

1 International Criminal Court
2 Trial Chamber IV - Courtroom 1
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed
5 Jerbo Jamus - ICC-02/05-03/09
6 Presiding Judge Joyce Aluoch, Judge Silvia Fernández de Gurmendi and Judge Chile
7 Eboe-Osuji
8 Hearing and Status Conferences
9 Wednesday, 11 July 2012
10 (The hearing starts in open session at 9.34 a.m.)
11 THE COURT USHER: All rise. The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE ALUOCH: Good morning, everybody.
14 Court officer, for the record, please call out the case.
15 THE COURT OFFICER: Thank you, Madam President. Situation in Darfur, Sudan, in
16 the case of The Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh
17 Mohammed Jerbo Jamus, ICC-02/05-03/09.
18 PRESIDING JUDGE ALUOCH: May I welcome the Prosecution team, the Defence team,
19 legal representative team, a team from the Registry, interpreters and court reporters.
20 I will ask the Prosecution to very quickly introduce the team because I think it's -- the
21 composition is different this morning. Please, the Prosecution.
22 MR OMOFADE: Indeed, Madam President. The -- your Honours, might I start by
23 saying it appears that the transcript, at least from the Prosecution's point of view, doesn't
24 seem to be registering. I wonder if this is shared by everyone else in the courtroom?
25 PRESIDING JUDGE ALUOCH: Yes, there's a problem with the transcript. Jasmine?

1 We'll just give a few minutes, please, yes, or a few seconds.

2 MR OMOFADE: I'm grateful, your Honour.

3 (Pause in proceedings)

4 PRESIDING JUDGE ALUOCH: Please, can you be patient, everybody? Just about
5 three minutes, I'm told. That's not too long to wait, is it? No.

6 (Pause in proceedings)

7 PRESIDING JUDGE ALUOCH: We have a technical problem which is going to take
8 longer than three minutes, or has already taken longer than three minutes. I suggest that
9 we adjourn for 15 minutes to give sufficient time for this problem to be sorted out.
10 Thank you.

11 THE COURT USHER: All rise.

12 (Recess taken at 9.41 a.m.)

13 (Upon resuming in open session at 9.51 a.m.)

14 THE COURT USHER: All rise.

15 Please be seated.

16 PRESIDING JUDGE ALUOCH: I sincerely hope that the problem has been resolved and
17 we'll start again.

18 Good morning, everybody.

19 Court officer, for the record, please call out the case.

20 THE COURT OFFICER: Thank you, Madam President. Situation in Darfur, Sudan, in
21 the case of The Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh
22 Mohammed Jerbo Jamus, ICC-02/05-03/09.

23 PRESIDING JUDGE ALUOCH: I will once more ask the Prosecution -- first of all, I will
24 welcome - formally welcome - the Prosecution team, the Defence team, the legal
25 representative, the Registry, team from the Registry, interpreters and court reporters.

1 Prosecution, please, will you introduce your team?

2 MR OMOFADE: Good morning, Madam President, your Honours. The Prosecution
3 this morning is represented by my friend Mr Manoj Sachdeva, sits to the left of me, trial
4 lawyer; Ms Alice Zago, she sits behind him, also a trial lawyer; Mr Rod Rastan, he's the
5 legal adviser to the Jurisdiction Complementarity and Co-operation Division, he sits next
6 to Ms Zago.

7 Directly behind me -- I beg your pardon, your Honours, Mr Rastan sits on the third row.

8 Mr Victor Baiesu, associate trial lawyer sits behind me. Ms Biljana Popova, the
9 Prosecution team's case manager, also sits on the third row, and myself I am Ade
10 Omofade, trial lawyer.

11 Thank you, Madam.

12 PRESIDING JUDGE ALUOCH: Thank you very much.

13 The Defence team, please, for the record would you introduce your team, Mr Karim
14 Khan?

15 MR KHAN: Yes. May it please your Honours, good morning. Abdallah Banda and
16 Saleh Jerbo are represented by Mr Nicholas Koumjian, co-lead counsel, who sits to the
17 extreme left of this table; Anand Shah, case manager; Mr Aidan Ellis, legal consultant;
18 Anna Katulu and Leigh Lawrie, who sits behind me, they are lawyers and members of the
19 legal team; and at the back on the last bench Mr Abe Abed and Mr John Modin who are
20 trial support. Your Honours, my name is Karim Khan.

21 PRESIDING JUDGE ALUOCH: Thank you very much.

22 The legal representative?

23 MR DIECKMANN: Thank you very much, Madam President, your Honours, my
24 learned friends from the Prosecution and the Defence. A very good morning to everyone
25 in the courtroom.

1 Today victims participating in the case are represented by Ms Evelyne Ombeni, our
2 assigned case manager. Myself, I'm Jens Dieckmann, associate counsel of the common
3 legal representatives.

4 Thank you very much.

5 PRESIDING JUDGE ALUOCH: Thank you.

6 The team from the Registry, please, will you introduce yourselves?

7 MS BERTRAND: (Interpretation) Good morning, Madam President, your Honours.

8 The Registry will be represented today by Abdoul Mbaye, interim head of the Counsel
9 Support System; Chi Wang, legal counsel; and myself, Anne-Aurore Bertrand.

10 PRESIDING JUDGE ALUOCH: Is there another problem?

11 MR KOUMJIAN: I am getting assistance to get the transcript on my screen. It never
12 started on my screen for some reason, but I'm happy that your Honour continue. I can
13 listen while that's being fixed.

14 PRESIDING JUDGE ALUOCH: Fortunately you are a team, so we can proceed. As it is,
15 we have already lost about half-an-hour because we were supposed to have started at 9.30
16 sharp, so I think we will proceed.

17 This hearing and status conference are scheduled to last a maximum of one hour
18 30 minutes. Therefore, the parties and participants need to be focused in order for the
19 Chamber to have sufficient time to address all the points in the agenda, which was
20 distributed on 6 July by Chamber's order 366.

21 The Chamber is currently seized of the Defence request for a temporary stay of
22 proceedings. That's request filing 274. One important purpose of this hearing is,
23 therefore, to receive further relevant submissions to enable the Chamber to make its final
24 determination on the Defence request.

25 Before we start hearing submissions, I would like to remind the parties and participants to

1 speak slowly, slower than usual like I am doing now, and to observe the five-second rule
2 between the interventions, questions and answers.

3 Point 1 of the agenda - the Defence request:

4 The Defence request is dated 6 January 2012. Responses to the request and the Defence's
5 reply to these responses were received in February and March 2012 respectively.

6 Several preliminary decisions were issued rejecting inter alia the legal representatives'
7 application to file an addendum, that was decision 304, and a request to file an amicus
8 curiae, decision 302.

9 The Chamber is interested in hearing an update of relevant factual developments, or
10 additional arguments if any, related to the Defence request.

11 The Chamber urges the parties to be concise and not to repeat the contents of their written
12 submissions. In any event, the parties should not exceed 15 minutes each on this topic
13 and the legal representatives should not exceed five minutes.

14 At this juncture, the Defence, I'll give you the floor.

15 MR KHAN: Madam President, your Honours, we are most grateful to the Bench for
16 scheduling this hearing. It is our respectful submission that this application to stay these
17 proceedings have exceptionally important consequences, primarily - and most
18 importantly - to the fair trial rights of Abdallah Banda and Saleh Jerbo, who have
19 consistently co-operated with this Court, shown respect to this judicial institution and
20 complied with all conditions imposed upon them.

21 But, your Honour, this application has wider ramifications as well. The stark reality,
22 whichever way one cuts it, is that the Defence has been reduced effectively to peeping
23 through a keyhole, cut by the Prosecution in a door firmly slammed shut by the
24 Government of Sudan.

25 That is the inescapable reality, and the key to open that door does not reside in counsel's

1 gown. It does not reside with the Defence. It resides in the Government of Sudan
2 fulfilling its international obligations.

3 If it does not, for the reasons we explained in our application, the only option is that the
4 Security Council, in accordance with the Charter that referred this matter to this Court,
5 finding that the situation in Darfur constituted a threat to international peace and security,
6 follows up on that finding and ensures that the conditions are created to allow this Court
7 to work; that the conditions are created to allow your Honours to do justice. The
8 ramifications are exceptionally important.

9 Your Honour, the Prosecution in the pleadings that have been put before you have put a
10 number of arguments across and, your Honours, we have responded to those in large
11 measure and I do not intend to repeat our arguments here.

12 But, your Honour, I would seek to disabuse you of some completely fallacious arguments
13 put forward by the Prosecution. The accused in this case, as I said at the outset, have
14 been co-operative in an unprecedented manner, coming from a court -- coming from a
15 country to which the jurisdiction of this Court does not effectively run, a country which
16 refuses international condemnation to change its ways and ensure the protection of
17 human rights that our clients are fighting for.

18 They not only surrendered to the Court. They have not wasted court time. In again an
19 unprecedented manner, they did not even contest the confirmation hearing. No attempt
20 to delay justice can be gleaned from the record that's before your Honours. And, your
21 Honours, what's more, the incontrovertible truth is that they have agreed certain
22 important facts.

23 Now, your Honours, the Prosecution regrettably in our submission is seeking to use in its
24 filings some of these agreed facts as reasons why this case can go forward.

25 Your Honours, there should be no doubt at all that our clients vigorously, robustly,

1 protest their innocence of any criminal wrongdoing at all. The fact that they have agreed
2 to certain facts to save court time to be truthful, that very important concept without
3 which a judicial organ cannot work, by being honest and saying they took part in the
4 attack, should not reduce their rights one jot, and yet that is the effective Prosecution
5 argument that somehow the Defence do not need to go into Sudan and do not need to
6 investigate not just the locus in quo, but to find the truth, to find witnesses.

7 Your Honours, we have said that 12 out of the 15 Prosecution witnesses that we believe at
8 this stage are going to be called reside outside of Sudan. Your Honours, the Prosecution
9 have focused their case in one direction and we say there is a massive blind spot, a
10 massive truth that they have not attempted to investigate.

11 PRESIDING JUDGE ALUOCH: Mr Karim Khan, what you are submitting on right now
12 is in your documents.

13 MR KHAN: Well, your Honour, with the greatest respect, I am not repeating at all
14 what's in the written submissions. I am touching upon some points that were not
15 addressed in order to present -- and, of course, we made an application for an oral hearing
16 to underscore what we say are some additionally important matters. But, your Honours,
17 let me move forward to issues that were not addressed at all really in the brief, or perhaps
18 that elucidation would be helpful.

19 Apart from the difficulties that have been articulated by the Defence, and no less -- a
20 person of no lesser international standing than Justice Richard Goldstone and his views
21 about fair trial rights and prejudice that could be caused that was annexed to our original
22 stay application, the Defence has not been able to investigate or speak in any meaningful
23 manner to any non-AMIS witness at all.

24 Now, your Honour, this is exceptionally important in the Defence's submission. This is
25 exceptionally important in the Defence's submission, because the Prosecution witnesses

1 by and large, the overwhelming majority that are AMIS peacekeepers, may have a reason
2 not to be completely candid on certain areas because of embarrassment, because of
3 collusion that the Defence say took place between AMIS and the Government of Sudan
4 that actually made -- contributed to that base becoming a legitimate military target.
5 Your Honours, this is an important issue because, not only have the Defence not been able
6 to speak to these people, the Prosecution haven't either.
7 Your Honours, it seems from the Prosecution evidence - and I have the citations if
8 needed - that between 15 to 20 PAE staff were based, were working, in MGS Haskanita at
9 the time of the attack, and about one third of them, five to ten, came from Haskanita itself.
10 But, your Honours, in addition to that, at least two interpreters working at that base were
11 from Darfur, but not from Haskanita.
12 Your Honours, these are important witnesses in any criminal case domestically. You go
13 to the people that were there, not a select bunch of people cherry-picked by the
14 Prosecution. You allow the Defence to get relevant evidence so that the right of
15 confrontation becomes effective, not theoretical, and so that the Defence cannot only test
16 the Prosecution case in an abstract manner by questioning a witness that comes in this
17 witness box, but by putting on an affirmative case that allows the truth to be told.
18 And there is, we say, a very real truth to be told that is starkly different from the narrative
19 that the Prosecution have chosen not only to put forward, but chosen to investigate. The
20 whole thesis pervading the Prosecution statements about this being an attack to use the
21 base as a warehouse is belied by the evidence that appears even on the Prosecution case
22 but, your Honours, if we are given a proper chance to investigate we say that would
23 become crystal clear. Your Honour, I have references for that.
24 In addition to the interpreters there were PAE medical personnel present at the camp and,
25 your Honours, the board of inquiry in fact that had been set up after the attack, they

1 themselves tried to investigate and speak to these doctors to get another perspective as to
2 the truth of what happened, what led up to the attack, that would be salient for your
3 Honours' determination in looking at and properly assessing the merits of our Defence.
4 And, your Honours, we saw - and it's Witness 486 - that that board of inquiry was not able
5 to make any headway. Sorry, it's Witness 355, at paragraph 27.
6 Now, your Honours, I want to move as swiftly forward as possible, but there are
7 important matters to discuss. Your Honours, the need for access is not speculative, and
8 the reason I said at the outset that we've had no meaningful ability to interview any
9 non-AMIS witness is because we had one -- the contact by telephone with one non-AMIS
10 witness and that individual told us by telephone that he was scared stiff, effectively. He
11 was not willing to come as a witness. He had been stationed at MGS Haskanita in the
12 weeks leading up to 29 September, so potentially could give very relevant evidence to the
13 Defence.
14 This witness -- and we can give more details in the ex parte session afterwards. This
15 witness also can give evidence, if we could get into Sudan and speak to him, that he heard
16 that the Government of Sudan had been passing intelligence from the base to the camp,
17 which gave a distinct military advantage to the Government of Sudan forces and also
18 which pierced the impartiality which is a fundamental requirement of a peacekeeping
19 operation.
20 He also could testify, he said, or could speak to the fact that rebels had claimed that they'd
21 intercepted radio conversations from Government of Sudan representatives at the camp,
22 with other officers outside of the camp.
23 And, your Honours, he was actually present during the attack and he said - his
24 account - that rebels came and told him and others to come out of the hiding place, they
25 were not aiming at killing people. Now, your Honours, he's not willing to speak to us

1 because of security issues.

