

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 1
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh
5 Mohammed Jerbo Jamus - ICC-02/05-03/09
6 Presiding Judge Cuno Tarfusser, Judge Sylvia Steiner
7 and Judge Sanji Mmasenono Monageng
8 Confirmation of Charges Hearing
9 Wednesday, 8 December 2010
10 (The hearing starts in open session at 2.31 p.m.)
11 (In the absence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed
12 Jerbo Jamus)
13 THE COURT USHER: All rise. The International Criminal Court is now in session.
14 Please be seated.
15 THE COURT OFFICER: Good afternoon, Mr President, your Honours. We are in
16 open session.
17 PRESIDING JUDGE TARFUSSER: Good afternoon to everyone. We are in session
18 and, first of all, I would ask the court officer to call the case, please. Court officer.
19 THE COURT OFFICER: Yes, Mr President. Situation in Darfur, Sudan, in the case
20 of The Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh Mohammed
21 Jerbo Jamus, case reference ICC-02/05-03/09.
22 PRESIDING JUDGE TARFUSSER: (Microphone not activated).
23 THE INTERPRETER: Microphone, please, Mr President.
24 PRESIDING JUDGE TARFUSSER: I would now ask the parties and participants to
25 introduce themselves, starting with the Prosecutor's team. You have the floor,

1 Mr Faal.

2 MR FAAL: Mr President, your Honours, ladies and gentlemen, good afternoon.

3 The Prosecution is today represented by Ms Shyamala Alagendra, trial lawyer; Victor

4 Baiesu, associate trial lawyer; Pubudu Sachithanandan, associate trial lawyer; Biljana

5 Popova, case manager; my name is Essa Faal, senior trial lawyer. Thank you.

6 PRESIDING JUDGE TARFUSSER: Thank you, Mr Faal. I would turn now to the

7 legal representatives of victims and ask them to present themselves and the victims

8 they represent.

9 MS CISSÉ: (Interpretation) Good afternoon. My name is Helen Cissé. I am

10 from the Senegalese Bar and I represent the following victims: A/0434, 0435, 0456 to

11 0463, 0579 to 0580, 0655 to 0656, 0736 to 0741 and 0754. And I thank you.

12 MR KONE: (Interpretation) Good afternoon. My name is Brahima Kone, I am

13 from the Malian Bar, and I represent the victims a/170 to a/192 and a/436, and I thank

14 you.

15 MR AKINBOTE: My names are Akin Akinbote and I represent the following

16 victims: 535, 537 to 542, 544 to 551, 557 to 562.

17 MR NICE: May it please the Court, my name is Geoffrey Nice. I appear with

18 Rodney Dixon, both of us of the Bar of England and Wales, to represent victims 1646

19 and 1647. There's been some ambiguity about the numbers in one or two of the

20 documents filed, but it's 1646 and 1647. I'm obliged.

21 PRESIDING JUDGE TARFUSSER: Thank you very much. I turn now to the

22 Defence team.

23 MR KHAN: Mr President, your Honours, good afternoon. Mr Banda and Mr Jerbo

24 are represented by Andrew Burrow, legal consultant; Aidan Ellis, legal consultant;

25 Anand Shah, case manager; and also present in court today is Stephanie Zosak, intern

1 for the Defence. My name is Karim Khan.

2 PRESIDING JUDGE TARFUSSER: Thank you very much, Mr Khan. And last, but
3 not least, the Registrar.

4 MR PREIRA: (Interpretation) I thank you, Mr President, your Honours. The
5 Registry is today represented by my colleague Cyril Laucci, who is legal adviser
6 within the Registry, and myself Didier Preira, Assistant Deputy
7 representing -- Deputy Registrar representing the Registrar. And I thank you.

8 PRESIDING JUDGE TARFUSSER: Thank you very much. Now before beginning
9 the confirmation hearing, the Chamber has to issue an oral decision.

10 The Chamber is seized with two applications made by the Prosecutor and the counsel
11 for the suspects filed two days ago and yesterday respectively. Both the Prosecutor
12 and the Defence challenge the continued representation of victims a/1646 and a/1647
13 by Mr Geoffrey Nice and Mr Rodney Dixon. They argue that their multiple loyalties
14 to the victims that they represent on the one hand, and to the Sudanese organisation
15 which serve as intermediaries between them and the victims on the other hand, may
16 subvert the regime of victim participation and amount to an abuse of court process;
17 give rise to a potential conflict of interest; and cast doubt as to the independence of
18 counsel.

19 The Defence further submits that such representation would be prejudicial to the
20 rights of the suspects and a fair and impartial trial.

21 The parties both request that the representation of the victims by the two counsel be
22 therefore terminated and substitute counsel be appointed.

23 The concerned legal representatives were given the opportunity to respond and did
24 respond to both challenges.

25 This said, the Chamber expresses its dissatisfaction as to the delay on the parts of the

1 Prosecutor and the Defence in raising their objections to the representation of the
2 victims concerned by Mr Dixon and Mr Nice filed as late as 48 hours before the
3 confirmation hearing, while they have both been aware of such representation at the
4 latest since the decision on victims' application for participation issued on 29
5 October 2010 almost one-month-and-a-half before the objections were raised.
6 The Chamber notes that because of this delay there is insufficient time for it to
7 proceed with any investigation of the allegations made by the parties on the issue in
8 question. As a result, the Chamber will only consider in its decision the information
9 presented by the parties in their applications as well as the response filed by
10 Mr Dixon and Mr Nice yesterday, bearing in mind the limited scope and purposes of
11 today's hearing.

12 On the basis of this information, the Chamber is of the view that no concrete evidence
13 has been brought to its attention that could substantiate the existence either of an
14 abuse of the Court process or of a conflict of interest between the interests of the
15 victims and the interests of the two Sudanese organisations.

16 The same applies to the assertion that the continuation of the relevant legal
17 representation would run contrary to Article 6 of the Code of Professional Conduct
18 for Counsel and therefore leading the Chamber to draw a reasonable inference that
19 the counsel's independence is compromised by external pressure.

20 Furthermore, with respect to the potential conflict of interest, Article 16(1) of such
21 Code of Professional Conduct for Counsel states that, and I quote, "Counsel shall
22 exercise all care to ensure that no conflict of interest arises. Counsel shall put the
23 client's interests before counsel's own interests or those of any other person,
24 organisation or State," end of quotation. Therefore, the primary responsibility for
25 addressing and resolving any potential conflict of interest rests with counsel, in

1 accordance with his or her professional obligations as prescribed in the Code of
2 Professional Conduct for Counsel.

3 Finally, the Defence alleges that the continued representation in question constitutes a
4 violation of the provision of Article 68(3) of the Statute, which permits victims'
5 participation before the Court provided that it is in a manner, and I quote, "which is
6 not prejudicial to or inconsistent with the rights of the accused and a fair and
7 impartial trial."

8 In this respect, the Chamber notes that this provision only relates to modalities of
9 victims' participation and not to the legal representation of victims. Therefore, the
10 Chamber is of the view that granting the legal representatives of victims (including
11 Mr Nice and Mr Dixon) the right to make oral submissions at the present hearing is
12 not inconsistent with or prejudicial to the fairness of the proceeding and/or the rights
13 of the suspects, insofar as such submissions are within the parameters that the
14 Chamber has already set out and that will be immediately reiterated.

15 The scope of the oral submissions that legal representatives of victims (all legal
16 representatives of victims) may make is defined by:

- 17 (i) The relevance to the personal interests of the victims they represent; and
18 (ii) the scope and purposes of the present confirmation hearing.

19 Therefore, and firstly, submissions by the legal representatives of victims are
20 permitted "only insofar as they relate to the personal interests of victims" and, as a
21 consequence, no submission which is irrelevant to the personal interests of the
22 victims represented by a counsel will be allowed.

23 Secondly, the subject matter of the present hearing is confined to a consideration of
24 the charges presented by the Prosecutor against the suspects, which the Chamber is
25 called upon to confirm or not according to the requisite threshold.

1 The case against the suspects only concerns the attack on the AMIS base in Haskanita
2 on 29 September 2007. These are the spatial and temporal parameters of the case
3 before the Chamber and no extraneous events may be the subject matter of the legal
4 representatives' submissions.

5 Finally, the Chamber wishes to clarify that the legal representatives are not allowed to
6 raise any issue in respect of which they do not enjoy locus standi under the legislative
7 framework of the Court.

8 Reading the filing of Mr Nice and Mr Dixon in light of the criteria just mentioned, the
9 Chamber points out that a number of the issues that the legal representatives
10 indicated that they would raise in their oral submissions go beyond the scope and the
11 parameters of victims' participation in the present confirmation hearing.

12 In this respect, the Chamber refers to the issues listed in paragraph 7 of their filing
13 which seem to relate to several different matters.

14 Firstly, the Chamber understands that the legal representatives of victims 1646 and
15 1647 intend to question the admissibility of the present case. In this respect, the
16 Chamber emphasises that legal representatives of victims do not have the authority to
17 challenge the admissibility of the case. This challenge, in accordance with
18 Article 19(2) of the Statute, may only be made by the suspect, or by a State which
19 would have jurisdiction over the case.

20 Secondly, the Chamber understands that the legal representatives of victims 1646 and
21 1647 intend to argue that, according to the criterion of interest of justice, the case
22 should not be brought before this Court. Regarding this point, the Chamber clarifies
23 that it does not have the power to review, or responsibility for, the Prosecutor's
24 assessment that the prosecution of the present case would not be detrimental to the
25 interests of justice. Arguments in this regard are beyond the scope of the

1 confirmation proceedings, the subject matter of which is confined to the charges
2 brought by the Prosecutor against the suspect.
3 Finally, the Chamber notes that the legal representatives of victims 1646 and 1647
4 intend to raise an issue relating to an alleged failure to investigate on the part of the
5 Prosecutor with respect to crimes other than those which the suspects are charged.
6 In this respect, the Chamber reiterates once again that the legal representatives'
7 submissions shall be strictly delimited by the scope of the case under discussion.
8 For these reasons, the Chamber rejects the application made by the Prosecutor and
9 Defence on Monday, 6 December 2010, and orders the legal representatives of victims
10 not to go beyond the scope provided in the legal framework of the Court for victims'
11 participation restricted to what affects their personal interests, as determined by the
12 Chamber .

13 (Pause in proceedings)

14 PRESIDING JUDGE TARFUSSER: The Chamber has noted that Mr Adaka is not
15 present today representing 21 victims who have been authorised to participate at this
16 hearing. I would ask, therefore, whether in light of the absence of Mr Adaka and in
17 the absence of any potential conflict of interest, one between Maître Cissé, Maître
18 Akinbote, or Mr Kone would be available to represent the views and concerns of
19 these 21 victims?

