE ALUOCH: Thank you very much. The Defence team, please
2 will you introduce yourselves.

3 MR KHAN: Madam President, your Honours, good afternoon. Mr Banda and
4 Mr Jerbo - who waive their right to attend today's hearing - are represented by
5 Andrew Burrow, legal assistant; Aidan Ellis, legal assistant; Anna Katulu, legal
6 assistant; and Anand Shah. My name is Karim Khan.

7 PRESIDING JUDGE ALUOCH: Thank you very much. The legal representatives,
8 please will you introduce yourselves.

9 MR KONÉ: (Interpretation) Good afternoon, President. I am Counsel Koné, legal
10 representative of victims *a170 to 192 and a436. Thank you very much.

11 MS CISSÉ: (Interpretation) Good afternoon, your Honour. I am Counsel Hélène
12 Cissé from the Senegalese Bar and I represent victims *from Senegal Botswana and
13 the Gambia, a0434, a435, a456 to a463, a579, a580, a656, a657, a736 to 741 and a754.
14 Thank you very much, your Honour.

15 MR ADAKA: (Microphone not activated)

16 PRESIDING JUDGE ALUOCH: Is your microphone on, please?

17 MR ADAKA: Sorry, I'll state that again. Good afternoon, your Honour, Madam
18 Presiding Judge. My names are Frank Adaka. I represent victims number 0552 to
19 0563 and victims number 0564 to 0578. Thank you.

20 MR AKINBOTE: May it please this honourable Chamber. My names are
21 Akin Akinbote, and I represent victims 535, 537 to 542, 544 to 551 and 557 to 562.

22 PRESIDING JUDGE ALUOCH: Thank you.

23 MR NICE: Your Honours, I represent with Rodney Dixon, co-counsel, assisted by
24 Mr Mohamed Ansari, case manager, victims 1646 and 1647. My name is Geoffrey
25 Nice.

1 PRESIDING JUDGE ALUOCH: Thank you very much. The representatives of the
2 Registry, please would you introduce yourselves.

3 MS DAHURON-JACOBY: Madam Presiding Judge, your Honours, the Registrar is
4 represented today by Mrs Fiona McKay, Chief of the Victims Participation and
5 Reparations Section; Ms Maria Louisa Martinod-Jácome, Chief of the Victims and
6 Witnesses Unit; Ms Lejla Komarica, administrative and operations officer in the VWU;
7 Vera Wang, assistant legal officer in the Office of the Director of Court Services; and
8 myself Charlotte Dahuron-Jacoby, Chief of the Court Management Section.

9 PRESIDING JUDGE ALUOCH: Thank you very much, parties and the participants.
10 I will introduce my colleagues: On my right is Judge Fatoumata Dembele Diarra.
11 On my left is Judge Sylvia Fernández de Gurmendi. And I am Joyce Aluoch.
12 The agenda was notified to the parties and participants on 12 April this year by the
13 Chamber's order ICC-02/05-03/09-128, but before going through each item the
14 Chamber would like to have an update on the notification by the Registry of the
15 decision on the Confirmation of Charges according to Rule 129 of the Rules of
16 Procedure and Evidence which states, in part, and I quote, "The Decision of the
17 Pre-Trial Chamber on the Confirmation of Charges and the committal of the accused
18 to the Trial Chamber shall be notified if possible to the Prosecutor, the person
19 concerned and his or her counsel."

20 The Chamber would like to know, for example, whether a summary of the Decision
21 on the Confirmation of Charges in Zaghawa has been communicated to the accused?

22 The representatives of the Registry, you have the floor as to this issue of notification.

23 MS DAHURON-JACOBY: (Interpretation) The Registry notified the counsel of the
24 accused applying Regulation 32(3). When a person is represented by a counsel that
25 person should receive notification when the decision is notified to the counsel.

1 Zaghawa is not a written language and the decision has not been written in Zaghawa.
2 The Registry also has not carried out a summary of the decision in Zaghawa on an
3 audio support. The Registry intends to produce a translation in Arabic of the
4 decision, but that is something that will be done in the future. The Pre-Trial
5 Chamber didn't consider it useful to carry out such a translation immediately.

6 PRESIDING JUDGE ALUOCH: Mr Khan, would you confirm that, please.

7 MR KHAN: Madam President, I can so confirm.

8 PRESIDING JUDGE ALUOCH: Thank you. By an email communication of the
9 Defence of 31 March to the legal adviser of the trial division and through their counsel,
10 Mr Khan, both accused persons have waived their right to be present at today's status
11 conference but they are represented by the said counsel, Mr Khan. Therefore, under
12 these circumstances, the Chamber finds that a reading of the charges would serve no
13 useful purpose at this stage of the proceedings. The charges can be read to them
14 pursuant to Article 64(8)(a) of the Statute at a later stage at which they will be present.
15 However, the Chamber would like to be assured that the Defence counsel has
16 effectively informed both accused persons of the charges brought against them and
17 whether it can be reported to the Chamber that both of them have understood the
18 nature of these charges. Mr Khan, you have the floor please.

19 MR KHAN: Indeed, your Honours, I can so confirm. In fact members of my team,
20 Mr Burrow, Mr Shah and Mr Ellis, went to -- had occasion to meet the clients and
21 matters have been explained as required.

22 PRESIDING JUDGE ALUOCH: Thank you very much. After --

23 MR KHAN: Madam President, just one correction. My recollection was playing
24 games with me. In fact, Mr Ellis didn't attend that particular mission; it was
25 Mr Burrow and Mr Shah that attended on my behalf.

1 PRESIDING JUDGE ALUOCH: Thank you for that correction. After it is
2 constituted, the Trial Chamber, pursuant to Rule 132(1) of the Rules of Procedure and
3 Evidence, has to set the date for the trial. However, to do so, the Trial Chamber
4 must have sufficient information on the current stage of the proceedings and this
5 information must be as precise as possible and up-to-date. Accordingly, the
6 Chamber has communicated to parties, participants and the Registry an agenda for
7 this status conference and has asked them to provide it with written submissions in
8 relation to the items on the agenda prior to this hearing.

9 Written submissions were indeed received from all the parties and participants and
10 the Registry within the deadline set by the Chamber. The submissions advanced
11 have assisted the Chamber to focus the discussion so as to expeditiously deal with
12 outstanding issues before it proceeds with setting a date for the opening of the trial.

13 At the same time, the parties will have the opportunity to provide clarification on
14 their positions should they wish to do so. The Chamber will proceed as follows: It
15 will address each item in -- each item of the agenda in turn by seeking clarifications as
16 necessary. I will then give the floor to the parties, participants and the Registry to
17 make relevant additional submissions should they wish to do so.

18 Item A of the agenda: Status of the agreement between the parties as to evidence
19 pursuant to Rule 69 of the Rules. The Chamber is grateful for the update provided
20 by the Prosecution and therefore -- and the Defence in their submissions filed on
21 14 April this year. The Chamber notes that the Prosecution and the Defence are
22 currently engaged in discussions with a view to ascertaining whether an agreement as
23 to evidence, pursuant to Rule 69 of the Rules of Procedure and Evidence, may be
24 arrived at.

25 In your submissions, you indicated that in the event of such an agreement being

1 reached the Chamber would be notified immediately.

2 I am sorry, I was forgetting the five-second rule. The Chamber would like to know
3 whether there have been any further developments on this point since the
4 submissions were filed, and if this is not the case the Chamber would like to know if
5 you have set a timeline for the negotiations on this point? The Prosecution team,
6 you have the floor.

7 MR OMOFADE: Madam President, I am grateful for the opportunity to address you.
8 Indeed, as the Prosecution outlined in its filing, discussions are ongoing between the
9 Prosecution and the Defence as regards agreements on facts.
10 The response to your Honour's first question is there have not been any developments
11 since the filing was made on 14 April. The discussions are still ongoing. We are
12 reasonably optimistic. It's rather difficult, from my point of view with the
13 Prosecution, it is rather difficult to speculate as regards a timeline when we think
14 these discussions might have been completed, and I say that with some degree of
15 hesitation because I do realise that your Honours want clarity, but I can only go as far
16 as to say that as soon as there are developments the Prosecution and indeed the
17 Defence will notify the Chamber. I hope that assists, your Honour.

18 PRESIDING JUDGE ALUOCH: Yes, thank you very much. Mr Khan, do you have
19 any comments on that agenda item?

20 MR KHAN: Madam President, I think my learned friend sets the position quite
21 fairly but the degree of agreement, in my view, it seems would be quite substantial
22 and from my perspective the discussions are going quite well and we would hope
23 that in the not too distant future we will be in a position to put forward certain agreed
24 facts, but of course a margin of deference perhaps can be accorded to the parties, but
25 I think there is a constructive dialogue that we are engaged in which we hope would

1 focus the issues to those most relevant which would have the result, we hope, in a
2 focused and if not quick resolution a quicker resolution than if no facts were agreed at
3 all. So, your Honour, to put it bluntly, I think the discussions are going well and we
4 will be in a position, I hope in the not too distant future, to put agreed facts before the
5 Chamber.