2 And the victim/witness unit, in the unique circumstances of this case, are not being
3 allowed to do their job. They are not being allowed to protect Defence witnesses,
4 witnesses of truth, we say, witnesses who want to come before the Court in the way that
5 they can do in the Democratic Republic of Congo, that they can do in Kenya, that they can
6 do in all other situations. This is a fundamental breach of the Defence rights to properly
7 investigate.

8 Your Honours, there's no magic even. Look at it another way, there's no magic in
9 contacting witnesses. They are of no evidential use unless they can come out, and we
10 have put in our application that the Victim and Witness Unit in writing have said they're
11 not able to assist.

12 So what to do? Should the rights of two individuals who are co-operating with the Court,
13 who have voluntarily come before this judicial institution and who submit themselves to
14 justice, be somehow given supermarket justice, cut price justice?

15 Your Honours, we say that your Honours will give no credence to that argument. And,
16 your Honours, we come to your Honours. We can't go directly to the Security Council;
17 we come directly to your Honours to protect our fair trial rights for the reasons that are
18 given in our stay application.

19 Your Honours, the risks are real. The bully-boy tactics of the Government of Sudan are
20 legion. Your Honours, just two days ago the British Foreign Secretary, William Hague,
21 was at the Ransdaal, the Buitenhof, and he applauded -- and the President of the Court
22 was present. He applauded the Government of Malawi for rejecting those bully-boy
23 tactics of the Government of Sudan, but bully-boy tactics they are.

24 The Presiding Judge will be aware, your Honours will be aware, that the Ambassador of
25 Kenya was unceremoniously booted out of Sudan when a judge of that jurisdiction said

1 that it would issue an arrest warrant if President Bashir came within its territory. Threats
2 of no-fly zones, and all the rest, by Sudan was considerable pressure. How more dire the
3 position of an individual witness that the world does not know about?

4 Your Honours, we have said in the stay, and I will repeat it with your leave, the head of
5 the security apparatus, which we say and which the Prosecution opposite say, is
6 conducting a genocidal campaign against the civilians of Sudan. It has been
7 internationally condemned by the world, including the Security Council.

8 What has been their approach? The head of these scary intelligence operators, Saleh
9 Gosh, has said, and I quote, "Anyone who attempts to put his hands to execute ICC plans
10 we will cut off his hands, his head and body parts, because this is a non-negotiable issue."
11 How chilling, how unacceptable and how repugnant are these proclamations of a senior
12 state official; that he's confronting not only individual witnesses who wish to speak the
13 truth, but he's defying your Honours' jurisdiction and the international will.

14 Your Honours, I am disappointed with the approach of the Prosecution in this case.
15 Defence witnesses and Prosecution witnesses and victims called are of equal status to
16 your Honours. If justice is blind, your Honours are seeking to protect everybody that
17 comes before this Court. It's not asking Prosecution witnesses to be cushioned and
18 cosseted in cotton-wool and wrapped up nicely and ask Defence witnesses to go through
19 the fire and live through with the scars or even the death that results. Your Honours will
20 treat all witnesses equally.

21 Now, the Prosecutor of this Court, when she was deputy, she said, and I quote "We have
22 an obligation that the people with whom we interact are protected. We will not be able
23 to protect them if there is no co-operation from the government."

24 Your Honours, that's the Prosecution's own -- the Prosecutor's own wise, reasonable, we
25 would say obvious, counsel. That is a statement of truth, and yet the Prosecution, we

1 regrettably say, say, "Trial at any cost." We say, your Honours, no, we want a trial, but
2 not at any cost.

3 We ask for a temporary stay until the international community does what is required, or
4 the Government of Sudan changes, and the conditions are such that the rights that this
5 Court was established to safeguard are realised. At the moment, they cannot be. And if
6 this trial goes forward the result is there will be, we say, a miscarriage of justice because
7 we are not able to bring the relevant, salient evidence to your Honours.

8 Now, your Honours, we have made -- the Prosecution say in their filing about you're
9 tardy and ineffective attempts. Your Honours, the record speaks for itself. I think we
10 have done everything we can do. My learned friend, Ms Lawrie, will speak later about
11 the co-operation requests that are outstanding. Your Honours, there's really nothing
12 more we can do to safeguard our clients' rights. Our only option is to come to the Court
13 with a request for assistance.

14 Your Honours, the fundamental difference -- and we cite a lot of the case law in our filing
15 but, your Honour, I -- whatever the realities of rear politic, horse-trading in the Security
16 Council, the Court must simply treat like cases alike. Unlike in the Milutinovic case,
17 there is no United Nations mission in Darfur. There is no Darfur Protection Force.
18 There, there was K4 and UNMIC.

19 Your Honour, this is a fundamental difference. This is why Judge Goldstone, this is why
20 the Defence and this is why we say the only fair, reasonable and proportionate outcome is
21 that this application to stay these proceedings be granted. Your Honours, a temporary
22 stay for the reasons we said.

23 PRESIDING JUDGE ALUOCH: Thank you, Mr Khan.

24 MR KHAN: Your Honours, there is -- my learned friend, Mr Koumjian, just passed me
25 a note. Of course there is a UNAMID, but their powers, their mandate, is completely

1 different to the enforcement mechanisms of K4 and UNMIC.
2 K4 and UNMIC, because of the intransigence of Serbia, and the policy of Serbia to rape
3 and kill and plunder, the international community gave administrative powers, executive
4 powers, to UNMIC and military responsibility to K4. Why not in Sudan?
5 There cannot be a fair trial at any cost. The passage of a resolution by itself holds no
6 magic, other than a mark of international opprobrium rightly placed at the feet of a
7 terrible regime but, your Honours, the task of taking that forward cannot be done by this
8 Court without international assistance.
9 This Court, completely different of course to the ad hoc tribunals, requires State
10 co-operation and in these circumstances the only option for the reasons we detail is for
11 Sudan to co-operate either voluntarily or because of diplomatic or military force.
12 Without this, your Honours, this case will lead to a travesty.
13 Your Honours, for those reasons, we do say that the Defence application is manifestly
14 well-founded and should be granted. I'm most grateful.
15 PRESIDING JUDGE ALUOCH: Thank you very much. I restrained myself from
16 stopping you, though you had exceeded 15 minutes, but thank you for your submissions.
17 Prosecution, please, you have the floor. And like the Defence, you have 15 minutes.
18 MR OMOFADE: Madam President, my colleague, Mr Sachdeva, will address you very
19 briefly on this.
20 MR SACHDEVA: Thank you Madam President. I see that the preponderance of Mr
21 Karim Khan's submissions are indeed contained in his filings, so the Prosecution won't
22 reiterate our filings, our submissions in filings 286 and 289.
23 What we would say is that some of the matters that are going to be dealt with in this
24 status conference are clearly relevant to the Defence request for a temporary stay, and in
25 that regard there is an update from the Prosecution specifically in relation to the Defence

1 access to Prosecution witnesses that are non-AMIS and in that regard there is some
2 progress.

3 But other than that, for the matters that are indeed new and additional, the Prosecution
4 seeks to preserve its right to respond in writing with respect, Madam President.

5 PRESIDING JUDGE ALUOCH: The legal representative?

6 MR DIECKMANN: Thank you very much, Madam President.

7 PRESIDING JUDGE ALUOCH: Thank you, Prosecution. Prosecution, thank you.
8 Legal representative?

9 MR DIECKMANN: I'm sorry, your Honour. Madam President, your Honours, first
10 and foremost the common legal representatives are most grateful for this opportunity to
11 address the Chamber on victims' issues today and bearing in mind the clearer
12 clarifications of the Chamber in para 9 and 10 of the scheduling order dated from 6 July.
13 We want, just for the record, to explicitly refer to our observations dated from
14 30 January 2012 and our request from 29 June 2012.

15 Madam President, your Honours, today the Defence inter alia was invited to update the
16 Chamber, the parties and the participants, regarding the Defence request. It's a long
17 period of time, six, seven months passed after January 2012.

18 Your Honours, after a careful consideration of the Defence submissions today, it's
19 respectfully submitted that the Defence did not present any new facts or any new
20 argument - legal arguments - that can support or give a stronger support to the Defence
21 request.

22 On 1 July 2011 the Chamber rendered its decision on Defence application pursuant to
23 Articles 57(3)(b) and 64(6)(a) containing specific critical remarks to the Defence
24 application. And I just want to refer to paras 35 and 36 of our observations from
25 30 January 2012 where we submitted that the Defence request in the light of the critical

1 remarks of the Chamber is still not specific enough, is still not explaining sufficiently why
2 all these potential investigations as listed in the request would be so necessary and
3 without any alternative, though it's submitted that the Defence ignores in fact the critical
4 remarks of Trial Chamber's decision from 1 July 2011.

5 Your Honours, it's submitted today that the Defence did not make any substantial
6 progress during the last seven months. Instead of submitting a properly and proper
7 founded further application under Articles 57(3)(b) and 64(6)(a) of the Statute, the Defence
8 still seeks a temporary close of this case. Since we did not hear any new argument,
9 nothing could change the position of the common legal representatives to the Defence
10 request today.

11 Your Honours, with your leave, and in the last minutes I have, I would like to make
12 additional observations on the specific issues of the Defence argument.

13 The Defence repeated even today that they do not request a permanent stay but just a
14 temporary one, suggesting that this is a less drastic remedy; a temporary stay less drastic
15 than a permanent one. The common legal representatives respectfully submit that the
16 Chamber shall take into account the dramatic effects even of a temporary stay of
17 proceedings that will have unavoidable harm to the victims.

18 In paragraph 46 of the Defence request it is stated, I may quote, "However, the Defence do
19 not seek to terminate proceedings through a permanent stay, rather Mr Banda and
20 Mr Jerbo hope that the political and security situation in Darfur and other parts of Sudan
21 will improve," end of the quote. This is the Defence condition for a lift - a later lift - of a
22 temporary stay of proceedings; the improvement of the political situation in Darfur.

23 It is respectfully submitted that this condition is so unclear, so unspecific and in fact
24 speculative. It is not foreseeable for the victims under which circumstances these
25 conditions will be fulfilled, if ever.

1 It's submitted that, under these conditions, a temporary stay of proceedings could not be
2 imposed. It's respectfully submitted today that also a temporary stay of proceedings
3 would endanger the perspective of the victims to have a fair chance to participate
4 effectively under Article 68 of the Statute in the proceedings and eventually seek
5 effectively reparations under Article 75 of the Statute.

6 In this regard, and with your leave, just for the record I refer to paragraph 24 through 28
7 of our observation from 30 January outlining the dramatic situation of the victims at this
8 time.

9 Your Honours, today the situation of the victims is even worse than seven months ago.
10 Diseases which are still not treated properly because of lack of effective medical assurance,
11 minor children, children of dead soldiers who were still taken out of school because of
12 lack of resources, all this situation continued.

13 Your Honours, all feedback we got from victims is that they have specific needs, and for
14 victims time is a matter. The longer they wait for justice, the worse the situation will be.
15 Therefore, we respectfully ask the Chamber to take this issue - this point - that even a
16 temporary stay of proceedings will endanger a situation in your final determination.
17 Thank you very much, your Honours.

18 PRESIDING JUDGE ALUOCH: Thank you very much, Counsel, for the -- legal
19 representative. Just before --
20 (Trial Chamber confers)

21 PRESIDING JUDGE ALUOCH: Sorry, this is a chance for the team from the Registry.
22 Did you have anything to say before that?

23 MR KOUMJIAN: I wanted to very briefly respond - I probably could do it in two
24 minutes - to the two remarks of the Prosecution and the victims' representative.

