

1 International Criminal Court  
2 Pre-Trial Chamber I - Courtroom 1  
3 Judge Cuno Tarfusser, Presiding  
4 Situation: Darfur, Sudan - ICC-02/05-03/09  
5 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain  
6 and Saleh Mohammed Jerbo Jamus  
7 Status Conference  
8 Thursday, 26 August 2010  
9 (The hearing starts at 3.00 p.m.)  
10 (Open session)  
11 THE COURT USHER: All rise. The International  
12 Criminal Court is now in session. Please be seated.  
13 JUDGE TARFUSSER: Good afternoon to everybody.  
14 First of all, courtroom officer, please call the case.  
15 Court officer: Good afternoon, your Honour.  
16 Situation in Darfur, Sudan, the Prosecutor against Abdallah  
17 Banda Abdallah Abakaer and Saleh Mohammed Jerbo,  
18 ICC-02/05-03/09.  
19 JUDGE TARFUSSER: Thank you. As always, for the  
20 record, please, could you present your team, the Prosecutor  
21 and then obviously the Defence and the Registry. Thank you.  
22 MR FAAL: Good afternoon, everyone.  
23 Your Honour, the Prosecution is today represented  
24 by the following, Ade Omofade, trial lawyer; Shyamala  
25 Alagendra, trial lawyer; Victor Baiesu, associate trial

1 I lawyer; Biljana Popova, case manager; and myself, Essa Faal ,  
2 senior trial lawyer. Thank you, your Honour.

3 JUDGE TARFUSSER: Thank you very much. Defence,  
4 please.

5 MR KHAN: Good afternoon, your Honour. My name is  
6 Karim Khan and I represent Mr Banda and Mr Jerbo, and in that  
7 I am assisted by Abeer Hassan, legal assistant, and Anand  
8 Shah, case manager.

9 JUDGE TARFUSSER: Thank you very much. The  
10 Registry.

11 MS DAHURON-JACOBY: Good afternoon, your Honour.  
12 Today for the Registry, on my left, we have Dahirou Sant-Anna,  
13 who is the legal coordinator for this case and situation.  
14 And Charlotte Dahuron-Jacoby, \* chief of the Court Management  
15 \* section

16 JUDGE TARFUSSER: Thank you very much. Myself,  
17 I am Judge Cuno Tarfusser for Pre-Trial Chamber I and I am  
18 assisted by Mr Silvestro Stazzone and Ania Salinas.

19 So, this is now the second status conference in this  
20 disclosure procedure in this case, Banda and Jerbo, and I  
21 would ask the parties and participants how things are going  
22 and how, if there are problems, always envisaging the hearing,  
23 the confirmation hearing of November. But before giving the  
24 floor to the Prosecutor, to the Defence and to the Registry,  
25 I have three issues to be clarified arising from the status

1 conference held on 13 July. There are three questions -- well ,  
2 maybe four -- but three questions to the Prosecutor and one  
3 to both the Prosecutor and the Defence.

4           The first question is -- regards the lifting of  
5 redactions granted in the Abu Garda case. I don't know if  
6 this is still actual but are you still considering to file  
7 an application requesting the variation of protective  
8 measures previously granted by the Chamber in the Abu Garda  
9 case. This is one question which is still open from the first  
10 status conference.

11           The second question, I think regards the so-called  
12 six new statements the Prosecutor was talking about at the  
13 last status conference. And my question is: How many, if  
14 you know it, witness statements are yet to be disclosed to  
15 the Defence, and for how many of them, if any, will you file  
16 a request for redactions, if there are any more? And in case  
17 when do you plan to be able to file these requests, if you  
18 will file them?

19           The third question regards the protective measures  
20 other than redactions. I wonder how the discussions are with  
21 the -- ongoing with the VWU with respect to protective measures  
22 for witnesses, and of course answering a -- please consider  
23 that we are in open session when answering this question.  
24 And do you still plan to make a request for an ex parte hearing  
25 for this matter? And when would you be able to provide the

1 Single Judge with an update of the development of such  
2 discussion and the implementation of protective measures,  
3 if any of them is agreed upon with the VWU?