6 PRESIDING JUDGE ALUOCH: Thank you both Mr Omofade and Mr Khan for the
7 assurances, but nevertheless the Chamber would like to instruct both the Prosecution
8 and the Defence to provide it in a joint filing with an update on the status of the
9 discussions on a possible agreement, if at all, as to facts by the -- by 4 o'clock on
10 16 May.

11 Item B of the agenda is on timing and volume of disclosure by the Prosecution. The
12 Chamber has received information in your written submissions on 14 April and takes
13 note of the important information provided therein. In light of these submissions,
14 the Chamber seeks the following clarifications from the Prosecution: In relation to
15 its ongoing investigations and the number of witnesses the Prosecution still intends to
16 add to its list, the Chamber notes that the Prosecution does not seem to be ready and
17 would like to be provided with information -- and the Chamber would like to be
18 provided with information why the Prosecution expects to be in a position to
19 interview additional witnesses only in late August. Prosecution, you have the floor,
20 please.

21 MR OMOFADE: Madam President, I am grateful. The deadline, and it might have
22 been how it was couched, but the deadline was, that we provided, was that we expect
23 to have completed those further interviews of fresh witnesses by the end of August.
24 I am actually able to inform the Chamber as we speak that we do anticipate that four
25 of those six new interviews would hopefully have been completed by the end of July.

1 A further witness that we propose to interview, there are a number of logistical
2 difficulties which, to a large extent, have plagued the proceedings in this case and we
3 are trying to surmount them. So it may well be that by the end of July four or even
4 five of the six witnesses would have been interviewed and we would have their
5 statements. As for the sixth one, it would be remiss of me to attempt to speculate at
6 this stage whether or not those logistical difficulties would have been surmounted.
7 All I can say is that we are using our best endeavours to ensure that they are
8 surmounted certainly well before August ending this year.
9 Unless I can assist you further, your Honour?

10 PRESIDING JUDGE ALUOCH: I see. I can see that you are more or less sticking to
11 your end of August. July, end of August; am I right to say that?

12 MR OMOFADE: To a large extent, the Prosecution have taken a rather long-stretch
13 approach and decided to give ourselves slightly more time rather than less. The last
14 thing we want to do is to have to come back before the Chamber having set ourselves
15 a rather short deadline and to have to come back to the Chamber, and indeed to the
16 parties and participants, and have to apply for more time. To the extent that we can
17 complete the further investigative activities within that time-frame, or even before, we
18 will attempt to do so, your Honour.

19 PRESIDING JUDGE ALUOCH: Thank you, Mr Omofade. As to the 242 items of
20 evidence the Prosecution intends to rely on at the trial, how many of the 242 items of
21 evidence the Prosecution refers to in paragraph 12 of its submissions are - and here
22 the Chamber will pose several questions - how many of those are documents in a
23 language other than English or Arabic and (2) how many pages do these comprise
24 and (3) how many of the items are audio-visual materials and (4) if there is
25 audio-visual material in which language is it recorded and (5) has the audio-visual

1 material already been translated and transcribed into a working language of the
2 Court, and in this respect I would like to remind you of the decision of Trial Chamber
3 II, ICC-01/04-01/07-1336, paragraph 13, in which it held that disclosure of audio-visual
4 material is only complete when a transcript and a translation into a working language
5 of the Court are provided.

6 Prosecution, you have the floor and I will be willing to repeat any question should
7 you have missed it. Thank you. And maybe I -- I may clarify, Prosecution, that you
8 have the floor for what you can submit orally today, but for responses that you may
9 preferably submit in writing the Chamber orders that -- the Chamber will give you a
10 deadline, but for what you are able to orally respond to today, please?

11 MR OMOFADE: I am grateful for that indication, your Honour. The -- to the
12 extent that I can respond, I will. The 242 items we've referred to, I am unable to give
13 an exact breakdown of the page number at this time, but your Honours will see that
14 at some point in the filing that we made we provided the number - the page
15 number - of 3,700 pages. What we arrived at there was a global number that
16 includes not only these 242 items, but also includes witness statements that we've
17 already obtained. It's a short task of subtraction, your Honour, and it should be that
18 I will be able to relay a figure to your Honour in due course.

19 As regards audio material, and I speak only from recollection here, from the pre-trial
20 proceedings as well as the proceedings in the other case in the Darfur situation that's
21 more of a twin case to this one, and I do recall that there might have been one audio
22 recording.

23 That audio recording, to the best of my recollection, featured a number of persons
24 speaking and I do recall that some of it was in English, but I can't put hand on heart
25 and say that all the discussion on the audio material was in English. So, to the extent

1 that we are obliged to comply with ensuring that these are translated into the
2 language of the Court, or into languages of the Court, we will ensure that that is done
3 almost certainly in a transcript form.

4 And might I just add that the other questions that your Honour has posed, if we
5 could be permitted to revert to the Chamber in a filing, or if the Chamber so wishes,
6 by virtue of an email in the next 24 hours, we should be able to do so.

7 PRESIDING JUDGE ALUOCH: The Chamber actually has -- was going to give you
8 a deadline so that you submit in writing the Chamber the Prosecution to make -- we
9 were going to ask you to make a filing by 9 May, not email.

10 MR OMOFADE: I am most grateful, your Honour.

11 PRESIDING JUDGE ALUOCH: The next three questions are somewhat overlapping
12 with agenda item F, but could the Prosecution provide the Chamber with an
13 explanation as to the three following issues: First, is the Prosecution in a position to
14 give an indication as to the languages spoken by the witnesses it still intends to
15 re-interview? And, secondly, is the Prosecution in a position to furnish the Chamber
16 with information on the languages spoken by the six witnesses it still intends to
17 interview and therefore possibly call as witnesses at trial?

18 Prosecution, you have the floor, please.

19 MR OMOFADE: I'm grateful, your Honour. Your Honour might have noticed that
20 appended to the filing that we made on 14 April was an ex -- was a, rather, a
21 Conf-AnxA, where we itemised the relevant witness identification numbers, together
22 with languages in which we anticipate that those witnesses will testify, should they
23 be called for trial. It does have a bearing on the questions your Honour posed,
24 because some of them are the same witnesses that we intend to re-interview.
25 In our filing, we cited the number of six. I am able to inform the Chamber that,

1 amongst those six, the languages that they will be testifying in would be between Fur,
2 the Fur language, F-U-R, and Arabic, but Arabic spoken more with a Sudanese dialect
3 rather than the classical Arabic. So those are the two languages that we anticipate.
4 I do believe the next phase of your Honour's question was the languages to be spoken
5 by the fresh witnesses that we intend to interview. I'm able to inform the Chamber
6 that at least four of those will be speaking English. One of them -- one of them may
7 be speaking Zaghawa, but this is something I may have to revert to the Chamber on,
8 and the sixth witness whom we expect to be an expert, I know English is not the first
9 language of the person that we are anticipating at the moment, but that has not been
10 settled within the office as regards whom exactly we intend to instruct as an expert.
11 So it would be rather anticipatory of me to provide a language, but it may well be
12 English. I wonder if I've helped your Honours to some extent.

13 PRESIDING JUDGE ALUOCH: Yes, Mr Omofade. Now a question --

14 MR KHAN: Madam President.

15 PRESIDING JUDGE ALUOCH: Sorry, I beg your pardon. Yes.

16 MR KHAN: Perhaps it would be useful, because rather than respond in toto at the
17 end, with your Honour's leave, I can make some submissions about what's been
18 discussed so far. In relation to the new witnesses, I would just make the obvious
19 point that even in the event that the Prosecution is done with interviewing these new
20 six by July or August, they have intimated that at that point they will seek redactions
21 from the Court and then there's, of course, the Court recess. So, as far as a timetable
22 is concerned, disclosure to the Defence is quite critical and it seems to me that on the
23 current timetable, given that redactions will be needed and the Court recess, it may be
24 unlikely that the Defence will get the statements of these six even in English before
25 September of this year. That's the first point.

1 Your Honour, in relation to the six new -- sorry, the six witnesses that the Prosecution
2 wish to re-interview, it is my respectful submission that matters perhaps not as
3 straightforward as the Prosecution think. When, for example, does a re-interview
4 become proofing? These witnesses that the Prosecution detail in their application
5 gave statements, four of them in 2008, one of them in 2009 and one in March of last
6 year, more than one-and-a-half years since the Defence in the Abu Garda case
7 commented on deficiencies in those statements, and many months since Mr Banda
8 and Mr Jerbo made their initial appearance.