25 PRESIDING JUDGE ALUOCH: You will have a chance. I will give you a chance. I'll

- 1 give the Defence a chance to respond.
- 2 MR KOUMJIAN: Okay. Now, or should I wait?
- 3 PRESIDING JUDGE ALUOCH: Not now.
- 4 MR KOUMJIAN: Okay, thank you.
- 5 PRESIDING JUDGE ALUOCH: Registry, please.
- 6 MS BERTRAND: (Interpretation) Thank you, Madam President.
- 7 The Registry would like to point out that we continue to support the co-operation requests
- 8 sent to us by the Defence. We do not have any further information at this point.
- 9 PRESIDING JUDGE ALUOCH: Thank you very much.
- 10 I'll give the floor to Judge Fernández just for a minute.
- 11 JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
- 12 I just wanted to ask clarification from the Registry. You said we will continue (Speaks
- 13 French). (Speaks English) What does that mean exactly, what you said?
- 14 MS BERTRAND: (Interpretation) This means that the Registry is following up
- 15 co-operation requests. We are in open session and so we cannot give you details, but we
- 16 make telephone calls, we give reminders to the competent authorities and we request that
- 17 we receive answers within a reasonable time period.
- 18 PRESIDING JUDGE ALUOCH: Thank you very much.
- 19 Yes, now I will come back to the Defence.
- 20 MR KOUMJIAN: Thank you. Thank you very much, Madam President.
- 21 Just to respond briefly to a few points by the Prosecution and the victims' representative,
- 22 we understand and we share the victims' representative's desire to have these proceedings
- 23 go forth expeditiously. The Defence request for a stay is we want the trial to go forward
- 24 when we can have a fair trial. We don't want an expeditious trial before it can be fair.
- 25 So when the Defence asks for a temporary stay of proceedings, until the political and

1 security situation in Darfur, in Sudan, changes, what we mean very -- I want to respond to
2 the legitimate point, if there is any doubt that anyone has. What we mean is the situation
3 changes so that the Court can operate in Sudan so that when we ask the Registry, "What
4 can we say to victims ...," or excuse me, "... to potential witnesses who we contact in
5 Darfur about protection?", and they tell us, "You can tell them nothing. Until they leave
6 Darfur, we can do nothing for you."
7 That's the position we got from the Registry. It's not their fault. It is because -- and this
8 is in our stay. This is because of the Government of Sudan's position on the Court, which
9 is not only non-cooperation, but interference that anyone who is co-operating is at great
10 personal risk.
11 And the situation, I think, has changed somewhat since we filed the stay, or at least the
12 manifestations of the problems are even more clear, because in the hearing that we had
13 last month, regarding the travel difficulties of the accused persons, any witnesses that the
14 Defence is able to contact and would be agreeable, anyone from Darfur and agreeable to
15 come, would face very similar risks or problems in crossing borders, in leaving Darfur
16 and in returning to Sudan when they've co-operated with this Court and testified to this
17 Court. And specifically there are potential witnesses, persons we'd like to talk to, who
18 are in exactly Mr Banda's situation. They are LJM and they would face the same
19 situation that he has.
20 Now, your Honours, in response to the Prosecution's indication that they were
21 responding to Mr Khan's remarks by saying some witnesses the Defence has asked to
22 contact they are going to update on whether they are agreeable to contact, I want to make
23 something clear about the distinction between that group and the principal group that the
24 Defence is concerned about speaking to.
25 The Prosecution -- these are witnesses that the Prosecution previously spoke to who were

1 members of revolutionary movements, who were mostly with the attacking forces. The
2 Defence has been quite open about the --

3 (Trial Chamber confers)

4 PRESIDING JUDGE ALUOCH: Yes, okay. Just continue and finish.

5 MR KOUMJIAN: Okay, sure.

6 PRESIDING JUDGE ALUOCH: Unfortunately, you don't have 15 minutes.

7 MR KOUMJIAN: Yes, I will finish very quickly then. Thank you.

8 The Defence has been open that what our Defence fundamentally involves, or one of the
9 factors, is intelligence from the AMIS base that was assisting the military and criminal
10 campaign of the Government of Sudan in that area.
11 What we haven't been able to speak to, and none of the witnesses that the Prosecution's
12 offered to try to facilitate communications for us with, are -- we haven't been able to speak
13 to people inside the base, those who would have information about what was going on
14 inside the base, what the Government of Sudan representatives, intelligence agents, covert
15 or overt, were present.

16 And these -- and I just point out that our application filed just after the stay to lift
17 redactions is very much related to the stay. If those redactions are lifted and some of the
18 individuals that we named - many of them are non-AMIS, or all of them are
19 non-AMIS - are given to us, assuming we get those redactions lifted will we be able to
20 even talk to them in Darfur and, if so, will they be too afraid to talk to us? If they are
21 willing to talk to us, will they come out of Darfur?

22 It's impossible for us to investigate the fundamental issues in this case, including the
23 intelligence activities of the Government of Sudan representatives, even though we have
24 their names, the Prosecution hasn't talked to those agents, those Government of Sudan
25 representatives, and we can't.

1 Thank you.

2 PRESIDING JUDGE ALUOCH: Thank you.

3 Judge Osuji has a point to make at this stage.

4 JUDGE EBOE-OSUJI: Counsel, while you were responding to the intervention of the
5 counsel for victims, one question that has troubled me in this case, which will help me
6 resolve, is really the material difference between the concept of temporary stay of
7 proceedings and the simple prosaic notion of adjournment of a matter. Is there a
8 difference from the perspective of legal element?

9 MR KOUMJIAN: Your Honour, I'm not sure how those terms have been interpreted, but
10 let me explain what we meant by a temporary stay. One very important factor is it saves
11 the Court -- we don't get paid. It saves the Court money, because the proceedings are
12 stayed temporarily with periodic reviews until such time that a fair trial is possible.
13 We think, you know, that could be a long time, or that could be very short. We, none of
14 us, could predict the Arab spring that occurred last year. There are demonstrations
15 going on in Sudan right now against the current government. It's a dynamic region and
16 the situation could change quickly.
17 What we mean by a temporary stay - and perhaps this differs from an adjournment - is it
18 means that the Counsel for the accused persons would not be paid.

19 JUDGE EBOE-OSUJI: Well, I was expecting more like a legal element to the distinction.
20 The other question that arises is when we speak of either a stay permanent or temporary,
21 or even an adjournment, whichever one one prefers, and we are talking about a trial that's
22 either in progress or imminent to start, which if you don't pull the emergency brake to
23 correct the matters being complained about the trial process would move like a train
24 towards the verdict and any uncured difficulties could have then resorted into perhaps
25 irremediable prejudices, can you then stay anything, or adjourn anything, if a trial hasn't

1 started or about to start?

2 MR KOUMJIAN: Your Honour, I believe you can. I believe it -- I understand the point
3 and we could see the one as we are, and see where we are in six months or a year, but the
4 reality is what's happening right now is normally we would be talking to these witnesses.
5 We would be out in Darfur, in Haskanita, investigating what was going on in that area,
6 talking to the people that were in the base before it was attacked, attempting to get orders
7 from the Court about these intelligence agents of the Government of Sudan who were in
8 the base, interviewing them. We can't do any of that.
9 So, your Honours, we realise things could go on for a while, to see how it goes, but while
10 we certainly are doing everything we can to talk to those we can talk to, and we have, and
11 we want to be clear to the Court we've talked to some individuals, those that are willing to
12 come and see us, we have been able to talk to people who were in the base when it was
13 attacked, the key events that happened before it was attacked, and they can talk about
14 these Government of Sudan agents and their activities inside the base.
15 So, at this time we believe it is appropriate to temporarily stay the proceedings because
16 the fair trial rights of the accused to investigate are denied at the current time but we
17 recognise, and that's why we call it temporary, the situation is dynamic and it could
18 change.

19 MR KHAN: With your leave, your Honour.

20 Your Honour, there is a number of differences with a stay and an adjournment.

21 Ordinarily, an adjournment would be requested by a party for reasons within its own
22 control, or something a party does not have that it can get.

23 Your Honour, in this situation there is nothing we can do that we have not done that
24 allows us to protect our clients' rights to a fair trial.

25 Your Honour, there is another practical difference. There are adjournments in this Court

1 every year but, your Honour, a spotlight really does put a stay, a temporary stay, in our
2 respectful submission, puts the spotlight where it belongs. It's not the responsibility of
3 the Prosecution if this case is temporarily stayed. It is not the fault of the victims. It is
4 not the fault of the Defence. It is only the fault of the Government of Sudan that is
5 defying international law by defying a requirement of the Security Council to co-operate.
6 So your Honours, a stay, a temporary stay, sends a clarion call out to the world that the
7 Government of Sudan's non-cooperation is frustrating justice, and it also has we say a
8 second advantage.

9 Your Honours, we are, at least Defence counsel, we are small minnows in this Courtroom,
10 never mind on the international stage, but your Honour's voice can be heard as far away
11 as New York in the Security Council. The Security Council must make a decision that
12 when it refers cases to this Court, can it wash its hands like Pontius Pilate and say we
13 have done our job? We have a fig leaf to hide behind while countries defy the rule of
14 international law.

15 Your Honours, the council members at the moment can say the ICC is seized of the matter
16 but, your Honour, that is meaningless unless you have the power to do something and get
17 to the bottom of this matter and a temporary stay has a number of ramifications, both in
18 relation to responsibility and also maybe into finally kick-starting the Security Council to
19 become seized of this matter --

20 JUDGE EBOE-OSUJI: If I can interrupt you, we will continue this discussion. I think
21 the Presiding Judge wants to sort something out, Mr Khan.

22 MR KHAN: Yes, of course.

23 PRESIDING JUDGE ALUOCH: May I request you to sit down for a minute please,
24 because I want to sort out a time. Ordinarily, if a trial starts at 9.30 we should have a
25 30-minutes' break from 11 o'clock. We started late, half-an-hour late, so I just need to

1 sort out the timing with the interpreters and court reporters.

2 Yes, we have a new schedule that we proceed up to 11.30. Then we have our 30-minutes
3 break so our sessions will be -- 30 minutes will be added to our sessions because it was not
4 a problem with the Chamber that we started late. So we will today stop, have a break at
5 11.30, yes.

6 Sorry, I will give the floor to Judge Eboe-Osuji to continue with that point, yes.

7 JUDGE EBOE-OSUJI: Mr Khan, I think I have got your essential point on the -- basically
8 that you are saying that there is indeed a material elemental difference between a stay and
9 an adjournment but in your submission you used a certain interesting phrase it also raises
10 its own issues for me that I need you to help me again resolve.

11 Frustration, the idea of frustration of justice. We have a legal counsel for victims put the
12 plight of the victims squarely into the proceedings and that brings of course -- that
13 palpable tension between the reasons for creating this Court, and the rights of the accused
14 you are trying to protect when, on the one hand, you say the victims are those who have
15 suffered atrocities that, you know, shock the conscience of mankind, and that those who
16 commit the crimes of this level, grave crimes that bother the international community,
17 must not go unpunished on the one hand, and you understandably are telling us as well,
18 that well, we have a difficulty, if you can zoom on to that sort of trial when there are
19 certain things that have not been done. So herein arises the dilemma we are talking
20 about.

21 If you are in a situation where the victims fear frustration that their plight have not been
22 heard, and the accused worry about frustrations that they have not got certain materials
23 or certain positions in the process that will enable them carry their functions, does it not
24 then assist to break that tension by saying: Okay, as I believe is part of the dominant
25 practice in the British courts now where, especially in the historic sexual abuse cases, a

1 preponderance of the jurisprudence says that it is preferable to go through the trial, and
2 receive all the evidence that's available, at the end of which the Judges are then able to
3 appreciate the impossibility of a fair trial. When you do that, you also have a situation
4 where the victims would have felt, well, our story has been told; the Judges would have
5 seen that it was impossible, if that is the case, to conduct a fair trial; and possibly, if you
6 finish it and make the motion and it succeeds at the end, before a verdict is rendered
7 jeopardy would have attached, we would move into the zone of double jeopardy, that
8 benefits the accused person, why isn't that a sensible compromise to this tension I'm
9 talking about?

10 MR KHAN: I'm grateful your Honour.

11 Simply put, it will have the effect of neutering the purpose of this Court. Your Honour
12 spoke about the reasons why this Court was created, and of course the sad reality, this
13 Court has been created because of the tragedy that we've seen since Nuremberg and
14 Rwanda, in the former Yugoslavia, in many other theatres including in Darfur but, your
15 Honours, let me take the points in sequence.

16 It's our submission there is no tension between the victims' interest and our interest, the
17 clients' interest, in having this matter finally disposed of in a fair manner.

18 Our clients are, your Honours know, you've got the papers before you, they are simple
19 people and they are not trained officers in Sandhurst or in West Point. They left their
20 lives to go in harm's way not for richness, they are living rough, but to fight against a
21 regime that has been internationally condemned and that is raping.

22 Your Honours, they have an interest to clear their name. Their good name matters as
23 much as anything else, and your Honour, their conduct is consistent with their desire to
24 have this matter resolved but a trial, your Honour, does not mean a trial at any cost.

