

1 International Criminal Court

2 Pre-Trial Chamber I

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

4 Case against Bahr Idriss Abu Garda

5 Status Conference - Open Session

6 Thursday, 3 September 2009

7 The hearing starts at 9.04 a.m.

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

10 SINGLE JUDGE TARFUSSER: Good morning. Today it's the right way  
11 to say good morning because it's 9.00. I know it's not very usual  
12 but ...

13 I will ask the courtroom officer to call the case, please. Thank  
14 you.

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

17 SINGLE JUDGE TARFUSSER: Thank you very much.

18 As always I would like first the parties and the participants to  
19 introduce themselves and their teams or their representatives, beginning  
20 with the Office of the Prosecutor. Thank you, Mr. Faal.

21 MR. FAAL: Good morning, your Honour. The Prosecution is today  
22 represented by Victor Baiesu, associate trial lawyer; Pubudu  
23 Sachithanandan, associate trial lawyer; Desire Lurf, associate trial  
24 lawyer; Biljana Popova, case manager; and myself, Essa Faal, senior trial  
25 lawyer. Thank you.

1 SINGLE JUDGE TARFUSSER: Thank you very much.

2 And now the Defence, please.

3 MR. KHAN: May it please, your Honour, good morning. The Defence  
4 for Bahr Idriss Abu Garda is represented by Andrew Burrow, legal  
5 consultant; Anand Shah, case manager; and myself, Karim Khan.

6 SINGLE JUDGE TARFUSSER: Thank you very much, Mr. Khan.

7 I will now turn to the Registry.

8 MS. MARTINOD: Good morning, your Honour. The Registry is today  
9 represented by Mr. Uros Mijuskovic, who's the legal officer at the Court  
10 Management Section; Mademoiselle Anne-Aurore Bertrand, associate legal  
11 officer, Division of Court Services; and myself, Maria-Luisa Martinod,  
12 officer in charge of the Victims and Witnesses Unit.

13 SINGLE JUDGE TARFUSSER: Thank you very much.

14 I introduce myself. My name is Cuno Tarfusser. I'm the Single  
15 Judge of Pre-Trial Chamber responsible for the situation in Darfur and  
16 any related cases. My team is composed by Silvestro Stazzone, Beatrice  
17 Pisani, Leila Bourguiba, and Ana Bispo.

18 So this to the preliminaries. This hearing will focus on the  
19 disclosure of evidence between the parties, and also as -- also for this  
20 hearing, for the present hearing, like last time, I would like to remind  
21 all the participants that we are in public session. I really don't think  
22 there will be a need to move to a private or closed session today, but if  
23 some issues need to be discussed in a private or closed session, they  
24 have to be addressed at the end of the public hearing. I'm also aware of  
25 the pending Prosecutor request for redaction which are now before the

1 Single Judge. The decision about this request will be filed very  
2 shortly, hopefully tomorrow. Of course due to the ex parte nature of  
3 these proceedings, such requests will not be subject of this hearing.

4 I would now first like to know from the Registrar and then from  
5 Mr. Khan how the preparation of the Defence team is going on so far and  
6 if the technical problems you have told me about at the last hearing are  
7 in the meanwhile solved, in particular I think there were connection  
8 problems and the computer training which had to start a few days after  
9 the hearing, just to know if these problems are solved. The Registrar,  
10 please.

11 MR. MIJUSKOVIC: Thank you, your Honour. The training took place  
12 as scheduled on the 27th of August and the technical problems have been  
13 solved, I'm informed.

14 SINGLE JUDGE TARFUSSER: Thank you very much.

15 Mr. Khan, you have the floor.

16 MR. KHAN: Your Honour, I'm most grateful. There's been a hive  
17 of activity in the Defence to sort out the office, and my thanks to the  
18 case manager in particular, Anand Shah. And the computer section, led by  
19 Tim Hoffman, have been hugely helpful, and the team has been given a  
20 training in Ringtail and the case manager has further training scheduled  
21 in the weeks ahead. So, your Honours, those technical difficulties have  
22 either been addressed or are well in hand.

23 SINGLE JUDGE TARFUSSER: Thank you. That's very good to hear  
24 this. Thank you very much, Mr. Khan.

25 I would now turn to the Prosecutor, asking him to give an

1 overview on how the process of disclosure is going on and is taking place  
2 so far. I'm obviously aware that, finally, the disclosure started quite  
3 quick and that a certain amount of documents have been already given to  
4 the Defence, but we will want to go a bit in the particular and know the  
5 amount of documents which currently has been already disclosed and the  
6 timing under which you might be able to disclose the other documents and  
7 maybe finish with the disclosure, in particular with regard to the  
8 documents covered by Article 54(3)(e) we talked also last time about and  
9 the documents which in the -- might have so-called potential exculpatory  
10 nature or may be material for the preparation of the Defence.

11 Please, Mr. Khan [sic], you have the floor.

12 MR. FAAL: As it pleases your Honour. Your Honour, we have had a  
13 number of disclosures so far, the first one on the 24th of August, and  
14 the second on the 28th of August, and the third on the 1st of September.  
15 With regards to disclosure of PEXO material, on the 24th of August and on  
16 the 28th of August we delivered the first and second packages of PEXO  
17 material, comprising in the first disclosure of 35 items and in the  
18 second five items. So, so far, 40 items have been disclosed to the  
19 Defence as PEXO.