20 *MR AKINBOTE: Your Honour, perhaps I should be the first to speak. I had a
21 word with Colonel Adaka before coming and he specifically said under no
22 circumstances should I appear for his clients, and under our professional rules of
23 ethics I cannot do so without his permission.

24 PRESIDING JUDGE TARFUSSER: You said you spoke to him and he said that you
25 should not represent them?

1 *MR AKINBOTE: Yes, that I have no such authority; that under no circumstance
2 should I represent his clients. At that time it was not clear whether arrangements
3 were being made, or the arrangements for his coming had been finalised or not, but
4 I'm aware that he had problems with travel arrangements.

5 (Trial Chamber confers)

6 PRESIDING JUDGE TARFUSSER: I would ask the Registry if they were aware
7 about these problems with Mr Adaka; if he came in -- he went in touch with you
8 somehow?

9 MR PREIRA: (Interpretation) Mr President, Mr Adaka did not contact us telling us
10 about any difficulties that he might have come across in order to get to the Court and
11 so we are not informed of the reasons of his absence here today before the Court, but
12 I might be able to provide you with further explanations at a later date during the
13 hearing, if you like?

14 PRESIDING JUDGE TARFUSSER: Yes, but I think -- yes. Yes, Mr Kone.

15 *MR AKINBOTE: About two weeks ago, he copied an email that he sent to CSS to
16 me regarding the travel arrangements and referring to an earlier mail whereby he had
17 requested that travel arrangements should be made for him since the army was not
18 sponsoring him. So I'm aware there was an email to CSS and that was all that I'm
19 aware of. He copied the email to me.

20 PRESIDING JUDGE TARFUSSER: Mr Khan.

21 MR KHAN: I'm most grateful, Mr President. It's most unfortunate that counsel is
22 not in court, given that the hearing has been notified to all parties. Your Honours
23 are of course alive to the provisions of Regulation 80 that, wherever the interests of
24 justice so require, legal representatives can be appointed by your Honours.
25 The whole purpose of this shortened confirmation hearing has been to avoid delay.

1 The matter has already been adjourned once, and it is the strong submission of the
2 Defence that this matter should not be delayed at all by the boycotting or
3 non-appearance of counsel and that your Honours simply appoint either OPCV, or
4 another counsel, to represent the interests of the victims in this case.
5 Your Honour, that's the first matter directly on point, but while I'm on my feet I must
6 make one submission. In the application that your Honours have not determined, in
7 the Defence objection to the legal representatives in court, Sir Geoffrey Nice and
8 Mr Rodney Dixon, we prayed at paragraph 43 for certain relief and, your Honour,
9 that was that powers of attorney and waiver documents be produced.
10 Now, your Honour, what was very helpful is that in the filing put forward by those
11 legal representatives on 7 December at paragraph 29 they appeared to support some
12 Defence concerns and, if I'm permitted to read that paragraph for ease of reference,
13 they say themselves that:
14 "The victims have at all times been aware of the way that the legal representatives
15 have been funded and signed documents to that effect should be available by the time
16 of the hearing. The need for a signed authority was overlooked and did not emerge
17 from the wide-ranging discussions that had been held."
18 Now, your Honours, this is a matter that does not concern modalities, it concerns the
19 actual rights of audience, and the clear and consistent case law of this Court is that
20 legal locus standi does not attach until powers of attorneys have been received.
21 Your Honours, I cite for example the decision in Katanga, ICC-01/04-01/07, of 10
22 June 2008, a decision of the Single Judge Her Honour Judge Akua Kuenyehia. I
23 apologise for the pronunciation.
24 It is very clear from that in the footnote 82 that the Single Judge -- and I quote, "The
25 Single Judge is of the view that only after a power of attorney for the lawyer

1 concerned is transmitted to the VPRS will that lawyer be the legal representative."
2 That view was adopted by Her Honour Judge Steiner in her decision that was dated a
3 couple of weeks after, if you bear with me for a moment, 23 June 2008,
4 ICC-01/04-01/07, and that's at page 6 of the learned Judge's decision.
5 So, your Honours, the Defence have raised an objection that has thus far not been
6 ruled upon. The legal representatives have conceded apparently that certain
7 documents have not been produced as yet. Of course, they do not specifically refer
8 to the waiver required by Article 16(3)(b) of the code or, indeed, the power of the
9 attorney required by the case law of this Court, but certain documents clearly are not
10 provided.
11 And your Honours, I've cited two authorities that, in my submission, until such
12 documents are properly filed, rights of audience should not be extended.
13 Your Honours, that's all I have to say on that matter. I'm most grateful.
14 PRESIDING JUDGE TARFUSSER: Please.
15 MR NICE: I happen to have two powers of attorney signed and with me, and they
16 can be made available to the Court if the Court would like to see them. We rather
17 thought that the Court had, in fact, taken account of all matters that were laid before
18 it in the filings and had ruled. My learned friend's argument is perhaps a little
19 unfortunate.
20 As to the specific issue of the waiver, that's explained in our filing and I can
21 supplement it in this way: The victims concerned were in Khartoum until pretty
22 well the moment when I first received notice of either of these two filings, but at that
23 stage unfortunately they had started their return to Darfur by car, which I gather
24 takes about a day and-a-half. Efforts to contact them to complete the formalities
25 were not possible and it may not be possible until pretty well about now, when they

1 reach Haskanita.

2 So, your Honours, the position is that the power of attorney is here, the matter that
3 we referred to in our filing and explained as to the state of knowledge of the victims
4 is well revealed in our filings, and we would ask the Court not to amend its ruling as
5 to our rights of audience today.

6 Your Honour, I didn't rise to express reaction to your ruling - it's not
7 appropriate - but it may help the Court if I say this, that the submissions I had already
8 prepared to make, and with your leave will be making, are very compact and had
9 already indeed foreshadowed the narrow scope of matters to which we can refer
10 today and there will be nothing controversial, I suspect, now in what we say.

11 So, your Honour, we have these powers of attorney. The other is something that
12 could not be dealt with, given that there was an oversight because of the delay by
13 those submitting these filings.

14 PRESIDING JUDGE TARFUSSER: I would ask you to give the powers to the
15 registrar so that he can file it in the case file. In any case, on this matter we have
16 ruled and we don't want to go back to what we have ruled.

17 (Trial Chamber confers)

18 PRESIDING JUDGE TARFUSSER: I would ask the other legal representatives of
19 victims, Madam Cissé, for example, if she would oppose to represent the 21 victims
20 represented by Mr Akinbote -- Adaka? Mr Adaka, sorry.

21 MS CISSÉ: Your Honour, if the Chamber so decides, as it has done in the case of
22 other victims, to designate a legal representative I have no objections to that, but it
23 depends on the Court, on the Chamber, because the essential rule for counsel for
24 victims is confidence and acceptance -- trust and acceptance. I'm not sure if I have
25 fully understood your question.

1 PRESIDING JUDGE TARFUSSER: We have no translation in English on this -- on
2 what Madam Cissé stated now.

3 JUDGE STEINER: Channel 2.

4 PRESIDING JUDGE TARFUSSER: Did you hear that?

5 THE INTERPRETER: The interpreter seems to have a technical problem. There
6 seems to be a problem with the interpretation from the English booth. Can you hear
7 the English booth now? You can? Good.

8 PRESIDING JUDGE TARFUSSER: Excuse me.

9 THE INTERPRETER: The interpreter apologises, there was a problem with the
10 console.

11 PRESIDING JUDGE TARFUSSER: The statement of Madam Cissé was not
12 translated.

13 THE INTERPRETER: The interpreter apologises. There was a problem with the
14 console. I'm now using a different console. Madam Cissé said: Your Honour, if
15 the Court so decides, as it has done in the case of other victims, to designate a legal
16 representative I do not object to this procedure, but it depends on the
17 Chamber because it is true that the main rule governing the conduct of counsel and
18 victims is a rule that involves trust and acceptance. I'm not sure if I have fully
19 understood the Chamber's question, though.

20 PRESIDING JUDGE TARFUSSER: I just asked if you, Madam Cissé or Mr Kone,
21 could represent the 21 victims which are represented by Mr Adaka, who is not here?

22 MS CISSÉ: (Interpretation) In this case my answer is, yes, my colleague and myself
23 are prepared to do this. We are often in Nigeria and we are in contact with
24 Maître Akin Akinbote, so we can inform the victims in Nigeria of the way this case is
25 progressing. So, we do accept.

1 PRESIDING JUDGE TARFUSSER: Thank you. Thank you very much to both of
2 you, Madam Cissé and Mr Kone.
3 So we can go forward with the hearing, or commence the hearing.
4 The present case has been triggered by the summonses to appear issued by the
5 Chamber for Mr Banda and Mr Jerbo on 27 August 2009, pursuant to which the
6 suspects voluntarily appeared before the Chamber on 17 June of this year. At the
7 hearing, in accordance with Article 60 of the Statute and the Rule 121 of the rules, the
8 suspects were informed of the crimes which they allegedly committed and of their
9 right under the Statute.
10 Pursuant to the decision of the Chamber, the present confirmation hearing is held in
11 the absence of the two suspects, who have submitted a personally executed waiver of
12 their rights to be present today, in accordance with Rule 124(2) of the Rules of
13 Procedure and Evidence.
14 According to Article 61(7) of the Statute, on the basis of the confirmation hearing and
15 of the evidence tendered by the Prosecution, the Chamber will determine whether
16 there is sufficient evidence to establish substantial grounds to believe that the person
17 committed each of the crimes charged.
18 Only in the event the charges brought by the Prosecution against Mr Banda and
19 Mr Jerbo in the Document Containing the Charges are confirmed after this hearing
20 will a trial be initiated. And now, pursuant to Rule 122(1) of the Rules of Procedure
21 and Evidence, I ask the court officer to read the charges. Please, court officer.
22 THE COURT OFFICER: Yes, Mr President.
23 Count 1: Violence to life and attempted violence to life, Article 8(2)(c)(i) and
24 Article 25(3)(a) and Article 25(3)(f) of the Rome Statute.
25 On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada

1 Locality in North Darfur, the Sudan, in the context of and associated with an internal
2 armed conflict, Mr Banda and Mr Jerbo together with JEM Splinter Group, SLA-Unity
3 and SLA Abdul Shafie forces under their command and control, acting pursuant to a
4 common plan and orders issued by them, jointly with their forces, attacked the MGS
5 Haskanita and killed 12 AMIS peacekeeping personnel and attempted to kill 8 AMIS
6 peacekeeping personnel, with the knowledge that they were (1) personnel involved in
7 a peacekeeping mission established in accordance with the UN Charter; and (2)
8 taking no active part in hostilities and thus entitled to the protection given to civilians
9 under the international law of armed conflict, thereby committing a crime in violation
10 of Articles 8(2)(c)(i) and 25(3)(a) and 25(3)(f) of the Rome Statute.