9 Now, your Honours, there is, of course, case law in the Lubanga case regarding
10 proofing, and I would simply ask that your Honours decide where the locus of
11 fairness lies, because in the decision of the Trial Chamber of 23 May 2008, the decision
12 regarding the protocol on the practices to be used to prepare witnesses for trial, the
13 learned Trial Chamber said the following, that "The purpose of allowing a witness to
14 re-read his or her statements is to help to refresh potential fallible memories. This is
15 not evidence checking, an evidence-checking procedure; namely, establishing
16 whether or not the witness maintains the original account or whether he or she
17 considers that changes to that written account need to be made."

18 Now, what comes next is very important, given the time that's taken place since those
19 individuals were originally interviewed, bearing in mind the Defence in the Abu
20 Garda case commented on deficiencies in those statements, given that there's many
21 months that have passed since the initial hearing, the following is very important,
22 "Any discrepancies of that kind should be ventilated in court, rather than being
23 discussed and recorded shortly before the witness gives evidence. The Chamber is
24 more likely to identify the truth if the witness explains any reservations about the
25 written account during their oral testimony, rather than by having his or her

1 concerns interpreted and recorded ..." in that case "... by a representative of the Victim
2 and Witnesses Unit."

3 Now, your Honours, it is, of course, rather perilous for the Prosecution and they are
4 on notice if they choose to re-interview a witness - if that's allowed in the first place it
5 is of course fraught with danger, and certain safeguards, of course, can always be put
6 in place, for example, the requirement that those interviews be tape-recorded and
7 videoed and that the Prosecution are instructed in the clearest possible terms not to
8 ask leading questions. But, your Honours, this process, of course, is all about getting
9 to the truth, and in my respectful submission there is a distinction, pre-confirmation
10 and post-confirmation, in seeking to re-interview pre-existing witnesses and, your
11 Honours, I don't put it any higher than that.

12 I would ask that your Honours look at the underlying principle in the Lubanga
13 decision, look at the difficulties that can arise. I have been very candid that I put the
14 Prosecution on notice that we reserve our right, in the event that leave is given to
15 conduct re-interviews, that we will draw -- we reserve our rights to make such
16 comment as is necessary and that certain safeguards can be put in place, but whether
17 or not it should be allowed at all at this point is a matter that may benefit from some
18 judicial clarity and, your Honours, I would simply place that before the Bench to
19 consider and decide upon in due course.

20 PRESIDING JUDGE ALUOCH: Thank you very much, Mr Khan. You have made
21 your submissions, you have referred to some jurisprudence from Trial Chamber I.

22 Do you want to make a filing?

23 MR KHAN: I beg your pardon, your Honour? Your Honour, it's a matter, I think,
24 that can be decided by the Trial Chamber. It's an oral submission. It is a matter
25 that the Bench is seized of by way of my submission just now.

1 PRESIDING JUDGE ALUOCH: All right.

2 MR KHAN: And I do take it that on the -- I think it was 8 May -- on 9 May,
3 submissions are going to be received from the Prosecution and a notification also
4 from both parties by 16 May. Your Honours, I took it that perhaps after that your
5 Honours will issue certain orders, and as part of those orders the issue of whether or
6 not the Prosecution should be entitled to conduct re-interviews at the trial stage of
7 witnesses that have been relied upon at confirmation and, secondly, if they are
8 allowed to do so, what safeguards should be put in place may be addressed by the
9 Bench, if the Bench consider it appropriate. Now, your Honour, I've been quite
10 candid that the process of re-interviewing pre-existing witnesses is fraught with
11 dangers, and I fully reserve all our rights to comment, depending upon how the
12 Prosecution, if leave is granted, conduct themselves.

13 PRESIDING JUDGE ALUOCH: I think you have given sufficient notice to the
14 Prosecution. Yes, Prosecution.

15 MR OMOFADE: Well, your Honour, to the --

16 PRESIDING JUDGE ALUOCH: Yes, please, Mr Omofade. Yes.

17 MR OMOFADE: I only say this in passing. It may well be that there will be a filing
18 coming from the Defence on this, but I say this in passing because my friend has gone
19 into detail about the decision on proofing, on witness proofing, in the Lubanga case,
20 but what is quite clear is that the scenario in the Lubanga case is totally unrelated to
21 the issue of re-interviewing a witness. The scenario in the Lubanga case, as my
22 friend well knows, related to witnesses who have been under -- who have now been
23 brought under the auspices of the Victims and Witnesses Unit and whom are -- who
24 are being sought to be prepared for actually testifying during trial.
25 Now, there's nothing whatsoever in the Rules that precludes the Prosecution from

1 re-interviewing witnesses that it has already done. Indeed, the floor is open to my
2 friend, if it does become an issue at trial, to cross-examine the witnesses or to call for
3 further information as regards disparities, if any, between the re-interviews and the
4 original interviews. So I say this in passing, your Honour, because I'm not sure if
5 your Honour is being invited to make a ruling on this, but it may well be something
6 that your Honours bear in mind if any decision is going to come, taking my friend's
7 submissions into account.

8 PRESIDING JUDGE ALUOCH: Well, since we have given a deadline, we want to
9 see what is going to be filed from your side and what the response will be from
10 Mr Khan. And Mr Khan, if you take the floor, please, would you speak a little
11 slower, respecting the five-second rule, please.

12 MR KHAN: I will indeed, Madam President, although mathematics was never my
13 strong point.

14 I want to be clear, we don't consider it necessary to put in writing what can very
15 properly be raised orally. You are seized of the concerns put forward by the
16 Defence.

17 PRESIDING JUDGE ALUOCH: As appear in the transcript.

18 MR KHAN: As appear in the transcript. And, your Honour, of course the Lubanga
19 decision deals with a different factual situation; but what I endeavoured to be clear
20 about is that the underlying concern that motivated the Bench in Lubanga to make the
21 order it did is, in my view, equally applicable at this stage. It cannot be right, and it's
22 for your Honours to decide.

23 And the Prosecution of course can make submissions today. It's a very
24 straightforward point; they can respond right now. Once the Prosecution, once a
25 party, has relied upon witnesses at the confirmation stage - which is to act as a filter

1 for trial - and witnesses have been tested in another case, part of the same family of
2 cases as it were, is it fair and appropriate for once defects and deficiencies -- once
3 defects and deficiencies have been pointed out by the Defence and by the Pre-Trial
4 Chamber in the diligent exercise of its duties to go back and seek to fill holes or to get
5 a different narrative -- and this is why I was quite careful with my words, that the
6 process is fraught with danger; but there is an underlying issue as to whether or not it
7 should be allowed at all in relation to pre-existing witnesses that have been discussed
8 at an earlier stage.

9 And that's why, your Honour, in my respectful submission, the spirit underlying the
10 finding in Lubanga regarding any additional information, any discrepancy, being
11 brought out transparently in the courtroom so your Honours can determine the
12 veracity of any new information is the safest forum to ensure a proper determination
13 of this matter.

14 What I do not want, to put it bluntly, one of many things I do not want, is in a closed
15 room -- not by any deliberate attempt, of course, but sometimes an investigator may
16 have a certain theory, he may have previous findings in mind, and witnesses come in
17 all shapes and sizes with all educational backgrounds, and by dint of leading
18 questions or suggestion pollute an account that may be given.

19 And that's why, in my respectful submission, at the trial stage there are strong
20 arguments to say the Prosecution - who are expected to take statements properly the
21 first time -- and they can all, of course, take statements even two or three times before
22 confirmation. After confirmation, after a party has spoken about certain issues or
23 the Bench has determined certain issues, there are strong grounds for not allowing
24 them to go back.

25 Any further questions should be before your Honours so your Honours can

1 determine what has triggered any additional information and your Honours can
2 determine the veracity of the same. I hope I'm clear, your Honours.

3 PRESIDING JUDGE ALUOCH: Yes. Thank you, Mr Khan. As I understand it,
4 you have made your points orally in court, yes, and according to you you have no
5 need for further filing. You have made your points. The Prosecution, Mr Khan has
6 made his points as appear in the transcript.

7 MR OMOFADE: Your Honour, the Prosecution takes note of Mr Khan's points.

8 PRESIDING JUDGE ALUOCH: Thank you very much. So we will proceed then
9 with question 3. The Chamber would like to know from the Prosecution how you
10 have arrived at the estimated 30 months for the translation of witness statements in
11 Zaghawa and whether steps have been undertaken to expedite the translation of these
12 documents.

13 In addition, the Chamber seeks clarification as to the page count of 3,700 to be
14 translated in Zaghawa as indicated in paragraph 10V of your submissions. Does this
15 page count include the 1,730 pages of the nine statements as referred to in paragraph
16 11 of your submissions? The question is not complete, unless you want me to stop
17 there and you answer that bit first. Is that what you want?