20 With regards to incriminatory materials, on the 28th of August  
21 and on the 22nd -- and on the 1st of September, rather, we made two  
22 disclosures. On the 28th of August we disclosed 138 items, including one  
23 video, all in one package. On the 1st of September, we disclosed three  
24 packages of incrim comprising of witness-related materials, and these  
25 include seven summaries of transcripts of witness interviews, seven

1 witness statements in redacted form as approved by the Chamber, and in  
2 addition, we further disclosed 111 documents and two video materials. We  
3 also disclosed 68 other items.

4 So far the disclosure of the materials is almost completed except  
5 for the following items: Those statements that are pending redactions,  
6 about four of them, and the translations of the summaries of transcripts  
7 of witness interviews and some of these statements. We are hoping that  
8 some of the translated statements or summaries would be available for  
9 disclosure sometime tomorrow or Friday -- sometime tomorrow at the  
10 latest. The other set would have to be disclosed sometime before the  
11 dead-line.

12 With regards to 54(3)(e) materials, the Prosecution is still in  
13 contact with the information providers. With one provider arrangements  
14 have already been made to make the materials available for disclosure.  
15 We are still in contact with the other provider --

16 SINGLE JUDGE TARFUSSER: There are two providers?

17 MR. FAAL: Two providers. We are still in contact with the other  
18 provider and we should be able to report back to the Chamber progress  
19 that is being made on that front in our status report of the 25th of this  
20 month. So we do hope that at least before the end of the disclosure  
21 dead-line, the 10th of September, we would have had all the materials  
22 disclosed. But with the 54(3)(e), it's safe to say that arrangements are  
23 still going and we would report back to the Chamber as soon as possible  
24 developments in that front. Thank you, your Honour.

25 SINGLE JUDGE TARFUSSER: Thank you very much, Mr. Prosecutor.

1           Mr. Khan, it's now your turn to give your statement about the --  
2   how the disclosure proceeding, from your point of view, is going on. You  
3   have the floor.

4           MR. KHAN: I'm much obliged, your Honour. The mechanics of  
5   disclosure are very much as my learned friend has articulated regarding  
6   the batches that have been disclosed starting on the 24th of August, and  
7   the last batch being given -- served on the Defence on Tuesday. The  
8   matters that at this stage are most pressing for the Defence are the  
9   questions of the translation. We require without any more delay the  
10  Arabic translations of all interviews, transcripts, and the summaries  
11  that my learned friend wishes to rely upon in pressing his case at  
12  confirmation.

13          Your Honour, on the last occasion I made submissions regarding my  
14  view of the interpretation of Rule 121 and the 30-day dead-line. I stand  
15  very much behind those submissions. At this late disclosure or  
16  unnecessarily delayed disclosure, given the initial hearing in June, has  
17  the potential to cause significant disruption and unnecessary  
18  difficulties for a small Defence team.

19          Your Honour, looking at the summaries that have been served on  
20  Tuesday, it seems some statements go back to 2008, some are in February  
21  of this year, but it's not clear why either the redactions were not  
22  requested earlier or, indeed, the date these documents were submitted to  
23  the translation unit of the court. Be that as it may, we do not have all  
24  those documents as yet.

25          Now, whilst I'm heartened to hear from my learned friend that

1 some of these documents will be served in the next few days, I would  
2 press your Honours to give a direction that all these documents be served  
3 by the end of this week; and if that is not possible to the Prosecution,  
4 if it causes them difficulties, they should be asked to explain when they  
5 submitted these documents to the translation unit and the reason for any  
6 delay because it will not be sufficient for the Prosecution to say they  
7 submitted these documents three weeks ago or four weeks ago or five weeks  
8 ago, given that most of these documents were submitted prior to the  
9 Article 58 application. Other documents, a second tranche, were  
10 submitted in January of this year, and it was always foreseeable that  
11 this was focused on a hearing in relation to a suspect that had from the  
12 first moment signalled his intention to cooperate with the court and  
13 appear in The Hague as required by your Honours.

14 Your Honours, the second issue is one of record. Your Honours  
15 have consented that the Prosecution for reasons that they, no doubt,  
16 detailed in their ex parte communications, that they were allowed to  
17 submit summaries, and of course the Rules make that perfectly proper and  
18 perfectly appropriate. But, your Honour, I will confess that the  
19 summaries that have been submitted are difficult to fathom because they  
20 are gleaned, they are cut and pasted and cobbled together in many  
21 respects, from transcripts of interviews. Now, without the questions  
22 being detailed, it is on occasion difficult to understand the chronology  
23 of a witness's testimony or his proposed testimony. In a case where the  
24 credibility of witnesses may be very much at stake, indeed even where the  
25 actual narrative of a witness needs to be understood, if a witness's

1 summary hops around between incidents, it's very difficult without the  
2 questions to understand a time-line, to create a time-line in relation to  
3 each witness summary.

4 Now, your Honour, these are all matters for the Prosecution. I  
5 just put them on clear notice that I do expect them to fulfil their  
6 obligations under the Statute and the Rules, and no doubt they are  
7 endeavouring to do that to the best of their ability and to the best of  
8 their judgement. But I do reserve my right, and I make this a matter of  
9 record, to make any necessary submissions at the Confirmation Hearing  
10 regarding the probative value in relation to these summaries for the  
11 reasons I've adumbrated.