25 Your Honour, if the Defence are not able to properly investigate, and the case law, it is in

1 our stay, the Prosecution of course referred to Strasbourg jurisprudence which we have
2 said is clearly not on point because Strasbourg is looking backwards, it is looking whether
3 or not a trial has been fair or whether or not there is a breach for example of Article 6 of
4 the Convention but, your Honours, both in the Lubanga case one looks at the
5 ground-breaking decision in Lubanga and the Appeals Chamber jurisprudence, when the
6 language the Appeals Chamber used is that if a fair trial is not possible - let me quote
7 actually. "A fair trial is the only means to do justice. If no fair trial can be held the
8 object of the judicial process is frustrated and the process must be stopped." And, your
9 Honour, the next -- let me continue. "Where the breaches of the rights of the accused" not
10 the rights of the victims only, not the rights of the Prosecution because that's not what
11 Article 67 speaks about, "Where the breaches of the rights of the accused are such as to
12 make it impossible for him or her to make his or her Defence within the framework of his
13 rights, no fair trial can take place and the proceedings can be stayed."
14 Now, your Honours, in the present case without doing proper investigations, how can we
15 possibly test evidence? How can we put a case to a Prosecution witness? How can we
16 get Prosecution witnesses properly to be pushed towards the truth?
17 Your Honour, we firstly don't have the material to controvert a witness, but also we don't
18 have the material ability to gather the information in the first place, and this is why I did
19 say, your Honour, we want a trial, we want a fair trial but not a trial at any cost. The
20 Article 67 rights is really the fundamental pillar upon which this Courtroom rests and,
21 your Honour, if it is whittled away in a case like this because of intransigence of a
22 government like the Government of Sudan to the detriment of individuals who patently,
23 on any fair assessment, are trying to submit to the supremacy of the law, and have their
24 conduct judicially determined, if it's sacrificed now, your Honours, the implications,
25 going back to what I said at the outset, go beyond in our respectful submissions the most

1 important consideration of ours, the rights of Mr Banda and Mr Jerbo, but would also
2 have the capacity to irredeemably infect and erode the integrity of this judicial institution.
3 Your Honours, we must not go forward at any price and we say for the reasons we've put
4 forward that a stay can be ordered at any time.
5 Unlike an adjournment there is nothing within our power that can be done. There is no
6 prospect today for a change of circumstance that's within the gift of the Defence, or the
7 Prosecution and the Prosecution's comments, and the late Prosecutor, the previous
8 Prosecutor's comments to the council about the Government of Sudan's conduct are very
9 relevant and your Honour, really, there is nothing really the Bench can do, in the face of
10 Government of Sudan intransigence.
11 The only fair - the only reasonable - action is to call it what it is. The Government of
12 Sudan is preventing a fair trial and it's for other actors, it's for the agency, the institution,
13 that referred this matter to this Court, to make sure that this Court can do that which it
14 was created to do, namely to render justice in a fair manner, and your Honours I don't
15 think we can say much more than that.
16 PRESIDING JUDGE ALUOCH: I see the Prosecutor is on his feet.
17 MR SACHDEVA: Thank you, Madam President. If I may, with your leave, just come
18 back on two points?
19 My learned friend is right to refer to the Lubanga stay. However, we need to look at the
20 context. In that case the trial was about to start in a month's or two months' time, so as
21 His Honour has stated the trial was moving ahead and at that point if certain materials
22 hadn't been disclosed then it would have been unfair for the trial to commence.
23 The situation here is completely different. There is no trial date yet, there is -- there are
24 developments that are still to take place in terms of investigations and, if the Defence seek
25 a temporary stay, which means they will not be paid, if there are developments then they

1 can't actually conduct their investigations because they have no money. So the very
2 solution they are requesting frustrates the very rights they are saying are being frustrated
3 and violated.

4 So in our respectful submission, yes, there maybe issues which require an adjournment,
5 even though no trial date has been set, but we reiterate our submission that a temporary
6 stay would be a disproportionate resolution to this issue.

7 Thank you, Madam President.

8 PRESIDING JUDGE ALUOCH: Whilst you are on your feet -- Mr Karim Khan, were you
9 going to respond in a matter of a second?

10 MR KHAN: In a matter of a second, your Honour, the Prosecution can't have it both
11 ways. They have large portions of this case -- large portions of even the Prosecution
12 material is redacted because they say there's no trial date, and your Honours now they say
13 because there is no trial date we can't stay the proceedings.

14 Your Honour, it's completely topsy-turvy, illogical and it does not withstand the barest
15 scrutiny. Your Honours, I really think anybody in this courtroom can see that the
16 argument doesn't pass muster.

17 PRESIDING JUDGE ALUOCH: Thank you.

18 Judge Eboe-Osuji has another point, please.

19 JUDGE EBOE-OSUJI: Yes, I was going to, President, take Mr Karim Khan up on the
20 reference to Lubanga.

21 Of course, the statement no one can quarrel with it. Where there has been a clear
22 appreciation by the Judge that a fair trial is impossible, it does not make sense to continue
23 or begin a trial that is about to start, but the rub of the matter is the concept of
24 impossibility. It doesn't mean one thing in every situation, does it? It will require a
25 clear appreciation of the circumstances by the Bench to say, "We have taken full

1 cognizance of the circumstances and in our view there is an impossibility in terms of a fair
2 trial. Therefore, it will not proceed."

3 Why is it inconceivable to make that sort of appraisal after the evidence has been received,
4 or the process indeed has gone on to allow the Judges to see, as I say, a full -- the full
5 impact of the difficulty the Defence has been put through, but before rendering a verdict
6 then make a pronouncement on whether or not indeed the trial has been so unfair that a
7 fair trial has been impossible to conduct? Why isn't that the solution?
8 That's one difficulty I am trying to get through with your motion, honestly speaking, and
9 that is, as I said, looking at the research of how they tried to resolve it in the British system,
10 they say, "Let's get all the material in, let's see it and at the end of it make that
11 determination after an appraisal of the process has taken place."

12 MR KHAN: Well, your Honour, even in the jurisdiction of England and Wales -- and I
13 am not holding that up as an example at all, but even in the jurisdiction of England and
14 Wales - and, of course, I am not holding that up as an example - if a fair trial at any point
15 becomes impossible, particularly since the enactment of the Human Rights Act in 1998, a
16 Judge will stop the proceedings going forward.

17 Now, your Honours, if one adopted what has been presented or advanced now as a
18 possibility, at least two consequences arise; the first of which the victims may have an
19 interest in and the Prosecution may have an interest in. If you went on regardless and
20 closed -- let the Prosecution present a case that had been inadequately tested and then you
21 came to the same decision that we ask you to make now, namely that it's not possible to
22 have a fair trial and the proceedings are stayed we don't know for how long, there are
23 very strong reasons why to say that on any resumption the principle of *autrefois* or *ne bis*
24 *in idem* may apply so that the proceedings should be permanently stayed because the
25 individuals concerned have run the jeopardy of a trial and a retrial may be required.

1 Your Honours, a trial for example could take place in ten years when your Honours have
2 even been further elevated. Your Honours, we don't know. We don't know.

3 Your Honours, the other aspect is the point I sought to address earlier. There is no magic
4 in a trial. There is no magic in having a courtroom full of lawyers and people coming
5 into the witness box, unless it's meaningful. Going back to International Human Rights
6 Law, rights should be practical and effective, not theoretical and illusion.

7 Your Honours, if we are not able to investigate to gather the information to properly test
8 Prosecution witnesses, and also the ability to gather evidence and information so we can
9 put an alternative narrative in an informed manner to Prosecution witnesses that are
10 desirous of speaking the truth, your Honour, the whole exercise becomes one of futility,
11 an exercise in futility.

12 Your Honour, the Court in our respectful submission should not be seeking - and I know
13 your Honours are not seeking to do it - contrive to find a way, navigate a way, where
14 these proceedings, because of the co-operation of the suspects, goes forward at any price,
15 at any cost, without proper regard to the fundamental Article 67 rights, and your Honours
16 we say that by focusing upon the purpose of this Court to do justice, and your Honours to
17 dispassionately look at the arguments of the parties, we say you will not be
18 able - manifestly you will not be able - to do that as things stand. There is no ability for
19 the Defence to go to Sudan, no ability to properly speak to witnesses, no ability from the
20 Court, from the Registry, or from the Victims and Witnesses Unit to get witnesses out.

21 Your Honours, it really is a simple matter, we say, albeit that the consequences are quite
22 stark.

23 PRESIDING JUDGE ALUOCH: Thank you very much, Mr Karim Khan.

24 I would like to move on to point 2 of the agenda. I think we have spent considerable
25 time on agenda item 1 and in the course of submissions we might have touched on

1 agenda 2 quite substantially, but nevertheless I will put agenda 2 as it is. Under this item,
2 the Chamber was going to hear submissions from the parties only.
3 Since the filing of the Defence request for a temporary stay of proceedings, the Chamber
4 has issued several decisions on redactions to witnesses' statements, or transcripts, or
5 interviews.
6 Under item 2 (a) of the agenda, the Chamber would like to receive submissions from the
7 parties on the current security situation in Darfur and its impact on effective Prosecution
8 disclosure.
9 Prosecution, only to the extent of what you can talk about at this public session, please.
10 MR OMOFADE: Madam President, I am grateful.
11 The Chamber might recall that on 9 May the Prosecution made a filing in which it alluded
12 in some manner to the prevailing situation - security situation - in Darfur.
13 What the Prosecution will do is refer your Honours to that filing and its related annexes,
14 save to say that from the Prosecution's assessments the security situation remains fluid
15 and rather unpredictable.
16 There are a number of developments obviously, but reports continue about aerial
17 bombardments in the Sudan, sexual violence, displacement of civilians, and these reports
18 more than anything emphasise the fact that most of these atrocities are attributed to the
19 affiliates of the Government of Sudan and certain militia groups in Darfur.
20 But what is also quite clear is that the security situation in Darfur cannot be divorced
21 completely from other developments in the region. So what we realise is that
22 developments, for instance, relating to the recent alliance - and I believe my friend,
23 Mr Koumjian, alluded to this at the last status conference - the recent alliance of interests
24 between the Government of the Sudan and the Government of Chad, have had an impact
25 on the situation in Darfur, as well as in the Sudan, such that it appears to be that because

1 there is that collaboration they have a common interest in fighting or reacting against
2 rebel groups that are anti both governments.

3 One can't also rule out the impact that the recent developments in Libya have had. The
4 developments in Libya as of 2011, and the support that the Libyan government was giving
5 to certain militia rebel groups in Darfur, has had an impact on the ability of those rebel
6 groups to relate in Darfur generally.

7 Your Honours, then there's the issue of the creation of the new state of South Sudan.

8 What appears to have happened is that the Government of the South Sudan and the
9 Government of Sudan appear to be in what, at least as of April 2012, appears to be an
10 emerging conflict, and so all of these factors taken into one pot appear to have an impact
11 on the security situation in Darfur itself.

12 I can go on and on, but what we also know is that certain rebel groups within the Sudan,
13 including the Liberation and Justice Movement to which Mr Banda belongs, appear now
14 to be a pro-government alliance, while another rebel group, which is the Sudan
15 Revolutionary Front, appears to be more anti the Government of the Sudan and more
16 aligned and receiving support from the Government of South Sudan.

17 So, as regards the more general security situation, it's very difficult to say because it's
18 changing as we see from day-to-day. As regards the impact that this might have had on
19 our ability to disclose witnesses' identities or statements, if any, I'd prefer to address you
20 on that, your Honours, in closed -- in the ex parte session that comes afterwards.

21 I am grateful, your Honour.

22 PRESIDING JUDGE ALUOCH: Thank you very much.

23 Any comments from the Defence?

24 MR KHAN: Yes, your Honours.

25 With your leave, I will hand up some files on the security situation in Darfur which is

1 very recent and it's all sourced. The actual document is 12 pages, but at the back of the
2 file your Honour will see the relevant newspaper articles and press reports.

3 Contrary to what the Prosecution have said, I think it's far too kind, far too emollient, to
4 say that the situation is fluid and unpredictable. It is dire. People are being killed on a
5 daily basis.

6 Your Honours, perhaps with the usher's assistance the files could be handed up to the
7 Bench.

8 PRESIDING JUDGE ALUOCH: Do you have any further contribution on this, or that's
9 all?

10 MR KHAN: Your Honour, I do, but I thought it would be a courtesy to let the Bench
11 have the files first in case there's any questions. Your Honour, I will be very brief
12 because the documents are in the file.

13 PRESIDING JUDGE ALUOCH: We would not be able to read as fast as you would want
14 us to right now.

15 MR KHAN: And one for the victims' lawyers and one for the Prosecution, please.

16 PRESIDING JUDGE ALUOCH: Mr Karim Khan, very briefly then please.

17 MR KHAN: Your Honour will see that from the reports, the snippets included, the
18 instance included, are all very recent, they are all this year.

19 Your Honour, regarding paragraph 24, it's clear that the tentacles of the Government of
20 Sudan are ever more tightly strangling the main arteries. Paragraph 24 of the first
21 document, your Honour, which is the security situation in Darfur, South Sudan and Chad,
22 update January to July 2012.

23 Your Honour, if your Honour turns to paragraph 24, you will see that 500 toll houses have
24 been erected by the Government of Sudan and passengers receive death threats, beatings
25 for non-payment and their tyres get shot.

1 Your Honours see in the paragraphs following not only lawlessness but the bombing by
2 Antanovs of different parts of Sudan; sustained bombing for seven days in some instances.
3 Your Honours will see at paragraph 27 even the United Nations has been understandably
4 affected. In paragraph 27 we source the assertion that travel to the war-affected areas by
5 air, with the assistance even of the United Nations Humanitarian Air Service, is no longer
6 possible due to recent negative security travel advisories given by the Government of
7 Sudan to the United Nations Department for Safety and Security. Nothing more clearly
8 can say that if the United Nations' wing dealing with humanitarian assistance can't
9 operate, what hope the Defence?

10 And your Honours, in paragraph 28 is the last point, I won't go into all the bombing and
11 the killings and the assaults and arbitrary arrests of lawyers, and all the rest that's detailed
12 in the document, but in paragraph 28 the United Nations Security Council, the council's
13 own panel of experts has been limited and movement has been restricted by the
14 Government of Sudan. So, your Honours, free movement is not possible. Civilians are
15 being stopped at checkpoints. The document details the problems at the border. It
16 details -- the stay application deals of course with the criminal consequences for
17 co-operation with the Court, and your Honour has also examples where lawyers have
18 been arrested for advocating for human rights.

19 Your Honours, all of these militate, we say, in favour of the stay and demonstrate what
20 can only be described as a lamentable and unacceptable pattern of conduct by the
21 Government of Sudan that unfortunately is not fluid but is sadly consistent since
22 President Bashir started his pogroms against the civilian population, which our clients
23 have sought to stand firmly against.

24 I am grateful.

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

1 MR KOUMJIAN: Your Honour, can I make a very quick correction on behalf of
2 Abdallah Banda, one of our clients? The Prosecution said that he is the group, the LJM is
3 part, I believe he said pro-government group. Let me, as previously stated, this is a
4 group, LJM, that entered into a peace deal that is currently in process with the
5 government that is ongoing. He has not defected to the government. You make peace
6 with your enemies, not with your friends. So I just want to correct to say that he is with a
7 pro-government group we feel is inaccurate. He is with a group that has entered into a
8 process mounted by the United Nations and African Union to try to negotiate a just peace
9 in Darfur.