11 Count 2: Intentionally directing attacks against personnel, installations, materials,
12 units and vehicles involved in a peacekeeping mission, Articles 8(2)(e)(iii) and 25(3)(a)
13 of the Rome Statute.

14 On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada
15 Locality in North Darfur, the Sudan, in the context of and associated with an internal
16 armed conflict Mr Banda and Mr Jerbo, together with JEM Splinter Group, SLA-Unity
17 and SLA Abdul Shafie forces under their command and control, acting pursuant to a
18 common plan and orders issued by them, jointly with their forces, intentionally
19 directed attacks against AMIS peacekeeping personnel, installations, materials, units
20 and vehicles involved in a peacekeeping mission established in accordance with the
21 Charter of the United Nations, which were entitled to the protection given to civilians
22 and civilian objects under the international law of armed conflict, with the knowledge
23 of the factual circumstances that established that protection, thereby committing a
24 crime in violation of Articles 8(2)(e)(iii) and 25(3)(a) of the Rome Statute.

25 Count 3: Pillaging, Article 8(2)(e)(v) and Article 25(3)(a) of the Rome Statute.

1 On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada
2 Locality in North Darfur, the Sudan, in the context of and associated with an internal
3 armed conflict, Mr Banda and Mr Jerbo together with JEM Splinter Group, SLA-Unity
4 and SLA Abdul Shafie forces under their command and control, acting pursuant to a
5 common plan and orders issued by them, jointly with their forces, attacked the MGS
6 Haskanita and appropriated property belonging to AMIS and its personnel including
7 vehicles, refrigerators, computers, cellular phones, military boots and uniforms, fuel,
8 ammunition and money, without the consent of the owners and for their private or
9 personal use, thereby committing a crime in violation of Articles 8(2)(e)(v) and 25(3)(a)
10 of the Rome Statute.

11 PRESIDING JUDGE TARFUSSER: Thank you very much, court officer. As
12 required by Rule 122 (3) of the Rules, I would now ask the Prosecutor and the
13 Defence whether they intend to raise objections or make observations concerning any
14 issue related to the proper conduct of the proceeding prior to the confirmation
15 hearing.

16 You have the floor, Prosecutor.

17 MR FAAL: Much obliged, Mr President. The only observation or issue we
18 intended to raise had, in fact, been raised in our filing of two days ago, and that
19 matter has been disposed. We have nothing else to raise. Thank you, your
20 Honour.

21 PRESIDING JUDGE TARFUSSER: Thank you very much, Mr Prosecutor. The
22 Defence?

23 MR KHAN: Mr President, I'm most grateful. Likewise, the application filed was in
24 a bid to ensure that today went smoothly, and it's been determined. Thank you.

25 PRESIDING JUDGE TARFUSSER: Okay. Thank you very much. So now we can

1 proceed to the hearings on the merit. The Prosecutor will be the first to take the
2 floor in order to present the case. He will be allocated not more than one hour.
3 After the Prosecutor, the legal representatives of victims will make their submissions
4 according to the parameters the Chamber established in its oral decision today.
5 Each group of victims, namely, each team of legal representatives, will have no more
6 than 10 minutes for its oral submission. And I ask Mr Dixon and Mr Nice to hand
7 over to the court officer the powers of attorney I would say immediately. Thank you.
8 At the end, the floor will be given to the Defence which, if it intends to make
9 submissions, will have not more than one hour.
10 Before giving the floor to the Prosecutor, I would like to remind the parties and
11 participants to speak slowly so as to allow the interpreters and the court reporters to
12 do their work in the best possible manner.
13 So while giving the floor to the Prosecutor, I ask him if he intends to tender into
14 evidence all the statements, documents and materials that are in the Prosecutor's list
15 of evidence filed on 22 October 2010? Please, Mr Prosecutor, you have the floor.
16 MR FAAL: Thank you, Mr President. Your Honours, in response to your question,
17 the Prosecution requests the Court to put in the record of the case all the materials
18 that the Prosecution has so far submitted.
19 (Pause in proceedings)
20 MR FAAL: Thank you, Mr President.
21 Honourable Judges, for the purposes of today's confirmation hearing, the Prosecution
22 has also submitted written submissions and we request that those submissions also
23 form part of the case record which your Honours will be considering in arriving at
24 your decision whether or not to confirm this case.
25 Your Honours would be scrutinising the Prosecution evidence with a view to

1 determining whether or not the case before you is a sufficiently credible one. The
2 Prosecution, however, recalls the decision of the Appeals Chamber in the Katanga
3 case where they recognised that an in-depth assessment of the evidence is not
4 expected at the confirmation stage. A full assessment of the evidence is neither
5 required nor possible at this stage. Such an assessment can only be made after the
6 parties have presented all their evidence and the credibility, reliability and
7 consistency of the evidence has been fully explored through questioning of the
8 witnesses.

9 In that regard, while we expect some scrutiny of the evidence, we also humbly
10 caution against over-rigorous testing of the same.

11 Today's confirmation hearing, your Honours, is, however, rather unique. It is
12 unique in the sense that the Defence and the Prosecution have both agreed that the
13 evidence submitted by the Prosecution has reached the required threshold for the
14 charges to be confirmed. And, to that end, the parties have annexed the entire
15 documents containing the charges to their joint filing as representing their agreement
16 on facts pursuant to Rule 69 of the Rules of Procedure and Evidence.

17 It is in that spirit that the Prosecution is making this presentation in order to attempt
18 to further convince the Chamber that the evidence presented is sufficient to establish
19 substantial grounds to believe that the suspects charged committed the crimes with
20 which they are charged in order to warrant committing them for trial.

21 Mr President, Honourable Judges, the evidence the Prosecution will be presenting in
22 today's hearing is not new to you. You have had an opportunity in the Abu Garda
23 case to consider most of it. We have, however, added to that the statements of three
24 new witnesses. We hope that these new statements will help tip the scale in favour
25 of confirmation.

1 We acknowledge that Mr Abu Garda is not charged in the case before you.

2 However, considering that the evidence is the same in the present case as it was in his,

3 there will be numerous passing references to Mr Abu Garda and his involvement in

4 the case before you. We simply cannot change the evidence. We hope that this is

5 understandable.

6 In this presentation, we will focus on presenting aspects of the Prosecution's case

7 which we believe will convince your Honours that there is sufficient evidence to

8 warrant committing the suspects to trial. In so doing, we will address your Honours

9 on three important issues:

10 The first is: What is this case about? The second is: Who are the suspects and the

11 positions they occupied in their respective groups? And the third is: How are the

12 suspects responsible for the crimes with which they are charged?

13 The presentation I am going to make will be accompanied by a

14 PowerPoint presentation which shows the broad heads of the subjects I am going to

15 discuss. So I will encourage all to switch I believe to PC-1 in order to be able to view

16 the PowerPoint if they so desire, but all the same all those issues are discussed in my

17 submissions.

18 I would also not be making any direct references to ERN numbers by reason of the

19 fact that all the issues and evidence I'm going to refer to have also been cited in the

20 written presentations. I hope this, too, would be acceptable. However, should the

21 Chamber require that I cite the ERN numbers as well, we can provide a copy of the

22 speaking notes which contain the ERN numbers. Perhaps I should ask for guidance

23 from the Chamber on that matter.

24 PRESIDING JUDGE TARFUSSER: Yes. The ERN numbers should be cited during

25 the hearing, yes.

1 MR FAAL: Your Honour, I was really considering the issue of time, but I can
2 prepare -- I can provide at the end of the hearing a copy of the speaking notes which
3 has the ERN numbers. I hope that is acceptable.

4 PRESIDING JUDGE TARFUSSER: Yes. I should say that is acceptable. Okay.
5 Perfect.

6 MR FAAL: Much obliged, Mr President. I will now turn onto the first issue in my
7 presentation which is: What is this case about?

8 Your Honours, on 1 July 2007 Abdallah Banda, who was the then
9 Commander-in-Chief of JEM was dismissed from his position by the chairman of the
10 movement Dr Khalil Ibrahim. A group that called itself the Interim Military Council
11 of JEM in turn purported to dismiss Khalil from his leadership of the movement and
12 handed over leadership to Banda.

13 Banda left the JEM base in Wadi Hawar and moved to Wadi Sayra together with JEM
14 troops who were loyal to him. He also left with JEM vehicles and equipment.

15 Some time in early September, Banda met up with Abu Garda in Wadi Andour and
16 the two of them started contacting JEM troops that were based in Haskanita in order
17 to convince them to defect from Dr Khalil Ibrahim's group and to join their group.

18 Khalil Ibrahim received information about this effort and he moved to Haskanita in
19 order to prevent his troops from joining Abu Garda and Banda.

20 In the meantime, some JEM troops in Haskanita, under the command of Mohammed
21 Hassan, left Haskanita to join Banda and Abu Garda. Khalil Ibrahim was able to
22 convince the majority of the troops to go back to his movement. Some of the JEM
23 commanders, including Mohammed Hassan, including -- excuse me, I beg your
24 pardon, your Honours, including Hassan Komoki and Abdallah Hagggar and their
25 troops joined Banda and Abu Garda.

1 As the majority of the troops returned to Dr Khalil Ibrahim's JEM, Banda and Abu
2 Garda led the JEM troops that were with them as a splinter group from JEM, even
3 though they claimed that their group was the real JEM.

4 On or about 25 September 2007 at Dar es-Salaam, Abu Garda and Banda met up with
5 Saleh Jerbo together with troops that belonged to the Abdul Shafie faction whom he
6 had just rescued from a GoS attack in Jebel Marra area.

7 On the same day, the two groups led by Banda and Jerbo moved to the Haskanita
8 area. Abu Garda remained in Dar es-Salaam for a few days, but he joined up with
9 Banda in Haskanita on 28 September 2007. Banda and Abu Garda remained in
10 Haskanita while the SLA-Unity and SLA Abdul Shafie forces and some JEM Splinter
11 Group forces moved to Dalil Babiker.

12 On 29 September, in the morning, these forces in Dalil Babiker were attacked by GoS
13 forces causing them significant loss of life and equipment.

