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No.: ICC-02/05-02/09

Date: 15 July 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner – Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR V. BAHAR IDRIS ABU GARDA

Public Document

Second Decision on issues relating to Disclosure

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo

Mr. Essa Faal

Counsel for the Defence

Mr. Karim A.A. Khan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

In the case of *The Prosecutor v. Bahar Idriss Abu Garda* (the “Case”), Pre-Trial Chamber I (“the Chamber”) at the International Criminal Court (“the Court”), Judge Cuno Tarfusser partly dissenting,

HEREBY RENDERS THIS DECISION

1. On 30 May 2009 the Single Judge issued a “Decision scheduling a hearing on issues relating to disclosure between the parties”¹ (the “First Decision on Disclosure”), whereby he convened a hearing on 9 June 2009 (the “Hearing”) to be attended by the Prosecution, the Counsel for the Defence (the “Defence”) and the Registrar, with a view to addressing matters which might be relevant in connection with the disclosure for the purposes of the confirmation hearing in the Case, scheduled to start on 12 October 2009.
2. The Hearing was held in closed session with a view to preventing sensitive information from being disclosed to the public. During the closed session, the Prosecution further requested an *ex parte* session with the Single Judge. In light of the submissions made by the parties during both the closed session² and the *ex parte* hearing,³ the Chamber is of the view that no such sensitive information was submitted. Accordingly, the principle of publicity of proceedings should apply and the transcripts of the hearing as a whole reclassified as public.
3. The present decision aims at establishing (i) the system governing disclosure for the purpose of the confirmation hearing in the Case, taking into consideration the precedents of the Chamber, the First Decision on Disclosure and the submissions of the parties at the

¹ ICC-02/05-02/09-18.

² ICC-02/05-02/09-T-3-CONF ENG ET.

³ ICC-02/05-02/09-T-4-CONF-EXP ENG ET.

Hearing; (ii) the registration procedure and time-frame for disclosure and requests for redactions; and (iii) the procedure related to requests for redactions and other protective measures.

I. The system governing disclosure for the purpose of the confirmation hearing

4. The Chamber takes note of the views expressed by the Prosecution on the system of disclosure proposed in the First Decision on Disclosure, and in particular his concerns that “the suggested system adversely affects the rights of the parties and the impartial role of the Judge”,⁴ as well as his request to modify paragraph 10 of the First Decision on Disclosure, that establishes that the Chamber shall have access to all potentially exculpatory evidence disclosed by the Prosecution to the Defence, in a way that “there won’t be any requirement on the part of the Prosecution to disclose PEXO material to the Chamber”.⁵
5. The Chamber also takes note of the views expressed by the Defence, which does not object the possibility for the Chamber to be “in possession of the potentially exculpatory evidence” disclosed to it by the Prosecution, while leaving the final decision to the Single Judge in light of the comments raised by the Prosecution.⁶
6. In establishing the final system governing disclosure in the present Case, the Majority of the Chamber (the “Majority”), Judge Cuno Tarfusser partly dissenting, deems it appropriate to recall the system of disclosure adopted by this Chamber in the proceedings related to the confirmation of charges in the cases of *The Prosecutor v. Thomas Lubanga*

⁴ ICC-02/05-02/09-T-3-Conf-ENG at page 5, lines 22-23.

⁵ ICC-02/05-02/09-T-3-Conf-ENG at page 8, line 19 to page 9, line 3.

⁶ ICC-02/05-02/09-T-3-Conf-ENG at page 16, line 10 to page 17, line 24.

Dyilo (the “Lubanga Case”)⁷ and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (the “Katanga and Ngudjolo Case”)⁸ together with the main principles behind it.

7. The Majority notes that the Court’s criminal procedure brings together “two features with such different origins as the rules on disclosure and the rules on communication of certain evidence to the Pre-Trial Chamber”.⁹ On the one hand, disclosure “aims at providing the Defence with sufficient information on the Prosecution case and potentially exculpatory materials in order to place the Defence in a position to prepare adequately for the confirmation hearing”.¹⁰ On the other hand, communication to the Pre-Trial Chamber of certain evidence before the confirmation hearing “aims at placing the Pre-Trial Chamber in a position to properly organize and conduct the confirmation hearing”.¹¹ It also “puts the victims of the case in a position to properly exercise their procedural rights during the confirmation hearing” and ensures the parties access to the evidence to be presented at the confirmation hearing before it commences, regardless of problems that may have occurred during the disclosure process.¹²
8. In the view of the Majority, whereas disclosure is to be conducted *inter partes* between the Prosecution and the Defence,¹³ the duty of communication to the Chamber of “[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation

⁷ ICC-01/04-01/06-102; ICC-01/04-01/06-108-Corr; ICC-01/04-01/06-568; ICC-01/04-01/06-T-9-EN.

