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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS***

Public

Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation

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Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, acting pursuant to Articles 64 and 67 of the Rome Statute (“Statute”), and Rules 76, 84 and 111 of the Rules of Procedure and Evidence (“Rules”), renders the following Reasons for the Order on translation of witness statements and additional instructions on translation:¹

I. Introduction

1. The translation of documents is a live issue in this case. On 16 August 2011 the Chamber issued an Order on translation of witness statements in which it instructed the prosecution to immediately start translating into Zaghawa the witness statements which it intends to rely upon for the purposes of the trial.² The reasons therefore are provided below. The Chamber also provides further instructions on the translation of the Decision on the Confirmation of Charges.

II. Background and Submissions

2. During their initial appearance on 17 June 2010, the Pre-Trial Chamber explored what languages the accused, Mr Banda and Mr Jerbo, speak and understand.³ Mr Banda specified that he speaks Zaghawa and does not speak Arabic very well.⁴ Similarly, Mr Jerbo indicated that he understands and speaks Zaghawa, and does not understand Arabic (although he speaks it).⁵ Defence counsel for the accused (“defence”) clarified that with regard to their

¹ Order on translation of witness statements, 16 August 2011, ICC-02/05-03/09-199.

² *Ibid.*

³ Transcript of hearing on 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT.

⁴ Transcript of hearing on 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT, page 6, line 24 – page 7, line 1 and page 9, line 25 – page 10, line 1.

⁵ Transcript of hearing on 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT, page 10, lines 13, 14, 20 and 21.

respective proficiency in Arabic, the accused are not comfortable following a complicated and novel judicial proceedings in a language that they are not familiar with.⁶

3. On 30 March 2011, the Chamber scheduled a status conference for 19 April 2011,⁷ and subsequently instructed the parties and participants to file written submissions on a preliminary agenda that included questions on language and disclosure.⁸

4. In its filing of 14 April 2011, the Office of the Prosecutor (“prosecution”) set out the status of disclosure of witness statements and informed the Chamber that it had disclosed the full statements of thirteen witnesses to the defence prior to the Confirmation hearing, twelve of which it intended to rely on at the trial.⁹ The prosecution submitted that of nine additional witnesses, only summaries had previously been disclosed to the defence because protection issues needed to be resolved before disclosure of the full statements could be effected.¹⁰ The prosecution informed the Chamber that it intended to re-interview six of these nine witnesses by the end of July 2011, resulting in the need for additional disclosure.¹¹ Finally, the prosecution submitted that it

⁶ Transcript of hearing on 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT, page 21, lines 9 to 24.

⁷ Order scheduling a status conference, 30 March 2011, ICC-02/05-03/09-127.

⁸ Email communication from the Chamber to the parties and participants through the Legal Adviser to the Trial Division on 4 April 2011.

⁹ Prosecution’s Response to the Trial Chamber’s Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 9. The prosecution indicated that it no longer intended to rely on witness DAR-OTP-WWWW-0447.

¹⁰ Prosecution’s Response to the Trial Chamber’s Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 9. The witnesses are DAR-TOP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312, DAR-OTP-WWWW-0314, DAR-OTP-WWWW-0433, DAR-OTP-WWWW-0441 and DAR-OTP-WWWW-0466.

¹¹ Prosecution’s Response to the Trial Chamber’s Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 6. The prosecution planned to re-interview witnesses DAR-OTP-WWWW-0441, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312, DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0466 and DAR-OTP-WWWW-0305.

would need to disclose the material of six new witnesses, including an expert witness, who the prosecution intended to interview by the end of August 2011.¹² In sum, the prosecution submitted it intended to rely on 27 witnesses in total, including the expert witness.¹³ It also described numerous practical implications arising from the obligation to disclose to the accused the statements of all prosecution witnesses in a language which they fully understand and speak as follows:¹⁴

- i. Zaghawa is not a written language;
- ii. The Zaghawa vocabulary is limited to no more than 5,000 words, rendering it difficult to translate certain words and concepts from languages of the Court such as English, French and Arabic into Zaghawa;
- iii. Consequently, the relevant material would first have to be transliterated and then read out to audio tapes in Zaghawa;
- iv. Other practical difficulties may also arise in translating annotations that are contained in certain witness related materials such as maps and sketches on to audio tape.
- v. The current page-count of material that needs to be disclosed pursuant to Rule 76 is approximately 3700 pages. This includes the full witness statements, as well as the Document Containing the Charges and the updated List of Evidence. Discussions with the Language Services Unit of the Office of the Prosecutor indicate that this process will take approximately 30 months if three translators were to work on the material on a full-time basis.