10 PRESIDING JUDGE ALUOCH: Thank you very much. I think that is in the previous
11 transcript because you explained -- yes, you explained that.

12 Now, information given by the Defence needs to be -- we need to officially record it as
13 hearing non-evidence and I would request the Registry to do that.

14 We have about ten minutes before our break. Within those ten minutes I think we can
15 turn to agenda item 2(b) and 2(c). The Chamber notes that here again submissions might
16 have been received but, nevertheless, I will go through that.

17 The Chamber notes that the Defence averred in its public request that it has not been able
18 to contact and question certain Prosecution witnesses who may be of assistance for its
19 preparation of the case.

20 Some of these witnesses will not be relied upon at the trial. These are Witnesses 304, 305,
21 306, 312, 314, 441 and 446. Other witnesses whom the Prosecution intend to rely on at
22 the trial, and who may according to the Defence be of assistance for its preparation of the
23 case, are Witnesses 307, 439, and 442. This is according to the Prosecution's list of
24 witnesses of 5 August 2011, Annex A to filing 189.

25 On 5 July 2012, by way of an email upon the Prosecution's request to the Chamber, the

1 Chamber allowed an inter partes communication to enable the Prosecution to update the
2 Defence on whether or not the Prosecution witnesses, namely, 307, 314, 441, 442, 466, 304,
3 305 and 306 and 439 have given their consent to be interviewed by the Defence.

4 Without revealing any confidential information, the Chamber would like to hear progress
5 reports from the parties on this inter partes communication, and concrete proposals for
6 resolving this issue, if it has not already been resolved and mark what I am saying
7 without revealing any confidential information. Prosecution, do you have any
8 comments on this? We have about five minutes to the break.

9 MR OMOFADE: Madam President, I am grateful. The, as your Honour rightly said,
10 the Prosecution made contact with the Chamber to seek permission to be able to
11 communicate with the Defence on this matter. The Prosecution has communicated
12 certain information to the Defence. We did that on 9 July. I will take the witnesses in
13 stages, if I may?

14 Witnesses 305, and Witness 439, the Prosecution has made contact with these witnesses,
15 and both of them have indicated their willingness to be interviewed by the Defence.

16 We've communicated that information to the Defence. I say in passing that both of these
17 witnesses were not residents of the MGS Haskanita, so they happened to be members of
18 certain rebel groups, and I say no more.

19 As regards the other witnesses in that list, Witness 312, the Prosecution has confirmed
20 from him that he is not willing to be interviewed by the Defence or to meet them.

21 Witness 306, the Prosecution made brief contact with. Your Honours might recall that
22 this was a witness that we had difficulties in contacting in the past. We haven't been able
23 to speak with him in order to confirm whether or not he is happy to speak with the
24 Defence. So on that particular witness I say the jury is still out.

25 Witness 304, the problems with this witness remain. We haven't been able to contact him.

1 We continue in our efforts to do so.

2 Then there's another batch of witnesses, Witnesses 307, 314, 441, 442 and 466. I can say in
3 short shrift that Witnesses 307, 314, 441 and 446 have all indicated that they are not willing
4 to be interviewed by the Defence. The last one is Witness 442. Your Honours might
5 recall that there was some communication with the Defence in the past when we spoke to
6 this witness late last year, I believe in September last year, and he indicated at the time
7 that in principle he was quite happy to have a meeting with the Defence but he did cite to
8 certain travel and work commitments and what he relayed to us was he will be happy to
9 review that decision some time this year.

10 Sadly, in the recent days, we haven't been able to establish contact with this witness. I
11 can say that we do have contact details for him. It might be that we will be able to
12 contact him in the coming days. One can only imagine that the offer that he had open
13 some time last year remains open. We will continue to communicate with the Defence in
14 this regard, but those are submissions. I believe, your Honours, that I have covered all
15 the witnesses.

16 PRESIDING JUDGE ALUOCH: Thank you very much. We have less than five minutes.
17 The Defence, do you think you can make a quick response or would you like to do that
18 after the break? Because we are taking a break at 11.30. Do you think you would be
19 able to make a quick response, Mr Karim Khan? That would be commendable.

20 MR KHAN: It would be a good discipline on me, your Honour, a good constraint. So,
21 your Honour, I have heard the purpose of this segment of the agenda, that the bottom line
22 is that the Defence is only going to be able to speak to two out of the ten Prosecution
23 witnesses that we requested more than a year ago. Two out of the ten. And your
24 Honours yourselves, in relation to 304, 305 and 306, stated in your decision of, I think it
25 was February of this year, public redacted decision on the Prosecution's request for

1 non-disclosure or redactions of material relating to those witnesses, and I quote, "That if
2 the Prosecution is unable to locate, contact or secure the consent of these three witnesses,
3 or otherwise resolve the underlying disclosure issue, the Trial Chamber will need to
4 consider whether a fair trial may still be conducted." And your Honours continued.
5 So, your Honours, out of those three, only one of them, out of those three, has agreed to
6 speak to us. Two haven't been contactable. And even as of yesterday, I am told, my
7 learned friend Mr Omofade sent an email to my learned colleague, Ms Lawrie, there was
8 no mention at all, not a whisper that they had contacted Witness 306. In fact, that they
9 were still attempting to contact him. So today, in this Courtroom, on this occasion for the
10 first time we hear that there had been some contact with Witness 306. I have the email
11 here. And I am grateful to my learned friend for bringing that to my attention.
12 Your Honours, these are important matters. It becomes even more important given the
13 other constraints that are on the Defence that we have gone into that curtail, in a very
14 meaningful and real way, our ability to get to the truth.
15 Your Honours, I have no more to say than that. I am grateful and, your Honours, I am
16 within the five minutes.

17 PRESIDING JUDGE ALUOCH: Thank you very much. You did very well within the
18 time I gave you.

19 We will have a well-deserved break. Our interpreters and court reporters also need a
20 break and we will resume the session at 12 noon. Half-an-hour's break. Thank you.

21 THE COURT USHER: All rise.

22 (Recess taken at 11.28 a.m.)

23 (Upon resuming in open session at 12.07 p.m.)

24 THE COURT USHER: All rise.

25 Please be seated.

1 PRESIDING JUDGE ALUOCH: The public session continues and now we are on agenda
2 item 2(d).

3 Prosecution. Sorry, you are on your feet, Prosecutor. Yes?

4 MR OMOFADE: Indeed, Madam President. Might I just respond very briefly to the
5 last item on the agenda, my friend for the Defence's response?

6 PRESIDING JUDGE ALUOCH: In half-a-second.

7 MR OMOFADE: I will certainly try to do so.

8 Just to point out that there was email communication with the Defence regarding 306.

9 The email communication did say that we haven't been able to contact him so as to obtain
10 his consent to the Defence request.

11 What I did say to your Honours, and I think it was at line -- page 43, line 6 to 11, "Witness
12 306, the Prosecution made brief contact with."

13 Your Honours might recall this is a witness we had been trying to -- we had difficulties in
14 contacting in the past. We haven't been able to speak with him in order to confirm
15 whether or not he's happy to speak with the Defence, so like I said the jury is still out.

16 I don't want to -- I just want the record to be straight.

17 There's no secret about it. Logistically, we have now located him. It wasn't physically
18 possible for him to communicate with us at that time. So we've made contact indirectly,
19 but we haven't been able to speak with him.

20 That's all I sought to clarify, your Honours.

21 PRESIDING JUDGE ALUOCH: Thank you very much. We will proceed to agenda
22 item 2(d).

23 Prosecution, in your filing 343, dated 4 June 2012, at paragraph 9 thereof, you indicated
24 that you are following up a number of other items with third parties, and you stated
25 further, and I'm quoting you, "It is anticipated this effort will also generate further

1 disclosure to the Defence pursuant to Article 67(2) and/or Rule 77."

2 In light of this submission, what is the time estimate for additional disclosure of Article
3 67(2) evidence and inspection of Rule 77 material?

4 MR OMOFADE: Your Honours, it's rather difficult to say because it's entirely dependent
5 on third parties, as we said in that filing. The filing, of course, that your Honours refer to
6 is filing -- the filing that we made on 4 June this year.

7 We can only speculate, but we would ask for three months in order to be able to at least
8 obtain responses from those third parties in relation to the disclosure under this -- under
9 this section.

10 PRESIDING JUDGE ALUOCH: Why such a long time, three months?

11 MR OMOFADE: Again, I say because it's entirely dependent on third parties. Perhaps
12 once we get into the ex parte session I'll be able to give your Honours a degree of an
13 update, but there have been communications, it's going back and forth and it's rather
14 difficult to speculate as to when the final responses that we require might come.

15 PRESIDING JUDGE ALUOCH: Thank you. We will look forward to hearing from you
16 on that.

17 MR OMOFADE: I'm grateful, your Honours.

18 PRESIDING JUDGE ALUOCH: Any comments from the Defence?

19 MR KHAN: Your Honour, just with your leave, this item and the next two on the
20 agenda with your leave will be dealt with by my learned friend, Mr Aidan Ellis. He's on
21 the list of assistants to counsel and a member of the English Bar.

22 Your Honour, as I said earlier, also for the sake of courtesy and getting the consent of the
23 Court, when we deal with co-operation issues I'll make the same application in relation to
24 Ms Lawrie, who is a member of the Scottish Bar. I'm grateful.

25 PRESIDING JUDGE ALUOCH: I see you have a wide network.

1 Thank you. Yes?

2 MR ELLIS: Well, your Honours, a very brief point to start is simply to say that the

3 Defence would welcome any progress on this agenda item.

4 To put it in context, it relates to a request for disclosure which the Defence originally

5 made on 19 July 2011, so the Prosecution have now been working on this for almost one

6 year.

7 PRESIDING JUDGE ALUOCH: Thank you for being very brief and at the same time

8 making your point.

9 I will turn to agenda item 2(e). The Chamber receives on a regular basis Prosecution's

10 requests for lifting of redactions. The Chamber is aware that this is an ongoing process.

11 However, the Chamber would like to know whether this process is still ongoing and, if so,

12 for how long? The Chamber is seeking this clarification based on the submission at

13 paragraph 10 of document ICC-02/05-03/09-343 when you say that you will apply to the

14 Chamber for lifting redactions.

15 Prosecution, can you clarify this, please?

16 MR OMOFADE: Madam President, indeed I can.

17 Again, it relates to the submissions in the filing of 4 June this year. At paragraph 10,

18 what we were attempting to convey was the fact that re-disclosure of material that comes

19 about as a result of lifting of redactions will be done as expeditiously as possible.

20 Your Honours will already be aware that there have been a number of applications to the

21 Chamber and, as a result of that, we've made certain re-disclosures to the Defence. Off

22 the top of my head I think we made one in April, another one in May and there's another

23 one that's going to be made to the Defence at the end of this week. Your Honours are

24 also seized of a number of applications from the Prosecution that also, if granted, might

25 generate further redactions to be lifted and further re-disclosure to the Defence.

1 So the efforts of unredacting and re-disclosing to the Defence are ongoing ones. It's
2 rather difficult to speculate as to when the whole task might be completed. I say this for
3 the main reason if one makes an application to your Honours requesting lifting of an item
4 in a particular witness statement, or witness-related material, what ordinarily comes
5 about is that of itself might trigger further redactions to be lifted in other material.
6 Because these are redactions that were authorised pursuant to Rule 81.4, the authorisation
7 of the Chamber is inevitably required before we can lift and disclose to the Defence.
8 So from our standpoint we can say certainly that within the next six weeks to I would say
9 eight weeks, we will review all the items of material available to us and apply for the
10 necessary redactions. Once granted by the Chamber, of course, the re-disclosure will, as
11 it has always been done, will take place almost immediately, probably within a day or
12 two.

13 A couple of caveats, your Honour, the first being there are a number of witness statements
14 obviously where security situations have not been resolved, and your Honours might hear
15 a bit more about that in the ex parte session.

16 We have no way of knowing, once those situations are resolved, when any applications
17 that ensue are going to be made -- any decisions that ensue are going to be made by your
18 Honours as to the lifting of redactions. So we are entirely dependent to some extent on
19 matters outside of the Prosecution's control only.

20 Many of these redactions that we refer to were temporary redactions, so your Honours
21 might have to give us the go-ahead either to lift them unilaterally or to make a fresh
22 application to.

23 Your Honours would also recall that in the Prosecution's recent application for protective
24 measures that we made on 19 June, it related to the statements of six witnesses. This is
25 one of the applications that I said is outstanding. Once there's a decision from your

1 Honours, we believe that there will be further six witness statements re-disclosed to the
2 Defence .

3 Now I have to say also in passing that there have been some minor issues that we've been
4 identifying relating sometimes to the names of investigators which had been redacted in
5 the past under Rule 81(2). What we had decided for some of them is that there's no
6 further need for those redactions to remain in place.

7 However, where it's only the name of an investigator that needs to be lifted so as to
8 re-disclose to the Defence maybe a document of about 50 pages. We've held on to that
9 for the time being, particularly where there's further information that we think ought to be
10 redacted and might come imminently.

11 So we anticipate that this is a process that might take another six weeks or thereabouts.

12 It may well take a bit longer.

13 PRESIDING JUDGE ALUOCH: Any comments from the Defence?

14 MR ELLIS: Your Honours, I'm grateful. Again, two short observations.

15 Your Honours, of course the Defence are concerned that material covered by Article 67(2)
16 and Rule 77 remains concealed from the Defence. As has already been submitted by lead
17 counsel, that is part of the picture of prejudice to the Defence in this case.