⁸ ICC-01/04-01/07-T-12-ENG.

⁹ ICC-01/04-01/06-102, Annex I, para. 28.

¹⁰ ICC-01/04-01/06-102, Annex I, para. 29.

¹¹ ICC-01/04-01/06-102, Annex I, para. 30.

¹² ICC-01/04-01/06-102, Annex I, para. 34.

¹³ ICC-01/04-01/06-102, page 5.

hearing” envisaged in rule 121(2)(c) of the Rules implies, according to the precedents of this Chamber, the filing of the evidence to be presented at the confirmation hearing in the record of the case.¹⁴ Accordingly, the materials and evidence that must be filed by the parties in the record of the case include (i) for the Prosecution, no later than 30 days before the date of the confirmation hearing, a document containing a detailed description of the charges (the “Prosecution Charging Document”) together with a list of the evidence to be presented at the hearing (the “List of Evidence”) and, no later than 15 days before the date of the hearing, if any, the amended charges and/or list of evidence, in accordance with rules 121(3),(4) and (5) of the Rules; (ii) for the Defence, if the person intends to present evidence at the hearing, no later than 15 days before the date of the hearing, a list of evidence (the “Defence List of Evidence”), in accordance with rule 121(6) of the Rules; and (iii) for both parties, the actual evidence on which they intend to rely at the confirmation hearing, in accordance with rule 121(2)(c) of the Rules interpreted in light of rule 122(1) of the Rules.

9. In the view of the Majority, and in accordance with the precedents of this Chamber, the parties are not requested to communicate to the Chamber those materials subject to disclosure on which they do not intend to rely at the confirmation hearing. These include materials of potentially exculpatory nature or otherwise material for the preparation of the defence that the Prosecution must disclose to the Defence before the confirmation hearing in accordance with article 67(1)(b) and (2) of the Statute and rule 77 of the Rules. Such finding stems from the acknowledgment that, while the Prosecution is under

¹⁴ ICC-01/04-01/06-102, Annex I, para. 33.

the obligation to disclose such materials to the Defence, the latter “need not to rely on those materials at the confirmation hearing if it considers that this option will be advantageous to its success at trial”.¹⁵ As clearly stated in the Lubanga Case,

if all materials disclosed by the Prosecution before the confirmation hearing, on which neither party intends to rely, were filed in the record of the case and presented thereat, the nature of the confirmation hearing would be significantly altered and the right of the Defence to decide whether to rely on such materials at the hearing would be infringed on.¹⁶

10. The Majority is of the view that the role of the Chamber, under article 61(7) of the Statute, is not to find the truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued, but, rather, to determine whether sufficient evidence exists to establish substantial grounds to believe that the person committed each of the crimes charged.¹⁷ The confirmation hearing “has a limited scope and by no means can it be seen as an end in itself”.¹⁸ As the Chamber has repeatedly emphasized,

[the confirmation hearing] is not a mini-trial, nor is it a trial before a trial but, rather, a procedural step to ensure that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person or the persons committed the crimes with which they have been charged.¹⁹

¹⁵ ICC-01/04-01/06-102, Annex I, para. 53.

¹⁶ ICC-01/04-01/06-102, Annex I, para. 54.

¹⁷ ICC-01/04-01/06-102, Annex I, para. 55.

¹⁸ ICC-01/04-01/07-428-Corr, para.6; see also, Appeals Chamber Judgment ICC-01/04-01/07-475, para. 68.

¹⁹ ICC-01/04-01/07-T-25-ENG CT, page 14, lines 5-11. See also, ICC-01/04-01/07-474, para.100; ICC-01/04-01/06-803-tEN, paras 37-39; ICC-01/04-01/07-717, para.64.

Therefore, the Chamber's role is "limited to distinguish those cases that should go to trial from those that should not".²⁰ Accordingly, as stated in the Lubanga Case, it would be contrary to the role of the Pre-Trial Chamber to have potentially exculpatory and other materials disclosed by the Prosecution before the hearing filed in the record of the case and presented at the confirmation hearing, if neither party intends to rely on those materials at the hearing.²¹

11. Therefore, all materials subject to disclosure on which the parties do not intend to rely upon at the confirmation hearing do not need to be filed in the record of the case.²² As a record of the *inter partes* exchanges, following any act of disclosure of material under article 67(2) of the Statute, the Prosecution is requested to file in the record of the case a disclosure note (the "Disclosure Note"), signed by both parties and containing a list of the items subject to disclosure and their reference numbers.²³ Similarly, with respect to material under rule 77 of the Rules, the Prosecution is requested to file in the record of the case a pre-inspection report (the "Pre-Inspection Report"), containing a list of the items submitted to the Defence together with their reference numbers.²⁴ Following any act of inspection of the originals of the documents identified by the Defence, the Prosecution is requested to file in the record of the case an inspection report (the "Inspection Report") signed by both parties, which must include a list of the items inspected, their reference numbers, a brief account of how the act of

²⁰ ICC-01/04-01/07-428-Corr, para.6; see also, Appeals Chamber Judgment ICC-01/04-01/07-475, para. 68.

