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Date: 7 October 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF THE PROSECUTOR

V.

BAHAR IDRIS ABU GARDA

Public Document

Prosecution's Observations on the proposed schedule for the confirmation hearing and the list of those issues on jurisdiction and admissibility and concerning the proper conduct of the proceedings leading to the confirmation hearing, that the Prosecution intends to raise pursuant to rule 122(2) and (3) of the Rules

Source: Office of the Prosecutor

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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REGISTRY

Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural history

1. On 15 July 2009, Pre-Trial Chamber I (PTC I) rendered its “Second Decision on issues relating to Disclosure” (“Second Decision on Disclosure”), in which it, *inter alia*, ordered the Defence to permit, as soon as practicable and no later than Thursday 24 September 2009, the Prosecution to inspect any books, documents, photographs and other tangible object in its possession or control which are intended for use for the purposes of the confirmation hearing, pursuant to rule 78 of the Rules of Procedure and Evidence (“Rules”), at a location and time and in a manner agreed by the parties.¹ On 11 September 2009, in its “Decision on the Prosecutor's requests for extension of time-limit”, PTC I postponed until Thursday 1 October 2009 the time limits for the Defence originally set at 24 September 2009.²

2. On 22 September 2009, the Defence filed an “URGENT Defence Application for an Ex Parte Hearing”, requesting the PTC I to convene an ex parte hearing for the next day. In the request the Defence attached two "confidential ex parte defence" Annexes. They also requested the PTC to grant the *voir dire* to take place on 29 September 2009, the subject of the *voir dire* being identified in a confidential ex parte Annexure A (“Annexure A of 22 September 2009 Filing”).³

¹ ICC-02/05-02/09-35, page 18.

² ICC-02/05-02/09-98, page 5.

³ ICC-02/05-02/09-113-Conf and ICC-02/05-02/09-113-Conf-Exp-AnxA

3. In the Decision issued on the same day, the PTC decided to convene an *ex parte* hearing with the Defence to be held in closed session on Wednesday 23 September 2009 at 9.30 hours in Courtroom I.⁴
4. On 1 October 2009, the Defence filed a Confidential List of Evidence in the record of the Case ("filing of 1 October 2009"), in which the Defence stated their intention to call one *viva voce* witness to give evidence, in public session, at confirmation.⁵ The name of this person appeared in the Confidential Annex of the filing to be that of the Team Leader for Investigation in *Prosecutor v. Bahar Idriss Abu Garda*.⁶
5. On 2 October 2009, the PTC issued the decision, *inter alia*, requesting the Defence to submit, no later than by 5 October 2009, written observations on possible reclassification of Annexure A of 22 September 2009 Filing, ICC-02/05-02/09-113-Conf-Exp-AnxA, as "confidential"⁷
6. On 2 October 2009, the Presiding Judge issued a "Decision Distributing the Proposed Schedule for the Confirmation Hearing", in which she invited "*the Prosecution, the Defence, the Legal Representatives of the Victims and the Registrar to file by Wednesday 7 October 2009 their observations on the proposed schedule for the confirmation hearing*" that was attached to the decision as Annex I.⁸ In the same decision, the Prosecution was invited to file, by Wednesday 7 October 2009, the list of those issues on jurisdiction, admissibility or concerning the proper

⁴ ICC-02/05-02/09-114

⁵ ICC-02/05-02/09-127, para. 4(a)

⁶ ICC-02/05-02/09-127-Conf-Anx

⁷ ICC-02/05-02/09-128

⁸ ICC-02/05-02/09-129 and Annex I.

conduct of the proceedings leading to the confirmation hearing, if any, that it intends to raise pursuant to Rule 122(2) and (3) of the Rules.

7. On 5 October 2009, the Defence filed its confidential Observations on reclassification (“filing of 5 October 2009”), in which the Defence requested Annexure A of 22 September 2009 Filing to remain *ex parte* until the end of the Confirmation Hearing at which time it could then be reclassified as “Public”.⁹ The Defence argued that disclosure of the contents of the Annex to the Prosecution would adversely affect the ongoing investigations of the Defence and its preparation for the confirmation proceedings.

II. The Prosecution’s observations on the proposed schedule for the confirmation hearing

8. The Prosecution notes that the schedule for the confirmation hearing proposed by the Presiding Judge is consistent with this Chamber’s established practice.¹⁰ In particular, the right accorded to participating victims to hold opening and closing statements is in line with this Chamber’s earlier jurisprudence as well as with Rule 89(1) of the Rules.¹¹
9. In respect of the time allocated for the examination of witnesses, the Prosecution notes that two hours have been foreseen for the examination-in-chief of each witness in accordance with the submissions presented by the Prosecution at the status conference of 23 September 2009. The Prosecution would like to reiterate its commitment to streamlining its examination-in-chief in the best possible manner to

⁹ ICC-02/05-02/09-135-Conf

¹⁰ ICC-01/04-01/07-547-Anx1

¹¹ ICC-01/04-01/06-462-tEN, see also ICC-02/05-02/09-136, at para 19.

comply with the allocated time and to assist the Chamber in safeguarding the efficiency of the proceedings.¹²

10. The Prosecution agrees with the proposed schedule reserving three time-slots for evidence to be presented by the Prosecution on some thematic issues.
11. In conclusion, the Prosecution endorses the schedule proposed for the confirmation hearing.

