

1 International Criminal Court
2 Pre-Trial Chamber I
3 Situation: Darfur, The Sudan - Case ICC-02/05-02/09
4 Case against Bahr Idris Abu Garda
5 Hearing
6 Closed Session
7 Tuesday, 9 June 2009

8 *(The hearing starts at 14:00)*

9 COURT USHER: All rise.

10 JUDGE TARFUSSER: So I hope that you feel comfortable with this not
11 so formal ... without robes. I think as long as we are in closed session, it
12 is more comfortable to be without robes. But that doesn't mean that it's less
13 serious, just less formal.

14 This hearing was convened by the single judge in order to discuss
15 issues relating to disclosure procedure between the parties. That's why we
16 have invited the OTP, the defence and also the Registrar. But first of all, I
17 would ask the Court Officer to call the case and then we go further with the
18 hearing. Please, Court Officer.

19 COURT OFFICER: *(Speaking in French)*.

20 JUDGE TARFUSSER: Thank you very much. In accordance with the
21 established practice, and I think it's more for ... I think we should ... I
22 ask the parties to introduce themselves, beginning with the Office of the
23 Prosecutor.

24 MR. FAAL: Thank you, your Honor. Your Honor, the Prosecution is
25 today represented by Ade Omofade, Trial Lawyer. Shyamala Alagendra, Trial

1 Lawyer. Victor Baiesu, Associate Trial Lawyer. Dirk Freimann, Investigation
2 Team Leader. Biljana Popova, Case Manager. My name is Essa Faal, Senior Trial
3 Lawyer. Thank you.

4 JUDGE TARFUSSER: Thank you very much. I turn now to the defence.

5 MR. KHAN: If it please, your Honor, my name is Karim Khan. I
6 represent Bar Idris Abu Garda today.

7 JUDGE TARFUSSER: Thank you very much. The Registrar, please?

8 MS. DAHURON-JACOBY: Good afternoon. My name is Charlotte
9 Dahuron-Jacoby. I am the Chief of Court Management Section. With me are Anne-
10 Aurore Bertrand in the Immediate Office of the Director of the Division of
11 Court Services. And David Beresford, who is the E-Court Systems Administration
12 Assistant in Court Management Section.

13 JUDGE TARFUSSER: Thank you. Myself, I am Judge Cuno Tarfusser,
14 Single Judge ... I know that you know me, but it's always for the record ...
15 of Pre-Trial Chamber I, responsible for the situation in Darfur, Sudan, and
16 any related cases. My team is composed on my right by Federica Gioia, on my
17 left by Silvestro Stazzone.

18 The purpose of this hearing is to discuss the principles related to
19 the disclosure; in particular, as it regards its scope, its modalities and its
20 time frame. I would like at the end to have information to make a good
21 decision for the disclosure. This was not the paper we issued on the 1 June,
22 was not the decision, but convened this hearing to prepare a good decision, to
23 have a very fair, expeditious and clear hearing on the 12 September. That's
24 the purpose of it.

25 On the principle regarding disclosure set forth in this decision,

1 both the Prosecutor and the defence are invited to their comments. The
2 Prosecutor is also requested to provide information on the issues identified
3 in the decision issued on the 1 June in order for the single judge to
4 establish an articulate calendar for the disclosure. I think that the
5 Prosecutor is familiar with the decision; therefore, fully aware of the issues
6 on which he is requested to provide information during the present hearing.

7 MS. DAHURON-JACOBY: Sorry to interrupt. But just for the record,
8 just arrived to represent the Registrar as well Christine Schon, ALO, in the
9 Victims & Witnesses Unit.

10 JUDGE TARFUSSER: OK. Thank you very much. The Registrar has been
11 invited to this hearing to indicate the technical modalities which would be
12 the most suitable for ensuring the efficiency and the expeditiousness of the
13 disclosure proceedings.

14 In view of the purpose and object of this hearing, as a matter of
15 logic I would suggest that we proceed as follows: Firstly, I think the
16 Prosecutor should comment on the general principles set forth in the decision
17 and will provide the information requested therein. Second, the defence will
18 have the floor in order to make its statements as regards both the principle
19 established by the single judge and the information provided by the
20 Prosecutor. And third, the Registrar may make her statements as regards the
21 issues identified in the decision as just recalled. And finally, the
22 Prosecutor and the defence will have, again, the opportunity to comment on
23 everything which has been said by the other participants.