18 MR OMOFADE: I'm entirely in your Honour's hands. In the event that your
19 Honour wants me to answer now, to the extent that I can, I will. If your Honour
20 wants it by Friday --

21 PRESIDING JUDGE ALUOCH: Okay. I'll let you answer that portion then.

22 MR OMOFADE: (Microphone not activated) My apologies, your Honour. As
23 regards the page count of 3,700, I should mention that this figure has been -- well, is
24 beefed-up slightly because of the list of evidence of the Prosecution which is a rather
25 bulky document.

1 Now, that document of itself contains 1,100 pages or thereabouts. As regards
2 whether or not it includes the nine statements that your Honour refers to and that we
3 mentioned in the filing, the response is, yes, those statements to a large extent were
4 taken in transcript form. What I mean by this is it was a question and answer
5 session with occasionally an interpreter interposing to translate what was being said.
6 So although it appears extensive in volume, a lot of it is a repetition of the same
7 questions and answers being provided only in a different language. So this accounts
8 for the page count.

9 And I believe the first question that your Honour posed was the steps that the
10 Prosecution has taken as regards the translation into Zaghawa and how we arrived at
11 the figure of 30 months. The figure of 30 months was merely an extrapolation based
12 on our discussions and numerous meetings with the language services unit of the
13 Office of the Prosecutor. We did point out in the filing and, indeed, this was raised
14 at the pre-trial stage that there are a number of difficulties that are associated with the
15 translation of documents and information into Zaghawa.

16 Now, I should say in passing that the situation as it occurred at the pre-trial stage is
17 that the Defence were able -- we were able to agree with the Defence and the Defence
18 were kind enough to waive their entitlement to disclosure under Rule 76 that would
19 normally have accounted for full transcripts and statements and, indeed, the
20 document containing the charges to be translated into Zaghawa.

21 Now, because -- as the Registrar's representative has pointed out, because Zaghawa is
22 not a written language, the method we have had to employ was first to transliterate - I
23 believe is the word - the documents into English even where the Defence have agreed
24 that we summarise the information required and only then hand it to a translator who
25 reads the document onto an audiotape.

1 Now, the difficulty with Zaghawa speakers that are able to perform this task is
2 that -- there are a number of problems. Firstly, they may speak Zaghawa, but their
3 other language may unfortunately only be Arabic. Those that speak Zaghawa as
4 well as English are few and far between, so even if we were to transliterate first into
5 Arabic and then provide the document to the translators or interpreters, even that
6 would present some difficulties as regards timing.
7 So that's the procedure that we employed at the pre-trial stage. The procedure that
8 we employ at this stage will largely depend on the extent to which our Rule 76
9 obligation is taken into account.
10 And it brings me to another point, and our position - the Prosecution's position - is
11 that Rule 76, whilst being an obligation on the part of the Prosecution, has to be
12 interpreted in a very pragmatic and realistic manner. What we say is -- and I know
13 the Defence have been conciliatory on this at the pre-trial stage, but what we say is
14 there has to be a pragmatic manner in which we have to interpret documents that
15 have to be provided to suspects or, indeed, accused persons in a language in which
16 they speak and understand.
17 We think -- and the Defence I believe may be with us on this, because it was
18 mentioned in their filing, we think that to the extent that summaries can be agreed to
19 be provided in order for us to meet our Rule 76 obligation, this is something that we
20 encourage and we urge the Chamber to adopt as a position. This, indeed, will have
21 a bearing on the length of time that is required for this translation.
22 The other issue I mention is the list of evidence. I did say that a huge number of
23 those pages relates to the list of evidence. Now, the list of evidence that we filed at
24 the pre-trial stage was in tabular form. A lot of the entries, even if they can be
25 translated into a written language, say Arabic, a lot of the entries relates to sources

1 and footnotes that we are referring the reader to.

2 Whilst this might be done properly in a written language, to do this on audio would
3 be absolutely impossible. So it may well be something -- and we urge your Honours
4 to take this into account when considering the extent to which Rule 76 applies to the
5 Prosecution in circumstances such as this and, no doubt, in circumstances that are
6 likely to feature before the Chambers of this Court on many more occasions. Those
7 are my submissions, your Honour.

8 PRESIDING JUDGE ALUOCH: I had not quite finished part of what you are
9 answering. The next item that I was going to go towards, to ask you, that as part of
10 these 3,700 pages that the Prosecution you included the translation in Zaghawa of the
11 Document Containing the Charges. The Chamber would like to know whether a
12 translation of the DCC is necessary as the charges have now been confirmed?
13 As you know, the Decision Containing the Charges according to the constant
14 jurisprudence of this Court is the referring document that defines the scope of the trial.
15 Do you have any comment before, yes, I ask the Defence? Yes.

16 MR OMOFADE: Your Honour, to some extent I covered it in my earlier response.
17 At the pre-trial stage, at the confirmation stage, we provided a summary of the
18 Document Containing the Charges which was kindly agreed to by the Defence. I
19 await what my friend's response is as regards whether or not the Defence think this
20 would also suffice at this level.

21 PRESIDING JUDGE ALUOCH: Mr Khan, do you have anything to say on this?
22 Mr Khan.

23 MR KHAN: Madam President, in fact, a DCC in Zaghawa was not prepared at -- a
24 summary was not prepared because we waived our right to a full document. Simply,
25 we were content -- given the way confirmation proceeded with, we were content with

1 a summary.

2 Your Honour, I hear what my learned friend says regarding Rule 76 and his plea for a

3 pragmatic approach, but the case law is settled. This matter must be one in which

4 the Defence is given full freedom to assert its right or to waive its right, because

5 Article 51 of the Statute makes it clear that the Statute -- the statutory provisions are

6 binding. They are the sovereign authority under which this whole Court operates.

7 And Article 67(a) -- 1(a) and (f) make it clear that the accused has a right to have

8 documents in a language that he fully understands. And, your Honour, that has

9 been clarified in numerous cases before this Court, including by the Appeals

10 Chamber in the Katanga case on 27 May 2008.

11 So, your Honour, I would simply ask that the pragmatism be in the hands of the

12 Defence. Let's see the full amount of Prosecution disclosure, but in relation to -- and

13 let's see the nature of the agreed facts, but in relation to evidence that is not agreed,

14 the Defence at this point, given the proceedings, we will be requiring a full

15 compliance with Article 67 and these core documents that the Prosecution rely upon

16 in a language that both Mr Banda and Mr Jerbo fully understand.

17 PRESIDING JUDGE ALUOCH: Thank you.

18 MR KHAN: Your Honour, which will continue to be as we have been throughout

19 since the initial hearing, as flexible and accommodating as we can, consistent with our

20 rights. That's the bottom line, but your Honours, I think the history shows that we

21 are at this point because of a very significant degree of cooperation that has been

22 extended to the Court by Mr Banda and Mr Jerbo and, your Honours, that sentiment

23 will continue.

24 PRESIDING JUDGE ALUOCH: Thank you very much. The Registry, the

25 representative of the Registry, do you have any views on propositions to expedite the

1 translation of these statements?

2 MS DAHURON-JACOBY: (Interpretation) Your Honour, having given the
3 submission of the Registry with regards to Zaghawa, at this stage the Registry does
4 not have a proposal with regards to assistance, bearing in mind Rule 76 gives the
5 Prosecutor the obligation to translate. That's all that we would like to say at this
6 stage with regards to Zaghawa.

7 If I could briefly go back to the point of the languages mentioned by the Prosecutor in
8 a table. Now, where it concerns Arabic with the Sudanese dialect, the formulation is
9 very imprecise. It doesn't make it possible for the Registry to prepare adequately.
10 We would therefore wish to have further precision with regards to the languages
11 mentioned.

12 MR NICE: Your Honour, might I make an observation?

13 PRESIDING JUDGE ALUOCH: Yes, yes.

14 MR NICE: Because, of course, a 30-month delay would have an effect on all those
15 with an interest in this case. The language proficiency of both accused is, I believe,
16 most articulated, or most fully articulated, to the extent it is at paragraph 10 of the
17 Prosecution's submissions. That paragraph which speaks of one accused having
18 some understanding of the Arabic language and the other having minimal is a
19 paragraph that, so far as we know, has not been empirically tested in any way, and as
20 a result of information coming to me and to us today, causes us some surprise and it
21 may be a proposition which soon we will be able to deal with in a way that may assist
22 the Court by a written filing.

23 PRESIDING JUDGE ALUOCH: Thank you very much. Prosecution, do you want
24 to make a brief comment, please?

25 MR OMOFADE: Your Honours, only in response to the clarification sought by the

1 representative of the Registry. What we discovered in the course of interviewing
2 many of the witnesses that we spoke to, many of them profess to and, indeed, do
3 speak Arabic, but it does transpire that the Arabic spoken in the Sudan is spoken with
4 a slightly different accent, so perhaps "dialect" was probably not the best choice of
5 words. It is spoken with a different accent, to the extent that an Arabic speaker from
6 the Middle East or other countries, countries other than the Sudan, those witnesses
7 were unable to follow adequately, so we had to actually find a person who was also
8 Sudanese but spoke Arabic. This is the clarification I believe that the representative
9 of the Registry wanted. So to the extent that that is possible, I think it will assist the
10 Court greatly.