²¹ ICC-01/04-01/06-102, Annex I, para. 56.

²² ICC-01/04-01/06-102, Annex I, paras. 50-58.

²³ ICC-01/04-01/06-102, Annex I, para. 74.

²⁴ ICC-01/04-01/06-T-9-EN at page 49, line 14 to page 50, line 14.

inspection took place and whether the Defence received the copies which it requested during the inspection.²⁵

12. Following careful analysis of the system of disclosure in light of the precedents of this Chamber, the First Decision on Disclosure and the views expressed by the parties at the Hearing, the Majority agrees with the Prosecution that the disclosure system adopted by the Chamber in the proceedings related to the confirmation of charges in the Lubanga Case and the Katanga and Ngudjolo Case “proved to be fair and efficient and has operated successfully in the two cases”²⁶ and that “there are no compelling reasons to depart from that system that was put in place by this same Pre-Trial Chamber”.²⁷
13. However, and taking into account some difficulties likely to be faced by Defence teams in relation to the assessment and evaluation of all materials disclosed by the Prosecution under article 67(2) of the Statute and rule 77 of the Rules, the Majority is of the view that it is necessary to further improve the current system in order to facilitate the Defence’s assessment of the potentially exculpatory evidence disclosed or subject to inspection. This would also enable the Chamber to better perform its role under rule 121(2)(b) of the Rules to “ensure that disclosure takes place under satisfactory conditions.”
14. In particular, the Majority notes that the way the material under article 67(2) of the Statute is disclosed to the Defence has an impact on the right of the suspect under article 67(1)(b) of the Statute to have adequate time and facilities for the preparation of his or her defence. It is hardly debatable that the mere transmission of allegedly exculpatory

²⁵ ICC-01/04-01/06-102, Annex I, para. 75.

²⁶ ICC-02/05-02/09-T-3-Conf-ENG at page 5, lines 10-11.

²⁷ ICC-02/05-02/09-T-3-Conf-ENG at page 5, lines 14-15.

material, possibly in large amounts, for which no effort of indicating its relevance to the Case has been made, may have an adverse impact on the evaluation of the adequacy of the time given to the Defence to prepare for the confirmation hearing.

15. Therefore, the Majority is of the view that, in order to facilitate the Defence in the analysis of the material disclosed under article 67(2) of the Statute, the Prosecution shall provide a further elaboration of such material by including in the Disclosure Note, together with the list of the items disclosed and their reference numbers: (i) a concise summary of the content of each item; and (ii) an explanation of the relevance of such item as potentially exculpatory.
16. Similarly, with respect to material covered by rule 77 of the Rules, the Majority is of the view that, in order to facilitate the Defence in the identification of the items which it wishes to inspect physically, the Prosecution shall include in the Pre-Inspection Report, with respect to those items which are material to the preparation of the defence, together with the list of the items submitted and their reference numbers: (i) a concise summary of the content of such items; and (ii) an explanation of the relevance of such items for the preparation of the defence.

II. The registration procedure and time-frame for disclosure

17. At the outset, the Chamber recalls that, pursuant to rules 15 and 121(10) of the Rules, the Registry is responsible for maintaining a full and accurate record of all proceedings before the Chamber, including the evidence exchanged between the parties for the purpose of the confirmation hearing. Regulation 26(3) of the Regulations of the Court (the "Regulations") provides that "documents, decisions and orders

shall, whenever possible, be submitted in electronic version for registration by the Registry". Finally, pursuant to regulations 15 to 19, 24 to 28 and 53(3) of the Regulation of the Registry, the Registry is entrusted with the management of access to and storage of the documents of the proceedings, as well as the registration of the evidence exchanged between the parties. Thus, the disclosure process between the parties shall be facilitated through the Registry.