14 Within hours after this attack, the commanders of these rebel forces, including Banda
15 and Jerbo, held a meeting in Dalil Babiker in which they agreed amongst themselves
16 to attack the AMIS forces stationed in Haskanita. Hours later, these two
17 commanders, Banda and Jerbo, led their respective forces and carried out a violent
18 attack on the AMIS base in Haskanita killing 12 AMIS peacekeepers and injuring
19 eight others. They destroyed the camp, looted 17 AMIS vehicles, fuel, money and
20 other personal items.

21 Your Honours, it is for their roles in this attack that the Prosecution charged them
22 with the charges that have just been read out by the legal officer. I would, therefore,
23 not repeat these charges, but move on to identify the roles and positions held by these
24 rebel leaders in their respective groups and I'll start with Abdallah Banda.

25 When Banda was dismissed as Commander-in-Chief of the main JEM movement on

1 1 July 2007, he moved with JEM troops who were loyal to him and he left with JEM
2 vehicles and joined Abu Garda, who in the meantime also had some JEM troops with
3 him.

4 The other JEM commanders and troops with them also defected from Dr Khalil's JEM
5 movement and joined them. Those defectors opted to join the splinter group under
6 the command of Banda and Abu Garda. Therefore, from the time of his dismissal,
7 Banda retained his command and military authority over these unit commanders and
8 troops that had joined his group and he retained the position of Commander-in-Chief
9 in the same way that he did over the JEM forces between 2004 until he was dismissed
10 by Dr Khalil.

11 Therefore, for all intents and purposes, the JEM Splinter Group took shape from the
12 moment Banda was dismissed and he formed his new group. Senior commanders
13 from mainstream JEM, like Witness 439, shares this same view, and he states that the
14 JEM Splinter Group came into existence as a separate rebel group from the moment of
15 Banda's dismissal. It is this splinter group that eventually became known as JEM-CL,
16 when they produced a founding declaration on 4 October 2007.

17 I'll now move on to Saleh Jerbo. Saleh Jerbo belongs to the SLA-Unity, which was
18 established by several commanders who broke away from the original SLA
19 movement. These commanders, or the commanders of these breakaway factions,
20 held a meeting in Um Rai where they formed a Unity Faction called SLA-Unity under
21 the command of (Expunged)
22 (Expunged), Abubakr Kadu as its Commander-in-Chief and Saleh Jerbo was
23 appointed its operations room commander.

24 Between May 2007 and 30 September 2007, Jerbo was based in the Haskanita area.
25 He was the highest ranking military commander of the SLA-Unity in the area and

1 exercised command and control over the SLA-Unity forces that were there.
2 Commanders under him included Mohamed Shatta, Mohammed Osman and Ahmed
3 Dignu Sonki.

4 From 17 September 2007 and specifically on 29 September 2007, that is the day of the
5 attack, Jerbo exercised effective command and control over the
6 SLA-Unity -- SLA-Abdul Shafie forces, I beg your pardon, that he had rescued after
7 the GoS attack on them in Jebel Marra area. And, your Honours, witnesses 307, 312,
8 314 and 433 all attest to the fact that the SLA-Abdul Shafie forces were under Saleh
9 Jerbo.

10 I would now talk about why the Prosecution is attributing responsibility to Banda
11 and Jerbo for the crimes with which they are charged.

12 Your Honours, the attack on the MGS Haskanita was not a mistake. It was a
13 calculated and deliberate attack on innocent peacekeepers, carried out pursuant to a
14 common plan between Banda and Jerbo and other commanders within their two
15 respective groups; that is, the JEM Splinter Group and SLA-Unity.

16 The Prosecution will provide evidence to show that these commanders, Banda and
17 Jerbo, are: Individually criminally responsible for these crimes charged for their
18 roles in planning the attack; ordering their subordinates to carry out the attack; and
19 for personally leading and physically participating in the attack itself. The
20 Prosecution will also highlight other factors which show that the suspects are
21 responsible for these crimes.

22 I would now address each of these points, starting with the planning of the attack.

23 Your Honours, the Prosecution witnesses indicate in their statements that the attack
24 on the MGS was planned at a meeting in Dalil Babiker. Seven Prosecution witnesses,
25 namely witnesses 304, 305, 306, 307, 441 and 442 and 443, all confirm that the

1 commanders meeting took place.

2 Indeed this Chamber in the Abu Garda case, based on identical facts and evidence

3 presented by the Prosecution, made a factual finding that there was sufficient

4 consistency among the witnesses to establish that "rebel commanders met near Dalil

5 Babiker in the immediate aftermath of the attack allegedly carried out by the GoS on

6 armed rebel groups in Dalil Babiker on 29 September 2007."

7 Your Honours, new Prosecution Witness 441 also confirms that this meeting took

8 place and he provided even more detail.

9 The question now remains that -- or the questions that remain to be answered are as

10 follows: Which commanders participated in that meeting and what was agreed at

11 this meeting?

12 With regards to the fore question, we refer your Honours to the statement of Witness

13 441 who states, and I quote, "The commanders who were present for the meeting

14 were the commanders from Bahr's movement, including Hasan Komoki, Banda,

15 Saboun and Adam A-Noor Radjab. The SLA-Unity commanders were Ah Karabino.

16 Saleh Mohammad Adam Jerbo, Dignu Sonki. Karabino and Jerbo had their own

17 unit in SLA-Unity."

18 Witness 307 also stated, and I quote, "Abdallah Banda and Saleh Jerbo called the

19 commanders for a meeting. Garda joined them for the meeting under a tree. There

20 were about 20 commanders at the meeting."

21 Witness 306 also supported this view and he stated, and I quote, "There was a

22 meeting between one of the SLA group commanders and Banda and Secretary Abu

23 Garda which ended about 4.30."

24 Your Honours, this shows quite clearly that Banda and Jerbo participated in that

25 meeting.

1 With regards to the second question, what was agreed at the meeting, the Prosecution
2 offers direct evidence from witnesses, as well as circumstantial evidence, from which
3 your Honours may infer that the agreement that was made at the meeting was to
4 attack the MGS Haskanita.

5 With regards to the direct evidence I go back to Witness 441, who states as follows,
6 and I quote, "Bahr alone spoke for about one hour and said that he decided to attack
7 the AU in Haskanita. He mentioned the AU by name in Arabic. I heard this. At
8 the end of the meeting, all the commanders clapped their hands, went to their
9 vehicles and moved."

10 Witness 314 had this to say, "He [Saleh Jerbo] told one of us openly and
11 straightforward that they were going to attack Haskanita and that they were going to
12 attack the Africans in Haskanita together with JEM."

13 Witness 442, who was present in the area at the SLA-Unity base but did not go to the
14 meeting, had this to say about the decision. He said, "I saw Hamad driving nearby
15 and I called him. He stopped and I asked him, 'Did the people decide how we can
16 attack this enemy?' And he said that these people are going to attack the African
17 Union base."

18 He was asked further and he said, and I quote, "I know how it lasted long, because
19 they did not come back to us and when the cars started driving no one of them came
20 to us except Hamad and he was passing by and I called him and I ask him what
21 decision did he take and he said that they are going to attack the African Union. He
22 was ordered to get cars for the group with Saleh Jerbo, which is a group of Ahmad
23 'Abd-Al-Shafie."

24 Witness 433 also stated, and I quote, "Saleh Jerbo talked to one of our leaders and
25 informed him that they were going to attack Haskanita."

1 The witness further states that, "When I talk about the implementation of the plan, I
2 mean the plan that Saleh Jerbo came and informed our group that they were going to
3 attack Haskanita, the African Union in Haskanita."
4 Your Honours, this is clear, direct evidence that the commanders Banda and Jerbo
5 agreed amongst themselves to attack the MGS Haskanita.
6 But, your Honours, there is also indirect evidence. Immediately after the meeting,
7 the commanders ordered their subordinates to go on a mission. Which mission was
8 this? We allege that it was to attack the MGS, and these following witnesses will
9 support that view.
10 Witness 305 states, and I quote, "Abdallah Banda is the commander, he is the
11 one ..." -- Witness 304, I beg your pardon. Witness 304, please, "Abdallah Banda is
12 the commander, he is the one that came and told us. Abdallah Banda told us 'We
13 are going now on a mission to Haskanita.' He spoke directly to the soldiers."
14 And 305 on the same subject stated as follows, and I quote, "After the meeting they
15 came and ordered us to go and we went. Abu Garda together with Banda and other
16 commanders met with SLA-Unity commanders, including Jerbo."
17 And Witness 307 also pitched on the issue and stated, and I quote, "When they
18 finished they asked us to enter our vehicles." He went on to say, "I asked Saleh Jerbo
19 where we were going and what those left behind would do? Saleh Jerbo told me
20 that we were going to set an ambush for the GoS and those left behind would find
21 another vehicle nearby. After the meeting they ordered us to get on our vehicles
22 and move."
23 Your Honours, it's quite interesting to note that some of the troops were told that they
24 were going to set an ambush for the GoS, but some witnesses explained what
25 happened and I will touch on that momentarily.

1 Witness 312 stated, "I know nothing about ..." -- "I know nothing about it apart from
2 its outcome." In this context he was referring to the meeting. He said, "I know
3 nothing about it apart from its outcome ,when I was asked to go on a mission." He
4 stated further, "I was told that the reason for the attack was that the force ..." -- "... this
5 force was collaborating with the government. It was said that those people ,when
6 they come ,the government comes behind them. Nothing else was said. It was not
7 explained that this was the reason to attack them, but it is obvious." He stated
8 further, "Two days after the attack I spoke to someone from the SLA-Unity group
9 who was with us from the early beginning.
10 I asked him why they attacked the African Union compound, and he told me that he
11 wasn't part of the meeting where it was decided to attack the African Union."
12 The Prosecution submits that the evidence of these witnesses is sufficient to conclude
13 that the plan by Banda and Jerbo, among other commanders, was to attack the MGS
14 in Haskanita. Indeed, Witness 433 can't be clearer when he stated as follows, and I
15 quote, "Saleh Jerbo talked to one of our leaders and informed him that they were
16 going to attack Haskanita. When I talked about the implementation of the plan, I
17 mean the plan that Saleh Jerbo came and informed our group that they were going to
18 attack Haskanita, the African Union in Haskanita."
19 Your Honours, the evidence also reveals that Banda and Jerbo not only planned the
20 attack, they also ordered troops under their command to carry out the attack.
21 Witness 441 is very clear on this point and he stated as follows, and I quote: "At the
22 time of the attack on the AU compound in Haskanita, all the soldiers were
23 following the instructions of Banda, Bahr, Jerbo and Komoki."
24 The Prosecution will now show other evidence of ordering in relation to each of the
25 suspects. And in relation to Banda, the Prosecution will rely on the evidence of

1 witnesses 304, 305, 306 and 441.