11 PRESIDING JUDGE ALUOCH: Thank you very much. I think I will now turn to
12 the Defence. The Defence indicated -- you might have answered what I'm going to
13 say, but all the same I'll say it since it is on the agenda. The Defence indicated that it
14 would inform both the Prosecution and the Chamber whether a full, partial or
15 summarised audio translation into Zaghawa will be required for the witness
16 statements that have already been disclosed. Is the Defence in a position to indicate
17 whether it will require complete audio translation of the statements that have been
18 disclosed in full? You might have answered that question, but maybe, yes, for the
19 record, please.

20 MR KHAN: Madam President, I have answered it, I think. In relation to issues that
21 are contested, we will require full translations. Your Honour, I will, with your leave,
22 touch upon something that the representative of the government have just mentioned,
23 which is whether or not the --

24 PRESIDING JUDGE ALUOCH: Sorry, what do you mean, "representatives of the
25 government"?

1 MR KHAN: Sorry, the victims I've just mentioned.

2 PRESIDING JUDGE ALUOCH: Thank you.

3 MR KHAN: It's that -- it's that --

4 JUDGE DIARRA: (Interpretation) Counsel, please, you are translated in French

5 and we have to take that into account.

6 MR KHAN: I'm grateful.

7 JUDGE DIARRA: (Interpretation) Okay. Thank you very much.

8 MR KHAN: Madam President, it is the question of whether or not the facility of my

9 clients, their ability to speak in Zaghawa or any other language, has been subject to

10 empirical testing. It's a rather bizarre suggestion. It's not the case, for example, that

11 a victim comes before the Court and the victim says, "I speak French" and a party

12 says -- or even non-parties, those that are sitting in this Court room with party-like

13 rights, can say, "Well, we don't believe that. We wanted to subject you to an

14 examination, or a test."

15 The case law is very clear. The Appeals Chamber ruling is binding. And I will read,

16 with your leave, because this rather surprising comment has been made. The

17 Appeals Chamber said in the Katanga case that I referred to some moments ago of

18 27 May 2008 that "The language in paragraph 1(a) and 1(f)," talking about Article 67,

19 "is similar in that the phrase fully understands and speaks is repeated." That itself is

20 important. It's repeated. "On its face, it is clear that this standard is not low. It's a

21 language an accused must both understand and speak and this fully understand and

22 speak. It suffices to state -- " "It suffices to state that the meaning of this provision

23 based on these definitions provides that the standard that must be required under the

24 Article is very high."

25 And, your Honour, that's at paragraph 40, and for the sake of the record, just to clear

1 it up absolutely clearly because this issue was determined in any event by the
2 Pre-Trial Chamber at an earlier point, paragraph 61 is important, "Given the addition
3 of the word 'fully' and the drafting history, the standard must be high. Therefore,
4 the language requested should be granted unless it is absolutely clear on the
5 record" - on the record - "that the person fully understands and speaks one of the
6 working languages of the Court and is abusing his or her rights under Article 67 of
7 the Statute. An accused fully understands and speaks a language when he or she is
8 completely fluent in the language in ordinary nontechnical conversation and it is not
9 required that he or she has an understanding as if he or she were trained as a lawyer
10 or a judicial officer. If there is any doubt as to whether the person fully understands
11 and speaks the language of the Court, the language being requested must be
12 accommodated. Ultimately, the Chamber in question is responsible for ensuring the
13 fair trial rights of the accused."

14 Your Honours, that's the standard. It couldn't be further from the truth, based on
15 this record, absolutely not a scintilla of information to say that our clients have in any
16 shape or form at any stage of these proceedings been abusing their rights under the
17 Statute. Unlike, for example, the Government of Sudan; unlike, for example, the
18 President of that country, they have surrendered voluntarily, whenever required, to
19 this Court. And so when such people who come before this Court voluntarily, not
20 under coercion, not being dragged by a warrant, say that there they speak Zaghawa,
21 they fully speak Zaghawa, that should be accepted, unless your Honours take the
22 view that such people who voluntarily come before this Court, unlike others, are
23 somehow abusing their rights under the Statute. There is no inference, not a jot of
24 information, to support such a preposterous claim. Your Honour, in my submission
25 the issue is clear.

1 PRESIDING JUDGE ALUOCH: Thank you very much, Mr Khan. I don't think the
2 Prosecution want to respond to that. No, thank you, they don't want to. Good, we
3 will proceed.

4 In relation to Article 54(3)(e) material, you have indicated in your written submissions
5 that there exist eight articles -- there exist eight Article 54(3)(e) documents for which
6 you are likely to obtain the consent of the information provider for this material to be
7 disclosed to the Defence. I'm addressing the Prosecution specifically. Subject to it
8 being used confidentially, as of 22 October 2010, in a confidential filing 83 before PTC
9 I, paragraph 3, you already submitted that, in principle, the information provider is
10 agreeable to the production and disclosure of a narrative summary containing the
11 pages of the eight documents. Could you please now provide the Chamber with
12 an -- would you provide the Chamber with an update on the status of the new
13 discussion with the information provider? Thank you, Prosecution.

14 MR OMOFADE: Your Honour, I'm grateful. In the first instance, might I clarify,
15 your Honours, that there has to be an amendment to that paragraph of our filing,
16 paragraph 18, and I have to say that the figure that we were -- that we meant to state
17 there is ten documents, rather than eight.

18 PRESIDING JUDGE ALUOCH: Sorry, have you amended it, or you say you will?

19 MR OMOFADE: I'm seeking to amend it orally before your Honours.

20 PRESIDING JUDGE ALUOCH: I see.

21 MR OMOFADE: The figure was meant to be ten, rather than eight. I'm able to give
22 a breakdown as well. One of those documents, we say, potentially falls under
23 Article 67(2) as being potentially exculpatory. The other nine documents fall under
24 Rule 77. The position that your Honour mentioned as regards the filing of
25 22 October last year is correct. The discussions that we've had with the information

1 provider do suggest that, in principle, they are agreeable to the lifting.

2 The difficulty is as -- is one that I believe even my friend for the Defence alluded to in
3 the Defence filing, the difficulty with relating to organisations as opposed to
4 individuals, sometimes it takes longer than one anticipates. So the only information
5 that I can give your Honour is we continue to talk to the information provider of these
6 materials and we could provide by way of a filing an update to your Honours within
7 a certain time-frame as regards the progress we have made.

8 PRESIDING JUDGE ALUOCH: Thank you very much and I will give you that
9 time-frame. I am being reminded that there were eight annexes to filing 83; is that
10 correct? Does it mean that two annexes were missing?

11 MR OMOFADE: Your Honour, the revision is a development since the filing. We
12 have conducted a further exercise which we believe is a more diligent one in
13 anticipation of today's proceedings and have on that basis sought to rectify this figure.
14 So the position now is what I've mentioned before your Honours, as opposed to the
15 position then.

16 PRESIDING JUDGE ALUOCH: Thank you very much and you -- the Chamber will
17 give you a deadline for that filing to be 9 May.

18 Now, agenda C item, issues concerning witnesses, protective measures. The
19 Prosecution submits that it has yet to disclose full statements of nine witnesses whose
20 identities were not disclosed to the Defence at the confirmation stage. Summaries
21 were provided, though, because of witness protection issues.

22 The Prosecution further submits that it is continuing to liaise with VWU, that is in
23 your paragraph 9 and 20 of your filing, on this issue and that the issues should be
24 resolved by the end of July.

25 The Chamber therefore asks the Prosecution and the VWU to provide it with written

1 submissions on issues involved or challenges currently faced in this respect by 9 May,
2 4 o'clock, 9 May. The Chamber requires to be provided with specific security
3 situations for each witness concerned, including the security situation assessment of
4 the five witnesses if possible. Is that right? Is that in order for you?

5 MR OMOFADE: Indeed, your Honour.

6 PRESIDING JUDGE ALUOCH: I will now address the issue of redactions. As
7 regards redactions and the lifting thereof, the Prosecution had indicated that it is
8 reviewing the redactions already granted by the Pre-Trial Chamber pursuant to
9 Rule 81(4) to determine whether any of them require lifting and submits that it could
10 make the necessary applications by the end of June; that is in your filing at paragraph
11 17, filing 131.

12 The Prosecution is aware of the importance for the Defence, and Mr Khan has alluded
13 to it already, of receiving full disclosure as early as possible; both the Defence and the
14 participants actually. On this basis, the Chamber requests the Prosecution to file its
15 request to lift any Rule 84(1) redactions by 6 June. Yes, Prosecution?