5. The same day, on 14 April 2011, the defence submitted that after reviewing the disclosed statements of prosecution witnesses and conferring with both accused persons, it would inform the prosecution and the Chamber whether the accused persons require a full, partial or summarised Zaghawa audio

¹² Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 7.

¹³ *Ibid.*, paragraph 12.

¹⁴ *Ibid.*, paragraph 10.

translation of the prosecution witness statements in satisfaction of the prosecution's obligations under Rule 76(3) of the Rules.¹⁵

6. During the status conference of 19 April 2011, when addressing the length of time required for the translation of documents to be disclosed to the defence, the prosecution recalled that at the pre-trial stage the defence waived the entitlement to disclosure under Rule 76 of the Rules that would normally have accounted for full transcripts and statements and the document containing the charges being translated into Zaghawa.¹⁶ The prosecution again noted the practical problems arising out of the obligation to disclose translated documents and suggested that Rule 76 of the Rules should be interpreted pragmatically so as to allow for the disclosure of translated summaries instead.¹⁷ The Presiding Judge then enquired whether a translation of the Document Containing the Charges ("DCC") would be necessary, given the jurisprudence of the Court that the Decision on the Confirmation of Charges is the document that defines the scope of the trial.¹⁸ The defence argued that under Article 67(1)(a) and (f) of the Statute the accused has a right to have documents in a language that he fully understands and submitted that in relation to evidence that is not agreed on, the defence will require full compliance with Article 67 of the Statute and the core documents that the prosecution will rely on in a language that both Mr Banda and Mr Jerbo fully

¹⁵ Defence submissions in response to the questions contained in the Trial Chamber's agenda for 19 April 2011 status conference, 14 April 2011, ICC-02/05-03/09-133, paragraph 8.

¹⁶ Transcript of hearing on 19 April 2011, ICC02/05-03/09-T-10-ENG CT WT, page 18, lines 16 to 20.

¹⁷ Transcript of hearing on 19 April 2011, ICC02/05-03/09-T-10-ENG CT WT, page 18, line 9 – page 19, line 21.

¹⁸ Transcript of hearing on 19 April 2011, ICC02/05-03/09-T-10-ENG CT WT, page 20, lines 11 to 14. The Registry had indicated earlier that although the Decision on the Confirmation of Charges had been notified to defence counsel in accordance with Regulation 32(3) of the Regulations of the Court ("Regulations"), neither the Decision on the Confirmation of Charges nor a summary thereof had been translated into Zaghawa and notified to the accused in audio form (Transcript of hearing on 19 April 2011, ICC-02/05-03/09-T-10-ENG CT WT, page 3, line 23 – page 4, line 3.) Defence counsel confirmed that the charges brought against the accused had been explained to them by members of the defence team (Transcript of hearing on 19 April 2011, ICC-02/05-03/09-T-10-ENG CT WT, page 4, lines 19 – 21.)

understand.¹⁹ Counsel confirmed that the defence will require complete audio translations of the witness statements in relation to contested issues.²⁰

7. On 16 May 2011, the defence and the prosecution filed joint submissions on the contested issues at the trial and attached an "Agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence between the Defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus AND the Office of the Prosecutor" ("Agreement") as a confidential annex.²¹ In this filing, the parties described the issues that are contested and suggested that the Agreement will significantly shorten the trial proceedings by focusing the trial only on those issues.²² They indicated that they shall not submit additional evidence unless the Chamber deems it necessary to have such additional evidence and/or submissions on the issues before it.²³

8. On 13 June 2011, in light of the Agreement and on request of the Chamber,²⁴ the prosecution submitted a revised list of evidence and revised list of witnesses.²⁵ The prosecution informed the Chamber that it had revised its list of witnesses to now include only sixteen witnesses. It indicated that if the Chamber confirms that the trial should proceed on the basis of the Agreement, it anticipated removing at least an additional four witnesses.²⁶ However, it

¹⁹ Transcript of hearing on 19 April 2011, ICC02/05-03/09-T-10-ENG CT WT, page 21, lines 2 to 16.