2 And Witness 304 states as follows: "Abdallah Banda is the commander. He is the
3 one that came and told us." He continued by saying, "Abdallah Banda told us 'We
4 are going now on a mission to Haskanita'. He spoke directly to the soldiers. It was
5 during Ramadan, and all the soldiers were sitting under the trees and he came and
6 gave the orders that we should board."

7 "As regards whether these orders came from JEM people or SLA people, I would say
8 if they did not have consensus they would not have sat together in one meeting."

9 This witness did not make up this conclusion from thin air. It is an opinion based on
10 his actual knowledge as a person who was present and saw and heard what
11 happened.

12 Witness 305 stated, "After the meeting, they came and ordered us to go and we went.
13 Abu Garda together with Banda and other commanders met with SLA-Unity
14 commanders, including Jerbo."

15 Witness 306 also supported this view when he stated, "There was a meeting between
16 one of the SLA group commanders and Banda and Secretary Abu Garda which ended
17 about 1630. We did not know what they discussed, but immediately afterwards,
18 Banda came and ordered us to move and to go on mission. The commander from
19 the SLA group went and informed his people."

20 The witness on to say, "We prepared ourselves for the mission and then we left.

21 Nothing else was explained to us and we went and attacked the African Union."

22 The witness further stated, "In the late afternoon we were ordered by Banda to go and
23 attack the government troops. We went, using 26 to 28 vehicles. When we
24 attacked, we discovered that it was the African Union base."

25 And in relation to Saleh Jerbo, the Prosecution will rely on the evidence of witnesses

1 312, 307, 314, 433 and 441.

2 Witness 314 stated as follows, and I quote, "He [Saleh Jerbo] told one of us openly and
3 straightforward that they were going to Haskanita and they were going to attack the
4 Africans in Haskanita together with JEM."

5 And Witness 307 states, and I quote, "When they finished they asked us to enter our
6 vehicles. I asked Saleh Jerbo where we were going, and what those left behind
7 would do. Saleh told me that we were going to set an ambush for the
8 Government of Sudan and those left behind would find another vehicle nearby.

9 After the meeting, they ordered us to get on our vehicles and move."

10 Witness 312 states: "I know nothing about it apart from its outcome." Again, this
11 witness was talking about the meeting, but what he knows about the meeting was the
12 outcome, that is, "when I was asked to go on mission."

13 And the witness further stated "I was asked whether in this case there was an order to
14 go on mission, and how it was communicated to everyone. In this case there was an
15 order to go on mission. The commanders came and blew their whistles. All the
16 soldiers stood up and received orders for the mission. In each vehicle there is a
17 commander, and it was these commanders who blew a whistle. This was Abdallah
18 Banda's vehicle, Saleh Jerbo's vehicle, Bahr's vehicle."

19 Witness 433, also weighed in on the issue and stated, I quote, "Saleh Jerbo talked to
20 one of our leaders and informed him that they were going to attack Haskanita.

21 When I talk about the implementation of the plan, I mean the plan that Saleh Jerbo
22 came and informed our group that they were going to attack Haskanita, the African
23 Union in Haskanita."

24 Your Honours, the evidence is very clear, and we believe that this is sufficient to
25 establish that Banda and Jerbo ordered their respective troops to carry out the attack

1 on the MGS.

2 But not only did Banda and Jerbo plan and order their troops to carry out the attack,
3 Banda and Jerbo personally led and physically participated in the attack itself. And
4 there are five witnesses who talk about this issue, and for that we rely on witnesses
5 304, 305, 307, 312 and 441.

6 Witness 304, for instance, stated, "Seven vehicles were in the front. Abdallah Banda
7 was in the convoy in the front. And when he is in the front then you can cannot
8 delay behind, you have to follow after him fast." He continued by saying, "We
9 arrived at the base and they immediately started firing at the base. The people at the
10 base when they were fired at they fired back. Because the area inside there is theirs,"
11 and "it is their base."

12 The witness went on to say, "I saw Abdallah Banda in the front car. The car of
13 Abdallah Banda had a Gronof automatic mounted on it. It has a kind of belt and can
14 take 200 bullets."

15 Witness 305 stated, and I quote: "When we approached the compound, Abu Garda,
16 Abdallah Banda and Jerbo, who were all in the lead vehicles, opened fire and started
17 shooting into the compound. They were in different vehicles. All the vehicles
18 entered" into the compound, into "the AU compound, including the one I was in."
19 So, your Honours, this is a witness who participated in the attack. He was in the
20 convoy. He is telling us that all the vehicles in the lead of that convoy entered the
21 compound. But your Honours, there is something I missed in this witness's
22 statement. He believed that Abu Garda participated in the attack.

23 The Prosecution submits that there is a very good reason for the witness to believe so,
24 and the explanation is this: Because Abu Garda's vehicle was in the front, the
25 witness thought that Abu Garda also participated in the attack, but what the witness

1 didn't know is that Abu Garda changed his vehicle with Abdallah Banda. Witness
2 441 confirms that fact.

3 And Witness 305 also confirms the fact -- 306, excuse me. Witness 306 also confirms
4 the fact that Abu Garda's vehicle was there, but he was in the vehicle; only that Abu
5 Garda was not there.

6 Your Honours, this explains the mistaken belief by Witness 305 that Abu Garda
7 participated in the attack, only that he saw his vehicle but did not know that Abu
8 Garda was not in the vehicle.

9 Your Honours, Witness 441 further explained that Abu Garda moved to a location.
10 As they were approaching the MGS, he moved via of the convoy and moved to a
11 location for his own safety and protection. That also further explains the fact that
12 305 was mistaken. But we do believe that this mistake in fact bolsters the credibility
13 of this particular witness. He talked about what he saw and what he knew.

14 Witness 441 stated that during the fighting at the Haskanita AU compound, Bahr kept
15 his phone, and Banda who spoke to Bahr told Bahr that they failed the first time and
16 that they had to withdraw. And Bahr told Banda that he should return and
17 "Kameluhoom," which translates from Arabic to English as "finish them," the witness
18 said Bahr stated, referring to the African Union. And the witness went on to say,
19 "I believe that the Commander-in-Chief during the attack on the African Union in
20 Haskanita was Banda and his second in command in the joint group was Saleh Jerbo."
21 The witness went on to explain this arrangement and he stated, and I quote, "In a
22 military context Bahr has nothing directly to do with Jerbo. Bahr just gives an order
23 to Banda and Banda delivers it to Jerbo. If Jerbo wants to speak to Bahr, he would
24 come to Bahr directly. This coordination happened during the attack on the AU in
25 Haskanita. In a normal situation, Banda and Jerbo give orders to their respective

1 soldiers. If there is a joint operation, they elect an overall commander and he orders
2 all the forces. I think it to be so because Banda seemed to be leading the attack on
3 the AU compound in Haskanita."

4 Witness 307 also stated that while they were at the forest where the two rebel groups
5 were gathered, getting ready to launch the attack, the commanders again ordered the
6 attack, and he put it in the following terms: "They," referring to the commanders
7 who were there at the time, Banda, Bahr and Jerbo, "shouted and when they shouted
8 like this, they attacked the African Union compound."

9 He went on to say, "Saleh Jerbo opened fire on the AU forces. The AU responded
10 but they were shooting in the air."

11 He went on to say that "This armoured tank managed to stop the attack of the
12 vehicles of Torabora." Your Honours, "Torabora" means "rebels." "And they
13 withdrew quickly. Saleh Jerbo and Hasan Komoki put pressure on the gate." He
14 went on to say that Abdallah Banda and Saleh Jerbo and their troops entered inside
15 the compound and came out with loot."

16 The witness proceeded by saying "I saw Abdallah Banda and Saleh Jerbo enter the
17 compound and the buildings inside the compound." He went on to say "I saw Saleh
18 Jerbo load three barrels of fuel in the vehicle that was looted from the African Union.
19 When he was leaving, I was outside the compound and I saw the three barrels of fuel
20 in the car."

21 Witness 312 stated as follows, and I quote, "This operation was led by Saleh Jerbo as
22 he was the Chief of Staff, what they called Etat majeur of the movement, and
23 Abdallah Banda who was the Commander-in-Chief of the army. The witness
24 further stated about Banda's role, and he said, "For sure Banda was there on the
25 attack on the African Union compound in Haskanita because I was with him and I

1 saw him."

2 In relation to Jerbo, Witness 312 states additionally, and I quote, "We received
3 instructions to stay where we were and they ordered us not to let any vehicle or
4 person go in or out of the area. These communications came from Saleh Jerbo to
5 Abu Digin soon after the shooting started."

6 The witness went on to say, "I learned that Jerbo obtained a vehicle from the AU
7 camp by threatening other soldiers with his gun to leave it to him. I also learnt that
8 they managed to open the ammunition store in the AU compound and also the food
9 stuff store," but this is in fact supported by Witness 307 who said -- who was in the
10 camp during the attack and stated as follows, and I quote, "Officers threatened
11 soldiers. If you were a soldier and you tried to loot a vehicle and there was a
12 commander, the commander would threaten the soldier and loot the vehicle himself."

13 We submit, your Honours, that this evidence is strong enough, potent enough to lead
14 your Honours to conclude that Banda and Jerbo led and personally participated in
15 the attack.

16 But, aside from the direct evidence I just discussed, there are a significant number of
17 factual circumstances from which cumulatively an inference may properly be drawn
18 that the suspects committed the crimes charged.

19 I will take the first factor, which is that the JEM Splinter Group commanded by Banda
20 and the SLA-Unity and SLA Abdul Shafie forces under the command of Jerbo, had
21 the means to commit the crimes charged.

22 First, these two groups constituted about 1,000 troops which is around the same or a
23 similar number alleged by the victims to have carried out the attack.

24 Two, these two groups also possessed the weapons and vehicles types described by
25 the victims to have been used by the attackers.

1 And three, the suspects and members of these forces bore the same or similar
2 characteristics as those described by the victims; in particular, the way they were
3 dressed and the types of weapons they carried.

4 Four, some of the victims were, in fact, able to identify, for instance, someone like
5 Mohammed Osman, who was a member of the SLA-Unity under Saleh Jerbo.

6 And fifth, both the JEM Splinter Group and the SLA-Unity had the type of military
7 expertise to carry out the type of organised attack on the MGS Haskanita, as the one
8 that was carried out on that day.