24 If there are no objections to this proceeding, I would say we can
25 start. And I will give the floor to the Prosecutor.

1 MR. FAAL: Your Honor, thank you for convening this hearing, and
2 thank you for giving us the opportunity to discuss the principles relating to
3 disclosure in this case.

4 We understand that your decision of 4 June does not, in fact, put in
5 place a final regime for disclosure; and as such, we would want obviously to
6 be considered with regards to some of the elements that are contained in that
7 decision. At the outset, however, the Prosecution would like to state that we
8 are satisfied with a lot of the elements that are contained in that
9 preliminary decision.

10 PRESIDING JUDGE TARFUSSER: Good to hear that.

11 MR. FAAL: We do think that (*inaudible*) clarity to the process. We
12 also think that they clearly articulate the role of the single judge in this
13 process; but also more importantly, it sets out a clear deadline for the
14 disclosure process.

15 However, that does not mean to say that the Prosecution agrees with
16 everything that is contained in that decision. In particular, the Prosecution
17 would like to draw attention to paragraph 10 of the proposed regime. In that
18 paragraph, your Honor proposed, I quote, "That the Chamber should have access
19 to all the evidence exchanged between the Prosecutor and the defence,
20 regardless of whether the parties intend to rely on it for the purposes of the
21 confirmation hearing. As a consequence, it is necessary that the Pre-Trial
22 Chamber have access to all the exculpatory material gathered by the
23 Prosecutor."

24 Your Honor, the Prosecution would wish that the single judge
25 considers adjusting this particular proposal for the following reasons: The

1 Prosecution observes that the system of disclosure that is suggested in this
2 particular paragraph is similar to the preliminary system that was initially
3 put in place by Judge Steiner in the Lubanga case.

4 But having heard the submissions of the parties on the matter, Judge
5 Steiner amended that preliminary system and replaced it with a new system that
6 is contained in her final decision on the system of disclosure, which could be
7 found in the following document: ICC-01/04-01/06-102 of 16 May 2006. This
8 decision modifies the preliminary system that she put in place, which is
9 contained in the following document: ICC-01/04-01/06-54 of 23 March 2006.

10 The final disclosure system that she put in place proved to be fair
11 and efficient and has operated successfully in two cases ... that's the
12 Lubanga case and the Katanga and Ngudjolo case ... without any contention by
13 either the parties or the Chamber. For this reason, the Prosecution submits
14 that there are no compelling reasons to depart from that system that was put
15 in place by this same Pre-Trial Chamber.

16 Another element we want to raise, still relating to the Chamber's
17 access to all evidence disclosed to the defence, the Prosecution submits that
18 a system whereby the Chamber should have access to all the evidence exchanged
19 between the Prosecutor and the defence would constitute a departure from the
20 case law and the practice that has been established by this particular Chamber
21 in the cases that I have referred to earlier.

22 In our view, the suggested system adversely affects the rights of the
23 parties and the impartial role of the Judge for the following reasons: Rule
24 121, sub-rule 2.C should not be read as requiring the Prosecution to
25 communicate to the Chamber exculpatory information or information that is

1 subject to inspection under Rule 77 but which the defence does not intend to
2 rely upon for the confirmation hearing. And I will raise three reasons for
3 that:

4 The first being, that the communication to the Pre-Trial Chamber of
5 all evidence exchanged between the parties, regardless of whether it is
6 intended to be relied on at the confirmation hearing ... in particular,
7 exculpatory evidence ... Oh, I am going too fast. OK. I will try to slow down.
8 I will take that again, your Honor.

9 First, the communication to the Pre-Trial Chamber of all evidence
10 exchanged between the parties regardless of whether it is intended to be
11 relied on at the confirmation hearing ... in particular, exculpatory evidence
12 on which the defence does not need to rely ... may hamper the exercise of the
13 Chamber's function under Article 61.7. According to 61.7, the Pre-Trial
14 Chamber must, and I quote, "On the basis of the hearing determine whether
15 there is sufficient evidence." It went on.

16 Other evidence which, although it may be in possession of and has
17 been brought to the knowledge of the Chamber, the parties have not expressed
18 any intention to rely upon or discuss at the confirmation hearing should not
19 be considered for the purposes of the decision.

20 If the Chamber conducts a detailed examination of all the evidence
21 that has been provided to it, despite its best intention, there is every
22 possibility that it may take into account material that has not been discussed
23 at the hearing in the decision making process. This problem can be further
24 exacerbated as the Chamber may consider that information without hearing any
25 arguments from the parties as to their relevance or reliability. What may, at

1 first glance, appear to have some probative value could in the end, in light
2 of arguments presented by the parties, prove to be irrelevant and unreliable.

3 The second point we would wish to make in that regard is, that in the
4 present form of the ruling the parties would effectively lose control over the
5 presentation of their cases by adopting a system that grants the Pre-Trial
6 Chamber full access to every item of the evidence which the Prosecution
7 considers as exculpatory, potentially exculpatory, and thus disclosed to the
8 defence. The decision effectively takes away from the parties the procedural
9 right to remain in control of the selection of the presentation of evidence
10 for the purpose of the confirmation hearing.

11 And the third point we would wish to make is, that the defence has
12 the right under the Statute not to present any evidence at all. The Chamber's
13 consideration of information disclosed to the defence, which the defence has
14 intentionally decided not to use, can circumvent that right. It was, indeed,
15 observed by Judge Steiner in the Lubanga case, and I quote, "That the nature
16 of the confirmation hearing would be significantly altered and the right of
17 the defence to decide whether to rely on such material at the hearing would be
18 infringed." And for that, your Honor, I refer you to the following filing,
19 that is ICC-01/04-01/06-102 of 16 May 2006, in particular at paragraph 4.

20 And in that case, Judge Steiner concluded, and I quote the following
21 passage, "In the opinion of the single judge, it is not the role of the
22 Pre-Trial Chamber to find the truth concerning the guilt or innocence of
23 Thomas Lubanga Dyilo, but to determine whether sufficient evidence exists to
24 establish substantial grounds to believe that he is criminally liable for the
25 crimes alleged by the Prosecution.

1 "The single judge considers that it would be contrary to the role of
2 the Pre-Trial Chamber to file in the record of the case and present at the
3 confirmation hearing potentially exculpatory and other materials disclosed by
4 the Prosecution before the hearing if neither party intends to rely on those
5 materials at the hearing." I refer to the same decision again, but this time
6 in paragraph 56.

7 Your Honor, as the plain language of Article 67.2 States, the Court
8 only intervenes in the disclosure process between the Prosecutor and the
9 defence in case of doubt as to the application of these provisions. And for
10 this, again, one can refer to the Lubanga decision.

11 Finally, your Honor, requiring the Prosecution to file with the
12 Registry all exculpatory information disclosed to the defence under 67.2
13 appears to be inconsistent with the Prosecution's right of control over its
14 files, as that is enshrined in Rule 10 of the Rules of Procedure and Evidence.
15 That rule, your Honor, expressly states that the Prosecutor shall be
16 responsible for the retention, storage and security of information and
17 physical evidence obtained in the course of investigations by his or her
18 office.

19 And for all these reasons that I have mentioned, the Prosecution is
20 of the you view that paragraph 10 of the proposed (*inaudible*) should be
21 modified. And in that regard, your Honor, we humbly make a request that an
22 adjustment be made to paragraph 10, such that there won't be any requirement
23 on the part of the Prosecution to disclose PEXO material to the Chamber.

24 That is, we are asking that we not be required to file in the record
25 PEXO materials; instead, the defence should be given the opportunity to

1 examine PEXO materials that is disclosed to it by the Prosecution, and the
2 defence would decide whether or not it wants to introduce any of those
3 materials in the record of the proceedings by deciding to use them.

4 Your Honor, in the proposed guidelines, your Honor raised a number of
5 questions to be addressed by the Prosecution. I will ask my colleague Mr.
6 Omofade to address the Court on those issues. We remain available to answer
7 any further questions your Honor may have.

8 PRESIDING JUDGE TARFUSSER: OK. Thank you. Thank you.

9 MR. KHAN: Your Honor, before my learned friend rises, it is one
10 thing to have general reference to a particular case. My learned friend has
11 made quite extensive reference to a decision of another Judge of this Court,
12 Judge Steiner. I don't have a copy of that, and I would be grateful if a copy
13 could be provided. I think it's only fair that when such extensive reference
14 is made to a Court decision, that normal courtesy extends that the other party
15 be provided with a copy of it.

16 Your Honor, the second matter is, I know my learned friend rose to
17 address you. I don't know if that's your preferred manner of operating as we
18 are, in effect, working in Chambers or if you wish to follow your previous
19 practice that counsel remain seated. Your Honor, I am in your hands.

20 PRESIDING JUDGE TARFUSSER: No, I think we should finish with the
21 Prosecution ... this you meant?

22 MR. KHAN: Your Honor, what I wanted to do is, that take advantage
23 of the time that my learned friend is on his feet to quickly peruse the
24 decision of Judge Steiner, so that we don't delay matters. So it wouldn't
25 delay matters if I could have a copy, and whilst my learned friend is on his

1 feet I can quickly peruse it to see if it conforms my response.

2 PRESIDING JUDGE TARFUSSER: But do you want to pause for ten
3 minutes to ...

4 MR. KHAN: No. My learned friend can continue. I was just asking
5 now ...

6 JUDGE TARFUSSER: OK.

7 MR. KAHN: ... interjecting, if there is a spare copy, as a
8 courtesy, it would be an efficient use of court time if it could be provided
9 to me now.

10 PRESIDING JUDGE TARFUSSER: Have you a copy?

11 MR. OMOFADE: I have a copy here. I just need to check, if it's an
12 unmarked copy. And I will be happy to provide it to Mr. Kahn.

13 PRESIDING JUDGE TARFUSSER: OK. So we are going to get a copy ...

14 MR. OMOFADE: We can provide a copy.

15 JUDGE TARFUSSER: OK. That's OK, if you can provide it. But if you
16 want to have some time to read it before we continue...

17 MR. KHAN: Your Honor is most gracious, but perhaps my learned
18 friend can continue. And if the matters raised in this decision are of
19 sufficient complexity, maybe I would ask for ten minutes. But I think at the
20 moment I am content that we carry on.

21 PRESIDING JUDGE TARFUSSER: Thank you very much. So you take the
22 floor. Thank you.

23 MR. OMOFADE: I'm grateful, your Honor. I am also grateful to my
24 friend, Mr. Faal. As Mr. Faal pointed out, I propose to address the more
25 specific issues that your Honor raised in the decision in paragraph 15 and its

1 sub-paragraphs of your Honor's decision of 30 May.

2 Your Honor posed a number of specific questions to the Prosecution.
3 What I propose to do is to attempt, as far as we can, to address those
4 questions. It may well be, however, that your Honor has further or follow-up
5 questions, in which case my colleague, Mr. Faal, will deal with them
6 subsequently.

7 The first question that your Honor posed, and I read for the sake of
8 the transcript, you requested an estimate of the overall amount of documents
9 that the Prosecution intends to use as evidence at the confirmation hearing.
10 At the present time, the Prosecution can provide an estimate of the number of
11 documents we intend to use. These numbers are as follows:

12 We propose to use approximately 57 of the documents that we have
13 cited in the Prosecution's application under Article 58 that was filed on the
14 20 November 2008. We think it's only fair that we also provide a page
15 breakdown to the defence, as well as to your Honor, to give some guidance as
16 to the volume of the material involved. So for the 57 documents that I
17 mention, we have come up with a page count of 1,079 pages.

18 Additionally, your Honor, the Prosecution proposes to use during the
19 confirmation hearing approximately 17 of the documents that were filed with
20 the Pre-Trial Chamber on the 16 January 2009. And I am able to give a page
21 count as well of 381 pages.

22 Aside from the two sets of documents that I mention, the Prosecution
23 has also identified approximately 54 additional documents that we propose to
24 use at the confirmation hearing. I should mention as a caveat that some of
25 these documents are in Arabic and have English translations. Some of them

1 contain annexes. Also, some of them are duplicates, sometimes exact replicas
2 of each other. And some of the documents have multiple parts.

3 For the purpose of counting as well, we have a page count of 584
4 pages. As I say, these were documents not cited in the application and not
5 contained with the filing of the 16 January, but also contain material of an
6 incriminatory nature. We believe all these batches of documents that were
7 mentioned can be disclosed immediately after they've been redacted.

8 The Prosecution can at this stage also state that it intends to use
9 ... and I now provide a total, a total of approximately 128 documents
10 comprising of 2,044 pages. I should also mention, however, that this document
11 count does not include witness statements, which I propose to deal with when I
12 respond to your Honor's second question under paragraph 15.

13 I should mention to your Honor that in accordance with Article 61.4,
14 we ... the Prosecution is still carrying on investigative activities in this
15 case. It is expected that these investigative activities will proceed until
16 the confirmation hearing and will likely generate further evidence. In that
17 regard, of course, we are mindful of the fact that any further evidence would
18 need to be disclosed to the defence in a timely fashion and in accordance with
19 the respective rules, and we propose to do so.

20 The second question that your Honor posed relates to witnesses. And
21 to be precise, your Honor asked for the number of witnesses, if any, that the
22 Prosecution intends to call to testify at the confirmation hearing and the
23 number of witness statements we intend to use at the confirmation hearing
24 pursuant to Rule 76 of the Rules. We are able to confirm at this stage that we
25 intend to call a maximum, a maximum of six witnesses to testify at the

1 confirmation hearing.

2 As regards the number of witness statements that we propose to use,
3 again I start with the caveat that the Prosecution investigation is still
4 ongoing and there's the possibility of further evidence and witness statements
5 being generated. That said, we can confirm that at the present time we propose
6 to use an additional nine ... a maximum of an additional nine witness
7 statements. So this would bring the total to 15 witness statements to be used
8 pursuant to Rule 76.

9 I should also mention, and it's only fair, that many of the witness
10 statements were obtained pursuant to Article 55.2 and, therefore, are in
11 transcript form. Also, many of them contain documentary annexes. What this
12 means is, that the 15 statements that we mention would generate more than the
13 normal page count that 15 statements would normally generate. And we have an
14 approximate number of 2,229 pages. I should say this figure includes annexes,
15 photographs provided by those witnesses.

16 The third question that your Honor posed in paragraph 15 of the
17 decision, you have requested an indication as to whether the Prosecution
18 intends to request that certain documents be disclosed to the defence in a
19 redacted form; and if the affirmative, an estimate of the amount of such
20 documents. We are able to confirm that the Prosecution will, at the
21 appropriate time, make requests that certain documents be disclosed to the
22 defence in a redacted form. These documents comprise at this time only of
23 witness statements and transcripts, together with their annexes.

24 So as I have referred to the witness statements and transcripts
25 earlier, I can say that we intend to use 15 witness statements and transcripts

1 at the confirmation hearing which, to varying degrees, we will be requesting
2 redactions for. I can also inform the Chamber at this time that the
3 Prosecution has already started working on the proposed redactions, and we
4 propose that by next week we will be applying to the Chamber for
5 authorisations for these redactions to be made prior to disclosure.

6 The fourth question that your Honor has posed, your Honor has
7 requested an indication as to whether we intend to request that protective
8 measures be put in place in order to protect witnesses, victims or other
9 persons at risk prior to disclosure of the names of witnesses, or of certain
10 documents or otherwise, including any relevant information and steps that we
11 are taking or intend to take to take in this respect that might be available
12 at this stage.

13 Your Honor, bearing in mind the nature of the information that your
14 Honor has requested in this particular question, the Prosecution would kindly
15 request that our response to this question be deferred to the end of the
16 hearing, and preferably done ex parte without the presence of the defence. And
17 I see my friend nods, or smiles.

18 If your Honor is in agreement, I will move on to the fifth question
19 that you raised. You have requested there in an indication as to whether the
20 Prosecution intends to rely on documents or information obtained on the
21 condition of confidentiality under Article 54.3.E of the statutes. Dealing
22 with this issue, your Honor, I will deal with it under three heads.

23 Article 54.3 material that the Prosecution intends to use, I can say
24 that we intend to use a few documents that have been collected under
25 conditions of Article 54.3.E. However, at the present time, we have not

1 identified any documents containing incriminatory material and obtained under
2 Article 54.3 that we intend to use for the confirmation hearing. As regards
3 Article 54.3.E material that needs to be disclosed to the defence pursuant to
4 Rule 77 ... under Rule 57, I can say that ... I believe my friend is telling
5 me something, so ...

6 *(Brief pause)*

7 MR. OMOFADE: Yes. Documents that we would propose to provide to
8 the defence pursuant to Rule 77 as part of the ongoing documentary review
9 exercise that we are performing within the Office of the Prosecutor, we can
10 say categorically that we have identified ten documents that fall into this
11 category that were obtained pursuant to Article 54.3.E and should be provided
12 for inspection to the defence pursuant to Rule 77.

13 The documents of this nature we can tell the Chamber at least that
14 they've generally and routinely been made public by the provider. They are all
15 of the same provider. The office has actually met with this provider last
16 week, and we are able to say that they've committed to lifting the Article
17 54.3 restriction. I should also mention that we are in the process of
18 reviewing our material generally to see if there is any analogous material
19 that can be provided in lieu of the 10 documents that I have mentioned, and
20 this is a continuous exercise anyway.

21 The final category, your Honor, is exculpatory material under Article
22 67.2. We are able to confirm that at this stage so far we have not identified
23 any documents under Article 54, obtained under Article 54.3.E which contain
24 potentially exculpatory material.

25 As mentioned earlier, we are still in the process of reviewing our

1 documents. So far, 1,404 searchable documents and 500 unsearchable items have
2 not yet been reviewed. Out of this lot that haven't been reviewed, we have a
3 total of 704 items containing 3,263 pages, which were collected under Article
4 54.3.E. All of these, I have to mention, have the same genre of material that
5 I referred to earlier and are from the same provider. So we think the same
6 rules will probably apply. Those are my submissions, your Honor.

7 PRESIDING JUDGE TARFUSSER: Thank you very much. Is this, for the
8 moment, finished for the Prosecution? So I would pass to the defence, if you
9 are ready. Otherwise, I will give you the ten minutes or the time you need.

10 MR. KHAN: Your Honor, I am grateful. I don't think it's necessary.
11 I am grateful, firstly, for the very thoughtful submissions of my learned
12 friend for the Prosecution. I must confess that, at first blush I didn't find
13 paragraph 10 extraordinary in the draft decision of the 30 May.

14 Your Honor, from the defence perspective, I can say we have full
15 confidence in your Honor and in the Pre-Trial Chamber that whatever documents
16 you do peruse, you are as professional Judges very well adept at separating
17 between what is evidence in the proceedings and other information that is in
18 your possession as an aid to your trial management of this case.

19 Your Honor, I haven't perused in detail the decision of the single
20 judge, Judge Steiner, of the 15 May. And I am grateful to the Prosecution for
21 serving it upon me. Suffice it to say, that there is merit all things being
22 equal for a consistency in approach, but these are early days for the ICC. And
23 one should not automatically ape a practice that is the result not of
24 generations of judicial case law and the accumulated experience of many, many
25 Judges, but is in both cases the decision of one judge. This issue must be

1 viewed on its merits.

2 Your Honor, at this stage, I am content to leave it to your Honor to
3 review the decision of the single judge and put it together with the able
4 submissions of my learned friend for the Prosecution to determine this issue.
5 But I can say for the record that there is no objection from the defence if
6 your Honor is in possession of the exculpatory evidence that is in the hands
7 of the Prosecution. It does not prejudice the defence one dot, in my
8 respectful submission.

9 Your Honor, it seems that in total, leaving aside the Article 54.3
10 material, there is about 4,073 pages of documents that the Prosecution is
11 going to be relying upon at confirmation. And I added that up from the 2,044
12 that was in the first batch related to by my learned friend and the 2,029 that
13 constitute the second batch. I don't know how many pages constitute the 10
14 documents that my learned friend detailed a moment ago, and no details were
15 given in that regard.

16 But your Honor, as these cases always do benefit from the guiding
17 hand of the bench, I do not think, it is my respectful submission, that the
18 involvement of the bench does not automatically mean that the bench will
19 arrogate to themselves the functions of the Prosecution and of the defence. So
20 I do not think, and I do depart here from the submissions of my learned
21 friend, that just by hint of the fact that your Honor may be in possession of
22 certain documents and certain disclosure that he has served upon me, that
23 somehow that would affect my rights and my role to adequately and effectively
24 and, if need be, robustly defend the interests of Mr. Abu Garda.

25 And it is also my position that the same would apply to the

1 Prosecution. It doesn't automatically mean, as my learned friend stated, that
2 the parties would lose control of proceedings.

3 Your Honor, there is no objection at all that if my learned friends
4 wish to address you on witnesses that they wish to have protective measures
5 afforded to, that can be done ex parte. And I am content at any appropriate
6 time to withdraw from the proceedings so my learned friends can address you on
7 that.

8 The guiding principle, your Honor, that of course you must be aware
9 of is, that protective measures must be proportionate. There have been cases
10 in other courts in which the Prosecution takes a sweeping stance that which
11 errs on the side of protection in all cases. And your Honor, I would ask you
12 to give the utmost scrutiny to whatever submissions are put forward by the
13 Prosecution, to decide whether or not those protections are necessary, whether
14 or not exceptional circumstances are made out that would deny a defence team
15 that is bound by the Code of Conduct, is bound by the rules of this Court and
16 whether or not it is necessary and proportionate to afford them the
17 protections that they seek.

18 Your Honor, there is no objection at all if pseudonyms are given; but
19 as an investigative issue, of course it aids the defence enormously,
20 enormously if we know who is raising the allegations against our client. It is
21 very difficult to investigate in the abstract phantoms. This case may well
22 turn, to an awfully large amount, on the credibility of witnesses put forward
23 by the Prosecution.

24 Your Honor, I have come early to this case and we don't even have
25 legal aid. That's a matter that has yet to be addressed. There is no team. But

1 it does seem that given the profile of my client and the political environment
2 in which he is operating, in which other rebel leaders are competing for
3 primacy in the region, that there may be motives that would affect the
4 credibility of core Prosecution witnesses.

5 That being the case, it is my strong submission that the Prosecution
6 should bear a heavy burden, a heavy burden to justify any protective measures
7 that would in effect deny my team the ability to investigate in a timely
8 fashion the identity of those individuals, their credibility, their links and
9 any motivations that they may have.

10 So your Honor, all of that of course can be done ex parte, but I
11 would ask you to bear these factors in mind when you are determining the
12 merits of any submissions put forward by my learned friend.

13 Your Honor, I don't think I have got an awful lot more to say in
14 relation to the disclosure. At this stage, I have to wait and see what is
15 given. Once I have received the disclosure, I will be in a far better position
16 to make what I hope would be cogent and useful submissions. But at this
17 juncture, your Honor, I think, unless I can assist further, those are my
18 submissions and response to those put forward by my learned friends on the
19 other side.

20 PRESIDING JUDGE TARFUSSER: Thank you very much. I can assure you
21 that I will try to be as balanced as possible also in this matter. I will give
22 the floor now to the Registrar.

23 MS. DAHURON: OK. With regard to the technical implementations
24 relating to disclosure, I would like to refer back to the E-Court protocols
25 adopted in previous cases, in all existing cases, in which I think the Office

1 of the Prosecutor is familiar with. The defence might be less familiar with.

2 What we would recommend to do is to refer to the latest E-Court
3 protocol adopted in the Katanga case. I will have to double-check the
4 reference number for you. Sorry about this. And we would then draft a
5 proposal, taking into account this latest version, which has already
6 incorporated technical adjustments that have been done because of past
7 practice, and with which at least the Office of the Prosecutor is in agreement
8 on the technical part.

9 Of course, what remains to be determined is the content of the
10 disclosure. But in fact, this has no influence on the E-Court protocol itself,
11 except on some minor information to be provided by either party. I will stop
12 here at this stage. And maybe if there are more specific questions that can
13 guide what I can present to your Honor and the parties.

14 PRESIDING JUDGE TARFUSSER: Thank you. Thank you very much. I don't
15 know if there are other questions which came out from what the defence said or
16 the Registrar said. I talk to all the parties.

17 MR. FAAL: Your Honor, the Prosecution's submissions have been very
18 clear. We have no further submissions to make. So it is safe to reiterate the
19 fact that the defence does not seem to have much of a problem if your Honor
20 were to modify paragraph 10 in the lines mentioned by the Prosecution.

21 PRESIDING JUDGE TARFUSSER: So we can I think come to the end of
22 this hearing. No, because we have got afterwards the ex parte ...

23 MR. OMOFADE: That's correct, your Honor.

24 PRESIDING JUDGE TARFUSSER: So do you want to do it now and then
25 come to the conclusion, or we conclude this part and then allow counsel to go

1 and continue afterwards?

2 MR. OMOFADE: Your Honor, I don't know what the logistics of the
3 courtroom ...

4 PRESIDING JUDGE TARFUSSER: I have got to suspend ten minutes
5 anyway.

6 MR. OMOFADE: In which case, the Prosecution proposes a 10-minute
7 adjournment and then we sit again. Then we will reconvene ex parte, your
8 Honor.

9 PRESIDING JUDGE TARFUSSER: Yes. So we conclude. OK. Just before we
10 stop and put in an ex parte hearing, I just want to say that I want to thank
11 you all for the information you have provided. And I hope that with this
12 further information, we can do a good decision for the disclosure.

13 About the complaints that have arisen about paragraph 10, I can only
14 assure everybody that we are ... we will deeply study all the questions, but I
15 will also say that ... I want to point out that formal decisions taken in this
16 Court are not mandatory, of course. And I am glad that also Mr. Kahn said that
17 we are in the early days of the ICC. And these are early days in the ICC. And
18 I think we can try to make it better. We study. If it was the best solution,
19 we will try to go in this way. If in our eyes it's not the best solution, we
20 try to modify it, to make it better.

21 But in any case, you can be assured that we will heartily try to do
22 the best, to assure loyalty, fairness, expeditiousness and the balance between
23 the parties in this trial. And all the trials. And this by interpretation of
24 the Rules. So of course, we can all make mistakes, but that is what we try to
25 do in any case. So I will close now this hearing in this session, and we will

1 continue in ten minutes with an ex parte hearing for the other issues.

2 MR. KHAN: Your Honor, if I may, just one additional question. I
3 didn't know that my learned friend stated in reference to the 2,044 documents,
4 that they would be available to be served upon the defence immediately upon
5 redaction. And it would be useful perhaps for your Honor to know how long they
6 anticipate any redaction will take.

7 MR. FAAL: Your Honor, as already mentioned, we are in the process
8 of carrying out the redactions. We are hopeful that by next week we would be
9 in a position to start making the relevant applications for approval of the
10 proposed redactions. It is, however, not possible at the moment for the
11 Prosecution to state exactly when this process will take, how long this
12 process will take, because we would propose redactions, submit them to the
13 Chamber for approval. And in many instances, we might have to come to Court
14 and justify why we propose particular redactions.

15 So the process may be long, but we hope that if we do our work
16 properly, it will be smooth-sailing and that we will be able to disclose the
17 material as quickly as possible. The whole objective here is to ensure that
18 the process runs smoothly and that we are able to disclose the material to the
19 defence as quickly as possible or as soon as practical. Thank you.

20 PRESIDING JUDGE TARFUSSER: Thank you.

21 MR. KHAN: Your Honor, my learned friend just said a moment ago
22 that the process may be long. Of course, the time is short if we are to abide
23 by the October anticipated date of confirmation. So once again, of course, my
24 learned friends can do only what they can do. And of course, the procedure
25 does require reference to your Honor. But I would ask that in setting the time

1 line due regard be given to what your Honor has already mentioned in the
2 decision for today's hearing, that the defence do have a very important right
3 of adequate time to prepare for the hearing, if it is to be an effective and
4 meaningful hearing in October.

5 PRESIDING JUDGE TARFUSSER: Don't worry. We take care about the
6 rights of the defence. Don't worry. The last question I want to point out to
7 you, you said that the case manager ... you have no ... the case manager for
8 the defence, you want us to provide for a case manager?

9 MR. KHAN: Well, your Honor, I am not sure if it is a matter of
10 forum, it's the right forum. A legal aid application has been put in by the
11 client. That has been considered by the respective department of the ICC. So
12 once that's considered, then the funds would be available for us then to
13 recruit a legal consultant and a case manager. But I think they have to look
14 through the means and decide if the client is indeed indigent or not. So your
15 Honor, I think at this point I don't need to trouble your Honor with any
16 application. I am sure it's been given proper scrutiny in the appropriate
17 forum of the ICC.

18 PRESIDING JUDGE TARFUSSER: OK. Thank you very much. I think this
19 concludes this part of the hearing, and I would like to thank you for being
20 here and for giving your contribution to us. We'll make a break of ten minutes
21 and then we will continue with the ex parte hearing. Thank you very much.

22 COURT USHER: All rise.

23 *(The hearing ends at 14:52)*