18. According to rule 121(3) of the Rules, the Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, the Prosecution Charging Document and the List of Evidence which he or she intends to present at the confirmation hearing.
19. According to rule 121 (6) of the Rules, the Defence shall file the Defence List of Evidence, if any, no later than 15 days before the confirmation hearing.
20. In light of regulation 33 of the Regulations, in order to comply with rule 121 (3) of the Rules, the Prosecutor shall provide the Prosecution Charging Document and the List of Evidence no later than Thursday 10 September 2009. The same reasoning shall apply to the Defence List of Evidence, if any, which shall be provided no later than 24 September 2009.²⁸

²⁸ The Single Judge, in the First Decision on Disclosure, set out the deadlines of Saturday 12 and 26 September 2009, respectively, for the Prosecution to provide the Charging Document and the List of Evidence to be presented at the confirmation hearing, and for the Defence to provide the Defence List of Evidence, if any. However, in order to respect the 30 days time-limit provided for in rule 121(3) of the Rules, and according to the precedents of this Chamber, the date of the filing of the Prosecution's Charging Document and List of Evidence as well as the Defence List of Evidence, if any, is to be anticipated.

III. Procedure related to requests for redactions and other protective measures

21. With respect to the *inter partes* disclosure process to take place before the confirmation hearing, in the First Decision on Disclosure the Single Judge requested the Prosecution to provide at the Hearing a number of relevant information on the amount and the nature of the material subject to disclosure.
22. Bearing in mind the information provided by the Prosecution with respect to requests for redactions for any incriminating or potentially exculpatory material to be disclosed to the Defence, the Chamber is of the view that these requests pursuant to rule 81 of the Rules and following the guidance given by the Appeals Chambers²⁹ shall be made as soon as practicable and no later than 28 August 2009.
23. As for *ex parte* applications for protective measures other than redactions to be put in place with respect to some of the witnesses, the Chamber is of the view that these *ex parte* applications, if any, shall be made as expeditiously as possible and bearing in mind the date set for the confirmation hearing.
24. With respect to any material which does not need to be redacted prior to disclosure, the Chamber invites the Prosecution to disclose this material to the Defence as soon as practicable.
25. As for material covered by article 67(2) of the Statute, the Chamber reminds the Prosecution that it shall be disclosed to the Defence as soon as practicable.

²⁹ ICC-01/04-01/06-568; ICC-01/04-01/06-773; ICC-01/04-01/07-475; ICC-01/04-01/07-521. See also Pre-Trial Chamber I, ICC-01/04-01/07-568.

26. In this respect, the Chamber notes that at the Hearing the Prosecution stated that, at that stage, it had not identified any material within the meaning of article 67(2) of the Statute covered by disclosure restrictions under article 54(3)(e) of the Statute, and that its documentary review was ongoing.³⁰
27. In addition, at that stage, the Prosecution said it had identified ten documents covered by disclosure restrictions under article 54(3)(e) of the Statute³¹ which would be provided for inspection to the Defence pursuant to rule 77 of the Rules, and that its documentary review in relation to rule 77 material was ongoing.
28. Accordingly, the Prosecution shall file periodical reports on the developments of its aforementioned ongoing documentary review and on the status of the procedures initiated under articles 54(3)(e), 73 and 93 of the Statute.

FOR THESE REASONS

DECIDES

That the system governing disclosure for the purpose of the confirmation hearing in the present Case shall be the one that governed disclosure in the previous cases before this Chamber with the changes expressly provided for in the present decision;

³⁰ ICC-02/05-02/09-T-3-Conf-ENG ET, p15, lines 21-24.

³¹ ICC-02/05-02/09-T-3-Conf-ENG ET, p14, lines 23-25 to p.15, lines 7-12.

ORDERS

The parties to submit any evidence with the appropriate metadata in accordance with the e-Court protocol as set out in the Katanga and Ngudjolo case (the “e-Court Protocol”);

ORDERS

The Registry to provide the Defence with the e-Court Protocol;

ORDERS

The parties shall file with the Registry:

- (i) the originals of all evidence for which no redactions pursuant to rule 81 of the Rules are needed, as confidential;
- (ii) the originals of all evidence for which redactions pursuant to rule 81 of the Rules are needed, as *ex parte*;
- (iii) the authorised redacted version of the evidence, as confidential; and
- (iv) an electronic copy of the original and of the authorised redacted version of the evidence, if any, or, in case of a tangible object, its electronic photograph including the details required in the e-Court Protocol, with the appropriate level of confidentiality as set out above;

ORDERS

That, when disclosing evidence under article 67(2) of the Statute, the Prosecution shall provide the Defence with a Disclosure Note, signed by both parties, filed in the record of the case and:

- (i) containing a list of the material disclosed and its reference number;
- (ii) concisely summarising the content of each item; and
- (iii) explaining the relevance of such item as of potentially exculpatory nature;

ORDERS

The Prosecution to permit, pursuant to rule 77 of the Rules, the Defence to inspect, starting as soon as practicable and no later than Thursday 10 September 2009, at location, time and manner agreed by the parties, any books, documents, photographs and other tangible objects in its possession or control which are material to the preparation of the defence, or intended for use by the Prosecution as evidence for the purposes of the confirmation hearing, or were obtained from or belonged to the person;