9 The second factor we would like the Chamber to consider is that the JEM Splinter
10 Group and the SLA-Unity and SLA Abdul Shafie forces, they had a motive to launch
11 the attack on the MGS Haskanita.

12 First, to obtain vehicles and materials needed for the newly created rebel group, that
13 is the JEM Splinter Group.

14 Second, to obtain vehicles and materials for the Abdul Shafie group that were under
15 Saleh Jerbo. And on this, your Honour, we draw your attention to the statement of
16 Witness 442 who said that after the meeting he was told that the day the commanders
17 had decided to go and attack the African Union so that they can get vehicles for the
18 Abdul Shafie forces.

19 The third motive they had was to replenish resources that had been lost during their
20 earlier battle that morning in Dalil Babiker with the Government of Sudan.

21 And the fourth was to obtain much needed food and fuel, especially in the harsh
22 terrain where they were under GoS assault.

23 And the fifth motive they had, your Honours, was to punish AMIS for its inability or
24 failure to prevent the GoS attack against the rebel groups.

25 Indeed, your Honours, AMIS was threatened before that "if the GoS attacks us again,

1 it will cost you."

2 The third factor we would wish to raise, your Honour, is that the JEM Splinter Group
3 commanded by Banda and the SLA-Unity and Abdul Shafie forces commanded by
4 Jerbo were the only, the only forces in the vicinity of Haskanita which were able to
5 carry out the attack on the MGS.

6 Indeed, Witness 439, Witness 442, Witness 312, Witness 307 and Witness 305 all
7 confirm that the JEM forces under the command of Khalil Ibrahim that were in the
8 Haskanita area prior to the attack left the vicinity and went to the north.

9 Witnesses 439 and 312 both confirm that at around the time of the attack on the MGS
10 Haskanita Khalil Ibrahim's JEM forces including Abdul Aziz Nur Osher and Fadoul
11 were fighting the Government of Sudan forces in Kuma in the North of Darfur.

12 This leaves only the SLA-Unity, the SLA Abdul Shafie forces and the JEM Splinter
13 Group forces under the command of Jerbo and Banda respectively to be the forces in
14 Haskanita. As such, there was no other armed group in the area which was capable
15 of carrying out such a ferocious attack.

16 Witness 439 and Witness 436 make this point very clearly, and I quote Witness 439
17 when he said, "If there is a force which participated in the attacks, it would be the
18 forces of Saleh Jerbo which was based in the area at the time." He went on to say,
19 "The force of Saleh Jerbo was the only force in the western part next to the forces of
20 Bahr." When the witness said "Bahr," he also meant the forces of Banda.

21 And Witness 466 also states, and I quote, "There was no other movements in the area
22 except Banda/Bahr and SLA-Unity."

23 Your Honours, I'll now raise the fourth factor which is Banda and Jerbo's command
24 authority over their troops. Your Honours, Banda and Jerbo were the undisputed
25 operational/military leaders of their respective rebel groups, and it is clear that these

1 groups were organised and disciplined such that the groups could not and would not
2 have carried out the attack without the authorisation or knowledge of their leaders
3 Banda and Jerbo.

4 Your Honours, the fifth factor we would like to raise is that the presence of Banda
5 and Jerbo at strategic locations and at critical times.

6 The fact that both Banda and Jerbo were present at these strategic locations at critical
7 time periods is additional indicia that they carried out the attack on the MGS.

8 First, their troops suffered a GoS attack in Dalil Babiker. During that attack, Banda
9 led the rebel groups. At this time, Banda was in the Haskanita area, but both Banda
10 and Jerbo were present and participated in the planning meeting. After this meeting,
11 Banda and Jerbo as military commanders led their troops to Haskanita where they
12 positioned their troops in preparation for the attack.

13 After the attack, Banda and Jerbo converged at a location where Abu Garda was
14 awaiting their return. Both Banda and Jerbo together with these forces then moved
15 onto Izban, and from there both Banda and Jerbo together with their respective forces
16 moved to Jebel Adola where most of the rebels who participated in the attack
17 congregated and where the looted property was shared.

18 Your Honours, we acknowledge that mere presence before and after the crime, even
19 mere presence and possession of looted property, might not be enough standing
20 alone to prove guilt, but presence along with all the other indicia is corroborative
21 evidence of guilt.

22 But equally important, your Honour, is the benefits which have accrued to the
23 suspects after the attack. The witnesses, both insiders and victims, are unanimous in
24 that the attackers looted the MGS.

25 Your Honours, significant benefits accrued to Banda and Jerbo and to the rebel

1 groups that they commanded soon after the attack on the MGS, and these include
2 much needed weapons, ammunition, food, fuel and vehicles and also public
3 recognition of the JEM Splinter Group culminating in an invitation to participate in
4 the negotiations in Juba but also they achieved the objective of having punished the
5 AMIS forces in the MGS Haskanita as the SLA-Unity forces had threatened to do.
6 It is no coincidence that all these benefits accrued to the suspects all at the same time.
7 Rather, it was the desired result of their common plan to attack the MGS Haskanita.
8 Your Honours, the suspects also made statements that showed, or show, that they
9 indeed participated in the attack and these statements are quite important and need
10 to be considered and your Honours I would just refer to a few: I have made
11 extensive references to statements attributed to these commanders which explicitly
12 state that their two groups were going to attack the MGS Haskanita.
13 Additionally, we draw your attention to the statement that was made by Banda in
14 Jebel Adola when some of his rebel forces attempted to escape with one of the
15 vehicles looted from the MGS. Banda stated, "You cannot take away a vehicle which
16 my people had given their lives for." These statements clearly indicate that Banda
17 and Jerbo participated in the attack itself.
18 Your Honours, there are numerous accounts of witnesses about the role of Banda and
19 Jerbo in the distribution of the looted property and for that we refer your Honours to
20 Witnesses 307, 305, 446 and Witness 306 and also 312. We say that these two
21 suspects would not have had a role in the distribution of the fruits of the attack if they
22 had nothing to do with the attack. The fact that they had the power, the authority to
23 make a decision as to who got what is because they led and participated in the attack.
24 Your Honours, the Prosecution's evidence is clear and shows that Banda and Jerbo
25 planned the attack on the MGS, they ordered their troops to carry out the attack, they

1 also personally led and physically participated in the attack itself. As such, there is
2 no other conclusion other than to hold them responsible for the crimes charged and to
3 commit them to trial.

4 In addition to the direct evidence of their direct involvement in the attack, the factors
5 identified clearly point to their involvement in particular the individual utterances
6 and also the untold benefits that accrued to them as a result of carrying out the attack.
7 For all these reasons, and in view also of the fact that the Defence have conceded that
8 the threshold of proof has been met, we humbly ask your Honours to confirm this
9 case and to commit Banda and Jerbo to trial.

10 I thank you all, your Honours, for your attention.

11 PRESIDING JUDGE TARFUSSER: Thank you very much, Mr Faal. Now we
12 suspend the hearing until 5 o'clock - say 40 minutes - in order to give a rest to the
13 interpreters and the court recorders, so as to give to Madam Cissé some time to go
14 through the applications of the victims represented by Mr Adaka and now
15 represented by Madam Cissé.

16 Therefore, the Chamber has already requested the Registrar to provide Madam Cissé
17 with such applications. Madam Cissé will also be given the possibility to be the last
18 representative of victims to take the floor.

19 The hearing is, therefore, suspended until 5 o'clock. Thank you.

20 THE COURT USHER: All rise.

21 (Recess taken at 4.17 p.m.)

22 (Upon resuming in open session at 5.03 p.m.)

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

24 PRESIDING JUDGE TARFUSSER: Now, we resume this confirmation hearing and I give
25 the floor to the legal representatives of victims. Please, you have the floor.

1 Mr Akinbote, please.

2 MR AKINBOTE: May it please the Honourable Tribunal, on behalf of my client I would
3 like to make the following submissions or observations.

4 The charge, as laid in the document containing the charges and as presented before this
5 Chamber by the Prosecution, are very, very clear. The Defence, in the joint submissions
6 of Prosecution and Defence, have not disputed the facts and they appear to be satisfied
7 with the charge -- the charges. The facts in support of the charges have also been
8 presented before this Chamber.

9 On our own part, and in the interests of our clients, there is not too much to add, but to
10 urge this Chamber to confirm the charges so that the proceedings can proceed to trial and
11 an expeditious hearing and determination of this case is put on the front burner, because
12 our clients are anxious that justice be done in this matter. And so I invite the Chamber to
13 confirm the charges as brought and laid before this Chamber. That will be all.

14 PRESIDING JUDGE TARFUSSER: Thank you very much, Mr Akinbote. Mr Kone, you
15 have the floor.

16 MR KONE: (Microphone not activated).

17 THE INTERPRETER: Microphone for the legal representative, please.

18 MR KONE: (Interpretation) Following the observations made by my colleague, Maître
19 Akinbote, and I share his point of view entirely, I will be very brief.

20 I would, first of all, like to remind you of the interest we have in this Court and the
21 hope that the victims have in regard to this Court. This hearing is a decisive stage in
22 their quest for justice.

23 Your Honour, your Honours, in dismissing the request made by the Prosecution and
24 Defence that wanted to put limits to the representations made by the legal representatives
25 and wanted to limit their observations to written submissions in fact, in dismissing this

1 request - this application - the Court has respected the provisions of Rule 68 (3), or
2 Article 68 (3), of the Statute and has thus established the importance that our presence has
3 for this Court at this hearing. This represents new hope for our client.
4 Your Honour, Mr President, your Honours, the Prosecution has sufficiently gone into the
5 facts - the charges against the suspects - and they have provided sufficient evidence in
6 support of their claims.
7 At this stage of the proceedings, Abdallah Banda - Mr Abdallah Banda - and Mr Saleh
8 Jerbo have admitted the charges against them, or rather they have admitted the facts
9 levelled against them, and therefore we would only like to request that the Court send
10 them to trial for judgment. Thank you.
11 PRESIDING JUDGE TARFUSSER: Thank you, Mr Kone. As we said before, Madam
12 Cissé will be the last one to give her some more time. I will give you the floor, Mr Nice.
13 Thank you.
14 MR NICE: Well, I'm afraid it won't be very much more time because my submissions, or
15 our submissions, will be very brief particularly in light of the ruling delivered this
16 afternoon.
17 First, I must record the appreciation of victims 1646 and 1647 for the orders made by the
18 Court permitting them to be represented.
19 As the Court will know, they were both present on the day as civilians, both subject to the
20 consequences of attack and they are both still resident in Darfur. The comments made
21 on their behalf, the document of 12 November, contained at paragraph 7 the heart of their
22 concerns; that is that they want your Honours to be informed of their concerns for the
23 truth to be known and for appropriate action to be taken. All other matters referred to in
24 paragraph 7 were really by way of background and so that the Court could be fully
25 informed as to everything that might have a bearing on both their representation and,

1 indeed, on the conduct of the hearing.