18 And secondly, your Honours, of course once redactions are lifted, that is really the
19 starting point for the Defence work. It is only once redactions are lifted that the process
20 of taking instructions and then of carrying out any further investigations, limited of
21 course by the constraints on Defence investigations, that whole process can only start once
22 the redacted information is revealed to the Defence.

23 PRESIDING JUDGE ALUOCH: Thank you. Prosecution, again in half a second.

24 MR OMOFADE: Your Honours, incidentally, it's not a response to my friend but just
25 some additional information.

1 I have to mention that your Honours will be aware that pursuant to Rule 76 we have been
2 disclosing translations of witness statements obtained. We've been disclosing them to
3 the Defence in the Zaghawa language.

4 What has happened is certain redactions have been lifted and the English versions of the
5 statements have been re-disclosed to the Defence. However, there's a catch-up process in
6 actually implementing those lifted redactions in the audio translations in Zaghawa, so I
7 just point that out for the record, just in case the Defence is wondering why the audio
8 translations haven't come sooner.

9 PRESIDING JUDGE ALUOCH: I'm just coming to Zaghawa, yes. Now, Prosecution,
10 what is the time estimate for full translation of all statements and transcripts of the 15
11 Prosecution witnesses to be relied on at trial? What is the time estimate?

12 MR OMOFADE: Your Honours, my colleague Ms Zago will respond to this topic.

13 MS ZAGO: Thank you, Madam President, your Honours. I'm grateful. I'm mindful of
14 the time constraints, and I'll try to be brief and concise as much as possible.

15 As your Honours will know from the monthly Prosecution and Registry reports to the
16 Chamber, to date the Prosecution has been able to translate into Zaghawa and disclose to
17 the Defence ten statements belonging to seven of the 15 witnesses the Prosecution intends
18 to call at trial.

19 I should mention obviously that the Registry has also substantially contributed to the
20 translation of those statements and the Prosecution is very grateful for that assistance.

21 As my colleague, Mr Omofade, has just briefly mentioned, these ten audio-translated
22 statements were disclosed to the Defence with temporary redactions as approved by your
23 Honours.

24 Whenever after such disclosure those temporary redactions were lifted pursuant to an
25 order of this Chamber, the Prosecution has proceeded to disclose immediately or

1 re-disclose actually immediately to the Defence the English written version of those
2 statements in non-redacted form and will proceed to re-disclose the corresponding audio
3 translation in non-redacted form in due course.

4 I might provide your Honours or our learned friends from the Defence additional details
5 as to the reasons why the Prosecution has adopted this way of proceedings, but generally,
6 it is more efficient and progressive for the Zaghawa interpreters to continue with the
7 translation of the remaining witness statements rather than suspending that translation
8 and going back over the audio files to proceed with the lifting of redactions on the audio
9 files.

10 Proceeding on this basis, by the end of August 2012 the Prosecution will have completed
11 and disclosed to the Defence the audio translation of an additional eight witness
12 statements and in so doing completing the translation into Zaghawa of all Rule 111
13 statements collected by the Office of the Prosecutor in this case.

14 By that time, the Prosecution will have fulfilled its Rule 76(3) obligation with respect to
15 the bulk, in terms of substance obviously, of its incriminating evidence. After that, the
16 Prosecution will proceed to translate into Zaghawa the remaining item of evidence falling
17 within the scope of the same rule. And for sake of clarity, these items are grouped in
18 three main categories: The first category is the interview transcripts of two Prosecution
19 witnesses who were interviewed by the office pursuant to Rule 112, and therefore their
20 interviews were audio and video recorded and transcripts were generated. Those
21 transcripts will be translated in Zaghawa by the end of November 2012.

22 The second category of items that remains to be translated into Zaghawa are the annexes
23 to Prosecution witness statements, such as sketches, pictures, x-rays, medical reports,
24 transcripts of videos that the Prosecution witnesses provided and were annexes
25 to -- annexed to their statements.

1 And the third and final category to be translated of, items to be translated into Zaghawa,
2 are the one called -- well, that we refer to as "witness prior statements."
3 In fact, three Prosecution witnesses gave oral testimony before the Pre-Trial Chamber in
4 the Abu Garda case, and one of these witnesses also testified before the Trial Chamber in
5 the Bemba case.
6 Those transcripts of those oral testimonies will also be translated into Zaghawa, together
7 with the victims' applications of six Prosecution witnesses who have dual status in the
8 current proceedings.
9 To that end, the Prosecution has already liaised with the common legal representatives in
10 order to obtain the unredacted versions of the victims' applications in order to be able to
11 disclose them and translate them accordingly to the Defence.
12 With respect to this third category of items to be translated, the general category of
13 witness prior statements, the Prosecution has already agreed with the Defence for certain
14 of those items to be -- on the extent of the translation into Zaghawa and the Prosecution
15 intends to approach the Defence with the aim of finding a sensible and pragmatic solution
16 with respect to the remaining witness prior statements and the victims' applications.
17 Overall, the Prosecution has estimated that with the currently available Zaghawa
18 resources, that are three language assistants, it will be, the Prosecution will be in a
19 position to fulfil its obligation pursuant to Rule 76(3) by the end of March 2013.
20 This of course does take into account the process of lifting the redactions to the audio files
21 that are currently still redacted and will be redacted in the future, and the quality check
22 and review of the translation that is required by the standards that the Office of the
23 Prosecutor applied to its translation.
24 The office will continue to update the Chamber on a monthly basis on the progresses that
25 it makes in terms of the status of its translation into Zaghawa, unless otherwise guided by

1 the Chamber.

2 This would conclude the Prosecution submission on item (f), but we remain at your
3 disposal to answer any questions your Honours may have. I'm grateful.

4 PRESIDING JUDGE ALUOCH: Thank you very much Ms Zago for that very detailed
5 information you're giving us. Nevertheless, I have some specifics that I would like to put
6 to you so that you can tell us whether this is right or not.

7 For example, the Chamber has noted the following: That only the summaries of
8 statements, or transcripts of interviews of Witnesses 307, 315, 420, 430, 442 have been
9 translated into Zaghawa, in bracket, in audio files.

10 Can you comment on that before I go to two other examples? Is that --

11 MS ZAGO: Might I seek your indulgence and consult with my colleagues? Thank you.

12 PRESIDING JUDGE ALUOCH: Yes, yes.

13 I beg your pardon. Can I just repeat that the numbers - the witness numbers - are 307,
14 315, 420, 439 and 442.

15 (Prosecution counsel confer)

16 PRESIDING JUDGE ALUOCH: Ms Zago, what I meant is only summaries as opposed to
17 full statements, yes. Can you comment on that, please?

18 MS ZAGO: Thank you, your Honour, for this clarification.

19 As your Honours might be and are aware, in light of the Appeals judgment decision
20 delivered on 7 February, if I'm not mistaken, 20 -- this year, following that judgment the
21 Prosecution proceeded with the translation of the full statements and will proceed with
22 the translation in the future of the full transcripts of the interviews conducted by the
23 Office of the Prosecutor with the two witnesses who were interviewed; audiotaped
24 interviewed.

25 According to our records, so far the Prosecution has translated the full statements and not

1 summaries. Of course I will list them for your assistance, if required?

2 PRESIDING JUDGE ALUOCH: Now, yes, if you have the information, please.

3 MS ZAGO: We have translated - the Prosecution has translated - and disclosed the two
4 full statements of Witness P-416, the full statement of P-417, the two full statements of
5 Witness P -- yes?

6 JUDGE EBOE-OSUJI: Ms Zago, sorry to interrupt you, but I believe that the question
7 was in relation to specific indicated witnesses which were -- the Presiding Judge gave to
8 you. It might speed things up if you will would deal with just those for now.

9 MS ZAGO: Might I verify my list against; the list given by your Honours? Thank you.

10 PRESIDING JUDGE ALUOCH: Yes, yes.

11 (Prosecution counsel confer)

12 MS ZAGO: Your Honours, thank you and I'm grateful for your patience.

13 The witnesses -- the full statements of the witnesses your Honours have just referred to
14 form part of the item that will be translated by the end of August first and by
15 mid-November, so so far the Prosecution has translated all the full statements of other
16 witnesses not referred to by your Honours just now.

17 The witnesses that you have just referred to will be translated - their full statements and
18 transcripts will be translated - in the near future and the written statements of those
19 witnesses will be completed by the end of August, while in particular for Witness 307 the
20 transcripts of his interview will be translated by mid-November 2010 (sic).

21 PRESIDING JUDGE ALUOCH: Thank you, and I take it that by the phrase "near future"
22 you mean August and November?

23 MS ZAGO: That is absolutely correct, your Honour. Thank you.

24 PRESIDING JUDGE ALUOCH: Good.

25 The statements of Witness 446, according to our observation, is only partly translated. Is

1 that correct and, if so, why?

2 MS ZAGO: Witness 446 provided two written statements to the Prosecution, two
3 different written statements, and one has been completed and disclosed in -- I should
4 probably clarify has been translated in full and disclosed to the Defence. The second
5 statement that this same witness provided the Prosecution with will also form part of the
6 translations that will be completed by the end of August this year.

7 PRESIDING JUDGE ALUOCH: Thank you very much.

8 One more -- sorry, two more. The statements of Witnesses 485, 486 and 487 are not yet
9 translated; am I right? If so, why not yet translated? Why are they not yet translated?

10 MS ZAGO: That is correct, your Honours. These three witnesses provided statements
11 and the Prosecution will proceed to translate them again by the end of August 2012. The
12 reason why those witnesses specifically, or the statements provided by those witnesses
13 specifically, have not been translated yet is because the Prosecution's resources were
14 employed in translating other witness statements that have been disclosed to the
15 Defence to date.

16 PRESIDING JUDGE ALUOCH: I see. So I want -- we want to understand you,
17 Ms Zago, as saying that the time estimate for the completion of the remaining translations
18 into Zaghawa of Rule 76 evidence is August and November? Would I be correct in that?
19 I just want the transcript to read the correct information.

20 MS ZAGO: I'm grateful, your Honour. We wanted to draw a distinction between the
21 different categories of statements. The first category of statements, written statements,
22 that will be disclosed in Zaghawa form by the end of August 2012 are the written
23 statements of those Prosecution witnesses who were questioned by the office pursuant to
24 the provision of Rule 111. This means that for those witnesses - Prosecution
25 witnesses - the Prosecution has collected written narrative statements. Those statements

1 in narrative form will be translated by the end of August 2012.

2 As respect the two Prosecution witnesses who were interviewed pursuant to the provision
3 of Rule 112 and therefore were -- their interviews were audio and video recorded and
4 transcripts were generated instead of narrative statements, for those two witnesses, which
5 are more voluminous in terms of pages, they will be translated and disclosed to the
6 Defence by mid-November 2012.

7 PRESIDING JUDGE ALUOCH: Thank you very much, because I'm going to ask the
8 Defence if they have any observations to make, unless you look like you have something
9 else to say?

10 MS ZAGO: Might I have an additional moment of indulgence and consult? Thank you,
11 your Honours.

12 PRESIDING JUDGE ALUOCH: Yes.

13 (Prosecution counsel confer)

14 PRESIDING JUDGE ALUOCH: Yes, please.

15 MS ZAGO: We have concluded our presentations, but we remain at your disposal, or
16 the Defence's disposal, to provide additional clarifications.
17 Thank you, your Honour.

18 PRESIDING JUDGE ALUOCH: Thank you very much. You were very clear, yes.
19 (Trial Chamber confers)

20 PRESIDING JUDGE ALUOCH: Any observations at all from the Defence?

21 MR ELLIS: Madam President, thank you.

22 The Defence appreciate the efforts made by both the Prosecution and earlier the Registry
23 for the translation of these statements.

24 Your Honours, it's also clear that there is still significant work to be done. I understood
25 from the Prosecution's submission that the estimated date for translation of everything

1 was the end of March of next year, once the prior statements are also translated.
2 Your Honour, two short submissions on that. First on a specific, the
3 Defence understands that in addition relevant portions of the Document Containing the
4 Charges remain to be translated, and your Honours on a general point of course once the
5 Defence receives the translations in Zaghawa that then needs to be transmitted to
6 Mr Banda and Mr Jerbo, the Defence will need time for them to listen to all of the
7 translations, to take instructions from them and to carry out any further investigations
8 that the Defence are able to do.

9 So, your Honours, I'm grateful.

10 PRESIDING JUDGE ALUOCH: Prosecution, I want to hear your comment on this
11 Document Containing the Charges, the translation of this document, this important
12 document, yes?

13 MR OMOFADE: Your Honours, it may be my recollection is wrong, but my
14 understanding was that -- well, my recollection, and I say again I might be wrong, is that
15 the excerpts of the Document Containing the Charges were meant to be done by the
16 Registry rather than the Prosecution.
17 I don't at the moment see how it fits under Rule 76 and that probably lends some credence
18 to my recollection, but I do stand to be corrected if I am wrong. Maybe that might jolt
19 the memory of my friends opposite.

20 PRESIDING JUDGE ALUOCH: By your friends opposite, you have two friends
21 opposite?

22 MR OMOFADE: I wonder if that assists the Defence? Maybe they are able to
23 contribute? I don't know if the Registry's able to contribute either? I realise that it
24 might be a different unit in the Registry, the STIC. I don't know if they are able to assist
25 your Honours?

1 PRESIDING JUDGE ALUOCH: Yes, yes.

2 MR ELLIS: Your Honours, on 4 October 2011 the Defence were in contact with the
3 Prosecution in order to identify those passages in the Document Containing the Charges
4 which the Defence thought needed to be translated, which rather suggests that it was the
5 Defence's understanding that the Prosecution would do the translating.