²⁰ Transcript of hearing on 19 April 2011, ICC02/05-03/09-T-10-ENG CT WT, page 23, lines 20 to 21.

²¹ Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, 16 May 2011, ICC-02/05-03/09-148 with a confidential annex. A redacted version of the Agreement was filed on 29 June 2011, ICC-02/05-03/09-148-AnxA-Red.

²² ICC-02/05-03/09-148, paragraphs 3 and 8.

²³ ICC-02/05-03/09-148, paragraph 6.

²⁴ Order requesting submissions on procedures to facilitate the fair and expeditious conduct of the Proceedings following the Joint Submission of 16 May 2011, 30 May 2011, ICC-02/05-03/09-155, paragraph 4.

²⁵ Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties, 13 June 2011, ICC-02/05-03/09-162 with confidential annexes.

²⁶ ICC-02/05-03/09-162, paragraph 7.

reminded the Chamber that its investigations were still ongoing and that it would reassess its list of witnesses after having conducted the interviews with the six additional new witnesses and the re-interviews with a number of witnesses already on the list.²⁷

9. During the status conference held on 12 July 2011, with respect to material that still needed to be disclosed to the defence, the prosecution informed the Chamber that it had reduced the number of re-interviews²⁸ it intended to undertake and would remove witnesses DAR-OTP-WWWW-0466, DAR-OTP-WWWW-0441, DAR-OTP-WWWW-0433 and DAR-OTP-WWWW-0314 from its list of witnesses should the trial proceed on the basis of the agreed facts.²⁹ It also suggested that it may remove an additional witness from the list, but still intended to interview five (rather than six) new witnesses.³⁰ The prosecution proposed to file an amended list of witnesses after 31 July 2011.³¹ On the basis of a reduced number of witnesses, the prosecution suggested that it would take about eight months for summaries of all the statements, the DCC, the list of evidence, and possibly the “pre-trial brief” to be translated if three translators work on the documents.³² This would not include the documents arising from the new interviews.³³ On the question as to whether it would be necessary to translate the DCC, the defence counsel submitted that although it has been translated into a language that the accused fully understands in every case so far, he would discuss the issue with his clients and inform the Chamber

²⁷ ICC-02/05-03/09-162, paragraph 9.

²⁸ The prosecution intends to re-interview witnesses DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0442, Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 10, lines 12 – 14.

²⁹ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 4, lines 23 and 24, and page 5, line 22 – page 6, line 4.

³⁰ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 6, lines 5 to 11.

³¹ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 7, line 7.

³² Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 11, line 4 – page 12, line 14.

³³ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 11, lines 20 – 24 and page 12, lines 13 and 14.

if they are willing to waive or alter their position in order to assist the Court.³⁴ The defence suggested that some of the interview transcripts are quite extensive and that it would be expedient, productive and fair if the prosecution provides fair and accurate statements from the interview transcripts.³⁵ The defence referred to jurisprudence of Trial Chamber II stating that the prosecution is obligated not just to provide interview transcripts, but to reduce them into statement form, and suggested that not only is it an obligation, but that providing fair and signed statements would also ease the burden of the translation unit.³⁶ The Chamber instructed the prosecution and the defence to make joint submissions on a practical way forward with respect to the translation of various documents.³⁷

10. On 8 August 2011, the prosecution filed submissions on the issue of the translation of incriminatory evidence.³⁸ The prosecution reiterates the practical difficulties involved in the translation of written material into the Zaghawa language and that the efficiency of the proceedings would be greatly enhanced if Rule 76 of the Rules is interpreted pragmatically and realistically.³⁹ It suggests that the procedure adopted for the purpose of the confirmation proceedings should be applied and describes how it ensures that adequate summaries of the material is provided in the Zaghawa language in accordance with Rule 76 of the Rules.⁴⁰ The prosecution informs the Chamber that from its list of witnesses, there are currently only two statements⁴¹ that are in transcript format and thirteen that are available as statements, and that all of these can be

³⁴ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 13, lines 6 – 11.

³⁵ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 13, lines 20 – 23.

³⁶ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 13, line 24 – page 14, line 13.

³⁷ Transcript of hearing on 12 July 2011, ICC-02/05-03/09-T-12-ENG ET WT, page 15, lines 16 to 23.

³⁸ Prosecution's Proposals on the Issue of Translation, 8 August 2011, ICC-02/05-03/09-192.

³⁹ ICC-02/05-03/09-192, paragraphs 3 and 4.

⁴⁰ ICC-02/05-03/09-192, paragraphs 5 – 13.

⁴¹ The prosecution specifies that the witnesses are DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0442.

made available to the defence to compare them with the proposed summaries.⁴² The prosecution notes that the DCC, the pre-trial brief and the list of evidence do not fall under Rule 76 of the Rules, but that it would provide translations of the relevant parts of each of these documents, once they have been identified by the defence.⁴³

11. The same day, the defence filed separate submissions addressing the issue of translation.⁴⁴ The defence submits that the fair trial rights of the accused, in particular the right to be fully informed of the grave charges and the case which the prosecution has brought against them, cannot be compromised.⁴⁵ The right to be provided with the actual statements of prosecution witnesses in a language which they fully understand and speak, which is explicitly stated in Rule 76(3) of the Rules, is critical for a meaningful and effective defence.⁴⁶ The defence sets out the background and describes the exchange between the prosecution and the defence on the issue of translation, including the fact that the accused waive their right to have the prosecution's list of evidence translated in full into Zaghawa.⁴⁷ The defence submits that in accordance with Rule 76(3) of the Rules, the prosecution is obligated to provide and translate witness statements of all witnesses it intends to call at trial and suggests that the prosecution may only rely on evidence contained in the finalised witness statements and the corresponding Zaghawa translations.⁴⁸ The defence requests that as each new page of the English version of the witness statement is translated onto the audio tape, the page number is read aloud at the relevant

⁴² ICC-02/05-03/09-192, paragraphs 9 – 12.

⁴³ ICC-02/05-03/09-192, paragraphs 14 and 15.

⁴⁴ Defence Submission on the Translation of Incriminatory Evidence, 8 August 2011, ICC-02/05-03/09-195.

⁴⁵ ICC-02/05-03/09-195, paragraphs 2 and 3.

⁴⁶ ICC-02/05-03/09-195, paragraph 3.

⁴⁷ ICC-02/05-03/09-195, paragraphs 4 – 18.

⁴⁸ ICC-02/05-03/09-195, paragraphs 22 and 25.

point.⁴⁹ In particular, with respect to witnesses DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0442 and any re-interviewed or newly interviewed witnesses, it requests that the prosecution produces “fair, accurate and well-organised statements of these witnesses based on all prior interviews, statements and transcripts of the interviews held” that are reviewed and signed by the witnesses.⁵⁰ The defence notes that the prosecution had specified that it would produce fair, accurate and well-organised summarised statements of all witnesses it intends to call at trial based on all prior interviews, statements and transcripts of the interviews held with the witnesses.⁵¹ The defence concedes that the prosecution has already agreed to produce signed statements for the first two identified witnesses, for whom currently only interview transcripts exist.⁵² The defence suggests that it was foreseeable that the witness statements would need to be translated since January 2010 and that the prosecution has delayed the proceedings by not having started translating the existing witness statements.⁵³ The defence also submits that the accused are entitled to a translation of the DCC, as the charging document, into a language the accused fully understand pursuant to Article 67(1)(a) of the Statute and requests the prosecution to proceed with the translation of the DCC into Zaghawa and subsequent recording onto audio tapes.⁵⁴ In sum, the defence requests complete and accurate signed witness statements and their translation for all witnesses the prosecution intends to rely on at trial, including a statement of witness DAR-OTP-WWWW-0439.⁵⁵

⁴⁹ ICC-02/05-03/09-195, paragraph 24.

⁵⁰ ICC-02/05-03/09-195, paragraph 23 and footnote 21.

⁵¹ ICC-02/05-03/09-195, paragraph 15, referring to the email communication in annex C.

⁵² DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0442; See also ICC-02/05-03/09-195, paragraphs 16, 18 and footnote 21.

⁵³ ICC-02/05-03/09-195, paragraphs 30 and 4.

⁵⁴ ICC-02/05-03/09-195, paragraph 26.

⁵⁵ ICC-02/05-03/09-195, paragraph 32. A translated summary of an interview transcript was disclosed for witness DAR-OTP-WWWW-0439 in October 2010 (ICC-02/05-03/09-162-Conf-AnxB-Corr, page 22).