ORDERS

The Prosecution to file in the record of the case Pre-Inspection Reports containing a list of the items submitted to the Defence and their reference numbers; and, in relation to those items which are material to the preparation of the defence, to further include in the Pre- Inspection Reports:

- (i) a concise summary of the content of such items; and
- (ii) an explanation of the relevance of such items for the preparation of the defence;

ORDERS

The Prosecution to provide the Defence, at its request during inspection, with electronic copies or electronic photographs, in the case of tangible objects, of all evidence or material subject to inspection;

ORDERS

The Prosecution, following any act of inspection, to file in the record of the case an Inspection Report signed by both parties and including:

- (i) a list of the items inspected and their reference numbers; and
- (ii) a brief account on how the act of inspection took place and whether the Defence received the copies which it requested during the inspection;

ORDERS

The Prosecution:

- (i) to file by 10 August 2009 the first report on the status of the procedures initiated under articles 54(3)(e), 73 and 93 of the Statute in relation to those items identified as of potentially exculpatory nature under article 67(2) of the Statute or which are material to the preparation of the defence pursuant to rule 77 of the Rules; and
- (ii) to subsequently file a report on this matter every two weeks;

ORDERS

The Prosecution:

- (i) to disclose to the Defence, as soon as practicable, any material which does not need to be redacted;
- (ii) to submit to the Chamber, as soon as practicable and no later than Friday 28 August 2009, any request for redactions under rule 81 of the Rules;
- (iii) to make *ex parte* applications for protective measures other than redactions as expeditiously as possible and bearing in mind the date set for the confirmation hearing;

FURTHER ORDERS

The Prosecution, pursuant to rule 76 of the Rules, to disclose to the Defence, as soon as practicable and no later than Thursday 10 September 2009, in original and in a language Mr Bahar Idriss Abu Garda fully understands and speaks, the names and the statements of the witnesses – with authorized redactions pursuant to rule 81 of the Rules, if any – on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify;

ORDERS

The Prosecutor to file in the record of the Case by Thursday 10 September 2009 the Prosecution Charging Document and the List of Evidence in the case of *The Prosecutor v. Bahar Idriss Abu Garda* in a language which the person fully understands and speaks. In so doing, the Prosecution shall further ensure that this is organised in such manner that:

- (i) each item of evidence is linked to the factual statement it intends to prove; and

- (ii) each factual statement is linked to a specific element of crime, a mode of liability, or both;

ORDERS

The Defence:

- (i) pursuant to rule 78 of the Rules, to permit, as soon as practicable and no later than Thursday 24 September 2009, the Prosecution to inspect any books, documents, photographs and other tangible object in its possession or control which are intended for use for the purposes of the confirmation hearing at a location and time and in a manner agreed by the parties;
- (ii) to provide to the Prosecution, at its request during inspection, electronic copies or electronic photographs, in the case of tangible objects, of all evidence or material subject to inspection;

ORDERS

The Defence in the event it intends to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, pursuant to rule 79 of the Rules, to notify the Prosecution no later than Thursday 24 September 2009;

ORDERS

The Defence:

- (i) to submit no later than Thursday 10 September 2009 any request for redactions under rule 81 of the Rules;

- (ii) to make *ex parte* applications for protective measures other than redactions as expeditiously as possible and bearing in mind the date set for the confirmation hearing;

ORDERS

The Defence to file in the record of the Case no later than Thursday 24 September 2009 the Defence List of Evidence, if any, to be presented at the confirmation hearing;

ORDERS

The Registry to make all necessary arrangements to provide the Defence with access to and training in the software necessary to facilitate:

- (i) the *inter partes* exchanges between the Prosecution and the Defence;
- (ii) the filing in the record of the Case in accordance with the e-Court Protocol; and
- (iii) access to the evidence filed by the parties in the record of the Case;

DECIDES

To convene a status conference on 26 August 2009 to address the disclosure process, the filing of the evidence in the record of the case, the disclosure process of potentially exculpatory evidence covered by confidentiality obligations and any related issues that the parties would like to raise;

DECIDES

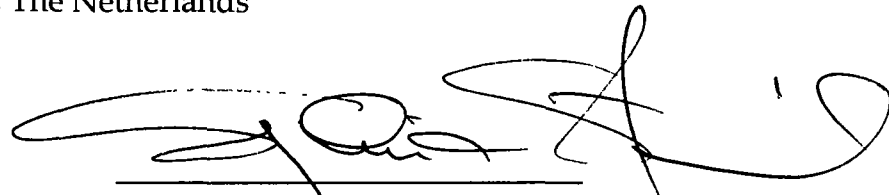
That the confidential as well as the *ex parte* transcripts of the hearing held on 9 June 2009 (ICC-02/05-02/09-T-3-CONF-ENG ET and ICC-02/05-02/09-T-4-CONF-EXP-ENG ET) shall be reclassified as public.