6 (Trial Chamber confers)

7 PRESIDING JUDGE ALUOCH: Registry, are you able to comment on this point at this
8 time so that it does not become a ping-pong game between you and the Prosecution?

9 MS WANG: Yes, thank you, your Honour. I think the Registry will have to go back to
10 verify the issue and report back to the Chamber on this issue, if you allow me?

11 PRESIDING JUDGE ALUOCH: Thank you very much. As a result of submissions on
12 this head, the Chamber has an oral decision to make on translation issues.

13 On 7 September 2011 the Chamber ordered the Prosecution and Registry to file regular,
14 monthly joint updates on the status of translation of witness statements and on the status
15 of training of Zaghawa interpreters.

16 The Registry recently informed the Chamber that it has trained two interpreters who have
17 passed their examination. In addition, the Registry informed the Chamber that it is not
18 involved any more in the translation of Prosecution witnesses' statements.

19 In light of the above, the Chamber decides that the regular monthly joint updates on
20 translation issues filed by the Prosecution and the Registry are no longer necessary and
21 may be suspended from the date of this oral decision.

22 The Chamber, however, instructs the Prosecution to continue submitting monthly reports
23 on the translation into Zaghawa by the Prosecution, a language assistance of the
24 Prosecution witnesses' statements to be relied on at trial and its disclosure to the Defence .
25 That is the oral decision on issues of translation.

1 I will now turn to agenda item 2(g), which deals mainly -- which mainly concerns the
2 Defence .

3 Defence, any submissions on the status of translation into -- are you on your feet ahead of
4 time or --

5 MR KOUMJIAN: Your Honour, oh, excuse me.

6 PRESIDING JUDGE ALUOCH: Thank you very much. Any submissions on the status
7 of translation into Zaghawa of disclosed material and the manner in which confidential
8 Zaghawa audio files can be shared with both accused persons or something to that effect,
9 yes? You anticipated it, so you have the answer.

10 MR KOUMJIAN: Well, I don't know if I have the answer but I have the question. Your
11 Honour, we have transmitted some material to Mr Jerbo. And let me explain, in answer
12 to your question, how we anticipate getting the material, the audio files, to the accused.
13 Because of the situation that they are in, we do anticipate using individuals that are
14 trusted by the accused outside of the Court, to transfer, to transmit the files to them. In
15 order to protect the confidentiality of these files, however, they will be encrypted and the
16 password will be given. We will give the password only to the accused persons so that
17 those who are transmitting the encrypted material will not have the passwords.
18 Thank you.

19 PRESIDING JUDGE ALUOCH: Thank you very much. Before I go into agenda item
20 2(h), I just want to ask the Registry to come back to the Chamber on the translation of the
21 document containing the charges by Friday. Thank you.

22 I will now go to -- turn to agenda item 2(h), which relates to expert evidence. The
23 Chamber received submissions one year ago on this matter, and at that time there were
24 issues arising as regards the disclosure of the identity of one expert witness. It appears
25 that no expert witnesses are included in the revised list of witnesses.

1 Prosecution, what is the position now?

2 MR SACHDEVA: I'm grateful, Madam President. Indeed, last July we did provide the
3 Defence with identified individual that we had considered at that stage could be called by
4 the Prosecution as an expert, and of course we have made the point consistently that we
5 do not object to joint instructions as per Regulation 44.

6 However, that said, we are at this stage considering whether, firstly, we will call or seek
7 leave to call this identified individual and, secondly, whether the Prosecution would rely
8 on the evidence of an expert.

9 With leave of the Court, we would wish to inform the Chamber by August 2012 as to the
10 final decision on whether an expert -- on whether the Prosecution would seek leave to call
11 an expert. What the Prosecution can say is that if we do intend to seek leave to call an
12 expert, the individual would be a military expert, and the area of expertise would be most
13 likely what a military commander would have undertaken in the similar scenario as we
14 face in this case.

15 May it please the Court.

16 PRESIDING JUDGE ALUOCH: Thank you. I understand you to be saying you would
17 not be opposed to joint instructions?

18 MR SACHDEVA: Absolutely. That submission remains the same, Madam President.

19 PRESIDING JUDGE ALUOCH: All right. Any views on this, Defence, please?

20 MR KOUMJIAN: Thank you, your Honour. Your Honour, this, as was correctly stated
21 by both the Court and by counsel, this matter was addressed in July and the Prosecution
22 indicated they would call a witness, a 16th witness, which would be an expert.

23 We just received today an indication of the area of expertise, the limited explanation that
24 we got a military commander who would answer what an accused -- what people would
25 do in this situation.

1 We had received a possible name from the Prosecution back in July, we appreciate that,
2 and that appeared to be someone, and I hope I'm not disclosing anything, just with a
3 peacekeeping background, so we were waiting to hear whether they were going to call
4 that person, see the report, so we would not be prepared right now to comment upon the
5 proposed expert in this general area of military commander in peacekeeping, we were
6 waiting to see their expert report to consider it.

7 However, we do feel definitely that expertise is required in this case in order to make the
8 trial efficient. It may be required on the issues that the Prosecution just raised, but we
9 definitely think another issue that appears to be outside of this individual's expertise, or
10 the proposed expertise, is an expert that could describe for your Honours the context of
11 the conflict in Darfur, the context of the history of that conflict and the parties involved,
12 the context of the agreements that were reached between parties to the conflict, all of
13 which relate to the issues identified for trial as to whether AMIS was a peacekeeping
14 mission in accordance with the UN Charter .

15 Further, we believe it is critical for the Court to understand the decisions that Mr Banda
16 and Mr Jerbo took at that time, to understand the context that this was a base in Darfur,
17 not in some place like Cyprus. That the intelligence coming from the base to the
18 Government of Sudan occurred in a particular context that's different if it was intelligence
19 coming from a base in Cyprus to one of the Governments of Cyprus.

20 This definitely relates to our motion that we filed last year in relation to disclosure of the
21 Al-Bashir application by the Prosecution and we had hoped, when we see that material, if
22 we see that material, that we can identify an expert that the Prosecution has relied upon
23 itself, I'm sure we could come to an agreement, that could tell your Honours about what
24 was happening in Darfur in 2007, and in the previous history, in order to understand that
25 the intelligence coming from this base occurred in the context where there was an ongoing

1 criminal campaign against civilian population, where thousands and thousands of people
2 were killed and affected.

3 This is critical to understand our clients' actions, because I promise you there will be
4 evidence even from the Prosecution witnesses that intelligence was coming from that base
5 to assist the Government of Sudan.

6 So we believe it's critical to show, the Prosecution has alleged, and we agree, that acts of
7 genocide -- that genocide was occurring. Reasonable experts, we recognise that some
8 may quibble with this legal term, whether all of the terminology is satisfied, but no
9 reasonable observer or expert would quibble, would question the fact, that the
10 Government of Sudan, at the time these events took place, was committing one of the
11 worst campaigns of violence against a civilian population of our era. And our clients,
12 aware of the intelligence coming from the base, made a decision. You have to, in order to
13 evaluate their decision, understand the context in which it occurred.

14 Haskanita is not named in the Prosecutor's application for the warrant of arrest of
15 President Al-Bashir, but an attack is named on Muhajir, which is the next town that
16 occurred the very next week after the attack on Haskanita in October 2007.

17 And the Prosecution alleges that 40 people were killed in Muhajir, and this was acts of
18 genocide.

19 In Haskanita, the common legal representative recently submitted some documents to the
20 Court that showed that on 6 September, I believe it showed that six individuals were
21 killed, and on 10 September 40 individuals were killed from the Government of Sudan
22 bombing, and we expect an expert to come to the Court and talk about the regular pattern
23 of the Government of Sudan indiscriminately bombing civilian targets.

24 This happened in Haskanita just before, in the weeks prior to this attack, and is part of the
25 reason that the attack took place. So we ask that either a joint expert is appointed with

1 the Prosecution from their own material, or that the Court appoint an expert of its own
2 from the panel of experts already listed for the Court on the situation in Darfur.

3 We'd rather not pick the witness ourselves because we think any reasonable, informed,
4 objective observer will tell your Honours the same thing: A horrible criminal campaign
5 was occurring involving -- against the civilians of Darfur and this Government of Sudan
6 intelligence, any intelligence that's aiding that campaign, was putting thousands of people
7 at risk.

8 PRESIDING JUDGE ALUOCH: Yes, I'll give the floor to Judge Eboe-Osuji.

9 JUDGE EBOE-OSUJI: Counsel, I've got questions for both of you actually. First with
10 you. So do I understand then that you do not oppose the idea of a joint expert? You've
11 pretty much said that, did you?

12 MR KOUMJIAN: Certainly on the issue of the context of the conflict in Sudan, we
13 welcome it, either a joint or a Court-appointed expert and we prefer that to having our
14 own expert called.

15 JUDGE EBOE-OSUJI: Okay. And for you --

16 MR KHAN: Your Honour, if I may, just to clarify, on the expert that it appears today for
17 the first time that the Prosecution has mentioned the area of expertise, in previous
18 correspondence, I think it was last year, we did inform the Prosecution that whilst we
19 were open for a joint expert, that required a conversation with the Defence without delay.
20 And in the correspondence that I sent to the Prosecution, I did inform them that the longer
21 unilateral contact takes place between a party and a witness, to the exclusion of another
22 party, the less likely it will be that I would be able to accept that we would be able to
23 accept that person truly as a joint witness.

24 In the normal course of events, it is our submission that best practice militates in favour of
25 joint instructions to a putative joint expert rather than one party having extensive contacts

1 and conversations, and then almost as an afterthought bringing in the other party and
2 saying, "Would you like to accept this as a joint expert?"

3 So it is a matter of regret, and it is a matter that I put to the Prosecution last year, and
4 that's my observation in relation to the expert that I believe my friends have alluded to
5 just now, that may testify on the military aspects of the attack.

6 Your Honour, I hope that assists.

7 JUDGE EBOE-OSUJI: Let me be sure that I understand you. You say it is a matter of
8 regret. Does it mean you will be not be agreeing to jointly appointing a particular
9 witness as a common expert (1) and, secondly, whether if that is the case - it may not be,
10 but if that is the case - you may still be open to a joint expert witness of somebody else
11 who may not have the same difficulties?

12 MR KHAN: Your Honour, we don't take a stubborn view on these things. We'll see the
13 expert's report and form a reasonable basis, but I think it's common sense that, if there
14 was a real intention to have a joint expert, it would have been preferable months ago, last
15 year, when we had this discussion, for communication to take place. We couldn't even
16 get the area of the proposed testimony, although my learned friend said that they had an
17 expert in mind.

18 So the longer unilateral communication takes place in the normal course of events the
19 more concern the Defence would have about the appropriateness of that, but your
20 Honours we keep an open mind and we will play every ball as it comes.

21 JUDGE EBOE-OSUJI: Thank you.

22 And one question for the Prosecution. You may have other things to say, but if you can
23 also address this. When Mr Koumjian was speaking, I think he indicated the possibility
24 of a Court-appointed expert. Of course, the Bench is not making a decision on that now,
25 but as much information we can get around it would be very helpful.

1 MR SACHDEVA: Indeed, indeed, and as my learned friend was making his submission,
2 I was forming a similar view that there is that possibility for the Court to appoint its
3 expert as it has done so in previous cases in the Court absolutely.
4 With your leave, Madam President, may I just come back to one or two issues that my
5 learned friend has raised with regard to the identified person last year? Just to make it
6 clear, we had identified someone, but at this stage we are considering whether this person
7 is appropriate and indeed whether we will call or seek leave to call an expert.
8 There has been no instruction provided or given to this person, and we are well aware of
9 the rules in respect of joint instructions of experts and counsel can be confident that, if a
10 decision is made, then full transparency in disclosure will be effected.
11 Thank you.

12 PRESIDING JUDGE ALUOCH: Thank you very much.

13 Prosecution, I think you had indicated that you would either -- you'd let the Chamber
14 know, or something, by August. I'd like to pin you down to 6 August. What is it that
15 you are going to do in the month of August in respect of this topic?

16 MR SACHDEVA: Madam President, with your leave, if the Prosecution could be
17 permitted to provide the Court by the end of August it's final decision as to whether it
18 would seek leave to call an expert, we would be most grateful for that.

19 PRESIDING JUDGE ALUOCH: Why end of August?

20 MR SACHDEVA: Precisely because it just gives the Prosecution a bit more time after the
21 recess is over to finalise its arrangements.

22 PRESIDING JUDGE ALUOCH: All right. Okay, we'll accept that then.

23 MR SACHDEVA: I'm grateful.

24 PRESIDING JUDGE ALUOCH: Finally for the public session is the issue of co-operation.
25 The Chamber wishes to receive an update from both parties on the status of pending

1 co-operation requests. The Chamber would particularly be interested in any update with
2 regard to the co-operation request sent to the African Union, as ordered by decision 268
3 redacted. Indeed, the latest Registrar's report on the implementation of the Chamber's
4 decision is dated 30 January 2012, report 284.

5 Defence, you have the floor first, and this is the last item on the public hearing which will
6 terminate at 12.30.

7 Thank you.

8 MS LAWRIE: I'm grateful, your Honours, for the leave granted to me to address the
9 Chamber on this final agenda item on co-operation issues.

10 Linking this agenda item to the Defence's request for a temporary stay is paragraph 17 of
11 the Defence's request for the a temporary stay. Paragraph 17 sets out the request for
12 disclosure of documents which have been submitted by the Defence, and that includes the
13 request made to the African Union.

14 In January, when this stay request was submitted -- sorry, I am just being guided to slow
15 down, so I'll bear in mind the pace.