12 Your Honour, there are other matters. I would ask that a  
13 direction be given in relation to any further disclosure, and it's a very  
14 simple request but it hasn't thus far been adhered to, that where the  
15 Prosecution give us statements and the statement refers, for example, to  
16 photographs or refers to diagrams, those documents be appended as  
17 exhibits to the statement. It seems completely unnecessary to expect the  
18 Defence to ferret around to try to tie-up pieces of evidence to a  
19 statement. The normal practice in many courts is that where a witness  
20 statement is taken and the witness prepares a diagram or looks at  
21 photographs, they normally say in the statement, I produce this as  
22 Exhibit A, as Exhibit B, and Exhibit A and Exhibit B are appended to the  
23 back of the statement. That practice has not been, from my quick review  
24 of the Prosecution disclosure, has not been complied with. And I would  
25 ask that in relation to all further or future batches of disclosure this

1 simple administrative task be required of the Prosecution. It is good  
2 practice. It is not onerous and it is consistent with the requirements  
3 of the Statute and the Rules that a disclosure be as simple as possible  
4 in order to have an expeditious and fair hearing.

5 Your Honour, I will give you one example of some of the  
6 difficulties. In the witness statement WWW-0312, it appears that six  
7 photographs are shown to the witness. One of these photographs purports  
8 to be the photograph of my client. Now, what the Prosecution do in the  
9 footnote - and if I may have the relevant statement - in the footnote the  
10 Prosecution give a generic information and they refer to eight -- in  
11 fact, nine photographs, eight plus one photographs. Now, your Honours,  
12 it's not for the Defence to try to tally which witnesses -- which  
13 photographs are shown to this witness and to guess which photograph is  
14 Abu Garda and which is witness A, B, and C. Where a statement states  
15 that photograph 1, paragraph 2 is shown to a witness, that photograph  
16 should be marked photograph 1, photograph 2, and it should be appended to  
17 the back of the statement.

18 This very simple, very basic, very normal procedure has not been  
19 done by the Prosecution. I see no reason why your Honours should not  
20 compel the Prosecution that when they submit statements in relation to  
21 photographs, diagrams, and documents, any real evidence or documentary  
22 evidence shown to the witness, they should be appended to the back of the  
23 statement so that it's easily accessible to the Defence and so I can  
24 identify, without being any kind of Sherlock Holmes, which photographs  
25 are said to have been identified by a witness.

1           SINGLE JUDGE TARFUSSER: I'll just interrupt you for a moment and  
2     I would say that this is very, very reasonable what the Defence said and  
3     I will ask the Prosecution to do it also for the already disclosed  
4     material and try to make this a sort of legenda, meant to send it to the  
5     Defence. I think it could be done also now also for the material and the  
6     documents already disclosed, and of course also for the document to be  
7     disclosed. I think this is very reasonable and should be done to make  
8     the work of the Defence a little bit more easy. Thank you.

9           MR. FAAL: May I take the floor, your Honour?

10          SINGLE JUDGE TARFUSSER: Yes, please, Mr. Faal.

11          MR. FAAL: Or, Mr. Khan, do you wish to go ahead?

12          Your Honour, I'm sure that counsel for the Defence would  
13     acknowledge that the Prosecution has made its best efforts to ensure that  
14     the Defence understands the material that's been provided, and we have  
15     during the disclosure exercise gone at length to make the materials more  
16     easy for the Defence to identify. Undoubtedly there may be difficulties  
17     sometimes. The photos that my learned friend complained about are -- at  
18     least from what I have seen, those photos had been marked.

19          There may be problems that I am not aware of, but should in case  
20     problems of this nature arise, these are basic things that could be  
21     settled by the two case managers. A simple e-mail or a simple telephone  
22     call, as had been the case sometimes, would solve some of these problems.  
23     I do not think that this is such a big problem that -- that that should  
24     be raised in court to -- I mean, because these are easy things that we  
25     can solve. But in any case, we would look at the complaints and see how

1 best we can improve on our practices and how best we can make things much  
2 more easier for the Defence, as we have done in the past.

3 Your Honour, my learned friend raised the issue of translations.  
4 The Court will recall that initially we wanted to use witness  
5 transcripts, but for some reason we had to change to summaries. The  
6 summaries would have to be translated and it would take time. The  
7 Prosecution had to even hire a few more Arabic translators to do the job.  
8 Like I promised, hopefully we would be able to disclose those summaries,  
9 translated summaries, by tomorrow.

10 Another issue, your Honour, that my learned friend raised is the  
11 chronology in the transcripts. The Prosecution tried to faithfully  
12 represent in the summaries the information contained in the transcript.  
13 If the witness was not very not chronological in his statement to the  
14 Prosecution when he gave the interview, the Prosecution would not go  
15 ahead and sanitise the summary just because we want to make it look good.  
16 Our job is to faithfully represent what is contained in the transcript,  
17 and we were very deliberate in doing so. If the witness is being  
18 inconsistent in what he said earlier and what he said later, it's for the  
19 Defence to take a look at it. But if we sanitise it, the Defence would  
20 not have the opportunity to see that. So we have faithfully represented  
21 in the summaries what is contained in the transcripts. We would have  
22 preferred that we had a smoother interview where the witness was  
23 coherent, very straightforward, but that's not the way things do happen.  
24 So the summaries represent exactly what is contained in the statements.