Judge Cuno Tarfusser appends his partly dissenting opinion to the present decision.

Done in both English and French, the English version being authoritative.

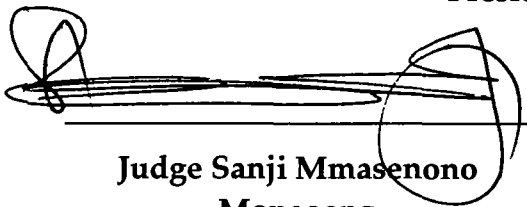
Dated this Wednesday, 15 July 2009

At The Hague, The Netherlands

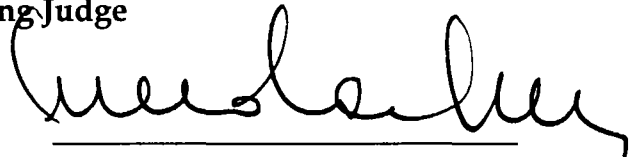

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Judge Sylvia Steiner

Presiding Judge


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**Judge Sanji Mmasenono
Monageng**


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Judge Cuno Tarfusser

Partly Dissenting Opinion of Judge Cuno Tarfusser

1. As recalled in the Single Judge's "Decision scheduling a hearing on issues relating to disclosure between the parties" (the "First Decision on Disclosure"),³² the provisions relevant to the disclosure process at the pre-trial stage in preparation of the confirmation hearing have been construed in different manners by different Pre-Trial Chambers of the Court. This difference in approach stems not only from a different reading of the relevant provisions but also, more broadly, from different conceptions of the role of the Pre-Trial Chamber (and of the Single Judge whom may have been appointed to exercise its functions) within the context of both the disclosure process and the pre-trial procedure as a whole.
2. The statutory instruments of the Court entrust the Pre-Trial Chamber with a relevant role in respect of disclosure between the parties. Article 61(3) of the Statute vests the Pre-Trial Chamber with the power "to issue orders regarding the disclosure of information for the purposes of the hearing". Rule 121(2) of the Rules entrusts the Pre-Trial Chamber with the task of taking "the necessary decisions regarding disclosure"; pursuant to rule 121(2)(b), a judge of the Pre-Trial Chamber shall organise status conferences aimed at ensuring that disclosure takes place under satisfactory conditions; rule 121(2)(c) of the Rules stipulates that "all evidence" disclosed between the parties for the purposes of the confirmation hearing "shall be communicated to the Pre-Trial Chamber". Finally, rule 121(3) establishes that the Prosecutor "shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the confirmation hearing, a detailed description of the

³² ICC-02/05-02/09-18.

charges together with a list of the evidence which he or she intends to present at the hearing". Rule 121(6) establishes a similar burden on the defence, requiring that it provide the Prosecutor with a list of the evidence it intends to present no later than 15 days before the hearing.

3. In the Majority's view, "the duty of communication to the Chamber [...] envisaged in rule 121(2)(c) implies [...] the filing of the evidence *to be presented* at the confirmation hearing".³³ Accordingly, the Majority holds that "the parties are not requested to communicate to the Chamber those materials subject to disclosure on which they do not intend to rely at the confirmation hearing" and that "these include materials of potentially exculpatory nature or otherwise material for the preparation of the Defence that the Prosecutor must disclose to the Defence before the confirmation hearing".³⁴ I firmly disagree with this contention, since my reading of the statutory texts leads to a different conclusion as regards the scope and purpose of the duty of communication pursuant to rule 121(2)(c).
4. It is worth highlighting the different wording between rule 121(2)(c), on the one hand, and rules 121(3) and 121(6), on the other hand: respectively, they refer to evidence disclosed between the parties "for the purposes" of the hearing and evidence to be presented "at the hearing". Therefore, Rule 121 envisages two different categories of evidence, namely (i) evidence disclosed between the parties for the purposes of the confirmation hearing and (ii) evidence that the parties intend to present at the confirmation hearing. The former category may be (and will usually be) broader than the latter one. More importantly, the two categories are subject to a different regime as regards access to

³³ Majority's Decision, para. 8. (emphasis added).

³⁴ *Ibid* , para. 9.

it by the Pre-Trial Chamber: while all evidence disclosed *for the purposes* of the confirmation hearing shall be “communicated” to the Pre-Trial Chamber, the evidence *to be presented at* the confirmation hearing by either party shall be included in a list to be “provided” to the Chamber within the time-limit respectively provided for the Prosecutor and for the Defence.