16 Going back, in January, when we submitted our request for a stay, the requests for
17 assistance were pending with four organisations and one government.

18 Now, these sources were mentioned publicly at paragraph 17. The sources named were
19 the African Union, the United Nations Security Council, the United Nations Mission in
20 Sudan, the Government of Nigeria and the United Nations Office for Co-ordination of
21 Humanitarian Affairs, generally referred to as OCHA.

22 Now, only one of these requests is the subject of a formal request for co-operation and that
23 is obviously the request submitted to the African Union. That was made pursuant to the
24 Trial Chamber's decision issued in December last year and, as Madam President has
25 indicated, the Registry provided the last update on that on 30 January. But, your

1 Honours, the other four requests for co-operation and assistance, specifically for
2 disclosure of documents, are also formal requests for assistance. They were issued by the
3 Defence via the Registry.

4 Now, your Honours, I'm guided actually by my colleague from the Registry, who touched
5 upon this issue earlier, and I will not go into great detail about the efforts that have been
6 made by both the Registry and the Defence to action these requests. However, if you do
7 require further detail I can of course provide that in the ex parte session, but suffice to say
8 that action has been taken by both sides.

9 The status as at today, and the conclusion that we are at, is that the Defence has received
10 no positive response from any of the organisations to which it has submitted requests for
11 disclosure of documents. So, your Honours, this is yet another avenue which is currently
12 closed to the Defence in seeking to put forward a positive Defence case, or even to test the
13 Prosecution case.

14 Your Honours, I just want to remind the Chamber that specifically in relation to the
15 African Union request, while the decision from the Trial Chamber is dated December of
16 last year, this request -- and again I'm giving publicly available facts. This request dates
17 from a letter that was submitted by the Defence in October 2010, so this has been
18 outstanding for some considerable period of time in some shape or form.

19 Your Honours, that concludes my submissions on the co-operation request. I can, with
20 your leave, touch upon an issue which was mentioned earlier by Judge Eboe-Osuji
21 regarding the British system and the situation which arises when fair trial rights occur.
22 I can only speak from my own small part of the British Isles, which is Scotland, but I can
23 say that we generally do not run trials and then assess at the end of them whether they are
24 fair or not, but rather the procedure is that a preliminary plea is taken before a trial occurs
25 and that plea is a plea of oppression in bar of trial.

1 Now, the result generally is quite drastic. It results in dismissal of that trial and no
2 further proceedings can be taken, but I underline here in this case that we are obviously
3 not seeking such a drastic remedy. We are seeking a temporary stay.

4 Also, there is a difference between historic sex abuse cases and this instance. Obviously
5 with sex -- historic sex abuse cases the witnesses are generally dead, or unavailable
6 forever, whereas in this case if the situation does change in Sudan those witnesses might
7 become available.

8 I'm grateful.

9 PRESIDING JUDGE ALUOCH: Thank you very much.

10 I'll give Judge Fernández the floor and then the Registry, please.

11 JUDGE FERNÁNDEZ DE GURMENDI: Just one point of clarification. Well, maybe the
12 Registry was going to clarify that.

13 You just said that you have not received any positive response. Have you received any
14 response at all, positive or negative, or any response?

15 MS LAWRIE: Your Honour, in relation to OCHA we filed the response that we received
16 in February, and the public part of that obviously indicated that the UN
17 Under-Secretary-General for Legal Affairs said that OCHA could not provide the
18 information that was requested.

19 JUDGE FERNÁNDEZ DE GURMENDI: And the others?

20 MS LAWRIE: With the others, there is some communication in respect of the request
21 that was submitted to the United Nations Security Council and also to the United Nations
22 Mission in Sudan, but the bottom line is while communications have been received there
23 has been no disclosure of documents.

24 JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

25 PRESIDING JUDGE ALUOCH: Thank you for your answers. Thank you for your

1 submissions.

2 The Registry, please, anything to say on this? Yes.

3 MS BERTRAND: (Interpretation) Thank you, Madam President.

4 I would like to add something regarding what the Defence said. I can also give details
5 about the measures taken by the Registry to obtain answers from the organisations
6 contacted. I can do that in closed session.

7 I would also like to point that the Defence had a negative response but, once again, I can
8 give you further details in closed session.

9 Thank you.

10 PRESIDING JUDGE ALUOCH: Thank you very much.

11 The legal representative, you are granted leave to make observations on this topic. Do
12 you have anything to say? I believe you do, yes.

13 MR DIECKMANN: Thank you very much, Madam President, your Honours. We're
14 most grateful for this second opportunity to address you on these matters.

15 Your Honours, bearing in mind the fundamental rights of victims due to Article 68 of the
16 Statute, we already submitted in paras 35 and the followings ones in our observations
17 from 30 January 2012 that the conditions for a temporary stay of proceedings due to the
18 relevant law and jurisprudence of the international criminal tribunals as well as
19 international human rights courts are not met since the Defence did not exhaust all
20 alternative remedies, including all legal measures, in order to safeguard an effective
21 co-operation of the Government of Sudan. And this update we just received here does
22 not give us any new information or facts that has to change our positions there.

23 Your Honours, perhaps briefly to sum up our position, how the common legal
24 representative understands the mechanism, how the Defence shall approach and respond
25 if they face a situation where the rights of the accused under Article 67 are violated, if they

1 identify issues they cannot solve by themselves, but all alternative measures -- it's our
2 understanding that they have to address the Trial Chamber through mechanism Article
3 57(3)(b) and 64(6)(a). This is the way they have to go.

4 And we are very much concerned, in fact, that here they did not exhaust all legal
5 measures since the application failed in summer 2011, by the decision 1 July 2011 by the
6 Chamber. Of course they did not fulfil the criteria and the requirements of the Statute.
7 So to our understanding, such an application is not an exhaustion of all legal measures.
8 Our view, our understanding, that first of all the Trial Chamber mechanism has to be
9 addressed is supported especially by the Tadic appeal judgment, and the common legal
10 representative regards this appeal judgment from 15 July 1999 as a fundamental source
11 and delivering a lot of very illustrative guidance how to respond properly to a situation
12 like this.

13 The Defence referred to the Tadic judgment just in para 32 of the Defence request, and in
14 the footnote 36, but they just refer to one para of this entire judgment.

15 And with your leave, your Honours, the common legal representative would like to
16 highlight the context of this para 55 and the very instructive concept of the ICTY Appeals
17 Chamber in this judgment. The ICTY -- sorry.

18 PRESIDING JUDGE ALUOCH: Very briefly, please. Extremely briefly.

19 MR DIECKMANN: Yes. Thank you very much, your Honours.

20 We address para 51 and 52 of this appeals judgment where the Appeals
21 Chamber explained definitely that the Appeals Chamber has to be addressed by any kind
22 of obstacles the Defence identified.

23 This is the basic condition before they can request a stay of proceedings.

24 And here, here we cannot find up to today, any explanation the Trial Chamber missed in
25 their own decision on 1 July 2011, and you refer Trial Chamber to para 22 of the decision

1 from 1 July 2011.

2 And finally, I would like in this context to refer to our submission from 29 June 2012,
3 where we try to give some factual information why we think that the factual allegations of
4 the Defence to say there are no alternative option, we exhausted all potential
5 investigations, are not without any doubt.

6 For example, Annex 1 of the submission is a map, a map of Darfur, where we identified
7 the locations the Defence want to travel due to their request.

8 Up to today, the Defence did not explain, and by doing this, responding to the critic of the
9 Trial Chamber in July 2011, why exactly these locations are essential, and why the
10 impossibility to travel to these locations would violate the rights of the accused.

11 Without these answers, your Honours, due to our opinion, this Defence request has to be
12 dismissed. This concludes our submissions and we are very grateful.

13 Thank you very much.

14 PRESIDING JUDGE ALUOCH: Yes, briefly?

15 MR SACHDEVA: Thank you, Madam President. The Prosecution would, with leave of
16 the Court, like to update the Chamber on some outstanding co-operation requests that it
17 also has but with leave to do that in closed session.

18 PRESIDING JUDGE ALUOCH: Thank you very much. And Judge Eboe-Osuji has a
19 question for the Prosecution.

20 JUDGE EBOE-OSUJI: Prosecutor, this question would have belonged in the first part of
21 the proceeding, but since Ms Lawrie also referred to this matter of co-operation it's also
22 something of critical importance to the request for stay.

23 The requests to the UN, to the Nigerian government, to AU, do you not see that that may
24 be something that may fall within Article 54(1)(a) of the Prosecutor's obligations to
25 investigate both sides? I just -- I don't know, I'm asking you.

1 MR SACHDEVA: Indeed, your Honour, and in fact the submissions that I have to make
2 in closed session may refer to your Honour's question.

3 PRESIDING JUDGE ALUOCH: Thank you.

4 MR SACHDEVA: If I may, Madam President, and I'm sorry that I'm doing this out of
5 sequence, but just in response to the issue in relation to the Defence's application to
6 temporarily stay the case, I would just like to point out that in our filing 286, in particular
7 paragraph 12, that in the Lubanga case of course there was midway through trial an
8 application to permanently stay the case. And there, the Defence had raised allegations
9 of Prosecution impropriety, a late disclosure, incompetent investigation, and the
10 Chamber reviewed the submissions and made a finding that these issues can be resolved
11 at the end of trial, and it can be resolved at the end of trial by assessing how they affect the
12 totality of the evidence. And indeed, that's what the Chamber did when it reached its
13 conclusion.

14 So in the Prosecution's submission, the resolution for the trial to commence, and any
15 allegations or any frustrations of rights of the Defence may have been confronted with,
16 can be taken at the end and can be dealt with at the end of trial.

17 PRESIDING JUDGE ALUOCH: Thank you. Normally, you would have a last word,
18 Defence. Can it be brief, Mr Karim Khan? We have to terminate this session by 1.30.
19 I'm sorry, not 12.30, but 1.30. So we have less than ten minutes to go. Can you contain
20 it within that time?

21 MR KHAN: Your Honour, I'll be very brief. There's not much actually to answer to.
22 The Appeals Chamber decision in Lubanga speaks for itself.
23 There is a fundamental and absolutely patently obvious difference between certain
24 imperfections in a trial process, for example specific documents that are not obtained, and
25 the blatantly obvious difficulties that the Defence have in this case which go to the heart of

1 the ability to challenge the Prosecution case, to put on -- to test the Prosecution evidence
2 or to put on -- explain to your Honours through evidence, not from the Bar table, but
3 through evidence, an alternative narrative which we say represents the truth as opposed
4 to the cherry-picked wrongly focused perceptions that the Prosecution would have this
5 Court accept in totality.

6 So your Honours, it's a fundamental difference of not only nature but of degree.

7 PRESIDING JUDGE ALUOCH: Thank you very much. I think that brings to an end the
8 public session.

9 Prosecution, we've done a quick arithmetic and you are end of -- when you say end of
10 August, it actually means 27 August.

11 MR OMOFADE: I do understand, your Honours, there might be what we call a bank
12 holiday at the end of August.

13 PRESIDING JUDGE ALUOCH: That's why I'm giving you the correct date. When you
14 talk of end of August, you are talking of 27 August.

15 MR OMOFADE: We had that in mind, your Honour.

16 PRESIDING JUDGE ALUOCH: Thank you.

17 Thank you, parties. Thank you the Prosecution team, the Defence team, legal
18 representative, the team from the Registry, interpreters and reporters, for this public
19 session which seems to have taken longer than expected but I think it was important that
20 all these issues were brought out.

21 We'll now adjourn for lunch and resume the session, a private session, Prosecution and
22 VWU only, at 3 o'clock. The Prosecution, VWU session will resume at 3 o'clock. Just a
23 minute.

24 (Trial Chamber confers)

25 PRESIDING JUDGE ALUOCH: Sorry, after a quick consultation amongst the Judges,

1 and if this would be accommodated by -- accommodated by the interpreters and court
2 reporters, is it possible to have a brief session, private session, with Prosecution and
3 Defence on issues of co-operation? Would that be possible right now, interpreters and
4 court reporters, is that possible? Or have we extended the time, over-extended the time?
5 (Trial Chamber and court officer confer)

6 PRESIDING JUDGE ALUOCH: This is not possible, so we will deal with it later on.
7 I think it's time to adjourn for lunch and we'll resume -- Prosecution, yes?

8 MR SACHDEVA: I apologise, Madam President. I just wanted to confirm on the
9 record that the issue that I intend to speak about can be divulged to the Defence. And
10 when I indicated closed session, I meant simply -- excuse me, I meant private session and
11 that the public should be excluded.

12 PRESIDING JUDGE ALUOCH: In that case, then, when we start at 3 o'clock we will
13 start with both parties on issues of co-operation, and we hope that that will be brief so that
14 we can then go into ex parte session with Prosecution and VWU. Is that acceptable?
15 I've seen a few heads nod, but you are on your feet. Very briefly, what do you want to
16 say?

17 MR SACHDEVA: That's absolutely acceptable. I just thought if it was not possible
18 technically, we could obviously provide a written update.

19 PRESIDING JUDGE ALUOCH: We'll use the first part of the afternoon to have both
20 parties on further issues of co-operation. That is closed, closed session. All right? Yes,
21 I believe that is fine, because everybody appears to be tired --

22 MR SACHDEVA: Indeed, Madam President.

23 PRESIDING JUDGE ALUOCH: -- and if not hungry.

24 Thank you very much once more to all parties, participants, Registry, interpreters and
25 court reporters. We will adjourn for lunch until 3 o'clock. Thank you.

- 1 THE COURT USHER: All rise.
- 2 (The hearing ends in open session at 1.28 p.m.)