25 Thank you, your Honour.

1           SINGLE JUDGE TARFUSSER: Yes, we know that witnesses are not  
2 always very -- not very easy to read witness statements. We've all read  
3 them, so they're quite difficult because witness is not a --

4           MR. KHAN: No, of course. Indeed, your Honour. That wasn't in  
5 fact the focus or the thrust of my attempted submission. It was one of  
6 putting the Prosecution clearly on notice that they are put to strict  
7 proof in relation to the Confirmation Hearing, and given the difficulties  
8 I've expressed, it's not for me to tell the Prosecution how to marshal  
9 its evidence or to submit it. But -- this is not about any  
10 inconsistencies in the account of witness statements; of course they are  
11 replete with inconsistencies. It's on focused on the difficulty in the  
12 Defence in following a summary when we don't have the actual question.

13           No, your Honours, I don't require an order in relation to the  
14 summaries. The Prosecution have made a judgement call. They have  
15 submitted what they think is adequate. I'm simply putting them on notice  
16 to the extent it is not adequate, I reserve my right to make any  
17 necessary submissions on behalf of my client at the Confirmation Hearing.  
18 I do that in good faith so as not to surprise my friends on the other  
19 side.

20           Your Honours, I understand the difficulties, I understand the  
21 difficulties, and rather than -- your Honour said at the outset that  
22 disclosures happened quite quickly. In my respectful submission, it's  
23 happened quite slowly for the reasons I've attempted to express today and  
24 on previous occasions. But, your Honour, no doubt there are internal  
25 difficulties regarding hiring of staff, although the Darfur case has a

1 high profile, the Darfur situation, and no doubt the Prosecution have  
2 got, one would have thought, and the court have got sufficient number of  
3 translators for the small number of statements they are putting forward  
4 in this case. I'm simply asking that all -- an order to be given that in  
5 relation to all transcripts and all summaries that the Prosecution are  
6 seeking to rely upon on the 12th of October, only a stone's throw away,  
7 they be required to serve it upon the Defence by the end -- in the next  
  
8 five days at the latest.

9 Your Honours, I think that is an extremely, if I may say so,  
10 reasonable request, because of course the person most directly affected  
11 by these proceedings is not my learned friend, it is not Mr. Ocampo, it  
12 is my client, and he has the basic right to know what the charges are  
13 against him in a language he understands. And in relation to that, I do  
14 ask that an order be given in the terms that I have requested.

15 Your Honour, the other matter that I would ask for a direction  
16 and an order to the Prosecution to assist my preparation is one that I  
17 anticipate my learned friend will oppose, but it is one that causes the  
18 Prosecution no discernible prejudice whatsoever. The Prosecution have  
19 said that they have an intention of calling approximately six viva voce  
20 witnesses. Various summaries and various transcripts have been served,  
21 of course some evidence is outstanding. I would ask that the Prosecution  
22 be ordered to disclose to me by the end of today or tomorrow which of  
23 those witnesses -- I think by the end of today, it's a very easy task, by  
24 the end of today which of those witnesses they are intending to call at  
25 the Confirmation Hearing. Your Honours, I don't have the names of these

1 witnesses. I simply want to focus my attention, my efforts, on those  
2 statements that the Prosecution are wishing to call viva voce. Of course  
3 they're calling those witnesses viva voce for a purpose. Your Honours,  
4 that's a reasonable request and it's an order that I ask be required of  
5 the Prosecution.

6 Your Honours, in relation to the Article 54(3)(e) material, I  
7 hear what my learned friend states. I'm still rather perplexed, and of  
8 course a lot of this is done behind closed doors as far as the Defence is  
9 concerned, both by the Prosecution's bilateral discussions with the  
10 information provider and also in perhaps ex parte hearings - I don't  
11 know. But I understood my learned friend to state that the status report  
12 in relation to that batch of documents will be provided to your Honours  
13 on the 25th of this month. Now, your Honour, that's only -- perhaps I've  
14 got it wrong. My learned friend's got his wonderful smile, so perhaps I  
15 stand to be corrected, but I read the 25th of this month. Your Honour,  
16 of course that's not acceptable, being only 17 days before the  
17 Confirmation Hearing. But it does perplex me why when Mr. Ade Omofade  
18 stated on the last -- on the 9th of June that an information provider had  
19 consented already to provide some information, why we don't already have  
20 it. Now, I can't really delve more other than to raise this concern to  
21 your Honours, because it's very much in my interests and the Court's  
22 interest that the Defence are properly prepared and in receipt of all

23 necessary evidence at the first available opportunity not the last.

24 Now, of course the first available opportunity has, in my  
25 respectful submission, already passed with the passing of the last three

1 months or thereabouts, but in those circumstances the most I can ask for  
2 is that the Prosecution be pressed to disclose this information. If it  
3 requires your Honours to ask questions of the Prosecution within certain  
4 confines in an ex parte hearing, I don't object to that at all. You do  
5 have, of course, an overarching responsibility to ensure that disclosure  
6 is complied with under satisfactory conditions. So, your Honours, I  
7 don't have any objection at all to recusing myself and, in an ex parte  
8 hearing, you getting some specifics from the Prosecution as to why when  
9 on the 9th of June, months ago, a clear indication was given by my  
10 learned friend, who hasn't been in court since, that the information  
11 provider had consented, why we haven't got that now -- there may well be  
12 of course good reasons for that, but perhaps the involvement of the Court  
13 may bolster my learned friend's hands in getting the necessary  
14 information provider to provide the information that may be germane to  
15 the preparation of the Defence case.

16 Your Honour, those are my submissions on this point.

17 Your Honour, I do accept my learned friend's point that a lot of  
18 matters can be dealt with directly between the parties. I'm always very  
19 much in favour of that and I'm heartened to say that the Prosecution team  
20 opposite have been most generous and courteous on a personal level and  
21 there are no difficulties preventing such communication. Indeed I'll  
22 give you an example. We have issues, for example, DAR-OTP-0157-1097 are  
23 a digital geographic information product produced by the Prosecution, the  
24 photographs of which are illegible, and that was not a matter I was going  
25 to raise in today's hearing. It was a matter I was going to raise with

1 the Prosecution. But it would be remiss of me not to raise issues of a  
2 fundamental nature because your Honours must remain appraised of my  
3 perspective as Defence counsel as to the quality and timeliness of  
4 Prosecution disclosure to the extent that may effect and impact upon our  
5 preparation and the effectiveness of the Confirmation Hearing.

6 I'm very much, I hope, on all fours with the Pre-Trial Chamber  
7 that the Confirmation Hearing must not be viewed as a simple cosmetic  
8 exercise; but it is a meaningful process in which the evidence of the  
9 Prosecution must be subjected to rigorous scrutiny, albeit in  
10 circumstances where the Defence come late to the case and it would only  
11 have had a few weeks to review the evidence. Your Honours, looked  
12 through that prism and the rights of the Defence, I made the submissions  
13 that I thought were necessary and appropriate. That is not to say that  
14 normal counsel-to-counsel discussions will not continue, they will; and I  
15 am very content to go on record to extend my personal thanks to the  
16 Prosecution team, all members of the Prosecution team, for their courtesy  
17 and willingness to assist the Defence. But that is not to say that I  
18 have to enter matters off the record, particularly if I'm going to make  
19 submissions at a future date if the Prosecution have not done that which,  
20 in my respectful submission, right or wrong, they were required to have  
21 done.

22 Your Honour, unless I can assist further those are my submissions  
23 on this issue.

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

25 I would like to give the floor to Mr. Faal to reply on these

1 issues.

2 MR. FAAL: Thank you, your Honour.

3 Your Honour, my learned friend has raised three issues, to which  
4 I would like to respond. The first issue is the request that the  
5 translations are -- be submitted or that there be an order that the  
6 translations be submitted in five days. I just wish to remind your  
7 Honour that there's been a decision on disclosure on which the Chamber  
8 has provided time-lines or dead-lines within which particular tasks must  
9 be discharged. The Prosecution stands by those guide-lines and has  
10 tasked out work to translators on the basis for those guide-lines. For  
11 those guide-lines to be changed now would put the Prosecution in grave  
12 difficulty because we may not be able to comply with the orders of the  
13 Court.

14 So, since we've been working on the basis of the dead-lines  
15 contained in the disclosure decision, I think it is prudent to stick by  
16 them. The Prosecution will always disclose whatever is ready to be  
17 disclosed, but to bring the time-line closer would unnecessarily put the  
18 Prosecution in great difficulty and we may not be able to comply with the  
19 orders of the Chamber, and that would create difficult situations.

20 So I encourage your Honour to stick with the decision contained  
21 in the disclosure decision.

22 With regards to names of witnesses, it's simply not possible at  
23 this stage for the Prosecution to indicate which statements relates to  
24 those witnesses the Prosecution intends to call, for the simple reason  
25 that the decision has not yet been made. It's not possible at this stage

1 to say, Look at statement number this because we may call that particular  
2 witness. The Prosecution has not yet made a decision which witnesses to  
3 call, and that is not as a result of any dragging of feet on the part of  
4 the Prosecution. It's just because that particular arrangements would  
5 make it possible for the Prosecution to call a particular witness have  
6 not yet been made --

7 SINGLE JUDGE TARFUSSER: Excuse me, Mr. Faal, if I interrupt you,  
8 but you have not very many days to decide on which witness you call --

9 MR. FAAL: Yes.

10 SINGLE JUDGE TARFUSSER: -- and give the name of the witness. So  
11 I think it must be -- you must be on this point to identify the witnesses  
12 you will call, because otherwise I think the dead-line of the 10th is the  
13 dead-line, of course. So I would ask you: When do you think that you  
14 know the six witnesses you -- or the witnesses you will call here in the  
15 court before the Chamber at The Hague at the Confirmation Hearing?  
16 Because also the Chamber would like to be informed about that as soon as  
17 possible. It's not only Mr. Faal --

18 MR. FAAL: Mr. Khan.

19 SINGLE JUDGE TARFUSSER: -- which -- which is interested in it.

20 MR. FAAL: Indeed, your Honour, but it just so happens that we  
21 are still working on the dead-line of the 10th. The Prosecution has not  
22 yet made a final decision on this. If it had, I would have been quite  
23 happy to communicate that information, but the circumstances under which  
24 we are working are such that decisions pertaining to witnesses are  
25 usually very difficult ones. We are not yet in a position to indicate an

1 A or B witness. Unfortunately, that's the situation.

2 SINGLE JUDGE TARFUSSER: Excuse me if I interrupt you again, but  
3 you say since the hearing in June, I think, that there are probably six,  
4 probably six. So -- and this number of six has remained since then, it  
5 didn't change up to seven or down to five, it's about six, yes. So at  
6 least two or three you must be sure about them, otherwise I don't know  
7 why you can say "six." So also if you don't disclose the names of all  
8 six but at least one, two, three, you must be sure on somebody, I think.

9 MR. FAAL: Your Honour, all I can say, and in all honesty, is  
10 that a decision has not yet been made on which witnesses to call. And as  
11 such, I cannot give any indication and I don't want to mislead anybody.  
12 No decision has been made. That's the situation.

13 SINGLE JUDGE TARFUSSER: Okay. Then as soon as the decision is  
14 made, also before the 10th of September, I invite you to inform the  
15 Chamber and the Defence about the names.

16 MR. FAAL: I would be more than happy to do so, your Honour.  
17 Thank you.

18 MR. KHAN: Your Honour, with great respect, I vigorously and  
19 fundamentally take issue with the position of the Prosecution on this  
20 issue. It is completely, with the greatest of respect, incoherent. The  
21 Prosecution have not plucked -- surely, diligent Prosecutors led by as  
22 august a person as Mr. Moreno-Ocampo have not plucked the six from the  
23 heavens. On the last occasion I mentioned that there has been, at least  
24 on this issue, consistency in the Prosecution regarding the witnesses'  
25 statements that they were going to rely upon and the viva voce witnesses.

1           Your Honours, the consent of the Prosecution is not necessary. I  
2   do maintain my request that they be ordered. And I'm not asking for the  
3   names of witness statements; I'm asking even for the WWW number because  
4   of course many of these witnesses or some of these witnesses or none of  
5   them, I don't know, may be so far anonymous. But I see, for the life of  
6   me, no reason why the Prosecution should not be required immediately, in  
7   fact, never mind by the end of today, to let the Defence know who these  
8   six witnesses are. Now, of course if in the coming days the Prosecution  
9   in their discussions in their vast office come to a different view, they  
10  wish to refine these witnesses, they can inform us according to the  
11  30-day dead-line.

12           But there has been consistency in the Prosecution position. They  
13  surely must have an inkling as to who these six witnesses are. Some  
14  statements have been given to the Defence, and I ask, notwithstanding the  
15  submissions of the Prosecution, that your Honours not be held hostage by  
16  the espoused difficulties put forward by the Prosecution, they be  
17  required by the end of today to disclose to the Defence which witness  
18  statements they provisionally intend to rely upon as viva voce witnesses  
19  on the 12th of October. Any other ruling amounts to delay and may be  
20  construed as an attempt for some kind of tactical advantage by the  
21  Prosecution.

22           Now, I'm sure that's not the case and I accept that there may  
23  well be refinement, and I will not hold the Prosecution to account for  
24  that. But, your Honours, out of these six that they have in mind, as  
25  your Honours stated, maybe two or three of them will remain the same.

1 Well, at least to that extent the Defence have a few days' additional  
2 time where we can focus our attention, and I do ask for a ruling on my  
3 submission, either to deny my request, or a ruling that the Prosecution  
4 be required by the end of today to articulate who are these six witness  
5 statements that they are intending to call viva voce, subject to the  
6 caveat that they have leave to amend that up to the date set by your  
7 Honours.

8 SINGLE JUDGE TARFUSSER: As far as I've understood, listening to  
9 Mr. Faal, when he said that the final decision is not yet made, I  
10 believe, of course, that the final decision is not yet made because I  
11 think the final decision must be taken by him and somebody else, by the  
12 team, but I think you could be able -- absolutely able to take this final  
13 decision in between tomorrow evening, I'm quite sure about that. Excuse  
14 me, my -- so I think that it is fair enough that by tomorrow evening you  
15 should have this final decision and give the name to -- or disclose the  
16 names to the Defence of -- the names of witnesses you will want to call  
17 to the Defence, I would think.

18 MR. FAAL: Your Honour, I wish it was that easy. I can assure  
19 you that for some of the witnesses, yes, it is possible for the  
20 Prosecution to make a decision as soon as possible; but not for all of  
21 them.

22 SINGLE JUDGE TARFUSSER: No, of course, but --

23 MR. FAAL: And, your Honour, I do think that the Prosecution  
24 should be given the opportunity to make its decision without pressure  
25 just because the Defence wants to know who these people possibly could

1 be. I mean, the Defence has all the statements at the moment. They can  
2 study all the statements. I mean, all the materials are relevant and the  
3 Prosecution intends to rely on all of them, but the Prosecution is simply  
4 not yet in a position to make a final decision on this, mainly because of  
5 the circumstances of these particular individuals. So unless and until  
6 those circumstances are adequately addressed, the Prosecution cannot and  
7 would not, in my view, make a decision to call those witnesses.

8 So to put pressure on the Prosecution to make a rushed decision  
9 on that would create more problems for the Prosecution. Your Honour, all  
10 I can promise is that maybe for one or two witnesses the Prosecution can  
11 possibly provide a name sometime tomorrow, by close of business, but  
12 certainly not for the rest of the witnesses because of problems I cannot  
13 allude to in this hearing because of the nature of the hearing. Thank  
14 you, your Honour.

15 MR. KHAN: Your Honour --

16 SINGLE JUDGE TARFUSSER: That's a good beginning, anyway.

17 MR. KHAN: Your Honour, I'm grateful for my learned friends. And  
18 my intention is not to make life difficult for the Prosecution. My  
19 intention is to be able to effectively represent my client. Now,  
20 wherever that leads me, I must go.

21 Your Honour, firstly, my learned friend states, We have all the  
22 statements. Well, I'm sure that was perhaps not meant, unless we do have  
23 all the statements that they are intending to rely upon, but I failed  
24 miserably, it seems to put forward my point adequately. I'm not asking  
25 for a final decision. I'm not asking for a variation in the 10th of --

1 in the dead-line for disclosure, the 30-day dead-line. I'm simply asking  
2 for a provisional indication in good faith as to who are these six  
3 witnesses that the Prosecution has on the record informed the Defence and  
4 your Honour that they are intending to bring and put in this witness box  
5 in court. I do not see how that could possibly prejudice the  
6 Prosecution. And I'm not asking for their names. I'm not asking for a  
7 final decision. I'm asking for a provisional decision as to who they've  
8 got in mind at the moment so that we can adequately focus our own  
9 preparation.

10 Now, a lot of this perhaps could have been solved if the  
11 disclosure had started earlier, but the horse has bolted. Given where we  
12 are, my request is proportionate, it is reasonable. It is not arduous or  
13 unduly onerous on the Prosecution. I'm not asked that they be rushed.  
14 I'm asking they do that which they should do which is to provide  
15 accessible and identifiable information to the other party to facilitate  
16 an effective and meaningful Confirmation Hearing. To that extent, your  
17 Honour, I rely on my earlier submissions and do ask for an order that the  
18 Prosecution be required to give by the end of today or tomorrow, as your  
19 Honour thinks fit, a list of which are the six magical viva voce  
20 witnesses that they've referred to at the last -- at the two previous  
21 Confirmation Hearings -- the two previous Status Conferences prior to  
22 today.

23 MR. FAAL: Your Honour, I regret that I would have to take the  
24 floor on this particular point again, but, your Honour, what is the legal  
25 basis for such a request? Already there is a decision on disclosure and

1 the Prosecution has been given a time-line within which to comply with  
2 all its disclosure obligations. Now your Honour is being asked to pretty  
3 much reverse the time-lines that have been placed in the decision on  
4 disclosure just for the convenience of the Defence.

5 Your Honour, the Prosecution has argued that it is not yet in a  
6 position to give that information by reason of the fact that there are  
7 particular measures that need to be put in place which are not yet in  
8 place; as such, the Prosecution is not able to provide that information.  
9 Your Honour, it would be grossly misleading and irresponsible of the  
10 Prosecution to give a provisional list only to come and change it later.  
11 There is no benefit to anybody in having a provisional list.

12 The Prosecution would deploy its best efforts to ensure that as  
13 soon as the decision is made that decision would be conveyed to all  
14 concerned, and that's what we want your Honour to hold. There is an  
15 order for all disclosures to be completed on the 10th of September and we  
16 encourage your Honour to stick by that decision. Thank you, your Honour.

17 MR. KHAN: Well, your Honour, it's very often the case that there  
18 is a fundamental disagreement between the parties, and whereas, no doubt,  
19 both of us, my learned friend Mr. Faal and myself, will endeavour to come  
20 to positions of agreement wherever possible, at the end of the day, of  
21 course, such issues of dispute have to be judicially determined.

22 Your Honour, I made it clear, I hoped, that I'm not seeking a  
23 variation of the requirement that 30 days before the hearing the  
24 Prosecution are obligated to firmly nail their colours to the mast and  
25 finally give notice, both of the document containing charges and the

1 list, the list, of evidence they are proposing to rely upon. I pause for  
2 a moment. The reference to a list, in my submission, supports my earlier  
3 submission that perhaps ordinarily the disclosure should already -- the  
4 meat of the case should already have been given to the Defence. And I  
5 note again while I pause that in previous cases like Lubanga that the  
6 Prosecution served directly upon the Defence statements which had been  
7 redacted. All of this is to imbue life into the black-letter Statute and  
8 Rules which are to ensure fairness to all parties, fairness to the  
9 Prosecution, fairness to Victims Representatives, and to the Defence.  
10 Where there is a rub, the rights of the Defence, given that the liberty  
11 of an individual and the good name of an individual is at stake must be  
12 given a margin of deference in my submission.

13 But, your Honours, I'm not seeking a variation at all and I'm not  
14 even asking that my learned friend ask irresponsibly. Of course there  
15 are no doubt travel difficulties, logistic difficulties, protection  
16 issues. I accept all of that, and I know my learned friend is in good  
17 faith, in good conscience, to the best of his abilities with whatever  
18 resources are available to him and the Office of the Prosecution,  
19 attempting to meet those challenges, challenges no doubt they are. I'm  
20 simply stating and requesting that information be given of a minor  
21 nature. I'm surprised, rather, that this has become a storm in a teacup.

22 The Prosecution has stated they intend to call six witnesses. As  
23 a matter of logic that could not have been plucked out of the air. At  
24 this point, I simply want to know which are the six witnesses they  
25 propose to call if all these protection difficulties are met. If they

1 are not met, of course the Prosecution have full discretion to drop some  
2 witnesses, to change additional witnesses. They have that discretion.  
3 I'm not seeking to tie their hands. I'm simply trying to undo a knot  
4 which is preventing me from properly preparing for confirmation.

5 I do not want to get flooded at the last possible moment,  
6 although there is a torrent that we are facing, which requires us to look  
7 at the Prosecution evidence at the last possible moment and then  
8 simultaneously, while we are assimilating that with one side of our head,  
9 to try to decide what Defence investigations we can possibly do in a  
10 15-day window.

11 Your Honour, I'm not asking my learned friend to behave  
12 recklessly. I know him too well and I would never make such a request.  
13 I'm asking that your Honour direct the Prosecution to adopt best  
14 practice, consistent with the spirit of the Statute, to give the Defence  
15 a timely manner that which I say I am entitled. The overarching concern  
16 of course, under Article 67 and even detailed under 121, is that  
17 disclosure must take place under satisfactory conditions.

18 Your Honours must determine on the fact of this case, in light of  
19 the submissions you have heard from Mr. Faal and myself, whether or not  
20 the request put forward by Mr. Abu Garda is reasonable, proportionate,  
21 and achievable. If it is, your Honour is compelled to one course which  
22 is to grant the request I have made. If your Honour thinks it is a  
23 frivolous motion, it is unduly onerous, of course the motion made by me a  
24 moment ago must be rejected. I maintain, with the greatest of respect,  
25 my motion is well based and should be granted.

1           SINGLE JUDGE TARFUSSER: Well, I think there are very natural  
2     opposite interests in conflict in this case, the interest of the  
3     Prosecution and the interest of the Defence. I think there is a  
4     dead-line which is the 10th of September, which is in a few days. I  
5     would propose to make a stop for about 15 minutes just to consult with my  
6     legal assistants and then -- I think in -- at 10.15 we be here again and  
7     coming out with some decision. Okay. Thank you. So suspended.

8           COURT USHER: All rise.

9           Break taken at 9.59 a.m.

10          On resuming at 10.25 a.m.

11          COURT USHER: All rise. Please be seated.

12          SINGLE JUDGE TARFUSSER: The Single Judge, on the oral request of  
13     the Defence, observes that the decision on the second disclosure of the  
14     15th of July, 2009, indicates the exact dead-line for disclosure to be  
15     completed. This dead-line, according to Rule 121, 121, is Thursday, the  
16     10th September 2009, also for the materials covered by Rule 76.  
17     Therefore, the request of the Defence is rejected. Nevertheless, the  
18     Single Judge invites the Prosecutor, as a matter of courtesy, and  
19     according also and again to the second decision on disclosure, where  
20     there is also written that the Prosecutor shall disclose to the Defence  
21     as soon as practicable and not later than the 10th of September, 2009,  
22     the names and the statements of witnesses, to provide to the Defence with  
23     a list, even if provisional and not complete, indicating the statements  
24     of witnesses the Prosecutor intends to call to testify.

25          This is the decision of the Single Judge.

1 I will now ask the parties if there is something else they  
2 will -- some other issue they want to raise, otherwise we come to the  
3 conclusion of this hearing.

4 The Registrar, please.

5 MS. MARTINOD: Thank you, your Honour. I would like just to draw  
6 to your attention two particular potential logistical and administrative  
7 difficulties that we -- may be faced if the Prosecution would be calling  
8 to testify in accordance with Rule 81 of the Regulations of the Registry.  
9 The Victims and Witnesses Unit had to arrange for the travel, so we  
10 encourage the Prosecution to contact us as soon as possible to make all  
11 the arrangements necessary in order to convene and arrange such travel  
12 because there may be administrative challenges to face such as  
13 preparation of passports. And also we would like to have your guidance,  
14 your Honour, in relation to familiarisation because in other cases we  
15 have the duty to familiarise the witnesses that will be appearing before  
16 Court. So we would like to know how we are going to be dealing with such  
17 familiarisation process. Thank you, your Honour.

18 SINGLE JUDGE TARFUSSER: I think the Prosecution and the Chamber  
19 will take note -- have taken note about these issues.

20 Mr. Faal, if you want to reply something, you have the floor.

21 MR. FAAL: Your Honour, the Prosecution takes note of the  
22 concerns raised by the Registry and would factor those in the decisions  
23 we are going to make in the next few days. Thank you, your Honour.

24 SINGLE JUDGE TARFUSSER: Okay. Is there something else? No.

25 And I think also that the 10th of September is very, very near, I

1 think there is no need -- I think you got this, there is no need to have  
2 other Status Conferences on disclosure, unless you think that there is  
3 need, but you can also always bring any observation to the attention of  
4 the Court, of the Chamber, or of the Single Judge at any moment if you  
5 think so.

6 And I want also at the end to assure Mr. Khan that the  
7 Confirmation Hearing will not be a cosmetic exercise.

8 This concludes the present hearing. Thank you very much to  
9 everybody, to the translators, to the record, and to the parties, to the  
10 Registry. Thank you very much.

11 COURT USHER: All rise.

12 The hearing ends at 10.29 a.m.

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