5. The difference in wording witnesses to a difference in meaning and purpose. On the one hand, the parties’ obligation to include all evidence to be presented at the confirmation hearing in a list to be “provided” to both the other party and the Pre-Trial Chamber in advance of the hearing serves a twofold purpose. First, *vis-à-vis* the other party, it facilitates the task to best prepare for the hearing and to be in a position to address the Pre-Trial Chamber on every single item contained in the list. Second, *vis-à-vis* the Pre-Trial Chamber, it substantiates the provision contained in the chapeau 61(7) of the Statute, which stipulates that the Chamber shall determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged “on the basis of the hearing”.
6. On the other hand, the prescribed “communication” of all evidence disclosed between the parties appears critical for the Pre-Trial Chamber to be in a position to meaningful exercise its functions, starting from the function “to ensure that disclosure takes place under satisfactory conditions” throughout its duration.
7. The duty of communication of “all evidence disclosed” between the parties also serves a broader purpose. Pursuant to article 61(3), the Pre-Trial Chamber is entitled to issue orders regarding the disclosure of information for the purposes of the confirmation hearing. Rule 79 of

the Rules, addressing disclosure by the defence, reiterates that the Chamber is entitled to order “disclosure of any other evidence”, despite the fact that the Defence is only obligated to notify the Prosecutor of its intent to raise either the existence of an alibi or a ground for excluding criminal responsibility.

8. Finally, beside the provisions specifically relating to the phase of disclosure, the Pre-Trial Chamber is also entitled “to request the submission of all evidence that it considers necessary for the determination of the truth”. This authority flows from article 69(3), second sentence, of the Statute, which is applicable to the Pre-Trial Chamber by virtue of rules 63(1) and 122(9) of the Rules. The latter provision, in particular, extends the applicability of article 69 to the confirmation hearing “*mutatis mutandis*”. The purpose of the confirmation hearing is to determine whether sufficient evidence exists to establish substantial grounds to believe that a person has committed the crimes charged. It is the soundness of the case brought by the Prosecutor that is at stake. Accordingly, the existence of a need to request the submission of a particular piece of evidence shall be assessed on the basis of the specific purpose of the confirmation hearing, which is to determine whether the case meets the evidentiary threshold enshrined in article 61 and should therefore proceed to trial. This function of filter between the Prosecutor, on the one hand, and the trial, on the other hand, is a fundamental characteristic of the Pre-Trial Chamber and usually referred to as one of the key features of the procedural system established by the Rome Statute.
9. In the majority’s view, the duty of communication under rule 121(2)(c) does not extend to material of a (purportedly) exculpatory nature. Textual, contextual and teleological arguments lead me to the opposite

conclusion. Rule 121(2)(c) of the Rules provides that “all evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber”. The provision appears as a portion of rule 121(2), the whole of which must be read “in accordance with article 61, paragraph 3”, of the Statute. Two main consequences flow from the wording and context of rule 121(2)(c). First, as regards the materials to be communicated, the provision stipulates that *all evidence* disclosed between the parties shall be communicated to the Pre-Trial Chamber. “All” is used in the English language to refer to “the whole quantity or extent of a particular group or thing”³⁵. It appears therefore hardly debatable that the evidence disclosed by the parties falls in its entirety within the scope of the communication to the Pre-Trial Chamber, irrespectively of its purportedly incriminating rather than exculpatory nature. Accordingly, the duty of communication *vis-à-vis* the Pre-Trial Chamber encompasses any and all piece of evidence disclosed, including material of a purportedly exculpatory nature.

10. Apart from the unambiguous wording of rule 121(2)(c), reasons for making the duty of communication *vis-à-vis* the Chamber fully independent from the purportedly incriminating as opposed to exculpatory nature of the disclosed evidence flow from other provisions of the Statute. Article 67(2) mandates the Prosecutor to disclose to the defence, as soon as practicable, evidence in his or her possession or control “which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”. It also establishes that, in case of doubt, “the Court shall decide”. The

³⁵ Oxford Dictionary of English, Second Edition, Oxford University Press, 2003, 41.

applicability of this provision to the pre-trial phase (and, accordingly, the need to replace the reference to the “accused” with reference to the suspect) is beyond controversy. It anticipates conflicts of views between the parties as to the nature of a specific material and vests the Chamber with a decisive role, thus assuming that the exculpatory nature of a given material may be controversial. For the Pre-Trial Chamber to be in a position to meaningfully exercise the task to decide in case of doubt as to the exculpatory or potentially exculpatory nature of a given piece of evidence, it seems crucial that the Pre-Trial Chamber be granted (by way of communication pursuant to rule 121(2) (c)) access to all of the material disclosed between the parties: not only may the exculpatory nature of a document be debatable on its face, but it may also only become apparent in light of other material equally disclosed among the parties. In light of the possible uncertainty as to the exculpatory (as opposed to incriminating) nature of a piece of evidence, it seems hazardous to make access by the Chamber to such evidence dependent upon the assessment by either parties; the rules on disclosure as a whole seem to rely on this assumption, by failing to make any distinction between pieces of evidence disclosed for the purposes of their communication to the Chamber.