4           The fourth, and then I'll stop it and give you the  
5 floor. To the Defence first, it relates to the translation  
6 to Zaghawa of witness statements. At the last status  
7 conference, in order to speed up - and we are very grateful  
8 for that - the proceedings, you proposed to receive only  
9 summaries of these statements translated into Zaghawa. First  
10 of all, if you confirm this position and can, therefore, the  
11 Prosecutor work on the assumption that it would be sufficient  
12 for the Defence to receive only the translation of the summaries,  
13 obviously without prejudice to the right of the suspect to  
14 request the full translation, if needed.

15           And on the other side, the question goes to the  
16 Prosecutor. Have you started, and which state are you with  
17 the preparation of those summaries and the translation of  
18 the summaries into Zaghawa. So these are my requests. And  
19 now I will give the floor to the Prosecutor to answer and  
20 add everything he needs or he thinks to add. Thank you.

21           MR FAAL: Thank you, your Honour, for giving us this  
22 opportunity to inform the Court and the parties the status  
23 of the disclosure exercise. Your Honour, I had already  
24 prepared some speaking notes which answer all the questions  
25 that you have raised. But in order to ensure that I provide

1 the most relevant information at the outset, I would briefly  
2 go through the questions and just state the Prosecution  
3 position on those matters, and I would later go back to the  
4 speaking notes that I had originally prepared.

5           With regards to the first question, the lifting of  
6 redactions in the Abu Garda case, there were two types of  
7 redactions that were granted. Some were under 81(2) and others  
8 were under 81(4). As we understand the jurisprudence of the  
9 Court, the Prosecution may be at liberty to lift our redactions  
10 under 81(2) and notify the Chamber accordingly.

11           With regards to 81(4), we would have to make a request.  
12 We have already prepared a notification for those redactions  
13 that affect -- that we are granted under 81(2), and we inform  
14 the Chamber and the parties of the redactions that we intend  
15 to lift.

16           With regards to 81(4), so far we have not identified  
17 any ones that we intend to lift, but once we identify those,  
18 we would make an application as quickly as possible.

19           With regards to the six new statements that were  
20 mentioned, only two have not yet been disclosed. Some of these  
21 statements are not from new witnesses; they are supplementary  
22 statements of some witnesses, for instance, 315, 355, and  
23 one is also the full transcript of Witness 442. But the new  
24 statements that we are in fact three: 441, which has not yet  
25 been disclosed; 467, which will not be disclosed because the

1 witness has decided that he does not want his identity disclosed  
2 to the Defence, so we will not use his statement. So it would  
3 be -- it does not contain any PEX0. If it did, we would have  
4 an obligation to disclose to the Defence but does not contain  
5 any PEX0, so we are not going to use that.

6           The other one is the statement of 466, which cannot  
7 be disclosed now because of witness protection concerns. So  
8 it's 466 and 441 which we cannot disclose now because of witness  
9 protection concerns.

10           The next issue is whether we intend to file a request  
11 for redactions with regard to these statements. For now our  
12 assessment is that redactions may not necessarily solve the  
13 problem. So we are taking the route of witness protection.  
14 We have already made a referral to VWU, but I would come back  
15 to that issue later.

16           With regards to whether we would want an ex parte  
17 hearing, we do not think it would be necessary. We can provide  
18 the information to the Chamber in a public hearing without  
19 having to go into the details of the identities of these  
20 witnesses or their current location, so it should be fine  
21 to deal with the issues in this hearing.

22           And the next question to address is the translation  
23 into Zaghawa. Yes, indeed, we have already started working  
24 on this. The first two batches have been submitted to LSU.  
25 We are hoping that the summaries would soon return to the

1 Prosecution division for onward disclosure to the Defence.  
2 Later on, I'll give you the exact figures and so forth.

3 Then the last question asked by your Honour is  
4 whether -- is it -- okay, the state of the summaries. Yes,  
5 we have worked on that and I would give you all the details.

6 With regards to disclosure more generally, the  
7 Chamber is aware that so far we have done three batches of  
8 disclosure. The first batch is to disclose everything that  
9 was disclosed in the Abu Garda case. In that regard we have  
10 disclosed 489 documents in batch 1 and batch 2. We have also  
11 disclosed a third batch of INCRIM packages, and this third  
12 batch contains 22 documents and including the transcript,  
13 full transcript of Witness 442, and one new witness, who is  
14 Witness 439.

