

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05-03/09

Date: 29 June 2010

PRE-TRIAL CHAMBER I

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

SITUATION IN DARFUR, SUDAN

***THE PROSECUTOR V. ABDALLAH BANDA ABAKAER NOURAIN AND
SALEH MOHAMMED JERBO JAMUS***

Public Document

Decision on issues relating to disclosure

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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REGISTRY

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Detention Section

**Victims Participation and Reparations
Section**

Other

In the case of of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ("Case"), Pre-Trial Chamber I at the International Criminal Court, Judge Cuno Tarfusser partly dissenting,

HEREBY RENDERS THIS DECISION

1. On 18 June 2010 the Single Judge issued a "Decision scheduling a hearing on issues relating to disclosure",¹ whereby he convened a public hearing on 23 June 2010 ("Hearing") to be attended by the Prosecutor, the Counsel for the Defence ("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 22 November 2010.

2. 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 and recent practice of the Chamber and the submissions of the parties at the Hearing, and (ii) the time-frame for disclosure.

System governing disclosure

3. At the Hearing, the Prosecutor expressed satisfaction with the disclosure system as implemented in the latest case before the Chamber, i.e. the case of *The Prosecutor v. Bahar Idriss Abu Garda* ("Abu Garda case").² The Defence, whilst not specifically commenting upon the adequacy of the system of disclosure as put in place in that case, focussed on the need that the disclosure process take place in compliance with such time-frames as to allow it to receive the relevant materials as early as feasible. More specifically, it expressed the wish that disclosure happen well in advance of the confirmation hearing and of the thirty-

¹ ICC-02/05-03/09-47.

² ICC-02/05-03/09-T-5, at page 11, lines 18-19.

day deadline set forth in rule 121 of the Rules of Procedure and Evidence ("Rules").³

4. The Chamber takes the view that, as highlighted by both the Prosecutor⁴ and the Defence⁵ at the Hearing, the Case presents indeed a significant degree of overlap with the one of *The Prosecutor v. Bahar Idriss Abu Garda*, since the facts underlying the charges contained in the summonses to appear for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus are the same as those underlying the summons to appear issued for Abu Garda. Furthermore, the estimate provided by the Prosecutor at the Hearing as to the materials which he intends to rely upon at the confirmation hearing, as well as in respect of the potentially exculpatory material, is very close to the one provided in respect of the Abu Garda case.⁶

5. As to the system governing disclosure, the Chamber recalls its "Second Decision on issues relating to Disclosure" in the Abu Garda case,⁷ whereby the Majority established (Judge Cuno Tarfusser partly dissenting) the following principles:

- I. disclosure is to be conducted *inter partes*, between the Prosecutor and the Defence;
- II. the duty of communication to the Pre-Trial Chamber of "[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing" pursuant to rule 121(2)(c) of the Rules is aimed at placing the Pre-Trial Chamber in a position to properly organize and conduct the confirmation hearing. Such duty

³ ICC-02/05-03/09-T-5, pages 18-19.

⁴ ICC-02/05-03/09-T-5, at page 27. line 9.

⁵ ICC-02/05-03/09-T-5, at page 16, line 10.

⁶ ICC-02/05-03/09-T-5, pages 4-5.

of communication requires the filing of the evidence to be presented at the confirmation hearing in the record of the case;

- III. based upon the limited scope and purpose of the confirmation hearing, those materials subject to disclosure on which the parties do not intend to rely at the confirmation hearing (including materials of potentially exculpatory nature or otherwise material for the preparation of the Defence that the Prosecutor must disclose to the Defence in accordance with article 67(1)(b) and (2) of the Statute and rule 77 of the Rules) need not to be communicated to the Chamber;
- IV. as a record of the *inter partes* exchanges, following any act of disclosure of materials under article 67(2) of the Statute, the Prosecutor is requested to file in the record of the case a disclosure note ("Disclosure Note"), signed by both parties and containing a list of the items subject to disclosure and their reference numbers;
- V. similarly, with respect to material under rule 77 of the Rules, the Prosecutor is requested to file in the record of the case a pre-inspection report ("Pre-Inspection Report"), containing a list of the items submitted to the Defence together with their reference numbers. Following any act of inspection of the originals of the documents or materials identified by the Defence, the Prosecutor 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 inspection took place and whether the Defence received the copies which it requested during the inspection;
- VI. in order to facilitate the Defence in the analysis of the material disclosed under article 67(2) of the Statute, the Prosecutor shall