2 Your Honours will know that in paragraph 10 of the same submission possibilities of

3 argument were advanced, but always within the limits of the Tribunal's rules and

4 procedure on what can be done by and for victims.

5 Paragraph 11 identified a couple of specific issues to one and only one of which I will turn,

6 although it has two parts.

7 In the document containing charges, there was reference to the possibility of those present

8 within camp, as these two victims were, being in some way collaborators. That issue has

9 not I think been raised in today's helpful opening by my learned friend who prosecutes,

10 but nevertheless the issue is there and the Prosecutor has in a filing he made reserved his

11 position on that particular topic.

12 These two victims in the statements that they've made already that the Court has seen and

13 in all other material that is available to us and might form the basis of questions if we

14 were ever asked -- allowed to ask them, or evidence that might be called consequent on

15 the involvement of these victims, is to the effect that they certainly had nothing to do with

16 collaboration and they saw and heard of nothing revealing collaboration.

17 That's clearly an important matter for them as individuals, given their position as victims

18 in these hearings and the possibility of reparation that might be considered at a later

19 stage.

20 It might also be of value, in due course, depending on the nature of the defence that might

21 be raised in this case. For example, if the proposition of this being a legitimate target was

22 raised, what happened to civilian individuals and possibly even what happened in a

23 wider context might become relevant.

24 But, your Honours, that's as far as I need go today in exploring the matters foreshadowed

25 in paragraph 11 of our filing. There is nothing in the statements of the two witnesses

1 whom we represent that would counter the argument that these charges should be
2 confirmed, and we look forward in due course to cooperating with the Court in every
3 conceivable way to make the involvement of these victims an additional benefit to these
4 proceedings.

5 PRESIDING JUDGE TARFUSSER: Thank you, Mr Nice. Mr Dixon? Okay, so I think
6 this concludes the victims -- oh, sorry. Excuse me, Ms Cissé. Excusez-moi. You have
7 the floor.

8 MS CISSÉ: (Interpretation) In accordance with the stipulations, in the decision of the
9 Pre-Trial Chamber concerning victims' participation in this hearing on the confirmation of
10 charges and with regard to the scope of the modalities of their participation that the
11 Pre-Trial Chamber has affirmed and elaborated on, I will now try to express some of the
12 concerns and views of the victims from Senegal, Gambia, Botswana, and Nigeria. And I,
13 as well as my colleague Mr Kone, has been designated as representatives for them. I
14 apologise for being lengthy.

15 I will give references for the victims in Nigeria, and Mr Kone and myself have been
16 designated as their representatives now, but I believe it is important that these victims can
17 be recognised and that they can know that they have been represented in spite of the fact
18 that Colonel Adaka is not present. So this is important.

19 The victims concerned are 552, 553, 554 to 556, 563, 565, 566, 567, 568, 570, 571, 572 to 578.

20 Their key concerns were presented to me by these victims. These concerns have to do
21 with the development in the preceding hearing on the confirmation of charges and in this
22 hearing, and it is this reason why I have been asked to emphasise three essential points
23 that they believe to be of crucial importance for the direct defence of their personal
24 interests. These three crucial elements could have a direct impact on the personal
25 interests of the victims I have the honour to represent, and they concern, first of all, their

1 willingness with regard to the rights of victims it concerns -- their concern with the rights
2 of victims, which are distinct from the rights of the Prosecution.

3 Secondly, the victims are also concerned, in particular, with the importance of preserving
4 the public nature of the hearings for the sake of transparency, and above all so that they
5 can have the impression that international justice is actually being done and they aren't
6 excluded from this process.

7 Thirdly, their third concern is directly linked to the way their personal interests are being
8 managed. They are convinced that given clear elements stipulated in the joint motion
9 submitted by the Prosecution and Defence with regard to the agreement on facts, but they
10 consider that nothing can present an obstacle to a decisive decision.

11 This first issue was raised following the reading of the joint submission and following the
12 request by the Defence and the Prosecution with regard to the rights of legal
13 representatives in relation to the effective participation of the victims.

14 The victims are convinced - and this is why they believe in international justice - they are
15 convinced that international justice, and criminal international justice in particular,
16 doesn't just have the purpose of punishing the most serious crimes that affect the
17 international community.

18 The Prosecution represents international order in a certain sense, but international justice
19 has the objective to deal with human beings who have been victims of grave harm in
20 material terms, in emotional terms, in moral terms, in psychological terms. They have
21 been such victims as a result of the murder of their fathers, their fiancés, their brothers,
22 their husbands, and there have also been serious consequences of physical harm inflicted
23 on victims, and as I will show in the case of Nigeria, this harm was very serious. So the
24 first concern was what I have just mentioned.

25 I will first commence by referring to those victims, the ones that I met last week, I

1 personally met them in Botswana. I still hear their complaints, their crying, as a result of
2 my meeting this fiancée, who was crying. She was bearing the child of her fiancé, who
3 was a military observer. He had gone to Darfur, for peace's sake, and the fiancée lost the
4 child as a result of the shock.

5 There were also questions put by the fathers, by mothers, by brothers, by sisters. There is
6 an indignation when they learned about the conditions under which their children or their
7 brothers were killed: Someone was shot in the back, was then treated, and when leaving
8 the clinic, the person was shot a second time and killed. The body of this brother, of this
9 much loved son, was returned without an arm.

10 There's the moral, physical, emotional suffering with regard to the victims in Senegal.
11 The widows and the children of these victims don't have any material assistance. They
12 don't have any emotional support. They suffer from psychological trauma.

13 I have just read out a few lines that concern someone who was wounded in Nigeria,
14 who survives after having suffered a terrible psychological trauma, and he suffers from
15 nightmares. He is sexually impotent as a result of the wound inflicted on him.

16 I'm also thinking about a policeman from CivPol who was shot in the back and was
17 seriously wounded and only survived because he pretended to be dead.

18 So, the first point is that the victims have distinct rights and the victims want these rights
19 to be respected, naturally, under the supervision of the Court and within the limits
20 imposed by the Pre-Trial Chamber. These victims want to state that they are convinced
21 that only the Court has the power to see that their legal representatives can represent
22 them correctly.

23 The victims also asked me to emphasise another issue at this hearing. The victims
24 believe that the public nature of the hearing, the transparency, is the only means that they
25 have to follow what the Court is doing, to have the impression that justice is being done.

1 I remember again, in Botswana, and I was very much surprised, in Botswana I was
2 surprised by this elderly woman. She used DVDs, CDs, public recordings to follow the
3 case. Without these recordings, she couldn't have had the impression that justice was
4 being done. So, the nature of public hearings relates to Regulation 20. And this is why
5 the victims I represent have this concern of having public sessions, naturally, subject to
6 the necessity of protecting the rights of the victims and witnesses. The victims want the
7 hearings to be as open as possible. This justice is for these individuals, and the victims
8 must be able to follow the proceedings and realise that justice is concerned with them.
9 In Botswana, there was a professor, and when I showed her the public documents that she
10 can see on the internet site, when I showed her documents concerning the participation of
11 victims, well, she said, "You know, this is all very technical."
12 So, it's important because most of them are perhaps illiterate, but most of them
13 understand oral English but not written English. It's important for these victims and for
14 the sake of the credibility of international justice to hold hearings in open session as much
15 as possible.
16 And then, thirdly, there's another concern of the victims. There's a conviction that they
17 have: They are convinced that the current hearing should result in the confirmation, in
18 the rapid confirmation of the charges, rapidly, and this will provide the rights of the
19 victims with the idea that justice will be done.
20 They must also have the impression that there is no impunity for the perpetrators of
21 crimes that their family members were the victims of. And this is something I have to
22 emphasise because the fight against impunity naturally concerns the Prosecution above all.
23 But, without going into the details, I remember what the father said to me, this father,
24 who said that it wasn't material harm that concerned him the most. What concerned him
25 the most was that the guilty should be punished. So this concern is not the exclusive

1 prerogative of the Prosecution.

2 The victims have the right to know that those who made them suffer will not be granted
3 impunity. They are convinced that the confirmation of the charges following this
4 hearing could be done expeditiously.

5 And I will now allow myself to emphasise three elements that are in the joint motion,
6 document ICC03/0505/0980. It's from the Prosecution and Defence. I will read it out in
7 English in 30 seconds, not to show that I know a little English, but because I don't want to
8 provide an erroneous interpretation in French. In this document the Defence is quite
9 clear, and I would like to emphasise that the Defence stated this by -- this was stated by
10 Defence, by someone I admired, given the competence and subtlety of this person. So
11 these statements were carefully weighed. This is an experienced lawyer we are talking
12 about and is fully aware of the scope of what he drafted.

13 (Speaks English) "Any of the matter of facts alleged in the DCC for the purpose of the
14 confirmation. Second, the Defence shall not object to the charges contained in the DCC,
15 challenge the evidence presented by the Prosecutor or otherwise present evidence and ask
16 the Chamber to consider the facts proven."

17 And this is pursuant to Rule 69. And as a result we believe that given the fact that the
18 facts have been admitted, these facts have been admitted, and given that we are concerned
19 with the direct participation of Banda and Jerbo - I apologise for abbreviating their
20 names - given their direct participation following a plan, and given the participation of
21 other troops over whom they had command, control, given the facts that were described
22 in the document containing the charges, well, these facts were recognised there, and the
23 Defence asks the Chamber to recognise them as proven. So attributing the charges is not
24 problematic.

25 Murder, under 8(2)(c)(e), and simultaneously the deliberate attack on personnel and

1 material that belongs to the mission, that should be protected as civilians, a person
2 international right, given these elements the victims I represent believe that a rapid
3 decision has to be made following this hearing on the confirmation of charges so that we
4 can give them justice.

5 They want to be able to understand that the suffering they were subjected to, they want to
6 understand that the death of their family members wasn't a useless death. Thank you.

7 PRESIDING JUDGE TARFUSSER: Thank you very much, Madam Cissé. I turn now to
8 the Defence and give the floor to it for its oral submissions. I am asking the counsel to
9 identify and determine the content of the facts the Defence has agreed upon.

10 MR KHAN: Mr President, your Honours, I'm most grateful. There will perhaps be no
11 one in the courtroom more pleased than the interpreters when I say that I will endeavour
12 to be exceptionally brief.