15 As I mentioned earlier, there are two new witnesses  
16 whose statements we have not disclosed yet, 441 and 446. Those  
17 would remain pending -- and 466, excuse me. Those would  
18 remain pending for the time being until we are able to  
19 solve the witness protection issues affecting those  
20 witnesses.

21 I can say already that Witness 441 has been accepted  
22 in the witness protection programme. So it is just a question  
23 of VWU finalising its work to move the witness to a safer  
24 location. VWU is currently working on that. If there is any  
25 new development, we would inform the Court. But until the

1 witness is moved, he still becomes vulnerable and that is  
2 the reason why we are unable at this current moment to disclose  
3 his statement. We are hoping that we -- we will be able to  
4 disclose it in due course, very soon. It all depends on the  
5 advice we receive from VWU.

6 466 has also been referred to VWU. A decision has  
7 not yet been made on the request. I think I should clarify  
8 this.

9 The referral was not necessary-- or, the referrals  
10 were not necessary for inclusion into the ICCP. The referrals  
11 were for protection advice, and it's up to VWU to determine  
12 whether this is a case for inclusion in the protection programme  
13 or they would advise that we take other protection measures.  
14 And the referrals affect five witnesses.

15 Witness 304, 305, 307, these are not new witnesses;  
16 these are old witnesses. And if you recall, in the Abu Garda  
17 case we used summaries of these witnesses. This time round,  
18 we want to use their full transcripts, and we have referred  
19 them to VWU. We are awaiting decision. And the other two  
20 witnesses are 441 and 466.

21 The other thing I would wish to inform the Single  
22 Judge -- we have dealt with the issue of lifting redactions,  
23 so I will not come back to that. The other issue I would like  
24 to raise is that of inspection. You would recall that we did  
25 indicate that there are two materials that are suitable for



1 inspection. We are unable to invite the Defence for inspection  
2 of those materials at the moment because they relate to  
3 witnesses who need protection, and those witnesses have been  
4 referred. So until such time witness protection issues are  
5 dealt with pertaining to those witnesses, we would not be  
6 able to invite the Defence for inspection. We hope that this  
7 would be done very soon, as soon as the protection issues  
8 have been dealt with.

9           There are two or three things that we need to disclose  
10 which we have not disclosed yet. One is the statement of  
11 limited use. The other is the DCC and the LOE, and then the  
12 summaries. I will deal with these one by one. With regards  
13 to the statement of limited use, we will disclose them on  
14 Monday. We could have disclosed them earlier but because we  
15 are very busy with the summaries, we were unable to do so.  
16 But we will disclose them on Monday.

17           With regards to the DCC and the LOE, we are actively  
18 working on them. It's difficult to give a date as to when  
19 those things would be filed. We are hoping that around the  
20 third week or the fourth week of September we should be able  
21 to disclose this.

22           We also note that we would have to also disclose  
23 to the Defence a Zaghawa version, audio version, of the DCC  
24 to the Defence. During most recent discussions with the  
25 Defence, they have graciously agreed to the most salient

1 portions of the DCC be translated into Zaghawa in full, and  
2 the more legalistic portions could just be summarised in audio.  
3 If my understanding is correct, Mr Khan. And we are hoping  
4 that because that would involve less time, less work, we would  
5 be able to disclose a Zaghawa version of the DCC a few weeks  
6 after the filing of the English version of the DCC.

7           The Defence has also graciously agreed to waiving  
8 the right to an LOE in Zaghawa, and we are very grateful for  
9 that because it would have been a nightmare reading in Zaghawa  
10 on audio an LOE that is written in English. So, because we  
11 would not have that problem, we do believe that we should  
12 be able to discharge our disclosure obligations pretty much  
13 by end of September.