11. Furthermore, making the duty of communication *vis-à-vis* the Pre-Trial Chamber depending upon the purported incriminating or exonerating nature of a given material, as assessed by the parties, may result in the judges being wrongly deprived of the knowledge of material which, had it been known to the Chamber, might have influenced its decision as to whether the case should proceed to trial. Failing to see a piece of crucially exculpatory material, on the basis that the duty of communication to the Pre-Trial Chamber does not extend to such

material and that no controversy arose between the parties requiring the Chamber to exercise its role under article 67(2) of the Statute, would result in sending to trial (and keeping in prison) an individual who should never had. It would be tantamount to having the Pre-Trial Chamber abdicate to its role of arbiter not only (and not so much) of the exculpatory or incriminating nature of a piece of evidence, but also ultimately of its role of filter vis-à-vis the cases of the Prosecutor and of guarantor of the rights of the defence. At the very minimum, it would hinder the Pre-Trial Chamber's role of guarantor of the orderly development of the disclosure process.

12. It appears significant that, requested of its views on the prospect of having the Single Judge accessing exculpatory evidence at the hearing held on 9 June 2009, the Defence submitted that there would be "no objection from the defence" if the Single Judge were to be "in possession of the exculpatory evidence that is in the hands of the Prosecution", which possession would "not prejudice the defence one dot".³⁶
13. Neither does rule 121(2)(c) make a distinction based on the intention by the parties to present a given piece of evidence at the confirmation hearing and to include it in the list of evidence provided for by rules 121(3) and (6) of the Rules. The mere fact of disclosure of a given piece of evidence triggers the parties' duty to communicate it to the Pre-Trial Chamber, irrespective of whether such piece of evidence will be included in the list of evidence to be provided to the other party and to the Pre-Trial Chamber in advance of the hearing.
14. On the other hand, rule 121(2)(c) must be construed in light of the principles governing the confirmation hearing and the decisions to be

³⁶ ICC-02/05-02/09-T-3-CONF-ENG ET 09-06-2009 17/23 lines 5-7.

taken by the Chamber pursuant to article 61. Article 61(7) of the Statute makes it clear that the determination as to whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged is to be made “on the basis of the hearing”. This provision makes it necessary that any decision by the Chamber be only based on materials which have been the subject matter of the hearing.

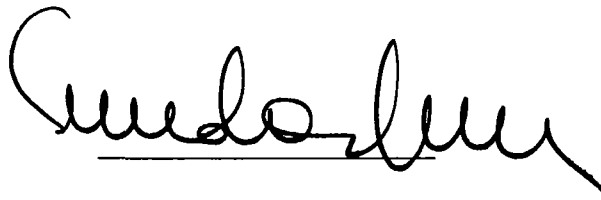
15. In light of the powers enshrined in articles 61(3) and 69(3) of the Statute and rule 79 of the Rules, there are two ways in which a material may become the subject matter of the confirmation hearing: either as a consequence of its inclusion in the lists of evidence respectively presented by the parties in accordance with rule 122(3) and rule 122(6), or by way of request by the Chamber. Accordingly, no piece of evidence which, albeit disclosed and communicated to the Pre-Trial Chamber, the parties have decided not to include in their list of evidence should be adopted as a basis for the decision under article 61(7) without the parties having been given the opportunity to explain and discuss such evidence at the confirmation hearing, whether orally or in the submissions to be exchanged following the hearing.
16. The above reasons make it clear that the view taken by the majority as regards the principles governing the disclosure process (in particular, as regards the scope of the duty of communication to the Pre-Trial Chamber of the evidence disclosed) not only contradicts to a great extent my reading of the relevant provisions, but also witnesses to an approach as to the ultimate role of the Pre-Trial Chamber which is not consistent with mine. Accordingly, I dissent from the majority’s decision to order the parties to communicate by way of filing in the record of the case only the evidence they intend to present at the

confirmation hearing and to order the Prosecutor, when submitting evidence pursuant to article 67(2), to file just a Disclosure note.

Done in both English and French, the English version being authoritative.

Dated this Wednesday, 15 July 2009

At The Hague, The Netherlands

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser