

1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation in Darfur, Sudan - ICC-02/05-02/09

4 Case against Bahr Idriss Abu Garda

5 Status Conference - Open Session

6 Wednesday, 26 August 2009

7 The hearing starts at 12.03 p.m.

8 COURT USHER: All rise. The International Criminal Court is now
9 in session. Please be seated.

10 SINGLE JUDGE TARFUSSER: So I would now -- I would first of all
11 ask the Court Officer to call the case, please.

12 COURT OFFICER: Situation in Darfur, Sudan, case, the Prosecutor
13 versus Bahr Idriss Abu Garda, ICC-02/05-02/09.

14 SINGLE JUDGE TARFUSSER: Thank you, Courtroom Officer.

15 As always, I ask the -- everybody to -- the parties to introduce
16 their selves for the record, starting with the Office of the Prosecutor,
17 please, Mr. Faal.

18 MR. FAAL: Your Honour, the Prosecution is today represented by
19 Beatrice Le Fraper Du Hellen, head of JCCD; Dirk Freimann, team leader
20 for investigations; Victor Baiesu, associate trial lawyer; Pubudu
21 Sachithanandan, associate trial lawyer; Desiree Lurf, assistant trial
22 lawyer; Biljana Popova, case manager; and my name is Essa Faal, senior
23 trial lawyer.

24 SINGLE JUDGE TARFUSSER: Thank you very much, Mr. Khan --
25 Mr. Faal.

1 As I see the team of Mr. Khan has risen a bit, if you would
2 present your team, please.

3 MR. KHAN: Good afternoon, your Honour. I am very pleased to
4 introduce today for the first time before this Court, Andrew Burrows, to
5 my left, who is the legal consultant on the case. Your Honour, if I may
6 be permitted so that your colleagues also may know a little bit about him
7 very briefly. Mr. Burrows worked in the Office of the Prosecution of the
8 Yugoslav Tribunal between 1996 and 1998. From there he went to the Iran
9 Claims Tribunal, and in 2000, he returned to private practice in South
10 Africa and then most recently as a solicitor in London.

11 We are also very pleased to have on board Mr. Anand Shah, who is
12 an American national. Mr. Shah previously has worked as a legal
13 assistant in the Association of Defence Counsel of the Yugoslav Tribunal.
14 For the last two years he has been working in America for PILPG, the
15 Public Interest Law Policy Group, with particular responsibilities for
16 the south of Sudan.

17 Your Honour, my name is Karim Khan.

18 SINGLE JUDGE TARFUSSER: Thank you very much. I'm very pleased
19 you're not more alone on the Defence.

20 The Registrar, please, if you would introduce your team.

21 MS. MARTINOD: Good afternoon, your Honour.

22 SINGLE JUDGE TARFUSSER: Good afternoon.

23 MS. MARTINOD: I have the pleasure to introduce, to my left,
24 Mr. Pieter Vanaverbeke, legal coordinator from the Division of Court
25 Services; Mr. Uros Mijuskovic, legal officer for the Court Management

1 Section; and myself, my name is Maria-Luisa Martinod, and I am the
2 officer in charge of the Victims and Witnesses Unit. Thank you.

3 SINGLE JUDGE TARFUSSER: Thank you very much.

4 MR. KHAN: Your Honour, if I may be permitted.

5 SINGLE JUDGE TARFUSSER: Yes, please.

6 MR. KHAN: Before we proceed I can't help but notice the rather
7 erratic transcript. And it may be the afternoon, but this type of
8 transcript one normally expects much later in the day. Perhaps it can be
9 adjusted.

10 (Trial Chamber and Court Officer confer)

11 SINGLE JUDGE TARFUSSER: We are already working on it, the
12 courtroom officer told me, and they think -- they said that we can
13 proceed because they're working on it and fix it while we are going on.
14 If that's fine for you, otherwise we stop for ten minutes.

15 MR. KHAN: No, your Honour, we can proceed. I'm grateful. Thank
16 you very much.

17 SINGLE JUDGE TARFUSSER: Well, just to introduce myself. I'm
18 Judge Cuno Tarfusser and my legal support team is composed of
19 Silvestro Stazzone, Beatrice Pisani, and Ana Bispo. Now, this hearing
20 held pursuant to the second decision on disclosure issued by the Chamber
21 on 15th of July, and it will focus on the disclosure of evidence between
22 the parties. I invited also the Registrar to appoint the hearing to give
23 an overview and because in case of any technical problems arises from the
24 discussion, we can hopefully give an immediate answer and bring these
25 problems to a quick solution.

1 I would like to remind the participants that the present hearing
2 we are in public session. I don't think there will be any need during
3 the hearing to move in private or closed session, but if there arises a
4 need in this matter, I propose to address them at the end of the public
5 hearing if this is okay for you all.

6 I'm aware but I mention it for the knowledge of the Defence of
7 pending -- of the pending Prosecutor's request pursuant to Article 68.5
8 of the Statute of the Court and Rule 81.4 of the Rules filed on
9 17th of August. Due to ex parte nature of these proceedings, such
10 requests will not be subject of this hearing, of course. They will be
11 subject of the ex parte hearing we will have with the Prosecutor and the
12 Victims and Witnesses Unit this afternoon at 3.00.

13 Now I want to remind all the parties of the date scheduled for
14 the commencement of the Confirmation Hearing which is and remains --

15 (Trial Chamber and Court Officer confer)

16 SINGLE JUDGE TARFUSSER: The courtroom officer told me if you
17 switch on and off the transcript it works -- it should work.

18 THE INTERPRETER: Sorry, and, your Honour, could you speak more
19 slowly for the interpreters. Thank you.

20 SINGLE JUDGE TARFUSSER: I was advised to speak slower. I will.

21 (Trial Chamber and Legal Officer confer)

22 SINGLE JUDGE TARFUSSER: So -- is it working? Yes. Yours --
23 okay.

24 I remind now all the parties of the date scheduled for the
25 commencement of the Confirmation Hearing, which is and remains hopefully

1 Monday, 12th of October. And with a view to ensure that this date will
2 not be postponed, I first of all ask the Registrar to give us an overview
3 on the situation in terms of organisational and technical issues leading
4 up to the Confirmation Hearing.

5 Please, you have the floor.

6 MR. VANAVERBEKE: In terms of preparation for the Defence team to
7 have access to all the necessary facilities and equipment, and office
8 equipment, and training, I can confirm you that the Defence support
9 section has waited until Mr. Khan -- Mr. Khan had his legal team
10 together, but in the meantime they were already provided with office
11 space and the necessary equipment. And as of tomorrow, there will be
12 training sessions organised as to the -- for Transcend and Ringtail,
13 accessing evidence in the court file. So that's their latest status.

14 SINGLE JUDGE TARFUSSER: Thank you very much.

15 Now, always in the same view of the dead-line, which is
16 12 October, I want to ask the Defence whether everything is fine in terms
17 of access to and training in the Ringtail as we just heard, if everything
18 is fine for you, as software, and in terms of having the team complete as
19 I think, but I would like you to ensure me about that. And if there is
20 something you have -- let know the Single Judge if there is something not
21 going the best way or if there are problems which could somehow restrict
22 the right of the Defence.

23 Please, Mr. Khan, you have the floor.

24 MR. KHAN: Thank you, your Honour. I'm grateful. Firstly it
25 would be remiss of me not to point out for the record my gratitude and

1 the gratitude of my client for all the assistance that has been afforded
2 to us at every step by the Defence support section and it's been timely
3 and efficient. The computer training will be scheduled, or the first
4 tranche of it, will be scheduled tomorrow. As indicated, Mr. Burrows and
5 Mr. Shah, in fact, their first day was yesterday and we are in the
6 process of getting computers connected. We have one computer at the
7 moment in our small office, and we hope by the end of this week all the
8 connection problems will be solved and the training will commence. So we
9 don't anticipate these technical matters will in any way affect the
10 anticipated confirmation date of the 12th of October.

11 SINGLE JUDGE TARFUSSER: Would not affect?

12 MR. KHAN: Will not affect.

13 SINGLE JUDGE TARFUSSER: Okay. Thank you. Thank you, Mr. Khan.

14 I would also like to know if you at this stage, at this time, are
15 aware of Mr. Abu Garda's position in respect of the exercise of his right
16 to participate in the Confirmation Hearing, in particular if he intends
17 to attend the hearing or if he intends to waive his right to be present.
18 If you know something about it now.

19 MR. KHAN: Your Honour, yes, I'm grateful. We hope to put in a
20 travel request to visit Mr. Abu Garda tentatively on around the
21 15th or so of September. It's been premature to do that so far because
22 we haven't received the disclosure of the Prosecution, and to have a
23 meaningful conference, one needs to read what the charges are. But,
24 your Honour, my specific stance on the presence of Mr. Abu Garda will be
25 determined after that. At this point, I think it's fair to say that

1 there is a strong possibility that Mr. Abu Garda may attend, but I don't
2 want to be bound by it because I need to get the specific instructions of
3 the client and that will be after the 15th of September. But I don't
4 want to surprise the Court. It's -- I think my preference is and the
5 preference of my client from my last discussion would be that if it
6 doesn't cause the court too many difficulties, he would like to attend
7 and submit once again to the jurisdiction of the court.

8 Of course that would be subject to one caveat and it would
9 require - and needn't be dealt with today - some discussions with the
10 Prosecution, as we had prior to the initial hearing, because of course he
11 is on a summons and I want to ensure that during the time scheduled for
12 the Confirmation Hearing that he remains, albeit under the control of the
13 Court, at -- in the premises of the ICC, although not at the ICC
14 Detention Unit. But that can be dealt with later.

15 Your Honour, the other matter, it's a purely technical one and it
16 may be premature as well for your Honour to speak to this issue without
17 having seen -- without having had sight of the Prosecution disclosure,
18 but I don't -- it may be useful to have an indication as to the amount of
19 time, the length of time, that your Honour is minded to set aside for the
20 Confirmation Hearing itself, or how many days. Because of course there's
21 been a big -- a rather large scale, in Bemba I think it was five days or
22 thereabouts. In Lubanga, and I stand to be corrected, it may have been
23 two weeks. So that may be useful as well for planning purposes, but,
24 your Honour, I don't --

25 SINGLE JUDGE TARFUSSER: No, I just can tell you that we have --

1 well, as far as I'm concerned now, we have the courtroom for two weeks or
2 some days more, 20 days or something like that. So I think there is
3 quite enough time and we don't want to restrict, of course, not the right
4 of the Prosecution, nor the right of the Defence in light of a fair
5 trial. So I think the time is needed, the time will be given as long as
6 we can do. So I think there shouldn't be any problem about that.

7 MR. KHAN: Your Honour, I'm grateful for that, and as I
8 indicated, when I have a formal position on the presence of
9 Mr. Abu Garda, I will notify your Honour, my learned friends for the
10 Prosecution, the Court, without delay. But I think at this point, the
11 Registry and others should anticipate that Mr. Abu Garda will be
12 attending subject to the caveat I mentioned a moment ago.

13 SINGLE JUDGE TARFUSSER: Of course.

14 Now I turn -- I've turned the roles, but I now turn to the
15 Prosecutor and asking him to give an overview on how the process of
16 disclosure has taken place so far, and we started only a few days ago,
17 and if he has -- the office of -- if the OTP has encountered any problem
18 in the disclosure procedure.

19 Please, Mr. Faal.

20 MR. FAAL: Thank you, your Honour. As your Honour as rightly
21 noted, the disclosure process has already started. So far we have
22 disclosed about 35 documents classified as potentially exculpatory. By
23 Friday the Prosecution hopes to be able to complete the disclosure
24 exercise with regards to PEX0 and Rule 77 material for the preparation of
25 the Defence.

1 Just prior to the commencement of these proceedings I had
2 informally informed counsel for the Defence of our plan to carry out
3 further disclosure of Rule 77 and PEX0 sometime on Friday. We also
4 intend to disclose the first batch of incriminatory materials. It is our
5 expectation that prior to the end of the dead-line for disclosure, being
6 10 September, the Prosecution would have been able to disclose all the
7 materials to the Defence and also comply with the instructions or orders
8 of the Chamber contained in its decision -- second decision on
9 disclosure. What I mean, your Honours, is that by that date the
10 Prosecution would have disclosed all the relevant material to the Defence
11 and also filed the documents containing the charges and the list of
12 evidence. That's where we start.

13 Your Honour, the Prosecution had also filed a report, a status
14 report, with regard to 54(3)(e) materials --

15 SINGLE JUDGE TARFUSSER: Yes, can we -- this -- I want first just
16 to go step by step just to clarify and then we come to the report you
17 filed yesterday or two days ago.

18 MR. FAAL: As your Honour wishes.

19 SINGLE JUDGE TARFUSSER: Now, I would like specifically if you
20 could provide information on the following issues so we can go step by
21 step and it's clear for our further Chamber but I think also for the
22 Defence and the Registrar. Do you know the amount of witnesses you
23 intend to call to testify at the Confirmation Hearing, if any?

24 MR. FAAL: Yes, your Honour. In previous Status Conferences the
25 Prosecution did indicate its intention --

1 SINGLE JUDGE TARFUSSER: Yes.

2 MR. FAAL: -- to call about six witnesses.

3 SINGLE JUDGE TARFUSSER: And this remains, that's just -- because
4 we go further to the dead-line so probably you make up better your mind.
5 That's why this question is coming up again.

6 MR. FAAL: Your Honour ...

7 (Trial Chamber and Court Officer confer)

8 MR. FAAL: Your Honour, this position has not changed. The
9 Prosecution is still considering the matter. At the appropriate time the
10 Prosecution would provide the final decision to the Chamber as to the
11 number of witnesses the Prosecution intends to call and who these
12 witnesses are. But at the present moment, the position that the
13 Prosecution will call six witnesses or about six witnesses still remain.
14 Thank you.

15 SINGLE JUDGE TARFUSSER: Okay. The amount and the nature of
16 documents which may need to be redacted in some parts, considering the
17 dead-line established for the submission and request for redactions,
18 which is Friday, 28th or, say, after tomorrow. Because Friday, 28th,
19 seems very far but then it is after tomorrow.

20 MR. FAAL: Thank you, your Honour. The Prosecution is cognizant
21 of the date final dead-line for submission of applications for
22 redactions, and indeed the Prosecution did file yesterday a request for
23 redactions to two witness statements. The Prosecution is also hoping to
24 file later today, or rather, to give notice of summaries it intends to
25 use of three additional witnesses. And in that application, your Honour,

1 the Prosecution would be requesting for anonymity. However, there is one
2 witness on whom the Prosecution has to make certain important decisions,
3 and that could impact on the date, final date, for submission of requests
4 for redactions.

5 And perhaps, your Honours, this is a matter that could be better
6 discussed at the next hearing, when the Prosecution would have a fair
7 idea as to what is possible for this particular witness. Only then would
8 the Prosecution be able to make a final decision on that particular
9 matter. Should it becomes necessary with regards to that particular
10 witness for the Prosecution to ask for an extension of the dead-line for
11 making applications for redactions, maybe by a day or two, the
12 Prosecution would consider that; but we are hoping that perhaps decisions
13 would be made such that it would not be necessary for the Prosecution to
14 make such a request. But, your Honours, I can't say more about that by
15 reason of the public nature of this hearing. But it is a matter we can
16 revisit during the next hearing.

17 Thank you, your Honour.

18 SINGLE JUDGE TARFUSSER: When you mean the next hearing, you mean
19 the afternoon?

20 MR. FAAL: (Microphone not activated)

21 SINGLE JUDGE TARFUSSER: Okay.

22 Another question is the amount of documents identified so far as
23 containing informations ex -- Article 67(2) and the status of the process
24 of review of the documents collected.

25 MR. FAAL: Thank you, your Honour. We have already submitted a

1 report to the Chamber. It's been filed publicly. The situation has not
2 changed since that report.

3 SINGLE JUDGE TARFUSSER: Okay.

4 MR. FAAL: And we're still proceeding with looking for
5 alternative material for the one 54(3)(e) PEX0 that we have. We have
6 also made a request for lifting of the eight documents that are material
7 for preparation of the Defence, which are 54(3)(e). We are also
8 proceeding in our documents review of materials in other collections
9 which has so far not yielded any material that is either PEX0 or Rule 77.
10 So the situation remains as was reported to the Chamber in our filing of
11 the 24th.

12 SINGLE JUDGE TARFUSSER: Now we come back to a matter you
13 already -- you already spoke about before, but the amount of material
14 covered under Rule 77 you identified so far. It's just to go step by
15 step. Do you know how -- the amount of material covered under Rule 77
16 which you have identified so far about?

17 MR. FAAL: Your Honour, those materials are classified into two
18 categories: Those that are 54(3)(e) and those that are not. There is no
19 problem with regard to those that are not 54(3)(e) because the
20 Prosecution has no restrictions in disclosing those materials. But with
21 regards to those that are 54(3)(e), we have identified eight documents --

22 SINGLE JUDGE TARFUSSER: Eight plus one.

23 MR. FAAL: -- and the situation has still not changed. We have
24 made a request for the lifting of the 54(3)(e).

25 SINGLE JUDGE TARFUSSER: Yes, I come back.

1 And have you already an idea of the amount and of the nature of
2 the documents you will include in the list of evidence just to get
3 prepared?

4 MR. FAAL: Yes, your Honour. We know the nature of the material.
5 It is difficult at this stage to state a number, for obvious reasons,
6 your Honour. The Prosecution would have to make a conscious decision as
7 to which documents to use in support of particular facts and also the
8 number of documents to use for that matter. And the reason being a
9 simple one. Your Honour, there are certain facts for which the
10 Prosecution has tonnes of material like, for instance, existence of armed
11 conflict in the Sudan. It makes no point for the Prosecution to disclose
12 all that material.

13 SINGLE JUDGE TARFUSSER: No.

14 MR. FAAL: So the Prosecution is in the process of making a
15 deliberate selection of the materials to use, bearing in mind the
16 importance of economy. Because there is no point overflowing the
17 Defence with irrelevant material or even the Chamber for that matter.

18 SINGLE JUDGE TARFUSSER: Or the Chamber, yes, no.

19 MR. FAAL: So we are in the process of making this decision. At
20 the appropriate time we should be able to communicate to the Chamber the
21 amount of materials we're talking about. At this stage it's not possible
22 to state a number. Thank you.

23 SINGLE JUDGE TARFUSSER: Thank you.

24 Have you something to object or to say?

25 MR. KHAN: Your Honour, firstly I'm grateful for the submissions

1 of my learned friend, of which I take note. We are, myself personally
2 and my team, extremely grateful for my learned friend providing to us the
3 day before yesterday the first batch of potentially exonerating material
4 as categorised by the Prosecution. That said, I must confess I am
5 disappointed with the state of disclosure. This is not a case of
6 overflowing the Defence. Indeed the Defence would be grateful for a
7 trickle of disclosure. The reality is that three months after the
8 initial appearance of Abu Garda, not one document, not one statement, not
9 one page of a statement that is alleged to show the basis or the evidence
10 upon which the Prosecution relies to support its assertion of criminal

11 responsibility of my client has been disclosed to the Defence. That is
12 the harsh reality of which there is no escaping.

13 It escapes my wit, your Honour, why, when on the 9th of June my
14 learned friend very properly said in the hearing, and, your Honour, that
15 was the part when I was absent because it was ex parte at that point, and
16 I'm grateful for your Honours -- I'm grateful for your Honours making
17 that public. But my learned friend, as I read it, and I stand to be
18 corrected, was rather clear. He confesses it's difficult to state time,
19 but continues:

20 "... we are hopeful that within a month at least this process
21 could be concluded, the process of submitting the applications and
22 obtaining the necessary approvals, and then disclosing the approved
23 redactions."

24 So we are hoping we should be due that within a month. 9th of
25 June, 9th of July, 9th of August, here we are today, still no evidence at

1 all.

2 Now, of course my learned friend has said, and I'm grateful, just
3 before the hearing he did say that he's hoping next week to give the
4 Defence the first batch of evidence that my learned friend and the
5 Prosecutor is hoping to rely upon; but, your Honour, in my respectful
6 submission the Prosecution is labouring under a significant
7 misapprehension with regards to its responsibilities. The requirement of
8 disclosure articulated in Rule 121(3), which mandates that 30 days before
9 the Confirmation Hearing a detailed description of the charges should be
10 disclosed, is not - and I emphasize - is not the same as their duty to
11 disclose. In my mind, your Honour, that rule was envisaged as a cutoff
12 point to force the Prosecution to finally focus its case, to finally
13 decide which witnesses it sought to call, which evidence it sought to
14 rely upon, and so the case could be honed and it would give the Defence
15 at least 30 days to finally decide what the Prosecution's case is and how
16 to respond.

17 Now, that rule, of course, and the Statute makes it clear, that
18 that rule has to be read subject to Article 61(3), and indeed Article 67.
19 Now what is a reasonable time before the hearing, of course, is fact
20 specific. It depends upon the scale of the disclosure and the time. And
21 whilst, I confess, this may not be the most -- this may not be the
22 biggest case at all before this court, the Defence is unnecessarily
23 handicapped by the failure of the ICC to ensure that the Defence has
24 access to this most basic of material.

25 On the 9th of June, the Prosecution detailed in summary form the

1 evidence upon which they sought to rely, and I'm heartened that in this
2 respect at least it seems there is a consistency in the Prosecution
3 position regarding the viva voce witnesses they intend to call and the
4 statements upon which they intend to rely. But it was manifestly clear
5 that out of these 128 documents that were articulated or that were
6 specified by the Prosecution, 57 documents had been before the Chambers
7 of this Court prior to the Article 58 summons and 17 documents had been
8 filed with this Court by the 16th of January, 2009.

9 Your Honour, my first point is, both for this case but for future
10 cases, it -- the preferable course would be to give the Defence more
11 rather than less. And personally I would have no argument, even if there
12 is not an order from the Trial Chamber regarding authorised redactions,
13 for the Prosecution themselves to redact documents in a manner that they
14 think is necessary, at least to give the Defence sight of something.
15 Your Honours, again I stand to be corrected and everybody in this court
16 of course is far more familiar and cognizant of the jurisprudence of this
17 court, but it doesn't appear from the Statute and the rules that there is
18 any prohibition on the Prosecution to do that, but at least it would give
19 the Defence a target. It would allow us to speak to our client.
20 Otherwise it is a waste of time.

21 There is no provision of course, as in other ad hoc courts, as in
22 the ad hoc tribunals, that insists, for example, that within 30 days of
23 the initial appearance the information upon which confirmation was sought
24 is disclosed. So there was no obligation under the rules as drafted for
25 the 57 documents given when the original Article 58 application was

1 submitted or the 17 submitted in January to be disclosed to us in a
2 timely manner. But such disclosure would have been good practice and,
3 your Honours, I don't see why, when the Prosecution said in June that
4 they could provide this disclosure, it hasn't been disclosed today.

5 Now, I confess, in fairness to the Prosecution, and I don't know
6 the explanation, and again I may be remiss, but it does appear that in
7 the second decision of disclosure your colleague Her Honour Judge Steiner
8 did include this date of the 28th of August which enlarged the date that
9 the Prosecution previously said that they could comply with, and I don't
10 know what was the reason for this extension. But, your Honours, the
11 bottom line is, to put it colloquially, the bottom line is that the
12 Defence hasn't had any incriminatory evidence upon which it can start
13 preparation.

14 Your Honours, in the decision of the 14th of August of
15 Judge Steiner, the first decision on the Prosecution request for
16 redactions - and again, I stand to be corrected - it seems that
17 11 witnesses were subject to that application. And my learned friends
18 have said that perhaps 15 or 16 witnesses will be called at confirmation.
19 Well, your Honours, I heard -- and I may be wrong, I see my learned
20 friend Mr. Faal smiling so no doubt he can stand up and correct me --
21 but, your Honours, the -- and two decisions -- two applications
22 apparently were filed recently. Be that as it may, seven -- in relation
23 to seven witnesses, the Prosecution application was granted ten days ago,
24 more than ten days ago, and again there seems to be no reason why, if
25 this application was granted, the Defence have not been served with the

1 redacted statement so we could commence our preparation in a timely and
2 efficient manner.

3 So, your Honour, we are disappointed to that extent because of
4 course it's not the assertion of the Defence at all that the Prosecution
5 is seeking to disclose information at the last possible moment. Of
6 course, we were given two days ago the first batch of exculpatory
7 evidence, but I think in the court itself, not just the Prosecution but
8 with respect perhaps even with the Chamber, they may be - and forgive me
9 if I'm wrong - a misapprehension on the 30-day rule. In my reading, it
10 must be viewed in relation to the final cutoff point of which the
11 Prosecution is fixed without leave of the court to say what its case is,
12 but it's not an excuse or a loop-hole to hide behind or to avail oneself
13 of in order not to give any disclosure in relation to a case that the
14 Prosecution has been investigating for months, if not years, and in
15 relation to which the Chamber has had access to at least more than half
16 of these documents since last year.

17 Your Honour, to those extents these are my observations at this
18 point. Your Honour, just one moment, there may be ...

19 (Defence counsel confer)

20 MR. KHAN: Yes, your Honour, there's another issue. My learned
21 friend did say that in relation to the unproblematic Rule 77 material and
22 the unredacted statements, if there are any -- even one statement that's
23 unredacted, again I would ask that my learned colleague, even without an
24 order of the court, disclose it without delay at all, I mean consistent
25 with the spirit of the Statute and the spirit of the Rules and the

1 fairness to the parties. Now, your Honours, those are my submissions at
2 this point unless I can assist further.

3 SINGLE JUDGE TARFUSSER: Thank you very much. I think the
4 Prosecution office is loudly called on the floor and I give you the
5 floor.

6 MR. FAAL: Thank you, your Honour. I'm sure that my learned
7 friend expects that I would respond to his submissions.

8 SINGLE JUDGE TARFUSSER: I would expect it as well.

9 MR. FAAL: Indeed, your Honour, the Prosecution is not labouring
10 under any misapprehension of the Rules or neither are we hiding behind
11 any rules to discharge our responsibilities. As your Honours understand,
12 disclosing material to the Defence is not something to be taken lightly
13 or to be just done in a very sloppy manner. The Prosecution had taken
14 all the necessary steps to ensure that there is smooth disclosure to the
15 Defence without any problems in a manner and in accordance with the
16 decision of the Chamber on its second decision on disclosure.

17 Your Honours, we -- I had earlier on indicated that the
18 Prosecution had in fact, just before the hearing, informed the Defence
19 that by Friday, this coming Friday, in three days' time, the Prosecution
20 would be disclosing all the outstanding PEX0, all the outstanding Rule 77
21 material, and the first batch of incrim, I think that was enough to
22 convince my learned friend that at least the argument that the
23 Prosecution misapprehended any of the provisions of the Statute or the
24 Rules, especially the 30-day rule for -- the 30-day minimum dead-line for
25 disclosure. Friday is just around the corner. Certainly it's not or it

1 would not be the 10th of September, which would be the remaining 30 days
2 before the Confirmation Hearing.

3 So obviously that offer by the Prosecution suggests that the
4 Prosecution is doing everything it could to ensure disclosure even well
5 before the dead-line provided by the Chamber.

6 Your Honours, my learned friend alluded to the Prosecution's
7 promise on 9th of June to finish the redactions within one month. That
8 was just a promise. The Prosecution intended and expected that the
9 process would have been completed. Unfortunately, it didn't happen. It
10 did not happen not -- certainly not on the fault of the Prosecution or
11 the Chamber. The process often takes time.

12 With regards to statements for which authorisation has already
13 been granted by the Single Judge Steiner on which redactions are to be
14 carried out, those redactions are being implemented, and at the
15 appropriate time, hopefully sooner than later, the Prosecution would be
16 able to disclose all those statements to the Defence.

17 Your Honours, there is no disclosure really that would satisfy
18 the Defence completely, but in this particular case the Prosecution would
19 again undertake to ensure that at least we would not be labouring under
20 misapprehension of the rules, we would ensure we will disclose everything
21 that we can possibly disclose well before the 30-day dead-line. Thank
22 you, your Honour.

23 SINGLE JUDGE TARFUSSER: Probably the fault was to make such a
24 promise which you can't hold.

25 Now, in any case we really hope that this -- the disclosure will

1 go on very, very quickly and that Friday will be really a dead-line this
2 time.

3 MR. KHAN: Your Honour, perhaps I should just clarify. The
4 complaint wasn't -- because my learned friend, I've known him for a long
5 time, all his submissions before any Court are always made with complete
6 propriety and in good faith. The complaint is not at all that he made a
7 promise; it's simply that the way the rule is operating, and it's not
8 just the Prosecution, it has had the effect, for whatever reason, that in
9 the three months since my client's initial appearance he has not been
10 given one -- the Defence have not been given one piece of paper which is
11 said to support the Prosecution's case and that would allow us to
12 properly start any meaningful investigation or preparation for the
13 Confirmation Hearing.

14 Your Honours, the point on the 30 days was simply that this -- if
15 it's construed as it is currently being construed by the Prosecution,
16 perhaps even by the Chamber, if that is the correct interpretation it is
17 to waste time unnecessarily. And it has the effect of negating or
18 diluting at least one of the rights of an accused to have adequate time
19 to properly prepare a case.

20 Your Honours, in your decision and in the second decision of
21 Judge Steiner, repeatedly talk about whilst there is a 30-day rule under
22 121(3), that is, must be read in light of the rights of the Defence. So
23 an expansive interpretation must be afforded -- and I am grateful, of
24 course, that we will get disclosure on Friday -- that we'll get some more
25 disclosure on Friday and maybe next week we will get for the first time

1 first sight of some evidence that the Prosecution rely upon to get this
2 case confirmed, but it doesn't really address, in all fairness, in all
3 objectivity, these three months that have been wasted in large part.

4 Of course the Defence -- the Prosecution are working very, very
5 hard. But an alternative that I put forward very succinctly for this
6 case and other cases in the future would be in the Rules there wouldn't
7 be anything to prevent the Prosecution having prepared their case,
8 redacting even extensively, err on the side of caution, but give it to
9 the Defence. Of course those redactions have to be authorised. Maybe
10 they're too extensive. Maybe the Prosecution have been too cautious.
11 Your Honours, in exercise of your mandate and your responsibility will
12 have superintendence and supervision of that process, and will ensure
13 that the redactions are not disproportionate. But the point is at least
14 that procedural device would be best practiced because it would allow the
15 Defence to have sight of something, otherwise we have nothing to speak to
16 the client about other than the weather.

17 SINGLE JUDGE TARFUSSER: So your criticism is towards the
18 interpretation of the articles by -- and the rules by the Chamber as well
19 of course?

20 MR. KHAN: Indeed. Your Honour, not the articles, the articles
21 are clear. It talks about --

22 SINGLE JUDGE TARFUSSER: Yes, but the interpretation.

23 MR. KHAN: Yes, indeed.

24 SINGLE JUDGE TARFUSSER: Yes, yes. Okay. We will keep this in
25 mind the next time.

1 Just to continue. As regards the material covered by
2 confidentiality restrictions under Article 54(3)(e) of the Statute, I
3 take note of the report submitted on Monday, 24th of August, but I would
4 like to make a clarification on this. The Prosecutor submitted that it
5 identified so far one document covered by Article 54(3)(e) of the Statute
6 as containing information Article 67(2), and eight documents covered by
7 Article 54(3)(e) of the Statute containing information that may be
8 material for the preparation of the Defence pursuant to Article 77 -- the
9 Rule 77. The Prosecutor submitted that he, and I quote:

10 "... was looking for identical information included in a public
11 document before asking the information provided to lift the
12 confidentiality restrictions imposed on this document."

13 Now, the problem is the "before." I would like to make clear
14 that the disclosure of his -- of this identical information contained in
15 a public document, the so-called principle of analogous information,
16 represents the very last resort, the extrema ratio sins (phoen).
17 Although such a principle minimises the prejudice caused by
18 non-disclosure, it would deprive the Defence from having access to the
19 actual document covered by Article 54(3)(e) of the Statute and therefore
20 to the sources of the information identified as material to be disclosed
21 to the Defence pursuant to Article 67(2) of the Statute and 77 of the
22 Rules. Therefore, the Prosecutor, being under the obligation to disclose
23 to the Defence any documents which in his view might have a so-called
24 potentially exculpatory nature or may be material for the preparation of
25 the Defence by the same token he is already under the obligation to ask

1 the information provided to lift the confidentiality restrictions.

2 Therefore, I order the Prosecutor to ask the information provider
3 for such a lift and do so immediately, considering the strict time-frame
4 we have in order for the Confirmation Hearing to be held on the
5 12th of October. Because there are -- the two things are not
6 alternative. You have in any case to ask the provider to lift the
7 confidentiality, and then in case he doesn't, you can do the other way
8 around. They are not alternative.

9 MR. FAAL: Much obliged, your Honour.

10 SINGLE JUDGE TARFUSSER: Okay. Thank you.

11 Now, I would come to the end and just asking the parties also on
12 this issue if there is some final observation to bring to the attention
13 of the Chamber or the Single Judge.

14 Yes, Mr. Khan.

15 MR. KHAN: I'm grateful. On that point, on the 9th of June, once
16 again, the Prosecution kindly indicated that the week before, so sometime
17 in the week starting the 1st, they had contacted one information provider
18 who had consented, we were told, on the 9th of June for the information
19 to be disclosed to the Defence. Of course I don't know what is
20 entailed -- what is entailed for formalisation of that, but I wonder when
21 we can expect it. Your Honour, I believe that was the submissions of
22 Ade Omofade. I can get the reference if my learned friend needs it.

23 SINGLE JUDGE TARFUSSER: Thank you, Mr. Khan -- Mr. Faal.

24 MR. FAAL: Your Honour, I do not have any reflection of what my
25 learned friend is referring to. It is possible that there is a

1 misunderstanding or a misinterpretation of what was being said. But in
2 any case, the Prosecution would comply with the order that's just been
3 issued by your Honour with regards to that one document. And the
4 Prosecution will again ensure that all restrictions there are that affect
5 the documents to be disclosed would be dealt with and there would be
6 complete disclosure within the expected time-frame. Thank you,
7 your Honour.

8 SINGLE JUDGE TARFUSSER: I think not the one document but there
9 are nine documents, eight plus one --

10 MR. FAAL: Yes, yes, that's exactly --

11 SINGLE JUDGE TARFUSSER: Yes. No, because you said, "We comply
12 with the order for the one document. The eight plus one.

13 MR. FAAL: Yes, your Honour, you are right.

14 SINGLE JUDGE TARFUSSER: Yes, okay. Okay.

15 MR. FAAL: And also with all the remaining documents.

16 MR. KHAN: Just for the sake of the record, it was page 15 of the
17 transcript of the 9th of June, and perhaps I can read into the record.
18 It's just one paragraph. Your Honour was directing the parties to direct
19 submissions on Article 54(3)(e), and my learned friend Mr. Omofade stated
20 that:

21 "The documents of this nature, we can tell the Chamber at least
22 that they've generally and routinely been made public by the provider,
23 they are all of the same provider. The office has actually met with this
24 provider last week and we are able to say that they've committed to
25 lifting the Article 54(3) restriction ..."

1 And, your Honour, then he goes on and talks about ten further
2 documents. So, your Honour, an indication was given in June. I don't
3 see the reason why there would be delay. Of course it may be the
4 provider hasn't formalised it, but I would ask my learned friend to
5 contact the provider with all due dispatch and, if possible, forward the
6 same to the Defence without delay.

7 SINGLE JUDGE TARFUSSER: Yes. Please.

8 MR. FAAL: Your Honour, that lends sufficient clarification to
9 the matter. Indeed the Prosecution is in contact with the information
10 provider and there are expectations that this one document, for instance,
11 would be made available publicly, so in which case it would render the
12 54(3)(e) restrictions rather meaningless. So to the extent that the
13 Prosecution would be able to disclose it to the Defence.

14 MR. KHAN: Your Honour, I do apologise. I mean, this is part of
15 the problem. We are working to a strict time-line. It is a huge ask --
16 otherwise, the confirmation proceedings are going to become nothing other
17 than the Rule 71 -- 61 of the ICTY to engage the Court when there's
18 nothing else to do. Your Honours, in 30 days effectively we have 15 days
19 because we have to read the Prosecution disclosure and then we have to
20 start deciding, within 15 days, whether or not we're going to call any
21 evidence. It's an unrealistic expectation. In order for the
22 confirmation to be meaningful, in order for the rights to be rendered
23 practical and effective rather than theoretical and illusionary, the
24 Prosecution must press whoever it is, their own staff, their own
25 investigators, their own analysts, and other providers, to serve

1 information on the Defence at the earliest opportunity.

2 On the 9th of June an indication was given that this information
3 could be provided to the Defence. As of today it has not. Now to say,
4 well, you know, it's going to be rendered otiose, because if it's public
5 anyway there's no objection, is not to grasp the thrust of the Defence
6 submissions. I do not mind one jot, with a j not a d, I don't mind one
7 jot whether or not we get information under Article 54 or under any other
8 provision of the -- of the Statute or Rules. The main thing's to get
9 evidence which is germane to the case and we are not getting it in
10 sufficient time in order to make the confirmation as effective as it
11 really should be. Because there's an awful lot -- just, to be fair,
12 there is an awful lot to do within 15 days because 15 days after we
13 receive the incriminatory evidence we have to tell the Court the nature
14 of our defence and what witnesses we are going to call. It seems to be
15 rather difficult. Notwithstanding those difficulties, of course, we will
16 do our best to comply in the best manner we are able.

17 SINGLE JUDGE TARFUSSER: Mr. Khan, what you said now I was going
18 to say to the Prosecution office before you started. Obviously I
19 wouldn't have said it as good as you did so that's why I thank you to
20 have done it for me. But I will really ask the Prosecution to put
21 pressure on themselves to give the information to the Defence to disclose
22 and to give the -- to put pressure on the provider of these -- under
23 confidential informations we have.

24 MR. FAAL: Your Honour, I'm sure that my learned friend is not
25 for a moment suggesting that the Prosecution is not taking its

1 responsibilities seriously. Indeed, we are. Every effort is being made
2 to ensure that the Prosecution is able to disclose that document and the
3 order-affected documents in a timely manner. And that effort would
4 continue, and as soon as possible there would be disclosure of those
5 documents. Thank you, your Honour.

6 SINGLE JUDGE TARFUSSER: Let me say that nobody has any doubt
7 about the fairness of anybody. So I think this is the base on which we
8 work, otherwise we can close and go home.

9 I would propose -- closing this hearing, I would propose that we
10 have another Status Conference, I think we'll need it, probably we should
11 have had one also before this, on disclosure, but as the time-frame is
12 very strict I would say that -- well, the only day possible is Thursday,
13 3rd September, at 9.00 in the morning, with the same participants, in
14 order to address the disclosure process and the filing of the evidence in
15 the record of the case at that moment, hopefully having nearly -- a
16 nearly definite disclosure -- the notice -- the news that disclosure is
17 nearly ended, put it -- that would be a good news by that time.

18 No other questions? So I declare the hearing closed. Thank you.

19 COURT USHER: All rise.

20 The hearing ends at 1.00 p.m.

21

22

23

24

25