14           With regard to the Zaghawa translations, the work  
15 is a little bit slow, and for obvious reasons. The Prosecution  
16 would have to first summarise the material into English, send  
17 it to LSU for initial translation in script into Zaghawa and  
18 then that material would be read on audio and sent for quality  
19 control. So the process is a little bit painstaking. But  
20 we are hoping that by end of -- so far, we have submitted  
21 all the statements, the summaries of all the insider witnesses.  
22 It is the other witnesses, say, African Union witnesses, whose  
23 statements are outstanding. Seventeen summaries would have  
24 to be finalised this week and submitted to LSU. And that would  
25 be the end of the summary -- that would be -- that would complete

1 the task of summarising everything into English.

2 Outstanding task would therefore be their  
3 translation into Zaghawa. So far, all that of all the insider  
4 witnesses have been sent. We are hoping that, by the end of  
5 next week, three audio versions would be ready and would be  
6 sent to the Defence, and the end of the following week, another  
7 three would be ready, and the rest would be completed by  
8 September 22. That is the information we have received from  
9 the Languages and services -- Language Services Unit. So,  
10 we are hoping that by end of September we would have concluded  
11 all the disclosure exercise as mandated by the Chamber.

12 May I just take this opportunity to assure all that  
13 we will do our utmost to disclose whatever is available for  
14 disclosure at the earlier possible opportunity.

15 Your Honour, I am available to answer any questions  
16 you may have. Thank you.

17 JUDGE TARFUSSER: Thank you very much. I think  
18 those are not bad news, I think, but the floor is to the Defence.

19 Mr Khan, please.

20 MR KHAN: Indeed, your Honour, not bad news at all.  
21 The Prosecution are to be thanked for their sincere efforts  
22 in getting the case in a way that the Defence could prepare  
23 and I thank them sincerely for that.

24 As my learned friend has indicated, in answer to  
25 your Honour's question, we are content to receive summaries

1 of all the statements in Zaghawa and all other matters are  
2 precisely as put by my learned friend, Mr Faal.

3 Your Honours, I am a little bit -- I do have one  
4 comment in relation to -- and I believe it was Witness 467  
5 that the Prosecution said has given a statement and has  
6 indicated he does not wish his name to be disclosed and,  
7 therefore, it seems he will not be relied upon and we will  
8 not get the statement.

9 Of course that is one way of looking at things, but  
10 it's not, in our respectful submission, complete. There are,  
11 of course, rights that the Defence have pursuant to Rule 77  
12 and also Article 67(2), and I would ask of course that  
13 consideration be given as to whether or not under those heads  
14 that statement of Witness 467 is material, possibly material,  
15 possibly helpful, to the Defence and forced to be disclosed  
16 and, if it is, we should be given at the very least a summary  
17 of that statement.

18 Your Honour, my learned friend has indicated the  
19 legal stance of the Prosecution regarding Rule 81(2) and 81(4)  
20 and I take -- I make no observations on that at all. I think  
21 my learned friend has put forward an understandable and correct  
22 analysis in relation to those two rules and the question of  
23 lifting of redactions.

24 Your Honour, I am grateful that my learned friend  
25 has made efforts to ensure that the DCC, the document containing

1 charges, is disclosed at the earliest opportunity and it seems  
2 that we will have it well before the 30 day minimum rule.

3 And, of course, in part the sooner we get it the  
4 more helpful it is to the Defence, but it becomes more important  
5 of course when the Defence has said, as my learned friend  
6 has put it, that the factual aspects of the DCC would need  
7 to be fully translated, but the legal aspects or contextual  
8 aspects can simply be summarised, but until we get a working  
9 copy it may not be the final -- it may not need to be the  
10 final copy, but until a working copy of that DCC is given  
11 we can't finalise that important matter, but it will be along  
12 the lines that we have already suggested.

13 Your Honour, I actually don't have really much more  
14 to say. If you'll give me one moment, let me check with my  
15 team and no doubt they will refresh my memory if I've missed  
16 any important aspects out.

17 JUDGE TARFUSSER: Of course.

18 MR KHAN: Yes, indeed, your Honour. I did misspeak.  
19 My learned friend did make it clear that there's no PEX0 in  
20 relation to Witness 467, so the simple -- the only rule is  
21 Rule 77 that I'd ask to make sure that the Prosecution turn  
22 their mind to that provision and whether or not under that  
23 particular head we are entitled to at least a summary.

24 Your Honour, I have nothing else to add.

25 JUDGE TARFUSSER: Thank you. I would say if

1 you -- if you -- as far as Witness 467 is concerned, if you  
2 make a written submission, eventually if you think, just to  
3 decide this question about what you have risen just five minutes  
4 ago so we can decide on it.

5 MR KHAN: Well, your Honour, the law is quite settled  
6 and I don't think that'll be a matter of controversy between  
7 the parties. There is a decision of Katanga, a decision of  
8 Her Honour Judge Steiner, a corrigendum on the decision on  
9 the evidentiary scope of the confirmation hearing, preventive  
10 relocation and disclosure under Article 67(2) of the Statute  
11 and Rule 77 of the rules, 25 April 2008, paragraph 109 to  
12 111.

13 And the salient aspect is that the learned Judge  
14 determined in that case that "... in relation to interview  
15 notes, transcripts and statements of potential witnesses that  
16 the Prosecution does not intend to rely upon at confirmation,  
17 that they are subject to Article 67(2) and Rule 77 review  
18 and that, if matters that are contained in those statements  
19 fall to be disclosed under those heads, redacted statements  
20 should be disclosed to the Defence in summary format in a  
21 manner that gives an overall account of the document" unquote  
22 and then she goes on.

23 So, your Honour, I don't think it's a matter of dispute.  
24 I would be content if the Prosecution simply ensure that they  
25 do their job bearing in mind that particular rule. If they

1 make a determination that it falls to be disclosed, your Honour,  
2 I think at the moment that would be sufficient and in due  
3 course no doubt the -- if we're not satisfied, your Honour,  
4 we may seize the Pre-Trial Chamber of the matter.

5 JUDGE TARFUSSER: What's the position of the  
6 Prosecution on this matter?

7 MR FAAL: Indeed, your Honour, the Prosecution has  
8 made its assessment and we did clearly say in Court that we  
9 have looked at the statement. It does not contain any PEX0.  
10 If it did we would have been under an obligation to disclose  
11 it under 67(2), but we looked at it -- 67(2). We looked at  
12 it and we realised that there is no PEX0 in it, so there is  
13 no need to disclose it under 67(2).

14 With regards to Rule 77, it even becomes more  
15 redundant. Rule 77 is only for inspection of things that are  
16 either material for the preparation of the Defence, or the  
17 Prosecution intends to use it. We don't intend to use it.  
18 It's not material for the preparation of the Defence.  
19 Otherwise, we would have had an obligation to disclose. We  
20 have made the assessments, your Honour, and there is no reason  
21 to disclose the statement.

22 If, for instance, there were things in the statements  
23 which make it such that the Prosecution harboured some doubt  
24 as to whether it contains PEX0 or Rule 77, we would have been  
25 obliged to come to the Court and ask for direction, but there

1 is no doubt in our minds that this statement does not contain  
2 PEX0, or Rule 77 material, and therefore we do not see any  
3 need or any obligation to disclose it under the rules.

4 Thank you.

5 MR KHAN: Yes, your Honour --

6 JUDGE TARFUSSER: There seems to be a bit of a  
7 controversial matter, this one.

8 MR KHAN: Well, your Honour, I clouded the waters.  
9 It's completely my fault when I referred to PEX0 because my  
10 learned friend did address it, as he said in his observations,  
11 but Rule 77 is, in my respectful submission, not to be  
12 interpreted in so trammelled a manner. It clearly provides  
13 for inspection of material -- of documents that are material  
14 to the preparation of the defence, and I believe that there  
15 is case law even from the Appeals Chamber of this Court that  
16 has defined material relevant -- material to the preparation  
17 of the defence to matters that are relevant in any way.

18 Your Honour, indeed, I'm looking at a decision of  
19 the Appeals Chamber in the Lubanga case dated 18 January 2008  
20 at paragraph 2, Rule 77 of the Rules of Procedure and Evidence:  
21 "The term material to the preparation of the defence should  
22 be understood as referring to all objects that are relevant  
23 to the preparation of the defence."