⁷ ICC-02/05-02/09-35.

include 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;

VII. in order to facilitate the Defence in the identification of the items which it wishes to inspect physically, the Prosecutor 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;

VIII. the disclosure process between the parties shall be facilitated through the Registry, in accordance with the e-court protocol adopted in the Abu Garda case, as subsequently amended and attached to this decision as Annex I.

6. As recalled above, Judge Cuno Tarfusser appended a partly dissenting opinion to the Decision on disclosure in the Abu Garda case. His dissent was based on a reading of the relevant provisions and, more broadly, of the role of the Pre-Trial Chamber other than the one adopted by the Majority and focused on the scope of the duty of communication to the Chamber of the disclosed material. The reasons for that dissent still stand and are hereby recalled and reiterated in their entirety, in particular as regards the view that also material of a purportedly exculpatory nature falls within the scope of the parties' duty of communication to the Chamber. Since the views of the Majority equally stand, however, disclosure in the case will be governed by the same principles and rules as adopted in the Abu Garda case.

Time-frame for disclosure

7. 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 Prosecutor Charging Document and the List of Evidence which he or she intends to present at the confirmation hearing. 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.

8. These provisions need to be read in light of regulation 33 of the Regulations of the Court. In order to ensure the minimum required by rules 121(3) and 121(6) of the Rules, the Prosecutor shall provide the Prosecutor Charging Document and the List of Evidence no later than 20 October 2010, while the Defence List of Evidence, if any, shall be provided no later than 4 November 2010.

9. The dates set forth in the previous paragraph represent the final deadline, beyond which, pursuant to rule 121(8) of the Rules, no charges or evidence shall be taken into consideration by the Pre-Trial Chamber. They have to be read, however, against the background not only of the need to ensure the expeditiousness of proceedings, but especially of the fundamental right of the suspect "to be informed promptly and in detail of the nature, cause and content of the charge in a language which [he] fully understands and speaks" (article 67(1)(a)). This right appears critical for such crucial evidence as that provided by prosecution witnesses, in respect of which rule 76(1) of the Rules mandates that the defence be provided with their names and copies of their statements "sufficiently in advance to enable the adequate preparation of the defence". Along the same lines, rule 76(2) of the Rules requires the Prosecutor to "subsequently advise the defence of the names of any additional prosecution

witnesses and provide copies of their statements when the decision is made to call those witnesses". Furthermore, the Chamber take due account of the paramount principle that any and all material, including material covered by article 67(2) of the Statute, shall be disclosed as soon as practicable.

10. Based on the above, and in light of the significant overlap between the Case and the Abu Garda case, the Chamber takes the view that it is appropriate that the Prosecutor disclose to the Defence any material which were already disclosed in the Abu Garda case which he intends to rely upon in the Case or which are covered under article 67(2) of the Statute no later than Friday 9 July 2010. A status conference will be held on Tuesday 13 July 2010, during which the parties will be requested to provide updates as to the development of the disclosure process, in light of which the subsequent deadlines for disclosure will be addressed and determined.

Redactions and other protective measures

11. During the Hearing, the Prosecutor stated that he will request redactions to all the statements of the witnesses, i.e. 23 statements and transcripts.⁸ By the same token, he clarified that a number of the redactions he expects to seek would be the same as those approved by the Chamber in the Abu Garda case. The Prosecutor appropriately recalled regulation 42 of the Regulations of the Court, pursuant to which "protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court". The Chamber further recalls regulation 42(2) of the Regulations of the Court, whereby "when the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a

⁸ ICC-02/05-03/09-T-5 at page 6, lines 6-7.

Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures”.

12. Accordingly, the Chamber points out that materials which were disclosed in redacted form in the Abu Garda case which the Prosecutor wishes to use also in respect of this Case shall be disclosed to the defence in the same redacted form, without a need for an authorisation by the Chamber. An application to the Chamber shall be made only when there is either a need for revision and amendment of previously ordered protective measures or for ordering protective measures in respect of previously undisclosed material. All such requests shall be submitted to the Chamber as soon as practicable, in compliance with the calendar which will be established by the Chamber in due course.

FOR THESE REASONS

DECIDES that disclosure for the purpose of the confirmation hearing in the present Case before the Chamber shall be governed by the system established in the Abu Garda case, as reiterated in this decision;

ORDERS the parties to submit any evidence with the appropriate metadata in accordance with the e-Court protocol attached as Annex I to the present decision;

ORDERS the parties submitting evidence to simultaneously file with the Registry:

- (i) The originals of all evidence for which no redactions pursuant to rule 81 of the Rules are needed, which, at this stage shall be filed as confidential;

- (ii) the originals of the evidence for which redactions pursuant to rule 81 of the Rules have been authorised, which shall be filed *ex parte*;
- (iii) a copy of the authorised redacted version of the evidence, if any, which, at this stage, shall be filed confidentially; and
- (iv) an electronic copy of the original or of the redacted version, if any or, in case of tangible objects, its electronic photograph including the details required in the e-Court Protocol attached as Annex I to the present decision;

ORDERS that, when disclosing evidence under article 67(2) of the Statute, the Prosecutor 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 Prosecutor:

- (i) to disclose to the Defence any and all materials he intends to rely upon in the Case which were disclosed in the Abu Garda case and to file them with the Registry no later than Friday 9 July 2010, respecting all the protective measures ordered by the Chamber in the Abu Garda case, if any;
- (ii) to disclose to the Defence any and all materials under article 67(2) which were disclosed in the Abu Garda case and to file them with the Registry no later than Friday 9 July 2009;

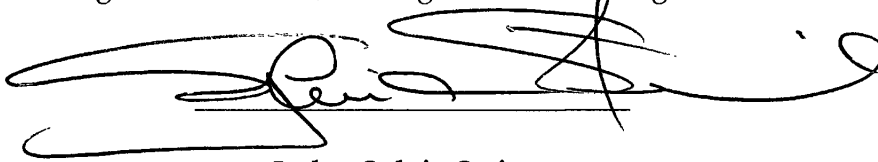
- (iii) to disclose to the Defence and to simultaneously file with the Registrar, as soon as practicable, any material other than those disclosed in the Abu Garda case which does not need to be redacted;
- (iv) to make *ex parte* applications for protective measures as expeditiously as possible and bearing in mind the date set for 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 Prosecutor and the Defence;
- (ii) the filing in the record of the Case in accordance with the e-Court Protocol annexed to the present decision; and
- (iii) access to the evidence filed by the parties on the record of the Case;

DECIDES to convene a status conference on 13 July 2010, at 15 hours, to be held in public session and to be attended by the Prosecutor, the Defence and the Registrar, at which updates as to the development of the disclosure process will be provided.

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

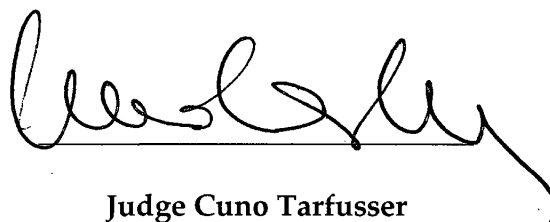


Judge Sylvia Steiner

Presiding Judge



Judge Sanji Mmasenono Monageng



Judge Cuno Tarfusser

Dated this Tuesday, 29 June 2010

At The Hague, The Netherlands