

1 International Criminal Court

2 Pre-Trial Chamber I - Courtroom 1

3 Single Judge Cuno Tarfusser

4 Situation in Darfur, Sudan - ICC-02/05-03/09

5 In the case of The Prosecutor v. Abdallah Banda,

6 Abakaer Nourain and Saleh Mohammed Jerbo Jamus

7 Status Conference

8 Wednesday, 23 June 2010

9 (The hearing starts at 3.04 p.m.)

10 (Open session)

11 (In the absence of the accused)

12 THE COURT USHER: All rise. The International Criminal
13 Court is now in session. Please be seated.

14 SINGLE JUDGE TARFUSSER: Good afternoon. Please, court
15 officer, would you please call the case.

16 THE COURT OFFICER: Situation in Darfur, Sudan, the
17 Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh Mohammed
18 Jerbo Jamus, ICC-02/05-03/09.

19 SINGLE JUDGE TARFUSSER: Thank you. This hearing was
20 convened by the single Judge in order to discuss issues relating to
21 disclosure between the parties. The Prosecutor, the Defence and the
22 Registrar have been invited. And, in accordance with the established
23 practice of the Court, I will ask the parties and participants to
24 introduce themselves, beginning with the Office of the Prosecutor.

25 MR FAAL: May it please your Honour, good afternoon all.

1 The Prosecutor, the Prosecution rather, is today represented by
2 Adebawale Omofade, trial lawyer; Shyamala Alagendra, trial lawyer;
3 Desiree Lurf, associate trial lawyer; Biljana Popova, case manager.
4 My name is Essa Faal, senior trial lawyer. Thank you.

5 SINGLE JUDGE TARFUSSER: Thank you, Mr Faal. Mr Khan,
6 please.

7 MR KHAN: If it please your Honour, good afternoon. Mr Banda
8 and Mr Jerbo are represented by my legal assistant, Abeer Hasan; my
9 case manager, Anand Shah; and myself, Karim Khan.

10 SINGLE JUDGE TARFUSSER: Thank you very much. Now the
11 Registrar, would you please identify the members of your team.

12 MS DAHURON-JACOBY: (Interpretation) Good morning, your
13 Honour. Good afternoon. I'd like to introduce Cyril Laucci, legal
14 officer; Anne Aurore Bertrand, legal officer; and myself, Charlotte
15 Dahuron, section chief, CMS.

16 SINGLE JUDGE TARFUSSER: Thank you very much. Now let me
17 introduce myself. I'm Judge Cuno Tarfusser, and I am single Judge
18 of Pre-Trial Chamber I, responsible for situation Darfur, Sudan, and
19 any related cases. My team is composed by Federica Gioia and Silvestro
20 Stazzone and Leila Bourguiba.

21 At first, I wanted to inform the Defence that interpretation
22 into Zaghawa and Arabic will not be provided during the present status
23 conference, as both Banda and Jerbo waived their right to attend the
24 status conferences, and I'm quite sure, Mr Khan, that you agree on
25 that.

1 MR KHAN: Indeed, I do, your Honour.

2 SINGLE JUDGE TARFUSSER: Thank you very much. The purpose
3 of the present hearing is to discuss the principles related to disclosure;
4 in particular, as regards its scope, its modalities and its time frame,
5 as highlighted in the decision scheduling the hearing issued by the
6 single Judge on 18 June. A final decision on this disclosure will
7 be taken on an expedited basis in light of the outcome of this hearing.

8 The Prosecutor is requested to provide information on the
9 issues listed in paragraph 5 of the decision I just mentioned issued
10 by the single Judge, so to establish an articulate calendar for
11 disclosure. I trust that the Prosecutor is familiar with the document
12 and therefore fully aware of the issues which he is requested to provide
13 information during the present hearing.

14 Moreover, the Prosecutor, the Defence and the Registrar are
15 invited to submit their views as to the system of disclosure as
16 established and implemented in the recent practice of the Chamber,
17 including the technical modalities.

18 Finally, both the Prosecutor and the Defence are invited
19 to submit any views they might have at this stage as regards the envisaged
20 scope and timing of the inspection to be conducted pursuant to Rules
21 77 and 78.

22 In view of the purpose and the object of this hearing, as
23 a matter of logic, I would suggest that we proceed as follows: Firstly,
24 the Prosecutor will provide the information requested in the decision;
25 second, the Defence will have the floor in order to make its statement

1 in relation to the information provided by the Prosecutor; and third,
2 the Registrar will have the floor if the Registrar has any observations
3 to make; and, finally, the Prosecutor and the Defence will have the
4 opportunity to comment on any matter which may be relevant in -- to
5 the disclosure procedure.

6 If there are no objections, I would give the floor -- and
7 I give the floor to the Prosecutor. Please, Mr Khan.

8 MR FAAL: Your Honour, Mr Faal for the Prosecution. Your
9 Honour, we would proceed to respond to the questions your Honour has
10 listed in your last decision on issues pertaining to disclosure in
11 this particular case.

12 The first question that was raised in your Honour's decision
13 was as follows, and I quote, "An estimate of the overall amount of
14 documents the Prosecution intends to use as evidence in the confirmation
15 hearing."

16 Your Honour, the Prosecution estimates that it will use about
17 420 documents during the confirmation hearing. These documents
18 comprise of the following: statements or transcripts of witnesses,
19 which amount to 23; documents received from witnesses in the form of
20 annexes to statements, photographs and videos, which amount to 187;
21 other material of an incriminatory nature generated from sources other
22 than witnesses - these include open source materials - and so forth.
23 These would be between 200 to 220. This figure of 420 obviously excludes
24 that material the Prosecution must disclose pursuant to Article 67(2)
25 and Rule 77.

1 Your Honour, in the Abu Garda case, 40 documents were
2 disclosed as PEX0. This figure is not likely to change. However,
3 we have not yet completed our review of the documents. Once we arrive
4 at a figure which we can give to the Chamber and to Defence with certainty,
5 we will come back to inform you, but the figure, it's likely to be
6 40 or thereabout.

7 This takes me to the second question that was listed by your
8 Honour which, with your permission, your Honour, I read: "The number
9 of witnesses, if any, he intends to call to testify at the confirmation
10 hearing and the number of witness statements he intends to use at the
11 confirmation hearing pursuant to Rule 76 of the Rules."

12 The Prosecution intends to rely on statements of 23 witnesses.
13 These comprise insider witnesses, one expert witness and
14 victim/witnesses.

15 With regards to whether the Prosecution intends to call
16 witnesses to testify at the confirmation hearing, the Prosecution has
17 not yet made a decision on this matter. There are witness protection
18 issues that have to be addressed before the Prosecution is able to
19 say with certainty that it intends to call witnesses or not. This
20 work is going on. As soon as we are in a comfortable position to be
21 able to tell the Chamber that we will call witnesses, we would inform
22 both the Chamber and the Defence. The Prosecution, however, hopes,
23 and we are working towards this, your Honour; that is, to give information
24 on this matter in very good time so that the Defence will not be prejudiced,
25 and we are working on this.

1 With regards -- this takes me then, your Honour, to the third
2 question that was raised, which, your Honour, is as follows, and I
3 quote, "an indication as to whether he intends to request that certain
4 documents be disclosed to the Defence in redacted form and, in the
5 affirmative, an estimate of the amount of such documents."

6 Indeed, your Honour, the Prosecution would wish to make
7 requests for redactions to all the statements of the witnesses; that
8 is, 23 statements and transcripts. At the present moment we expect
9 that the redactions will relate mainly to information, the disclosure
10 of which may prejudice ongoing investigations; that is, redactions
11 to names of investigators, locations of interviews, et cetera, in
12 accordance with 81(2); also information, the disclosure of which may
13 prejudice the safety, security and privacy of members of families of
14 witnesses and/or victims pursuant to 81(4).

15 The Prosecution would, however, wish to draw your Honour's
16 attention to the fact that a number of redactions were already approved
17 in the Abu Garda case for the purposes of protecting witnesses and
18 victims. According to Regulation 42 of the Regulations of the Court,
19 those protective measures shall continue until the end of the
20 proceedings or otherwise varied by the Chamber.

21 In that regard, the Prosecution wishes to state that most
22 of the redactions that we would wish to make in this case have already
23 been made in the Abu Garda case, and those redactions under the rules
24 shall continue. According to regulation 42(2) which states, and I
25 quote: "When the Prosecutor discharges disclosure obligations in

1 subsequent proceedings, he or she shall respect the protective measures
2 as previously ordered by a Chamber and shall inform the Defence to
3 whom the disclosure is being made of the nature of these protective
4 measures."

5 In view of the fact that most of the measures that we would
6 wish to be ordered in this particular case have already been granted
7 in the Abu Garda case, it will not be necessary, in our view, to make
8 a request for the same orders again. And also in view of regulation
9 42(2), the Prosecution proposes to proceed as follows: The Prosecution
10 will come up with a chart which shows all the redactions that were
11 previously ordered by the Chamber. We would also on the same chart
12 make an indication as to whether we intend to keep those same redactions.
13 Should in case we propose to change those redactions, we would state
14 the reasons why we would wish those redactions to be changed.

15 Undoubtedly, your Honour, there would be new redactions which
16 we would have to seek. These would pertain mainly to materials that
17 were not disclosed in the Abu Garda case, such as the transcripts of
18 insider witnesses which were not disclosed previously. In that regard,
19 we would make a request for new redactions. And when we make such
20 a request, obviously, we would state the reasons for the redactions
21 that we are going to seek.

22 We expect that in this case the redactions to these
23 transcripts would be limited. We are hoping that the redactions would
24 be limited mainly to names of investigators, places of interviews and
25 identities of third parties.

1 However, this would pretty much depend on the security
2 situation of the relevant witness at the time. For that reason, I
3 hasten to say that we reserve our right to revisit this situation and
4 will inform the Court accordingly as we progress in the disclosure
5 process, but we do hope that this time round we'll be able to disclose
6 much of the material without redactions, including the identities of
7 the Prosecution witnesses, but this is just a hope for the time being,
8 as it pretty much depends on ongoing work on witness protection.

9 Your Honour, I now proceed to the fourth question that your
10 Honour raised, which is, and I quote, "an indication as to whether
11 he intends to request that protective measures be put in place in order
12 to protect witnesses, victims or other persons at risk, prior to
13 disclosure of the names of witnesses or of certain documents or otherwise,
14 including any relevant information on the steps he is taking and/or
15 he intends to take in this respect which might be available at this
16 stage."

17 As earlier mentioned, your Honour, the Prosecution intends
18 to make requests for measures for the protection of witnesses. The
19 first step, obviously, your Honour, is to make appropriate redactions.
20 The second step would be to take measures with the guidance of VWU
21 to protect particular individuals. That is the most difficult part.

22 At this moment I can say that the Prosecution is working
23 together with VWU to address protective measures for witnesses. Should
24 there be a problem which we think needs to be brought to the attention
25 of the Chamber, the Prosecution will make a filing.

1 In the meantime, things are moving quite well. For that
2 reason, the Prosecution suggests that at the appropriate time it will
3 request for an ex parte hearing wherein, together with VWU, the
4 Prosecution can inform the Chamber on the security situation of each
5 of the relevant witnesses. For the time being, though, we think it
6 is not necessary, but at the appropriate time the Prosecution will
7 make such a request.

8 I'll now move on to the fifth question that was raised, and
9 the question reads as follows, and I quote, "an indication as to whether
10 he intends to rely on documents or information obtained on the condition
11 of confidentiality under Article 54(3)(e) of the Statute."

12 The Prosecution has not yet decided whether it intends to
13 rely on any such document. At the present moment, though, it looks
14 unlikely that we would rely on any 54(3)(e) materials. Should the
15 situation change, we would inform the Chamber accordingly.