16 MR OMOFADE: Your Honours, the issue as regards lifting of redactions, the 6 June
17 is a deadline that we feel is reasonable. I don't know if your Honour intends to leave
18 the issue of redactions mainly because there is a clarification that the Prosecution
19 wants to make, but if your Honour still has more questions on that topic I will reserve
20 my comments.

21 PRESIDING JUDGE ALUOCH: The broad topic was really protective measures, and
22 I am still continuing on that. Maybe you hold on a little.

23 Now, concerning the nine witnesses for whom protective measures are yet -- are not
24 yet in place, and whose full statements have not been disclosed to the Defence, the
25 Prosecution suggests that protective measures will be resolved by the end of July and

1 that -- and that thereafter it will apply to the Chamber for redactions to the statements
2 prior to disclosing them.

3 However, the Chamber is of the view that the Prosecution need not necessarily wait
4 to file its application for redactions to these nine witness statements. Rather, the
5 Prosecution may apply immediately for two types of redactions. If necessary,
6 temporary redactions to remain until protective measures have been fully effected
7 and other redactions.

8 This course of action will enable the disclosure of the full witness statements to these
9 nine individuals without further delay, and once protective measures are in place the
10 Prosecution may request the lifting of the temporary redactions.

11 Prosecution, is there any reason why applications for redactions to the material of
12 these witnesses may not be filed earlier? That's the question I am posing.

13 MR OMOFADE: With the suggestion that your Honour provided, it may be that we
14 are able to do it sooner than the end of June, which is the suggested time-frame, and
15 the suggestion I refer to is your Honour's suggestion that this could be done by
16 identifying full redactions and those that we anticipate are temporary pending
17 protective measures being in place. So with that in mind, it may well be that we are
18 able to apply for the redactions much sooner, and without having to wait for
19 protective measures to be in place.

20 PRESIDING JUDGE ALUOCH: The Chamber is giving the same deadline of 6 May.
21 Is that reasonable? Sorry, I beg your pardon, 6 June.

22 MR OMOFADE: Your Honour, that's reasonable.

23 PRESIDING JUDGE ALUOCH: That's reasonable?

24 MR OMOFADE: Yes, your Honour.

25 PRESIDING JUDGE ALUOCH: Any other comments on this topic? None.

1 Finally, the Chamber recalls the jurisprudence of the Court as for the lifting of
2 redactions previously granted under Rule 81(2) of the Rules, namely, redactions
3 accorded to protective Prosecution's ongoing investigations. The Chamber adopts
4 the same approach taken by the Trial Chambers which have held that there is no need
5 for the Prosecution to file requests with the Chamber when lifting previous redactions
6 applied under Rule 81(2) of the Rules.

7 Good. I will now move on to expert witnesses, unless there is any other issue
8 that -- yes, the Prosecution, you need to address something, yes?

9 MR OMOFADE: Your Honour, just it is another issue that maybe the Chamber
10 wants to take into account that is not contained in our filing of 14 April, and it relates
11 to the six additional witnesses that we propose to interview and it's just to give the
12 Chamber a heads-up that some of those statements may well also require redactions
13 under 81(4) and possibly 81(2). So in terms of time-frame, once those statements
14 have been obtained, immediately thereafter the Prosecution will file for the necessary
15 redactions, but I just thought it is something that I ought to bring to the Chamber's
16 attention.

17 PRESIDING JUDGE ALUOCH: Thank you very much. As I said, I will move to
18 expert witnesses. The Prosecution indicates at paragraph 7 of its filing that it intends
19 to call an expert witness and that a report is expected by the end of July. The
20 Chamber notes that both parties intend to rely on expert witnesses; that is the
21 Prosecution and the Defence. Have any discussions taken place with regard to the
22 question of joint instructions? Are any such discussions envisaged? If so, when are
23 they expected to be concluded if at all? In this regard, the Chamber would like to
24 remind the parties of its powers under Regulation 44(2) of the Regulations of the
25 Court. It would further like to ascertain whether the parties are envisaging the

1 instructions of an expert who has been included on the list of experts maintained by
2 the Registry, pursuant to Regulation 44(1) of the Regulations? Prosecution, you have
3 the floor first, yes.

4 MR OMOFADE: Your Honour, as regards the issue of expert witness, the
5 Prosecution does anticipate, as I mentioned earlier, instructing an expert witness.
6 All I can say at this stage is that the final decision as to whom that expert will be, and
7 indeed the parameters of the expertise, are still the subject matter of some internal
8 discussions.

9 Therefore, we are precluded to a large extent from engaging in discussions with the
10 Defence. Once we have some clarity within ourselves, it is certainly something that
11 is worthwhile exploring with the Defence to see if there's a possibility of a joint
12 instruction, and we propose to do that, your Honours.

13 PRESIDING JUDGE ALUOCH: Thank you. Any comments from Mr Khan on this?

14 MR KHAN: Madam President, briefly. We haven't had any discussions regarding
15 the expert; no discussions of substance other than the Prosecution intimated prior to
16 their filing that they were considering calling one expert. We don't even know the
17 general area of expertise.

18 Madam President, in the previous stage, the Prosecution relied upon Witness 445 and
19 that witness was designated an expert witness. That is very clear from the
20 transcripts and from what took place. That witness was called to speak to issues of
21 opinion, gave opinion evidence. But is the expert that is currently being proposed in
22 addition to Witness 445, or is the Prosecution no longer intending to rely upon
23 Witness 445? I would ask that some clarification be given in that regard.

24 And your Honour, the second point with your leave, relates to the last matter
25 discussed and the protective measures or redactions that the Prosecution may seek in

1 relation to --

2 PRESIDING JUDGE ALUOCH: Sorry, Mr Khan, maybe you can let the Prosecution
3 respond to that first, before? Yes.

4 MR KHAN: Indeed.

5 PRESIDING JUDGE ALUOCH: Prosecution, yes, would you like to respond to the
6 question posed by Mr Khan?

7 MR OMOFADE: Well, your Honours, to one extent I am able to respond. It is not
8 the same expert that the Prosecution called at the pre-trial stage. As regards the
9 other aspects that -- I believe the other information that the Defence sought to know is
10 the nature of the expertise; I may well be wrong. The Defence will know as soon as
11 we have clarity ourselves, but I will engage with my friend on this, as I said earlier.

12 PRESIDING JUDGE ALUOCH: Yes, Mr Khan, you can put your next question.
13 You can see the Prosecution too want to engage with you in this matter of experts.

14 MR KHAN: Indeed, I am ever grateful. It is not a question; it was simply a
15 suggestion.

16 PRESIDING JUDGE ALUOCH: Yes.

17 MR KHAN: That in relation to the six witnesses that my learned friend alluded
18 to - the new witnesses - instead of waiting until all six witnesses have been
19 interviewed and statements have been taken and then going to the Court and seeking
20 protective measures or redactions, I would ask that whenever they are in possession
21 of such a statement, at that point they come to the Bench and so that the Defence get
22 each statement as soon as possible without delay. That's the only suggestion that we
23 put forward.

24 PRESIDING JUDGE ALUOCH: Prosecution?

25 MR OMOFADE: Your Honours, it's a perfectly good suggestion. It's what we do

1 propose to do. What I believe I said earlier, when I referred to the additional
2 statements, the additional witnesses that we propose to interview, was that we will
3 submit their statements to the Chamber immediately thereafter for any redactions
4 that may well be required. So that's what we do propose to do and, subsequently,
5 there should be no difficulty with disclosure.

6 PRESIDING JUDGE ALUOCH: Thank you very much. So in light of the
7 information you have both provided, the Chamber would like to encourage you both
8 to discuss the option of joint instructions in the issue of engaging experts as you both
9 seem not to have had positions on this agenda item; and the Chamber would, in fact,
10 instruct the parties to provide it in a joint filing, if possible, with an update on the
11 status of the discussions on the issue of experts by 30 May. I think that is a
12 reasonable time. Mister -- both Mr Khan and Mr Omofade, I think that's a
13 reasonable time.

14 MR KHAN: Well, Madam President, it's a step too far, perhaps. It's a reasonable
15 time if your Honours can give a date as to when the Prosecution have to disclose the
16 name, identity and subject matter of the proposed expert. Of course, if they give us
17 the name on the 29th, we can't be expected to respond in a joint filing on the 30th. So
18 perhaps an additional deadline for the Prosecution to give us the information, the
19 parameters of the instruction and any preliminary report would be helpful.

20 PRESIDING JUDGE ALUOCH: Prosecution.

21 MR OMOFADE: Your Honour, it's highly unlikely -- even projecting that far ahead,
22 it's highly unlikely that any expert that we do instruct would have come up with a
23 report of any sort by 30 May. So what I do propose, and I tend to agree with your
24 Honours, is that all your Honours are requesting by 30 May is an update on
25 discussions that might have taken place.

1 If there haven't been any developments, then we are well able to inform your
2 Honours that the process is still ongoing. I believe what your Honours had in mind
3 was to be able to monitor how this is progressing, rather than to place deadlines at
4 this stage.

5 PRESIDING JUDGE ALUOCH: Indeed. We want an update of the discussions.
6 Thank you very much.

7 Item D of the agenda, preparation of the Defence. The Chamber notes that the
8 submissions of the Defence as regards the difficulties it has so far encountered for its
9 preparation, the Chamber would like to address the issue of the estimate of the length
10 of time the Defence will need to prepare after final disclosure by the Prosecution. Do
11 you have anything to add in light of the Prosecution's filing and the clarification
12 provided to the Chamber a short while ago, Mr Khan?

13 MR KHAN: Madam President, there's nothing really useful that I can say. The
14 timelines and the state of Defence preparation will be informed by two issues: What
15 facts are agreed and the nature of the Prosecution evidence. So it's putting the cart
16 before the horse, somewhat, for the Defence to give any useful guidelines or
17 expectations as to the length and nature of the case until we get that disclosure.
18 Your Honour, as we intimated in our filing, there are very real and significant and,
19 indeed, unique problems for the Defence in this case because we cannot gain access to
20 the alleged crime scene or conduct investigations in Sudan. There have also been
21 very real problems in getting cooperation and assistance from the African Union.
22 And, your Honours, we will be filing in the next few days hopefully an application
23 seeking the assistance of the Trial Chamber to assist the Defence in that regard. Your
24 Honours, when that application is before you and we see hopefully the response from
25 the Government of Sudan and the African Union, and there may be further requests,

1 perhaps the landscape will become somewhat clearer and the issues that are
2 confronting the Defence can be resolved, we hope.

3 PRESIDING JUDGE ALUOCH: Thank you, Mr Khan. Item D of the agenda,
4 outstanding issues relating to victim participation, the Chamber has received
5 information by the Registry in its written submissions on document 129 on 14 April.
6 The Registry submits that there are 11 outstanding incomplete applications that have
7 not yet been filed in the case - that's paragraph 1 of that document - which it estimates
8 to be completed by the end of June. It anticipates that the completed applications
9 could be filed with the Chamber by the end of the summer recess.

10 The Registry further notes that there are 150 additional potential applicants in the
11 case, paragraph 3, and it estimates that receiving and submitting applications to the
12 Chamber would take several months, that's paragraph 4. Finally, the Registry seeks
13 the Chamber's guidance on whether it should transmit incomplete applications for
14 participation in the trial proceedings by deadlines established by the Chamber,
15 paragraph 2.

16 First, the Chamber would like to provide the requested guidance on the transmission
17 of incomplete applications. For reasons of efficiency and expeditiousness, the
18 Chamber requests the Registry to only submit applications that are complete at the
19 time of any deadline the Chamber may set for the transmission of victim applications.

20 Secondly, the Chamber would like to receive clarification on the following issues:

21 As regards the outstanding 11 applications, how the Registry came to the end of June
22 estimate? How did you arrive at that estimate? The Chamber is not entirely clear
23 on why it will take the Registry until mid-August, if we understand you correctly, to
24 file 11 outstanding applications with the Chamber.

25 The Registry -- the representative of the Registry, you have the floor on this item,

1 please. Please, let's observe the five-second rule. I did not observe it last time; I
2 apologise. We just have to train ourselves to observe the five-second rule. Yes.

3 MS MCKAY: Your Honours, the basis for the estimate of the end of June for
4 receiving outstanding information on the incomplete applications for participation is
5 based on information largely from the legal representatives of the applicants
6 concerned and the time within which it appears most likely that such information
7 would be received, but perhaps taking a somewhat cautious approach.

8 And the proposal to file those applications by the end of August is similarly based on
9 perhaps an abundance of caution since we don't yet know what dealing with those
10 applications might involve; but should the calendar of the preparation for trial require
11 it, then I believe that -- and should the Registry receive the information sooner, then I
12 believe it would be possible to file those applications sooner.

13 PRESIDING JUDGE ALUOCH: Thank you. A follow-up question, Registry. At
14 paragraph 2 of filing 134 -- 132, rather, the Chamber would like to know whether
15 these three incomplete applications referred to by Messrs Nice and Dixon - that's
16 right - are part of the 11 outstanding applications referred to by the Registry or
17 whether these three come in addition of the 11 outstanding applications. Registry,
18 please.

19 MS MCKAY: Your Honour, I confirm that they are among the 11 outstanding
20 applications.

21 PRESIDING JUDGE ALUOCH: Thank you. As regards any potential --

22 MS DAHURON-JACOBY: Sorry. Sorry, your Honour.

23 PRESIDING JUDGE ALUOCH: Yes. I beg your pardon, yes.

24 MS DAHURON-JACOBY: If I may just, for the record, the previous speaker from
25 the Registry was Mrs Fiona McKay, Chief of the VPRS, for the record.

1 PRESIDING JUDGE ALUOCH: Yes, thank you. I know that she is, but I think for
2 the record you are right. As regards any potential future applications in this case,
3 has the Registry already undertaken steps to collect applications from the 150
4 individuals it estimates may file applications in this case?

5 MS MCKAY: Indeed, your Honour, we have begun steps -- taking steps. We do
6 believe that it might take some time since we believe that some of the people who
7 may be potential victims of the case are in -- reside in countries that -- where we have
8 not yet managed to establish a means of contacting them, and it's for that reason that
9 we again were rather cautious in our estimate because it may take some time to
10 achieve that, but it may also be achievable in a considerably shorter time span.

11 PRESIDING JUDGE ALUOCH: Thank you. Now, since the Chamber is dealing
12 with the question of victims under this agenda item, the Chamber would like the
13 briefly address two other matters. We are at the trial stage of this case now and
14 therefore this Chamber will have to decide on the modalities of participation of
15 victims at trial and on common legal representation. As these two matters are
16 interlinked, the Chamber will issue a decision on the modalities of participation once
17 the issue of common legal representation will be dealt with. The Chamber is of the
18 view that on the issue of common legal representation, this is a matter between the
19 Chamber and the Registry. Participants will be in any event consulted by the
20 Registry and thus, following the Registry's report filed yesterday, filing 134, the
21 Chamber finds that no further filings are necessary, be it by the parties or
22 participants.

23 I will now move to the issue of dual status individuals, unless there are any
24 comments. Thank you, there are none. Issues of individuals status - issues of dual
25 status individuals, I beg your pardon. This is a point on which the Chamber

1 requires clarification. Could the Prosecution please clarify how many of the
2 witnesses it intends to call are dual status individuals. The seven victims whose
3 names were ordered to be disclosed to the Defence by the Pre-Trial Chamber in its
4 decision ICC-0205-0309-89 have the dual status; is this correct? Prosecution, you
5 have the floor.

6 MR OMOFADE: Your Honour, I have to confess that this is information that I don't
7 have to hand at the current time. We should be able to --

8 PRESIDING JUDGE ALUOCH: Is there a conversation going on between you and
9 the legal representatives?

10 MR OMOFADE: There was interference and this was why I paused, your Honour.

11 PRESIDING JUDGE ALUOCH: All right, yes.

12 MR OMOFADE: Your Honour, it may be information that I am able to provide to
13 your Honours between after this hearing and tomorrow afternoon, but it's
14 information that I don't have to hand and I hesitate to provide a figure that is not
15 accurate.

16 PRESIDING JUDGE ALUOCH: Thank you. Yes, I see -- yes?

17 MS CISSÉ: (Interpretation) Thank you, your Honour. I just wanted a clarification.

18 As you have just said that the problem of the representation, of joint legal
19 representation, is something that has to be settled between the Registry and the
20 Chamber, and that you feel it is not necessary to take on any other filings, we have
21 been informed of the recommendations of the Registry on 15 April, and we were
22 travelling at the time, we responded immediately by responding, I would like to
23 know whether the Chamber has received this response, that's the first point, and
24 secondly, would the Chamber allow us to make some very brief comments on the
25 report, because we only were able to read it this morning when we arrived at the

1 court?

2 MR OMOFADE: I'm sorry, may I --

3 PRESIDING JUDGE ALUOCH: Yes.

4 MR KONÉ: May I just add that we have filed similar submissions this afternoon as
5 well.

6 PRESIDING JUDGE ALUOCH: Legal representatives of victims, we have filings 136
7 and 137. I believe one of them is yours, 136 and 137? As I have already said, these
8 are issues we are going to deal with in due course.

9 MS CISSÉ: Okay.

10 PRESIDING JUDGE ALUOCH: Yes, these are -- we have two filings, 136 and 137.

11 MS CISSÉ: (Interpretation) Your Honour, given the information that we have just
12 been given from the VWRS on 11 new filings and 150 potential victims, we just
13 wanted to say that in order to enable the Chamber and the Registry to come up with
14 an informed decision on this problem regarding the joint legal representation, we
15 think that this can only be done once the 11 filings and the 150 potential victims, once
16 this question can be settled in order to establish whether there are 150 new victims
17 who might be given the status of victims recognised by the Chamber with the
18 implications as to legal representation. Therefore, we feel that until this question is
19 settled we would like, given the current state of affairs, that the legal representation of
20 victims should be maintained until full light is shed on the 150 potential victims
21 which may have an impact on the Court's decision and regarding the need of joint
22 legal representation. Thank you, your Honour.

23 PRESIDING JUDGE ALUOCH: Thank you very much. We have noted your
24 submissions. I was going to call them sentiments. No, they are your submissions,
25 not sentiments, or both. May I correct the transcript to read filings 135 and 136. 135

1 and 136. They are not 136 and 137. It is filing 135 and 136.

2 In any event, for the benefit of the record, the Chamber instructs the Prosecution
3 together with the legal representatives to file a report indicating in a table the victims'
4 applications, numbers of the dual status individuals, the corresponding witness codes
5 and which of the legal representatives are representing these individuals -- these dual
6 status victims. These joint submissions should be filed by 9 May. This is an issue
7 the Chamber is going to consider, but we want this extra information from -- to be
8 filed. Thank you very much.

9 Item F of the agenda, languages to be used in the proceedings. I know that it has
10 been alluded to now and again during the course of these proceedings, but I would
11 like to say something about it as an agenda item.

12 In order for the Chamber to determine the language or languages to be used at the
13 trial, pursuant to Article 64(3)(b) of the Statute, it invited submissions of the parties
14 and participants on this issue. Now the Prosecution has provided a list of its current
15 witnesses, it is important to note that this point, the Prosecution has provided
16 information on the languages of the proposed testimony.

17 Noting the Registry's submissions on the request -- on the question of languages other
18 than Zaghawa, and in particular the Fur language, F-U-R, the Fur language, this is set
19 out in the Prosecution's submissions at paragraphs 9 and 10 -- sorry, this is
20 paragraphs 9 and 10 of the Registry's report, the Chamber would like to know
21 whether any of the parties or the Registry have further observations to make in this
22 regard?

23 Prosecution, having taken note of the discussion on the language requirements of the
24 accused, and counsel's position on consecutive interpretation at the pre-trial stage, the
25 Chamber invites you to address the matter again today very briefly. Is there

1 anything to say at this time at all, over and above what has already been stated?

2 MR OMOFADE: Your Honours, no.

3 PRESIDING JUDGE ALUOCH: No.

4 MR OMOFADE: The only issue that might be relevant is what we have alluded to in
5 our filing, and that's the fact that in the event that there is consecutive translation it
6 will take more time for the testimony of witnesses, and we ask that your Honours
7 take that into account in allotting the time to witnesses who are meant to testify but,
8 aside from that, nothing else, your Honour.

9 PRESIDING JUDGE ALUOCH: Mr Khan, do you have any additional matter on this
10 at all?

11 MR KHAN: No, your Honour, I am most grateful.

12 PRESIDING JUDGE ALUOCH: Thank you very much. Registry, any further
13 submissions on this, if at all?

14 MS DAHURON-JACOBY: (Interpretation) Your Honour, just to confirm what the
15 Prosecutor's office has said regarding the additional time required in the event of
16 consecutive interpretation, and to go back briefly on the languages Arabic with
17 dialect and Fur, the Registry, as it has done in other cases, will undertake a check on
18 the languages before the testimony of the witnesses in conjunction with the
19 Prosecutor's office to ensure that we have the appropriate interpreters.

20 PRESIDING JUDGE ALUOCH: Thank you very much. And agenda item G is the
21 date of the trial. The Chamber invites parties, participants and the Registry to make
22 additional submissions in light of today's discussions if they so wish as to their
23 readiness for the commencement of the trial, if at all. Prosecution, do you have
24 anything to say on this item?

25 MR OMOFADE: Well, there are two matters, your Honour. The first is what

1 myself and my friend for the Defence have alluded to, the discussions that are taking
2 place will hopefully narrow down the issues that will be determined at the trial.
3 If that's the case, then the time-frame of 30 months that the Prosecution mentioned as
4 regards translation in respect of Rule 76 would be reduced, hopefully considerably.
5 Therefore, this is something that is -- this is a figure that is subject to review.
6 And then the second issue is we take into account obviously the difficulties that the
7 Defence has cited as regards investigative activities, and indeed the logistical
8 difficulties that the Registry has alluded to, but with those in mind, subject to what
9 your Honours have to say, we are able to accede to a trial date that is within the
10 time-frame that the Registry proposed. Those are my submissions.

11 PRESIDING JUDGE ALUOCH: We have only six minutes left on the tape and we
12 have -- I have an oral decision to -- an oral instruction on email communications.

13 Mr Khan, do you want to comment at all on the date of the commencement? Thank
14 you very much.

15 As you may well already know the Chamber does not need to be copied on the
16 exchanges which are primarily between the parties, the participants and the Registry.
17 In the interests of transparency of the proceedings and efficient email management,
18 the Chamber should generally only be receiving mails directly addressed to it with a
19 specific purpose. Disclosure problems and the like should be resolved inter partes.
20 The Chamber should only be involved if the problem persists and a solution cannot
21 be found inter partes.

22 Generally all requests should be submitted in proper filings and parties and
23 participants should not be using email when there should be a formal filing. In other
24 words, emails shared with the Chamber should not contain any substantive issues.
25 In exceptional circumstances, requests can be made by email only if the matter is

1 urgent and needs immediate attention.

2 Matters that need to be addressed in a hearing should not be submitted by email.

3 Email communications should ordinarily be sent within regular working hours.

4 Emails sent outside these hours should not be expected to be dealt with except in

5 exceptional circumstances. All parties and participants should by now have an ICC

6 email address which is the secure address that the Chamber will use. No private

7 email addresses will be used.

8 The Chamber should be asked to provide guidance in particular by Registry only

9 when absolutely necessary and after having consulted with the relevant parties or

10 participants, and the transcript concerned if an instruction was provided early.

11 Now, the Chamber will suspend the hearing for 30 minutes. We only have less than

12 five minutes left to the tape and we will resume after 30 minutes, that should be at

13 5 o'clock, in closed session with the parties, that is Prosecution and Defence and the

14 Registry only. The Chamber thanks the legal representatives of victims --

15 MR NICE: Your Honour.

16 PRESIDING JUDGE ALUOCH: Yes.

17 MR NICE: Sorry, your Honour, I understood that you might give us a moment at

18 the end one-by-one. Can I take one minute of your time to make just half-a-dozen

19 points?

20 PRESIDING JUDGE ALUOCH: Yes, yes.

21 MR NICE: I will make them very briefly. First, any agreement as to facts between

22 the Prosecution and the Defence may have an effect on the interests of the victims and

23 cannot necessarily be binding on them.

24 Second, in our filing we have asked for the opportunity to make representations

25 about modalities of disclosure and we would invite the Court to consider giving us

1 that opportunity. We can of course always apply at a later stage in any event.
2 As to experts, the victims have an interest in the content of whatever expert reports
3 may be prepared and we would ask specifically to be informed at the earliest possible
4 moment of what is to be covered by experts.
5 We will make a filing, if appropriate, alternatively we will make submissions to the
6 Registry about common legal representation. We haven't made a filing yet.
7 As to the 11 prospective victims, it was forecast that the three for whom we make
8 application would be completed today in the event the identification documents,
9 identity documents are not available today, they will be available very soon. And
10 we would press the Court to ensure that disclosure to the victims gives us adequate
11 time to prepare any representations we may wish to make and any enquiries we may
12 need to make.
13 Your Honour, I am thankful for that opportunity.
14 PRESIDING JUDGE ALUOCH: Thank you very much. I am afraid we are just at
15 the end of the tape and I want to assure the legal representatives that the Chamber
16 wants to address in closed session a matter which at this early stage does not affect
17 the interests of the victims and therefore the Chamber finds that the legal
18 representatives' participation in the closed session hearing may not be necessary.
19 Thank you very much, parties and participants. We will adjourn for 30 minutes and
20 resume the confidential closed session at 5 o'clock. Thank you.
21 THE COURT USHER: All rise.
22 (The hearing ends at 4.29 pm.)
23 CORRECTIONS REPORT:
24 The Court Interpretation and Translation Section has made the following corrections
25 in the transcript:

- 1 *Page 2 line 10
- 2 "...representative of victims 70 to 92." Is corrected by "...representative of victims
- 3 a170 to 192 and a436."
- 4 *Page 2 lines 12 – 13
- 5 "I represent *Senegalese victims, and Botswana and the Gambia, A034, 436, 433, 580,
- 6 656, 741." Is corrected by "I represent victims from Senegal Botswana and the Gambia,
- 7 a0434, a435, a456 to a463, a579, a580, a656, a657, a736 to 741 and a754."