12. On 16 August 2011, the Chamber instructed the prosecution immediately to start translating into Zaghawa the witness statements which it intends to rely upon for the purposes of the trial.⁵⁶
13. Taking into account that in accordance with the jurisprudence of the Court the Decision on the Confirmation of Charges is the basis of the trial, on 26 August 2011, the Chamber requested the defence to clarify whether it would like to have the Document Containing the Charges translated instead of the DCC and the specific reasons therefore.⁵⁷
14. On 29 August 2011, the defence responded to the Chamber's query and indicated that it required the translation of the Decision on the Confirmation of Charges. In addition, the defence recalled that the prosecution had indicated that the DCC may be amended. The defence referred to jurisprudence of the Court in which the Trial Chambers had found that the DCC is critical for the complete understanding of the statement of facts that underlie each charge and argued that the DCC is particularly relevant in the present case. The defence submits that Mr Banda and Mr Jerbo would also have the right to have a translation of any amended DCC and reserve the right to request a translation if an amended DCC is filed.⁵⁸
15. On 1 September 2011, the prosecution filed the Prosecution's update to the Trial Chamber on language related issues and further information on re-

⁵⁶ ICC-02/05-03/09-199.

⁵⁷ Email communication from the Chamber to the defence through a Legal Officer of the Trial Chamber on 26 August 2011, at 11:46 am.

⁵⁸ Email communication from the defence to the Chamber through a Legal Officer of the Trial Chamber on 29 August 2011, at 2:34 pm, referring to ICC-01/04-01/06-1548, paragraph 13 and ICC-01/04-01/07-1547-tENG, paragraph 13.

interviews of two Prosecution witnesses.⁵⁹ The prosecution describes the efforts it has undertaken to find Zaghawa translators and estimates that the summarised witness material can be translated within approximately five working months from the date the translators can begin working (which is indicated to be on 5 September 2011).⁶⁰ This does not include other material such as the DCC and the list of evidence.⁶¹ The prosecution will disclose the translated material pursuant to Rule 76 of the Rules on a rolling basis, as soon as they are ready.⁶² The prosecution informs the Chamber that it has successfully conducted the planned re-interview with witness DAR-OTP-WWWW-0442.⁶³ It will prepare a summary of the transcript for translation once the audio tapes have been transcribed in mid September.⁶⁴ The other re-interview, with witness DAR-OTP-WWWW-0307, had to be postponed and the prosecution informs the Chamber that it will now take place from 12 to 17 September.⁶⁵ The prosecution submits that the transcription of the audio tape of the interview will take about three weeks, after which a summary of the interview transcript can be prepared for translation.⁶⁶

16. On 7 September 2011,⁶⁷ the defence filed its response.⁶⁸ The defence expresses serious concerns about the prosecution's intention to only provide the defence with Zaghawa translations of the transcripts of witness interviews in summary

⁵⁹ Prosecution's update to the Trial Chamber on language related issues and further information on re-interviews of two prosecution witnesses, 1 September 2011, ICC-02/05-03/09-205.

⁶⁰ ICC-02/05-03/09-205, paragraphs 2 – 5.

⁶¹ ICC-02/05-03/09-205, footnote 6.

⁶² ICC-02/05-03/09-205, paragraph 6.

⁶³ ICC-02/05-03/09-205, paragraph 8.

⁶⁴ ICC-02/05-03/09-205, paragraph 8.

⁶⁵ ICC-02/05-03/09-205, paragraph 9.

⁶⁶ ICC-02/05-03/09-205, paragraph 9.

⁶⁷ The Chamber shortened the deadline for responses by email communication through a Legal Officer of the Chamber on 2 September 2011.

⁶⁸ Defence Response to the Prosecution's update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses, 7 September 2011, ICC-02/05-03/09-210.

form rather than the translations of witness statements.⁶⁹ It reiterates its position that Rule 76(3) of the Rules obligates the prosecution to provide witness statements of all witnesses the prosecution intends to call at trial in both the original language and translated into a language that the accused fully understands.⁷⁰ The defence emphasizes that it has not waived the right to be provided with written statements in English and Zaghawa at the trial stage and criticizes the delay in the translation of the witness statements.⁷¹ The defence also notes that the prosecution did not provide information on the translation of any amended DCC.⁷² The defence requests the Chamber to order the prosecution to provide Zaghawa translations of any amended DCC, of all existing signed witness statements and of all witness statements that still need to be produced for the witnesses the prosecution intends to rely on at trial.⁷³

II. Relevant provisions

17. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 64 of the Statute

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

⁶⁹ ICC-02/05-03/09-210, paragraph 4.

⁷⁰ ICC-02/05-03/09-210, paragraphs 5 – 7.

⁷¹ ICC-02/05-03/09-210, paragraphs 8 and 9.

⁷² ICC-02/05-03/09-210, paragraph 10.

⁷³ ICC-02/05-03/09-210, pages 6 and 7.

- (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
- (b) Determine the language or languages to be used at trial; and
- (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;

[...]

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's 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. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 76 of the Rules

Pre-trial disclosure relating to prosecution witnesses

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall 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.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 84 of the Rules

Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the

disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 111 of the Rules

Record of questioning in general

1. A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.
2. When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record.

III. Analysis and Conclusions

18. In the Chamber's view, the submissions from the parties raise the issues of the scope of disclosure obligations set out in Rule 76 of the Rules as well as of the status of the Decision on the Confirmation of Charges and the DCC. The Trial Chamber considers these issues in turn.

(i) Witness statements

19. Rule 76(1) and (2) of the Rules determine that the prosecution shall disclose to the defence the names of the witnesses it intends to call to testify as well as copies of their (prior) statements. However, the Rule does not elaborate on what format the statements must have. The Chamber finds that Rule 76 of the Rules must be read in conjunction with Rule 111 of the Rules.⁷⁴ Rule 111 of the Rules requires that a record is made of formal statements by any person who is questioned in connection with an investigation or prosecution, and requires

⁷⁴ Rule 111 of the Rules is contained in Section III entitled "Collection of evidence" within Chapter 5 of the Rules dealing with "Investigation and Prosecution".

that this record is signed by all those present. The rule specifies that if somebody who is present does not sign the record, this shall be noted along with the reasons therefore.

20. Trial Chamber II held that the prosecution is under an obligation to provide signed witness statements for the witnesses it intends to rely on during the trial. When discussing the need to prepare a witness statement for a witness, with regard to whom a statement in transcript form had been taken and disclosed, Trial Chamber II ordered the production of a signed witness statement on the following grounds:⁷⁵

35. The Chamber agrees with the Defence for Mr. Ngudjolo that it is incumbent upon the Prosecution to produce signed witness statements of all witnesses it wants to present at trial. Rule 111 clearly states that "[a] record shall be made of formal statements made by any person who is questioned in connection with an investigation [...]he record shall be signed by [...] the person who is questioned [...]". The Chamber is aware of the specific procedure laid down in rule 112, but it is of the view that this concerns an additional measure of protection for persons questioned under article 55(2) and not an alternative to the procedure laid down in rule 111. Indeed, the audio/video recording of the interviews of persons suspected of having committed a crime within the jurisdiction of the Court, is first and foremost a measure to safeguard the right of suspects to remain silent and to be presumed innocent. It may also be used to reduce subsequent traumatising of vulnerable witnesses in accordance with rule 112(4), or indeed as a tool for preserving evidence in case of a unique investigative opportunity. However, the Chamber considers that rule 111 applies regardless of whether the statements of a witness are being audio/video recorded. **Accordingly, a signed witness statement has to be taken from any person being questioned by the Prosecution in connection with an investigation, which shall be communicated to the**

⁷⁵ Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, ICC-01/04-01/07-1553, paragraph 35.

Defence in case the Prosecution decides to rely on the person's testimony, or which has to be disclosed under article 67(2) of the Statute or rule 77 of the Rules. [Emphasis added]

21. The Chamber finds that, according to Rule 76 of the Rules read in conjunction with Rule 111 of the Rules, the prosecution is required to provide signed witness statements for all the witnesses it intends to rely on during the trial, including those for witnesses DAR-OTP-WWWW-0442 and DAR-OTP-WWWW-0307.
22. Concerning the form of witness statements, the Trial Chamber notes that this issue has arisen in the course of previous trials. Trial Chamber I has noted the advantages of being provided with witness statements in a narrative form in the following manner:⁷⁶

One would have been to draw together in appropriate narrative form all of the facts and matters which the Prosecution are suggesting are true and which are to be relied upon during the course of his evidence before this court. The second advantage is that the witness statement would have contained a solemn declaration that the witness realises that if anything is stated in the witness statement which is wilfully untrue, he potentially faces penalties.

23. The defence requests to be provided with signed “fair, accurate and well-organized statements, based on all prior interviews, statements and transcripts of the interviews held with these witnesses”.⁷⁷ As the defence can, *inter alia*, seek to challenge the credibility of a witness on the basis of a statement that has been reviewed and approved by a witness, withholding signed statements

⁷⁶ Transcript of hearing on 30 January 2009, ICC-01/04-01/06-T-113-Red ENG CT WT, page 12, lines 16 – 23.

⁷⁷ ICC-02/05-03/09-195, paragraph 23 and footnote 21.

(if this is not justified on account of protection issues as described in Rule 76(4) of the Rules) in effect deprives the accused of one of the means normally available to an accused to prepare the defence. The Chamber therefore finds that disclosing organised and comprehensive witness statements will be useful to the defence. Given the defence arguments and the issue of translation of the statements into Zaghawa, the Chamber grants the defence application in the present case to receive comprehensive and well-organised witness statements in narrative form based on all the available material relating to these witnesses.

24. The Chamber notes that in addition to the signed witness statements disclosed to the defence for the AMIS witnesses, the third-party witnesses and witness DAR-WWWW-0439, the prosecution has already agreed to provide signed statements for witnesses DAR-OTP-WWWW-0442 and DAR-OTP-WWWW-0307 instead of supplying only transcripts and summaries thereof.⁷⁸ The materials outstanding are therefore only those additional statements arising from the re-interviews and interviews with new witnesses that the prosecution seeks to add to its list of witnesses.

(ii) Translation of witness statements

25. Turning to the question of translation, Rule 76(3) of the Rules specifies that “the statements of prosecution witnesses shall be made available in original and in the language which the accused fully understands and speaks”. Article 67(1)(a) and (f) of the Statute further establish that the accused has the right to “be informed promptly and in detail of the nature, cause and content of the

⁷⁸ ICC-02/05-03/09-195-AnxE.

charge, in a language which the accused fully understands and speaks” and that the accused has a right to “such translations as are necessary to meet the requirements of fairness, [...]”.

26. The Appeals Chamber has addressed the issue of languages the accused fully understands and speaks and has found that

[a]n accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.⁷⁹

27. The Appeals Chamber added that

[t]he subject of understanding is exclusively the accused. Thus, the Chamber must give credence to the accused's claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks.⁸⁰

28. The Appeals Chamber concluded that the language requested by an accused should be granted unless there are indisputable indications that the person fully understands and speaks one of the working languages of the Court and is abusing the right arising out of Article 67 of the Statute.⁸¹ It emphasized that

⁷⁹ Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, paragraph 3. See also paragraph 61.

⁸⁰ ICC-01/04-01/07-522, paragraph 59.

⁸¹ ICC-01/04-01/07-522, paragraph 61.

“[u]ltimately, the Chamber in question is responsible for ensuring the fair trial of the accused”.⁸²

29. As is mentioned above, the two accused in the case have indicated that they fully understand and speak Zaghawa.⁸³ There are no indications that the accused fully understand and speak a working language of the Court, or that they are acting in bad faith. On the contrary, the Chamber notes that the defence has exhibited a high degree of cooperation and has made significant efforts to reduce the amount of material that needs to be translated both before and after the confirmation of charges, for example by now waiving the right to have the list of evidence translated.

30. Although the defence accepted to receive disclosure in summary form at the confirmation stage,⁸⁴ the rights of the accused enshrined in the Statute and the Rules require the disclosure of fully translated (signed) statements in a language the accused fully understand. The accused cannot be expected to accept a limitation of their statutory rights simply because they were previously willing to cooperate in order to assist the expedient conduct of the confirmation proceedings.

31. Rule 76(3) of the Rules confers upon the accused the right to disclosure of the witness statements as opposed to summaries prepared by the prosecution. At this trial stage, the defence has not waived this right and therefore translations of the witness statements, as specified above, should be provided. The Chamber finds that translations of only summaries of the witness material is

⁸² ICC-01/04-01/07-522, paragraph 61.

⁸³ See *supra*, paragraph 2.

⁸⁴ The Chamber notes that Article 61(5) of the Statute allows the prosecution to rely on evidence in summary form for the purpose of the confirmation of charges.

insufficient and the (signed) witness statements need to be translated into Zaghawa and disclosed to the accused persons in their entirety in audio format.

32. In the present case, structured witness statements will facilitate translation, reducing significantly the number of pages to be translated. The Chamber also notes the defence request that as each new page of the English version of the witness statement is translated onto the audio tape, the page number is read aloud at the relevant point.⁸⁵ The Chamber is persuaded that this is a measure that will greatly assist the defence in working with the audio translations, while not significantly impacting the work burden on the translators for the translations that still need to be produced. It therefore grants the defence request. Page numbers need not be inserted in the already completed audio translations.

(iii) Translation of the Decision on the Confirmation of Charges

33. The Chamber notes that, in line with other Trial Chambers' findings and under the Statute, the Decision on the Confirmation of Charges (and not an amended DCC) is the relevant document for defining the scope of the trial proceedings.⁸⁶

34. The defence initially applied for the translation of the DCC, but, in response to a question of clarification raised by the Chamber, on 29 August 2011 it requested the translation of the Decision on the Confirmation of Charges.⁸⁷

⁸⁵ ICC-02/05-03/09-195, paragraph 24.

⁸⁶ Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, paragraph 16; Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, ICC-01/04-01/07-956, paragraph 9; Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010 (notified on 21 July 2010), ICC-01/04-01/06-836, paragraph 37.

⁸⁷ See *supra*, paragraph 14.

35. As there was a corrigendum to that decision, the Chamber instructs the Registry to provide a translation into Zaghawa of the Corrigendum of the “Decision on the Confirmation of Charges”.⁸⁸

36. Pursuant to Article 67(1)(f) of the Statute the defence has a right to such translations as are necessary to meet the requirement of fairness. In its latest filing, the defence reiterates its request for the translation of an amended DCC.⁸⁹ Given that in the present circumstances of the case, the Chamber does not intend to request the filing of an amended DCC, and that the prosecution has indicated its willingness to translate sections of the DCC that the defence has identified as relevant,⁹⁰ the defence is invited to inform the prosecution of the particular sections of the DCC it requires, if any.

IV. Orders of the Chamber

37. The Chamber orders the prosecution, pursuant to Articles 64(3)(c) and 67(1) of the Statute and Rules 76, 84 and 111 of the Rules, to disclose organised and signed witness statements in narrative form of all witnesses it intends to rely on for the purposes of the trial, including those already interviewed and those who will be interviewed, in their original language and in Zaghawa audio format on a rolling basis as soon as is practicable. A final disclosure date will be determined in due course.

⁸⁸ Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011 (notified on 8 March 2011), ICC-02/05-03/09-121-Conf-Corr; a public redacted version was issued on 7 March 2011(notified on 8 March 2011), ICC-02/05-03/09-121-Corr-Red.

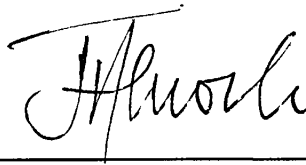
⁸⁹ ICC-02/3-03/09-210, page 6.

⁹⁰ ICC-02/05-03/09-192, paragraph 15.

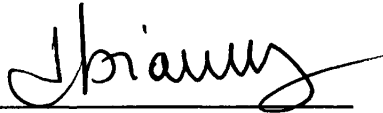
38. The prosecution is further instructed to comply with the request of the defence to indicate the page numbers on the audio recording as described in paragraph 32.
39. The Chamber orders the Registry, pursuant to Articles 64(2) and 67(1)(a) of the Statute, to provide an audio translation into Zaghawa of the Decision on the Confirmation of Charges.⁹¹

⁹¹ Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011 (notified on 8 March 2011), ICC-02/05-03/09-121-Conf-Corr; a public redacted version was issued on 7 March 2011(notified on 8 March 2011), ICC-02/05-03/09-121-Corr-Red.

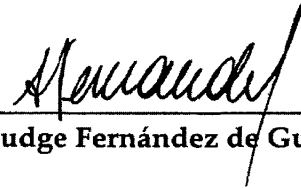
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembele Diarra



Judge Fernández de Gurmendi

Dated this 12 September 2011

At The Hague, The Netherlands