16 With regards to material that must be disclosed pursuant
17 to 67(2) and Rule 77, which were obtained under conditions of
18 confidentiality, the Prosecution has one document that is under Article
19 67(2). We also have six documents that are under Rule 77. In the
20 Abu Garda case, the Prosecution was able to disclose this one document
21 that was under Article 67(2). We would disclose that same document
22 again this time round.

23 With regards to the six Rule 77 documents the Prosecution
24 was able, in the Abu Garda case, to provide alternatives or analogous
25 material. In this particular instance, the Prosecution would work

1 with the hope that we would be able to disclose all the relevant material
2 by obtaining the provider of the information to lift the restrictions.

3 Should -- in case that fails we would be able to provide
4 analogous material, but we would first work towards obtaining the
5 lifting of the restrictions.

6 There are also approximately 40 other documents which were
7 disclosed as PEX0 in the Abu Garda case which were not received under
8 any conditions. The Prosecution would be able to disclose those
9 documents again without any difficulty.

10 I now move on to the sixth question, and I quote from the
11 order of your Honour, and it states: "Considering that, as regards
12 the inspection to be conducted by the parties pursuant to Rules 77
13 and 78 of the Rules, it is appropriate that both the Prosecutor and
14 the Defence submit any views they might have at this stage as regards
15 its envisaged scope and timing."

16 With regards to scope of inspection, I would like to state
17 that in the Abu Garda case there wasn't much of an inspection, as such.
18 The materials were looked at during the disclosure process, and that
19 worked quite well. We could use the same approach again.

20 In terms of the amount of material that should be made
21 available for inspection, the Prosecution believes that we have two
22 items of evidence, physical evidence, that are most suitable for
23 inspection. All the other material for disclosure are mainly documents
24 which can be disclosed through the normal process even without
25 inspection. But, all the same, should the Defence wish to have all

1 these materials inspected during the disclosure process, we can still
2 do that. We can still carry out such inspections without any
3 difficulty.

4 But at least for now, I can say that we have two items of
5 physical evidence which the Defence may wish to inspect. At the present
6 moment, though, the Prosecution cannot state the nature of these
7 materials as disclosure of this information could impact on the identity
8 of the source of this material. For that reason, we would keep that
9 information to ourselves until such time as it would be appropriate
10 to disclose such information.

11 I now move on to the seventh question that was raised by
12 your Honour, and the question reads as follows, and I quote, "Considering
13 that, with a view to enhancing the overall effectiveness of the
14 disclosure process, it is appropriate that the Prosecutor, the Defence
15 and the Registrar submit their views as to the system of disclosure
16 as established and implemented in the recent practice of the Chamber,
17 including its technical modalities."

18 The Prosecution is satisfied with the disclosure regime that
19 was put in place in the Abu Garda case. The Prosecution will, therefore,
20 be happy to use the same regime again as it worked quite well.

21 I now move on to the eighth question. Your Honour, the eighth
22 question reads as follows, and I quote, "Considering that, in addition
23 to the above, all parties and participants are invited to submit any
24 information, observation or concern which they deem relevant for the
25 purposes of the overall effectiveness of the disclosure process."

1 Your Honour, we have alluded to a particular issue that could
2 affect the disclosure process; that is, the implementation of Rule
3 76 of the Rules of Procedure which require that the Prosecutor shall
4 disclose to the accused - the suspect I may say in this particular
5 instance - the statements of all Prosecution witnesses in their language
6 which the accused or the suspect in this case fully understands and
7 speaks.

8 During the initial appearance, the two suspects confirm that
9 they fully speak and understand Zaghawa. Banda has some understanding
10 and knowledge of Arabic, and Jerbo the same to a lesser degree. This,
11 therefore, means that in order to implement Regulation 76, disclosure
12 of the statements and transcripts of the witnesses should be in Zaghawa.
13 This can cause significant problems for the following reasons:

14 1. Zaghawa is not a written language, as far as the
15 Prosecution knows;

16 2. The vocabulary, as we understand of Zaghawa, is very,
17 very limited, compromising no more than 5,000 words. If this
18 understanding is correct, it would be very difficult to translate
19 certain difficult concepts and words that you would find in more advanced
20 languages;

21 3. Translation of the relevant material would therefore
22 have to be done orally on audio, such that the suspects can listen
23 to the information. This also has practical problems. For instance,
24 annexes to statements of witnesses, like sketches by the witnesses
25 with annotations and so forth, it would be almost practically impossible

1 to have that read out in audio for the suspect to fully comprehend
2 the information that is being conveyed.

3 The other bigger problem, though, your Honour, is the fact
4 that the information we are talking about comprises of 3,100 pages,
5 approximately. We have information from the relevant unit responsible
6 for doing this type of work in the OTP that, in order to read out in
7 translated form from Arabic or English to Zaghawa all these 3,100 pages,
8 will take two to three translators approximately nine months to one
9 year to complete this work.

10 It therefore means that should -- in case a decision is taken
11 that this material would be read in Zaghawa on tape, for the benefit
12 of the suspects, it will take an inordinate amount of time before this
13 confirmation hearing would ever take place. The Prosecution does not
14 think that such delay would be justified in view of the fact that there
15 are alternative approaches that could be considered.

16 For that reason, the Prosecution would recommend to the
17 Chamber and to my learned friend for the Defence to consider the following
18 options: One is to appoint full-time interpreters or translators for
19 the Defence who will work with the Defence team and the suspects, and
20 interpret or translate the material that is available to the benefit
21 of the Defence and the suspects. Or, the Defence be requested that
22 after disclosure it would identify the core material which it would
23 wish to be translated or read on tape into Zaghawa, and the Prosecution
24 would hire the relevant people to do this work, but at least the material
25 should be limited to such extent that we would not be indirectly

1 implementing Rule 76 because, otherwise, it's like we are not finding
2 alternatives at all.

3 So, if limited core material is selected, we may be in a
4 position to have those translated; maybe with assistance from the
5 Registry such work could be done quickly.

6 These are the views we have with regards to the issue of
7 language, but we would be happy to listen to the Defence to see what
8 views or options they may wish the Chamber to consider.

9 I now move on to the last question that your Honour requested
10 us to deal with, and it reads as follows, "Considering that in light
11 of the paramount principle of publicity of the proceedings," and I
12 am not even sure this is a question that would need to be answered,
13 but I may just hasten to say that the Prosecution does not at this
14 stage see any need to go into private session; maybe during Defence
15 submissions or the Registry submissions such need would arise, but
16 your Honour would adequately deal with it.

17 On that note, the Prosecution sits. Thank you.

18 SINGLE JUDGE TARFUSSER: Thank you very much, Mr Faal.
19 Before giving the floor to the Defence, I just wanted to point out
20 three questions or three problems for the Prosecutor to think about.
21 One is that you didn't say anything about the time frame for the
22 disclosure to take place. I would not want to arrive so close to the
23 30 days' deadline as we did in the Abu Garda case, so I would try to -- like
24 to have a bit of a time frame also because -- so we can make a schedule,
25 a calendar of the disclosure proceedings.

1 The second point is the witnesses giving testimony at the
2 confirmation hearing. You know what the single Judge is thinking about
3 that. I think it's, obviously, permitted to do so but I think the
4 Prosecution should choose witnesses if -- if any, which are very
5 important for the case. Well, not just repeating things we already
6 have read, possibly.

7 And the third thing I think is most tricky one, because I'm -- I
8 think, and I'm sure, that the parties and -- that there should be
9 collaboration between the parties, and I'm sure that Mr Khan is very
10 collaborative in order to make the proceedings go on in a smoothly
11 and expeditious way.

12 But about the language problems, you know, I ask -- I would
13 like to know what happened in the last year, because we issued the
14 first summons to appear one year ago, where you knew that the two suspects
15 are speaking Zaghawa, and probably you should have done something also
16 before; in the translation, I mean. When you say that should the
17 suspects insist on the disclosure of statements in Zaghawa, well, I
18 think that is somehow their right. Of course, they can waive this
19 right, I think, but that would -- I think is -- what I ask is why didn't
20 you think about this before?

21 And another -- the number of 3,100 pages, I think it's -- it's
22 very -- it's very meaningful, 23 statements. Probably it depends on
23 the format, but 23 statements can't be 3,100 pages in a normal form.

24 And the last thing, always talking about the interpretation,
25 what you propose to the Prosecution - or what the Prosecution proposes

1 to the Defence - why should this, the interpretation, the full-time
2 interpretation, be work with the Defence and not with the Prosecution?
3 I mean, it's a duty of the Prosecution to give to the Defence the
4 translated statements. But I've -- well, I would like to hear also
5 Mr Khan on all these problems, and I give you the floor.

6 MR KHAN: Your Honour, I am, indeed, most grateful. My
7 learned friend has taken us through, in his usually adroit manner,
8 the principal areas that were raised in your Honour's order of 18 June.

9 It does appear at first glance that there appears to be,
10 as perhaps could be regularly foreseen, a large degree of overlap between
11 the cases of Banda and Jerbo and the case that the Prosecution has
12 already organised itself for, which is the completed and concluded
13 case of Abu Garda.

14 And I say that for a number of reasons; I won't go through
15 them in detail. But, for example, today my learned friend stated or
16 indicated he would rely upon approximately 420 documents in this present
17 case. Now, whilst, of course, on the 9 June status conference of last
18 year the Prosecution indicated in its preliminary prediction that it
19 would intend to call about, or adduce, 128 documents, it ended up using
20 437.

21 So when one looks at the number of documents, the number
22 of witnesses, there were 21 witness statements in Abu Garda; 23, it
23 appears, in the present case. So when one compares the answers given
24 to what actually was disclosed in the Abu Garda case, there appears
25 to be a large degree of overlap. And the 21, I believe it includes

1 two statements for two particular witnesses, so they were duplicated.

2 Your Honours, the reason I say all of this is that the primary
3 consideration of the Defence is to ensure that these proceedings,
4 however long they last, are, indeed, as expeditious and properly
5 conducted as it is possible -- as possible.

6 Now, despite the great deal of cooperation on non-contentious
7 issues, there were clear disagreements, obviously, between the Defence
8 and my learned friends opposite. And your Honour perhaps can cast
9 his mind back to one of the status conferences last year where I
10 complained and lamented the dead time that had been caused between
11 the initial appearance of Abu Garda in May and the disclosure that
12 we received. The first disclosure received by the Defence was 28 August
13 and, in fact, the bulk of the disclosure we received in September.

14 SINGLE JUDGE TARFUSSER: That's why I asked the time frame.

15 MR KHAN: Indeed, indeed, your Honours. And my learned
16 friend, in good faith, continuously stood up and said, "These are various
17 problems, and we will disclose it as soon as possible, as soon as
18 practicable, with all due expedition." And of course, that was his
19 intention, but sometimes an office as large as the OTP needs to have
20 their minds focused, in my respectful submission, because there is
21 a fundamental disagreement, in my respectful submission, when it comes
22 to the Prosecution's understanding of their obligations. And in
23 passing, in a previous status conference I had made the obvious point
24 that sometimes the Prosecution do not get it right. Sometimes they
25 do labour under a misapprehension when it comes to the utility and

1 how one interprets the rules. And I previously referred to the Lubanga
2 decision and Article 54.

3 Now, your Honours, my particular concern is this, that Rule
4 121 makes it binding upon the Prosecution to disclose the document
5 containing charges and the list of evidence it intends to rely upon
6 30 days before any confirmation hearing. In my respectful submission,
7 looking quite objectively at what happened last time, the reality is
8 the Prosecution viewed as that being the cut-off date for disclosing
9 evidence and, in my respectful submission, your Honour, some guidance
10 is needed from the Pre-Trial Chamber and, in particular, by yourself
11 as the single Judge charged with the conduct of these proceedings.

12 It is because Rule 121 must be read through the prism of
13 Article 67 that the right of a suspect to a fair and expeditious trial
14 and a right of a suspect to be fully informed in a language he fully
15 understands of the nature of the charges against him.

16 Now, if one looks at -- there's many, many rules, and I'm
17 not going to belabour the point, but if one simply looks at Rule 76(2)
18 and Rule 76(1), it makes it clear that the Prosecution's in practice
19 understanding of its obligations of 121 are simply, with the greatest
20 of respect, unsustainable, because what Rule 76 requires is that the
21 Defence be served with copies of prior statements and the names of
22 witnesses sufficiently in advance of any hearing so as to ensure adequate
23 preparation of the Defence.

24 But when one looks at subparagraph 2, it's a very minor point,
25 but it's revealing, in my submission. Whenever the Prosecution

1 disclose such evidence, they are permitted, by dint of 76(2), to serve
2 additional statements when a decision is made. Now, your Honours,
3 if the Prosecution could simply get away with disclosing for the first
4 time statements 30 days before the hearing, 76(2) would be, if not
5 redundant, of greatly reduced effect.

6 So the presumption must be - and there's authority from this
7 Court and, indeed, this particular Pre-Trial Chamber - that the
8 presumption must be in favour of open justice. It must be in favour
9 of the Prosecution, consistent with its overall obligations and Article
10 54, to disclose evidence in the most timely manner possible.

11 Your Honour, this is important for a whole raft of reasons:
12 one, of course, is that Rule 121 also allows the Defence various options,
13 but one of them is to present evidence. And we are given -- the Defence
14 is given 15 days from the receipt of the document containing charges
15 and the evidence; only 15 days to read that evidence, to assimilate
16 that evidence, to analyse it, to decide what missions or investigations
17 are required, to obtain that evidence in a proper form and to serve
18 it. That is a gargantuan task that may be beyond any Defence team.
19 So, your Honour, Rule 121 simply cannot be viewed in those terms.

20 Your Honour, the other reason, of course, is that the Statute
21 and rules do allow for the Defence to make requests of the Pre-Trial
22 Chamber and the Prosecution in relation to unique investigative
23 opportunities and the like. I think it's Article -- just bear with
24 me one moment. Yes, Article 56. Your Honours, again, that provision
25 would be eviscerated unless the Defence is given disclosure in the

1 most timely fashion possible.

2 Now, your Honour, what I would request and submit as being
3 a sensible way of proceeding in this case is the Prosecution firstly
4 to identify what evidence in the Abu Garda case they are intending
5 to rely upon again. That's the first step.

6 The second step would be for the Prosecution, without
7 delay - and this should, in all fairness, be a matter that they could
8 determine in the next few days, definitely by the end of next week - for
9 them -- second step would be for them to notify the Defence and, of
10 course, the Pre-Trial Chamber, of any evidence relied upon in the Abu
11 Garda case that they are not seeking to rely upon now. And your Honour,
12 of course that allows the Defence to focus its efforts and its attention
13 in a most effective manner possible, whilst at the same time not affording
14 or causing the Prosecution any disadvantage whatsoever.

15 And your Honour, the third step, of course, would be for
16 the Prosecution to serve upon the Defence, without delay, any wholly
17 new evidence. So one doesn't have to wade through a whole morass of
18 documents, one can, very quickly at first instance, see what is new
19 and focus upon that because that may require the most effort and the
20 most attention. And I think, in my respectful submission, that is
21 an appropriate way of proceeding.

22 Your Honour, when it comes to the number of witnesses and
23 whether or not viva voce witnesses are going to be called, with the
24 greatest of regret, of course, really, this is not a matter, at first
25 blush, for the Defence, because the whole architecture of the Statute

1 and rules gives an awful lot of scope to the Prosecution to decide
2 upon what evidence it -- to decide the evidence it relies upon in its
3 bid to get a case confirmed.

4 The issue of redactions is, however, important and, as I
5 understood my learned friend's submissions - as I understood my learned
6 friend's submissions - what the Prosecution propose seems to be
7 sensible.

8 My learned friend referred to the regulation of the Court,
9 that any protective measures previously ordered continue to apply.
10 And these matters, of course, have been judicially determined in the
11 past. And I would simply ask -- I would simply suggest that your Honour
12 perhaps can make a decision that that practice could be followed because
13 it would have the fortuitous effect of getting evidence in the hands
14 of the Defence but without delay.

15 But, your Honour, I also make an additional submission, which
16 I hope is helpful; it will certainly be of great assistance for the
17 Defence. There is no provision in the Rules that I see or in the
18 Statute - and I stand to be corrected - that requires the Prosecution
19 to delay in handing over documents until an order of the Court is
20 obtained.

21 Your Honour, of course there are protective issues, and of
22 course the Pre-Trial Chamber serves an essential role in protecting
23 the rights of the Defence whilst conducting ex parte hearings and making
24 such determinations. But, your Honour, in my respectful submission,
25 that important mandate can work in parallel with a mechanism that

1 requires the Prosecution to make unilaterally, at first instance,
2 whatever redactions it thinks necessary to protect a witness or
3 information and serve that upon the Defence.

4 Your Honour, of course that will be subject to judicial
5 oversight. The Prosecution can take a cautious approach, and your
6 Honours in due course may lift some redactions as being unnecessary.
7 But from the Defence perspective, very simply put, something is better
8 than nothing.

9 And, your Honour, the proposal I've just made has the distinct
10 advantage that it will allow us to look at the scope and the parameters
11 and the contours of the Prosecution's case, trigger any investigations
12 or actions we need in a timely fashion. And I do, with your indulgence,
13 refer back to what happened in Abu Garda May, June, July, August, all
14 wasted at public expense due to no fault of the Defence, simply because
15 we were not given any information to work with.

16 Your Honour, in relation to the Rule 77 material, I think
17 the practice of the Pre-Trial Chamber has been to draw a distinction
18 between inspection and disclosure. And pre-inspection reports,
19 disclosure reports, have all been required of the Prosecution in its
20 duty independently, independently to turn its mind, cast their mind
21 at Rule 77 and evaluate whether or not, amongst the morass of papers
22 in their archives, there is evidence which is material to the preparation
23 of the Defence and, indeed, the Appeals Chamber of this Court has made
24 it very clear that, given the Prosecution's obligation to investigate
25 exculpatory as well as incriminatory material, that is a task they

1 should be able to do without any prompting or assistance from the Defence.
2 Of course, it may be that we will try to give them some assistance
3 to direct them in a useful direction.

4 Your Honour, your Honour has himself, if I may say so, made
5 a very insightful comment regarding the problems of translation. This
6 of course is a right to the suspect and it's a problem, a very real
7 problem that must be grasped by the ICC, not only in this case but
8 in future cases, as to what is the proper course of proceeding.

9 Now, your Honour, many avenues are possible, and I'm not
10 ruling all of them out. What I do take issue with, and where I completely,
11 with the greatest respect, depart from my learned friend, is the
12 suggestion that it will take two or three Court professionally-trained
13 Hague-based interpreters, what was it, 90 days, nine months? Nine
14 months, to read audio files, and yet the same task could be done in
15 the sand of Darfur, or in the outback of Chad, by one person in a quicker
16 time. It seems to be -- fly in the face of logic and good sense.

17 Now, your Honour, it seems that that proposal should simply
18 be rejected as not being a conducive solution to the problem.

19 Now, your Honour, I need to take instructions upon all of
20 this. It may well be that suspects may not -- may choose not to rest
21 on their strict rights to have every single document translated. I
22 take no position on that so far at this point. But, your Honour, all
23 I would ask is that the Zaghawa problem, or the translation into Zaghawa,
24 not be used as a distraction from the core issue of getting material
25 in English to the Defence team.

1 Your Honour, even if one were to accept my learned friend's
2 second proposal that we could highlight the essential evidence, and
3 there may well be mileage in this, there may well be -- it may well
4 be that some discussions can take place and a solution can be obtained
5 but, leaving that apart, it requires the Defence to know what the case
6 is before we know what is important.

7 And once again, this supports my primary submission that
8 very strict, very clear time lines should be imposed upon the Defence
9 to disclose the different categories of evidence that I have sought
10 to detail in this submission.

11 Your Honour --

12 SINGLE JUDGE TARFUSSER: On the Prosecutor, on the
13 Prosecution, you mean.

14 MR KHAN: On the Prosecution.

15 SINGLE JUDGE TARFUSSER: Not on the Defence. You said on
16 the Defence.

17 MR KHAN: No, no, on the Prosecution. And your Honour, if
18 that is done, I'm sure a way can be navigated that hopefully will be
19 satisfactory.

20 Your Honour, just bear with me a moment. I wondered if there
21 was any other issue that I haven't raised. Yes.

22 Your Honour, my learned friend for the Prosecution of course
23 will address you as to whether or not -- or why translations appear
24 not to have been more advanced. I take no position on that. I simply
25 don't know the reason.

1 Your Honour, unless I can assist further, those are my
2 submissions and responses to what my learned friend has so eloquently
3 put before you.

4 SINGLE JUDGE TARFUSSER: Thank you very much.

5 Now to the Registrar, I give you the floor. And especially
6 if you focus also on the Zaghawa problem, on the language problem,
7 if possible, if you know something about it, or how we can deal with
8 it, anyway. Thank you.

9 MS DAHURON-JACOBY: (Interpretation) Thank you, your Honour.
10 If I may, to get back to the question of disclosure, electronic disclosure,
11 if it could perhaps settle the problem of protocol with regard to that.

12 The Prosecutor has said that they were satisfied with the
13 system used in Abu Garda. The Defence has not made any comment on
14 that. We would just like to point out that right now before one of
15 the courtrooms in this Court there is a discussion on the protocol
16 with regard to electronic disclosure that would apply to all of the
17 cases.

18 This draft protocol, as it currently exists, is largely based
19 on the latest protocol that was used in the Abu Garda case. It would
20 be a question of making minor amendments to the electronic protocol.
21 The court officer will send that to the different parties for comments
22 and may indeed plan to adopt that version of the protocol pertaining
23 to electronic disclosure.

24 With regard to Zaghawa, pursuant to Rule 76, it is indeed
25 up to the Prosecution to produce the translations in the language of

1 the suspects. We reserve the right not to comment on the comments
2 made by the Prosecution, except to answer specific questions by the
3 judge pertaining to that matter.

4 SINGLE JUDGE TARFUSSER: No, I have no questions at this
5 moment, because we will come back to this problem in the -- during
6 the disclosure probably also in light of the confirmation hearing then.

7 MS DAHURON-JACOBY: (Interpretation) Excuse me. With
8 regard to the confirmation of charges hearing, the Registrar has already
9 identified some trained interpreters, as was seen during the first
10 hearing. Now, the first ten minutes were just kind of a warming-up
11 process, and there were some technical problems, but we are nonetheless
12 able to provide consecutive interpretation, as well as simultaneous
13 interpretation was not expected. So there is the capacity to do so,
14 and the Registry is currently trying to identify more interpreters
15 and translators in order to provide them training with a view towards
16 the confirmation of charges hearing.

17 SINGLE JUDGE TARFUSSER: Thank you. Now I give back the
18 floor to the Prosecution. And I really ask him to deal with the problem
19 of the time frame, because I really would like to have a very expedited
20 disclosure and a very soon disclosure, not staying for a long time
21 without doing anything. I think there are some issues raised by the
22 Defence which are quite condivisible, I think. Thank you.

23 MR FAAL: Your Honour, indeed, I would address the issue
24 of the time frame for disclosure. However, I would hasten to say that
25 whatever the interpretation my learned friend for the Defence may have

1 for Rule 121, he cannot change what is contained in the Statute. And
2 the Prosecution would not submit itself to be railroaded into such
3 strict deadlines that would make the process so meaningless. We do
4 recognise our obligations and we will do our utmost to make sure that
5 this disclosure is carried out as smoothly as your Honour determines.
6 We would respect all the time lines that your Honour places on the
7 Prosecution.

8 And, for that reason, the Prosecution can confirm that,
9 indeed, there is a significant overlap between the Abu Garda case and
10 the present case.

11 MS DAHURON-JACOBY: Sorry to interrupt. There seems to be
12 a problem on channel 1, which the court reporter is not receiving.
13 It's resolved now, I see.

14 MR FAAL: Okay. Thank you for bringing that to our attention.
15 Your Honour, I'll repeat some of the things I have said that are not
16 contained in the transcript.

17 I was saying that we would be guided by your Honour's decision
18 with regards to the deadlines for disclosure. We do expect to have
19 deadlines that are reasonable and not deadlines that are so strict,
20 as requested by the Defence, that would make it impracticable for the
21 Prosecution to comply, regardless of the fact that the two cases are
22 similar.

23 But the Prosecution is looking at this case with a very
24 focussed mind, unlike what my learned friend suggests. In fact, we
25 have already identified all the material that can be disclosed in three

1 weeks without any problems, and it's easy to quickly guess what that
2 material would be.

3 Every material pertaining to existence of armed conflict
4 can be disclosed. Everything pertaining to AMIS's neutrality can be
5 disclosed. The only problematic documents pertain to the statements
6 and transcripts of witnesses. And the reasons are quite obvious:
7 Protection of witnesses. Do we disclose their identities or do we
8 not disclose them? We cannot answer that question now. How can we,
9 therefore, disclose those statements? We cannot, until those problems
10 are solved.

11 I did indicate to your Honour that we are working on these
12 issues and we hope to be able to find a solution very soon. As soon
13 as those solutions are found, we would be able to state to the Court
14 what type of redactions we wish to maintain and those we would wish
15 your Honour to change. Until we cross that line it is not possible
16 to disclose the materials, whatever the Defence wants but, obviously,
17 there is a bulk of material which could be disclosed very quickly.
18 And we can undertake to the Chamber that we can disclose all that material
19 in one month without any difficulty; maybe in one or two or three batches,
20 but we can disclose all that in one month.

21 SINGLE JUDGE TARFUSSER: So do it.

22 MR FAAL: The difficulty is the core material, which is the
23 statements of witnesses and transcript of their interviews; that is
24 the problematic bit.

25 You wanted to say something, your Honour, or may I proceed?

1 Your Honour did raise this issue, that the 23 statements
2 may not really amount to 3,100 pages. Indeed, it surprises -- it would
3 surprise many people if one says that, yes, these 23 statements goes
4 to 3,000-some-hundred-pages. I would say that not all the 3,100 pages
5 are actual utterances of the witnesses, because there are annexes with
6 annotations, sketches, and so on, but the entire bulk of material is
7 about 3,100 pages.

8 I would also wish to inform the Chamber - or your Honour,
9 excuse me, pardon me for that - that the transcripts of witnesses are
10 voluminous. One set of transcript, for instance, may contain two,
11 three hundred pages, and that is why we have this large number of pages.
12 But to just reassure your Honour, we have done the calculation, we
13 have checked, and we know that this figure that we have given is very
14 close to the accurate figure.

15 And one of the reasons why these statements are so bulky - or
16 the transcripts - is that the witnesses were interviewed under Article
17 55(2) and, also, you have two or three languages used during the interview,
18 and all that would have to feature in the transcripts, so they become
19 quite rather voluminous.

20 My learned friend on the other side raised an interesting
21 argument. He suggested that the Prosecution said it would take them - at
22 least with two or three interpreters - nine months to one year to
23 translate all that material. And then we expect that it will take
24 one interpreter appointed for the Defence less time. That has never
25 been our argument.

1 Our position is, because it will take this long for the
2 Prosecution, we recommend that interpreters and translators - we never
3 mentioned a number - it depends on what is necessary. So the Defence,
4 if it wishes to go with the recommendation, can ask, can say, "I need
5 five. I need six," provide that number, and they can assist.

6 But all we are asking for is that at least this is a
7 recommendation that can be considered. How is that different from
8 the Prosecution doing it? It is, indeed, very different for the simple
9 fact that the Defence, after receiving disclosure in English, may
10 consider that a particular statement is, in fact, not necessary for
11 them to have translated, and they can pick and choose those they deem
12 necessary to be translated. Whereas, the Prosecution, we have -- we
13 simply have no choice. If we are to implement Rule 76, we have to
14 have everything translated or interpreted.

15 Your Honour raised a related question: What has happened
16 in this last year? Why didn't we do it? It's because we simply did
17 not know. We had the material translated into Arabic. By the time
18 we realised that one or more of these suspects speak only Arabic, it
19 was simply not possible to have -- Zaghawa, excuse me, your Honour -- it
20 was simply not possible. Not that because we did not try. Indeed,
21 we tried. We put together the material. We asked the languages unit
22 in the OTP to start recruiting people. They identified people and
23 they determined the amount of time it would take to do this work. And
24 by the time we got the figure, the Prosecution decided that, perhaps,
25 this is a matter to be brought before the Pre-Trial Chamber so that

1 possibly, with the collaboration of the Defence, a solution would be
2 found, and that is the only reason for that.

3 Your Honour, the Defence has made some proposals as to how
4 disclosure could be done more effectively. There are some of their
5 recommendations which can find sympathy from the Prosecution. We would
6 not have any difficulty conceding or agreeing with the Defence to go
7 accordingly. For instance, what evidence in the Abu Garda case we
8 still intend to rely on in this case. We have promised that for most
9 of that we would, in fact, be able to disclose in a month, in a month's
10 time. So it would not, in fact, be necessary to go through the process
11 of their identification because we can hand over all that material
12 in a month.

13 To notify the Defence any evidence relied on in the Abu Garda
14 case that we do not intend to rely on in this particular case, that
15 would be a little bit difficult to do. The Prosecution would consider
16 it. If it is possible to do so, we would inform the Defence, but we
17 make no such undertaking.

18 The Defence also requested that we serve on them the new
19 documents that we may have received. The Prosecution is not in a
20 position to do so by reason of the fact that those documents implicate
21 serious protection requirements which we have not yet been able to
22 discharge.

23 In its creativity, the Defence suggested that these documents
24 can even be disclosed, heavily redacted, without the superintendence
25 of the Court. The Prosecution differs. We think that the rules are

1 clear: Disclosure has to be supervised by your Honours. That's why
2 we have these status conferences.

3 In any case - in any case - even if the Prosecution was able
4 to do that, we still think that we would have to first solve the protection
5 problems that surround these statements before we are able to disclose
6 them.

7 In sum, therefore, inasmuch as all of us are interested in
8 expeditious disclosure, the Prosecution would make its best effort
9 to disclose the bulk of the material, including PEX0, Rule 77, and
10 everything that pertains to AMIS's neutrality, existence of armed
11 conflict, most of the public source material under attack on the MGS
12 Haskanita, save for the statements and transcripts of witnesses. Those
13 we cannot disclose now, unless and until we solve the issue of protection
14 of witnesses.

15 Thank you, your Honour. I'd be happy to answer whatever
16 further questions your Honour may have with regards to this case. Thank
17 you.

18 SINGLE JUDGE TARFUSSER: Mr Khan, please.

19 MR KHAN: Your Honour, there was never any intention -- overt
20 intention on my part to railroad the OTP juggernaut into a strict time
21 line. Of course, I was putting forward submissions for your Honour's
22 consideration. But I do take exception to the Prosecution's assertion
23 that having -- having in mind Article 67, the Prosecution's obligation
24 to get to the truth, that they are somehow prohibited, somehow legally
25 estopped from looking at the evidence that they are very familiar with,

1 deciding what potential information could potentially put a putative
2 witness in jeopardy and blanking it out. My learned friend says there's
3 no provision or that's not possible, but that is what the Prosecution
4 have done in the past. And let me explain.

5 Your Honour, in a previous case - it's the decision on
6 evidentiary scope of the confirmation hearing - preventive relocation
7 and disclosure under Article 67(2) of the Statute and Rule 77 of the
8 Rules, 21 April 2008, the Katanga Chamber allowed the Prosecution to
9 do precisely that. Now, your Honour, there is a distinction; that
10 related to material that was potentially exculpatory or otherwise
11 material to the preparation of the Defence or material that the
12 Prosecution did not seek to rely upon at the confirmation hearing but,
13 your Honour, that's by the by. These protective measures are not
14 excuses, are not measures to delay disclosure. They are not there
15 for the protection of the Prosecution for any tactical advantage, of
16 course not. They are there for the protection of witnesses. And if
17 that measure of unilateral Prosecution editing and redacting could
18 protect witnesses in Katanga, why not now?

19 As far as the witness is concerned - and, of course, it's
20 the witness that one must be focused upon when it comes to protective
21 measures - it makes little difference, once they've given a
22 statement -- it makes little difference, once they've given a statement,
23 whether or not a party calls them or not. They're either in jeopardy
24 or they're not. And the redactions that the Prosecution were content
25 to do in Katanga are either consistent with the Prosecutor's obligation

1 or he was remiss. They can't have it both ways.

2 So it is my respectful submission for the Prosecution, not
3 intentionally, but to effectively delay service of documents because
4 of an understanding that prior judicial authorisation is needed, must
5 be -- in my respectful submission, be viewed as erroneous, when they
6 can simply sit down, have a lawyer who took the interview, for example,
7 who's familiar with the subject matter, to blank it out and serve it
8 upon the Defence. That can be done without a huge delay. And of course,
9 it would still be subject to judicial oversight.

10 And your Honour, it is absolutely wedded to my learned
11 friend's last -- one of my learned friend's comments about the
12 interpretation.

13 Of course we are willing to collaborate and be cooperative
14 on as many issues as we can that are not inconsistent with the
15 instructions of my clients or their rights but, in order to focus on
16 what's germane, we need to see it and that's why I would ask that very
17 clear time lines be given; not for the morass of evidence, the background
18 reports, armed conflict that we did not dispute in Abu Garda, but on
19 re the crux of the matter, which is going to be the various statements
20 that the Prosecution it seems will disclose later, not earlier.

21 And I would ask rather than get helpful - but not
22 necessary - information in a month, they focus their full efforts,
23 their full -- motivate and harness the full resources of that office
24 to get us what is helpful, which is the new evidence that they're going
25 to rely upon, so we can be properly prepared for the November confirmation

1 hearing.

2 And your Honour, I would request, without seeking to be
3 coercive, without seeking to railroad the Prosecution, in order to
4 focus minds, that very clear dates be given with an emphasis on disclosure
5 of what is new to the Defence at the earliest possible opportunity.

6 SINGLE JUDGE TARFUSSER: Is there somebody else who wants
7 the floor to add something? No.

8 So I think that it is in the interest also of the Prosecution
9 to expedite disclosure - to begin immediately, I would say, with the
10 disclosure - because this helps also to get the collaboration from
11 the Defence in the translation issue; otherwise, I don't know how we
12 arrive to November.

13 In any case, on the basis of what I heard in this hearing
14 and of the information provided by the parties and participants, the
15 Chamber will issue as soon as possible the decision on disclosure,
16 giving as strict as possible time lines and schedules for disclosure
17 and guidelines for disclosure.

18 In any case, you know that at any time you can address a
19 request to the Single Judge asking to schedule a status conference
20 if there is a need for it. And, therefore, I conclude this hearing.

21 I would like to thank the participants for attending, the
22 parties and participants for attending, and of course the interpreters
23 and the recorders. Thank you very much.

24 THE COURT USHER: All rise.

25 (The hearing ends at 4.27 p.m.)