24 Now, your Honours, if this statement in any way is  
25 inconsistent, in any way contradicts, in any way departs from



1 other Prosecution evidence, it is, in my respectful submission,  
2 material to the preparation of the defence. And it's in that  
3 light that the application of Rule 77 should be understood,  
4 and that's all I'm asking. It is a -- it's under Rule 77 that  
5 I found my application. If in any way it departs, is  
6 inconsistent, contradicts evidence that is being otherwise  
7 led by the Prosecution as to the nature of their case, the  
8 factual or legal underpinnings of their case, it falls to  
9 be disclosed. And that's all I'm asking, that the Prosecution,  
10 bearing in mind that application, conduct the Rule 77 review  
11 that I have sought.

12 JUDGE TARFUSSER: Please, Prosecutor.

13 MR KHAN: And, your Honour, I am grateful and I do  
14 apologise most profusely to my learned friend. It's because  
15 my very able team are handing me additional documents to support  
16 the propositions that have been advanced. Indeed, that  
17 Prosecution is the position of the Prosecution themselves  
18 because in their Prosecution's -- sorry, in the decision that  
19 I referred to of 25 April, 2008, paragraph 97, the learned  
20 Judge Steiner notes that the Prosecution themselves have noted  
21 that material preparation the Defence must be given that  
22 expanded interpretation.

23 I do apologise for interrupting my learned friend.

24 JUDGE TARFUSSER: Prosecutor.

25 MR FAAL: Your Honour, I think there is no

1 controversy here. Defence is simply restating what the  
2 Prosecution has said. I mean, Rule 77 embodies two issues:  
3 One, material for the preparation of the Defence, or intended  
4 for use by the Prosecution. And I have stated that the  
5 Prosecution does not intend to use the material.

6           Also, the information is not relevant for the  
7 preparation of the Defence. We have made the assessment and  
8 have made that conclusion. So there is no controversy here.  
9 We are talking about the same thing. Defence is simply  
10 restating the Prosecution's submissions, albeit in their own  
11 words. So, really, there is no controversy here. We have  
12 made the assessments and we have satisfied ourselves that  
13 this is the case. If the situation were different, we would  
14 disclose the statement. Indeed, we in fact intended to, only  
15 that the witness does not wish to be identified, and that's  
16 the only reason we are holding it back. It does not help anybody  
17 in this particular instance. Thank you, your Honour.

18           MR KHAN: Yes, your Honour. It was me being dense.  
19 I fully accept that this is not the matter of controversy.  
20 If my learned friend has made a determination that the contents  
21 of that statement are not relevant to these proceedings and  
22 to the Defence then, of course, I don't need to proceed with  
23 the matter, and I apologise for belabouring the point  
24 unnecessarily.

25           JUDGE TARFUSSER: Well, in any case, I think that

1 the parties are now -- it seems that you found an agreement;  
2 otherwise, if this would continue, I would just suggest that  
3 you come back to the Single Judge with a request so we can  
4 rule on this matter if it arises in the future.

5 So, if there are no other issues. The Registry has  
6 nothing to say on this case?

7 MS DAHURON-JACOBY: (Interpretation) Your  
8 Honour, nothing in particular on the part of the Registry.  
9 As regards the interpretation booths for the confirmation  
10 of charges, we will be submitting a full report by the  
11 end of September at the latest, that is, two months before  
12 the planned date for the confirmation of charges hearing.

13 JUDGE TARFUSSER: Thank you very much. So I would  
14 say that we do not plan for another status conference because  
15 things seem to be going on quite smoothly. If there is a need,  
16 I suggest that the parties will come to the Single Judge with  
17 a request for a status conference; otherwise, we follow the  
18 indications given by the parties in this status conference  
19 and probably, by the end of September, we should have come  
20 to a end of this disclosure proceeding, preparing then the  
21 hearing of November.

22 Thank you very much to everybody, to the translator  
23 and the transcriptionist. Thank you very much.

24 THE COURT USHER: All rise.

25 (The hearing ends at 3.33 p.m.)

1                   CORRECTION REPORT

2   The following correction has been made to the English  
3   transcript:

4   \* Page 2, lines 14 to 15

5   "And Charlotte Dahuron-Jacoby, I am in the Court Management  
6   Session."

7   Is corrected by

8   "And Charlotte Dahuron-Jacoby, \* chief of the Court Management \*  
9   section"