13 At the outset, I would join on behalf of Mr Banda and Mr Jerbo with the final comments
14 and submission of my learned friend Madam Cissé. We do move and request the
15 Pre-Trial Chamber to deliver a rapid decision on this matter, as soon as you are able to
16 consider the evidence, and make a decision. That is notwithstanding the fact that the
17 rules require that a decision be rendered within a maximum of 60 days.

18 Your Honour, before I go further, I will clarify one issue that's been commented upon by
19 my learned friend, Mr Kone, and it is one aspect of the joint submission that perhaps is
20 being misunderstood.

21 In relation to the participation of the victims that were present in the Court at that time,
22 there was no attempt, in fact, to deny them for a moment any of their rights under the
23 Statute and perhaps something was lost in translation - I know not - but given they've said
24 that their clients, the victims, are acutely and closely watching these proceedings I think it
25 may be useful to clarify that specifically at paragraph 11 of the joint submission both

1 parties, namely the Prosecution and the Defence, have stated that we do not object to the
2 legal representatives making oral submissions, but we simply said that in the nature,
3 given the joint agreement, given that this would not be a contested confirmation hearing
4 that their views could be properly -- may properly be able to be put before the Chamber in
5 writing.

6 Your Honour, only one critical issue needs to be determined in this hearing - indeed, that's
7 the very reason for the existence of confirmation - it's whether or not in accordance with
8 Article 61(7) the Prosecution have established substantial grounds for believing that the
9 charges have been met.

10 Now, your Honours, the motivations and the views of the Defence are accurately detailed
11 in the joint submission. Paragraph 8 emphasises that the Defence and the Prosecution do
12 not for a moment seek to arrogate to themselves the critical decision-making power of the
13 Pre-Trial Chamber. This filing was not born out of disrespect or a failure to understand
14 the important role of the Chamber; it was born out of a desire for economical judicial
15 proceedings and an understanding from the Defence point of view that confirmation is
16 not a trial and the very conception of confirmation allows the Prosecution to rely in
17 totality upon a summary of evidence or written statements and they are not obliged to call
18 live viva voce witnesses to the courtroom for their credibility to be tested.

19 That being the case, that being the case, the Defence made the submission that was filed
20 on 19 October that your Honours have seen before.

21 Now, your Honour, this agreement does speak to the material facts alleged in the DCC;
22 that's the core issue. That is not to say that the Defence say that the Prosecution theory is
23 correct. Indeed, far from it. The Defence view is that there are many misconceptions
24 and errors and fallacies that infect the Prosecution theory of the case, but your Honours
25 that's not a matter that is determinative at the confirmation stage.

1 If your Honours decide, consistent with the joint agreement and bearing in mind the
2 evidence that's been put forward by the Prosecution to commit this case for trial, these are
3 issues that will be tested in due course and ultimately be decided by a Trial Chamber of
4 this Court.

5 Your Honour, that's all really I have to say on behalf of Mr Banda and Mr Jerbo.

6 It is important, with reference to your Honour's question, to bear in mind the Defence
7 rights detailed at Article 61(6). The Defence of course are not required for a moment to
8 contest the charges. They have the option of whether or not they wish to object.
9 Whether or not they wish to challenge the evidence or call evidence of their own. The
10 Defence has every right consistent with the right to remain silent and the specific
11 provisions of Article 61 to sit on their hands and say nothing, but the Defence has gone
12 further. We didn't play that game. We very openly, in this joint filing, accepted that in
13 relation to the material facts averred to in the DCC, we said that we would not contest
14 them.

15 Your Honour, I am not -- with your leave, I would not be inclined and perhaps not able to
16 give further and better particulars in relation to specific parts of the evidence that is
17 accepted or not accepted. It's not required. The joint agreement is a standalone
18 document. We continue to adopt it. It's before the Court and we do not renege from a
19 jot or a word from the submission that was filed a couple of months ago.

20 Your Honour, I don't know if that is satisfactory, but it's the best I can do. I am most
21 grateful.

22 PRESIDING JUDGE TARFUSSER: Thank you very much, Mr Khan.

23 Before closing this -- oh, sorry. Mr Faal.

24 MR FAAL: May it please, your Honours. The Prosecution would just wish to say very
25 briefly a few words about the submissions of Maître Kone and also the submissions we

1 just heard from my learned friend opposite Mr Khan.

2 Your Honours, we join the submissions of Mr Khan in that the joint filing never intended

3 to block legal representatives from making oral submissions. I think it behoves the

4 Prosecutor to clarify this issue in Court. We always support victims participation.

5 Listening to my learned friend opposite, it struck me that he seemed to have been blowing

6 hot and cold. In any case, I'll just remind the Chamber of the statement that was read

7 by Maître Cissé derived from the joint filing which, in paragraph 5, clearly stated that

8 both the Prosecution and the Defence would accept that the Chamber may consider the

9 facts in the DCC as having been proven and that, I think, is the whole essence of the

10 agreement, nothing more and nothing less. Thank you.

11 PRESIDING JUDGE TARFUSSER: Mr Khan.

12 MR KHAN: Yes, your Honour. I don't object for a moment to my learned friend. Of

13 course, the Defence has the right to the last word. I thought I made it clear. I'm sorry if

14 my learned friend thinks I blow hot and cold, but I endeavoured to say that we do not

15 seek to depart from a word of the joint filing. But what the joint filing refers to is what

16 your Honours have to determine, whether or not in relation to the core evidence

17 presented the confirmation standard is met.

18 Your Honour, that is not the same as saying the Defence buys into the theory put forward

19 today. That is not supported by evidence. It is not to say that the motives that my

20 learned friend has put forward today is accepted. Far from it. But they are not matters

21 that are relevant to your Honour's determination of looking at the evidence and deciding

22 whether or not the confirmation charge -- confirmation standard is met. That was the

23 clarification and the attempt at specificity that I was endeavouring to address.

24 Your Honours, I am once again most grateful.

25 PRESIDING JUDGE TARFUSSER: Thank you very much. I think we are quite clear

1 with what you said.

2 Before closing the present hearing, the Chamber has another small oral decision to issue.

3 The Chamber grants the parties and the victims' legal representatives the opportunity, if

4 they wish so, to file written submissions no later than 17 December 2010 for the

5 Prosecutor and the legal representative of victims, and no later than 4 January 2011 for the

6 Defence.

7 The Chamber will not grant any request for leave to reply to the written submissions.

8 The Chamber underlines further that any written submission which go beyond the scope

9 of the issue discussed at this confirmation hearing will be disregarded by the Chamber

10 and in its final determination of the present course -- case.

11 The Chamber expresses its gratitude to all the parties and participants, so as to the

12 interpreters and court recorders, for their collaboration at this hearing. Have you -- no.

13 MR FAAL: Well, Mr President, thank you for giving me the floor. The Prosecution

14 would wish to state clearly on the record that we do not intend to file closing observations,

15 and the agreement that was entered into with the Defence was predicated also on the fact

16 that neither side would file such a document.

17 We also hope that perhaps legal representatives would consider not filing such a

18 document so that a decision can be made on this case quite expeditiously. Thank you,

19 Mr President.

20 PRESIDING JUDGE TARFUSSER: Legal representatives. Yes, Madam Cissé.

21 MS CISSÉ: (Interpretation) Well, I do believe it is up to the representatives of the

22 victims to establish what the concerns of the victims themselves are. Once again, the

23 representatives are indeed the only ones who have the powers to express the points of

24 view, the concerns of the victims under the authority of the Court. I'd like to take this

25 opportunity to say that we, as legal representatives, do wish to make closing written

1 submissions and of course we'll file them in due course.

2 PRESIDING JUDGE TARFUSSER: Thank you. Yes, I'm sorry. Mr Akinbote.

3 MR AKINBOTE: I didn't intend to file any observation since neither the Defence nor the
4 Prosecution is filing any. So that I don't intend to.

5 PRESIDING JUDGE TARFUSSER: Okay. Thank you very much.

6 MR KONE: My name is Mr Kone and the person who spoke was Akinbote.

7 PRESIDING JUDGE TARFUSSER: Yes.

8 MR NICE: Your Honour looked at me and so perhaps it's appropriate that I should say
9 something. We don't forecast making any written submissions. We will make our
10 position clear in a day or so in writing, for the avoidance of any uncertainty.

11 PRESIDING JUDGE TARFUSSER: Thank you. Mr Khan.

12 MR KHAN: Your Honour, I would with respect fully endorse the submissions put
13 forward by the Prosecution. One of the driving forces, as I've alluded to in relation to
14 this joint filing, was to have matters expedited. The consequence of allowing the
15 proceedings to stay open, to allow written submissions, is yet again to delay. It is to
16 frustrate the attempts of the Defence to have a fair and expeditious trial.

17 Your Honour, your decision of 29 October 2007, referred at paragraph 66, to the rights of
18 the legal representatives to make oral submissions. Your Honours, they have had that
19 opportunity to make oral submissions. There has been no submission of substance
20 whatsoever on behalf of my clients that would seem to militate in favour of proceedings
21 being kept open and, your Honour, I would also in passing simply refer to, because I don't
22 want to take inconsistent positions later on, that your Honour's previous position, on 30
23 October 2009, at page 82 of the transcript in the Abu Garda case presided over by your
24 colleague Judge Steiner, was taking into account the guiding principle that grants the
25 Defence the right to have the last word and its precedents on the Lubanga and Katanga

1 cases, decides that the Defence is entitled to file its final observations after the final
2 observations of the Prosecution and of the legal representatives. That will always be in
3 all proceedings my default position and the default position of my clients but, for the
4 reasons I have detailed, it is my submission that no good reason has been given in order to
5 keep these proceedings open a moment longer and I would ask that they be closed today
6 and the 60 day maximum commence from the end of today's proceedings. Your Honour,
7 I am grateful.

8 (Pause in proceedings)

9 PRESIDING JUDGE TARFUSSER: The Chamber confirms its decision taken and decides
10 that the terms will not run during the recess. This closes the hearing. Thank you to
11 everybody, to the interpreters, to the court records, to the parties and participants.
12 Thank you very much.

13 THE COURT USHER: All rise.

14 (The hearing ends at 5.49 p.m.)

15 CORRECTIONS REPORT

16 The following corrections have been made in the transcript:

17 *Page 7 line 20

18 "MR KONE" is replaced by "MR AKINBOTE"

19 *Page 8 line 1

20 "MR KONE" is replaced by "MR AKINBOTE"

21 *Page 8 line 15

22 "MR KONE" is replaced by "MR AKINBOTE"

23