III. Prosecution's Observations on jurisdiction and admissibility

12. As regards the issues on jurisdiction and admissibility the Prosecution submits that it does not intend to raise any of these issues. Nonetheless, the Prosecution reserves the right to respond to issues raised by the Defence in relation to said topics.

IV. The Prosecution's Observations on the Proper Conduct of the confirmation hearing

Prosecution's Observations on non-disclosure

13. The Prosecution submits that the Rome Statute contemplates for the purpose of the confirmation hearing a disclosure mechanism involving both parties in the proceedings. In particular, as regards the disclosure obligations of the Defence, Rule 78 of the Rules of Procedure and Evidence provides that the Defence shall permit

¹² See Transcript ICC-02/05-02/09-T-11-ENG of 23 September 2009, page 15 line 9 to line 19.

MR. FAAL: (...) I just thought perhaps that there is an issue the Prosecution may need to clarify with regards to the amount of time the Prosecution would spend with its witnesses on the stand for the purposes of in-chief examination. We are hoping that half-a-day in this case two hours would be enough for the Prosecution, but I just want to leave in that caveat that there is a possibility, but our expectation and our hope is that two hours would be enough. Thank you.

PRESIDING JUDGE STEINER: Yes, we need to work within a margin of flexibility, mainly because of the interpretation problems, so everyone has to speak very, very slowly during these hearings. Then that is why we have to have this margin of flexibility, but I thank you very much for the clarification.

the Prosecutor to inspect any documents in the possession or control of the Defence, which are intended for use by the Defence for the purpose of the confirmation hearing.

14. The Single Judge emphasized in his “Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties” of 30 May 2009 that *“the principles related to the disclosure apply mutatis mutandis and if not otherwise provided, to both parties, albeit bearing in mind that (i) it is the Prosecutor who bears the burden of proof, and (ii) the Defence is free to decide whether or not to present evidence at the confirmation hearing.”*¹³ The Decision further reads: *“Therefore the following material shall be subject to disclosure: (v) any evidence in possession or control of the Defence which is intended for use by it for the purposes of the confirmation hearing and is subject to inspection under rule 78 of the Rules.”*¹⁴
15. The Prosecution notes that as specified by the Defence in its filing of 5 October 2009, the subject of the *voir dire* was the Team Leader for the investigations in this case, whom the Defence intends to call as a *viva voce* witness to give evidence, in public session, at the confirmation hearing. The Prosecution understands that reliance on the documentary evidence subject of the *voir dire*, as specified in the Annexure A of 22 September 2009 Filing, would be indispensable to the Defence conducting its examination-in-chief of the Team Leader, should he appear before the Court as a *viva voce* witness.
16. In its filing of 1 October 2009, the Defence notified the Prosecution that it could inspect any books, documents and any other tangible objects in the possession or

¹³ ICC-02/05-02/09-18, para. 7.

¹⁴ ICC-02/05-02/09-18, para. 8.

control of the Defence, which are intended for use by the Defence for the purpose of the confirmation hearing at a location and time as agreed by the parties. However, in its filing of 5 October 2009, the Defence effectively excluded the documentary evidence subject of the *voir dire*, as specified in the Annexure A of 22 September 2009 Filing, from the material it had previously committed to allowing the Prosecution to inspect.

17. The Prosecution submits that the documentary evidence subject of the *voir dire*, as specified in Annexure A of 22 September 2009 Filing, clearly falls under the disclosure obligations incumbent on the Defence under Rule 78 of the Rules. Therefore, denying Prosecution's access to the document would put the Defence in breach of its obligations deriving from Rule 78 and the Second Decision on Disclosure.

18. The Defence argued that reclassification of the said document, which implies disclosure of the relevant annexure, would amount to forewarning the Prosecution about the lines of cross-examination. The principles of fairness and the disclosure obligations of the parties, however, place an obligation on the Defence to disclose all the materials it intends to use during the confirmation hearing. The rules provide no exception of the type the Defence is seeking.

Defence's Failure to give notice of alibi

19. On the issue of alibi, the Prosecution recalls that Rule 79 requires the Defence to give notice of alibi. In addition, the Second Decision on Disclosure¹⁵ and the Decision of the Single Judge cited in para. 14 above mandate the Defence to give

¹⁵ ICC-02/05-02/09-35, page 18 ; ICC-02/05-02/09-18, paras 6, 8 (iv)

notice of alibi. The Prosecution notes that the statements of Defence witnesses seem to establish some form of alibi, though the Defence has not yet given any formal notice thereof to the Prosecution.

20. The Prosecution notes that the failure to give formal notice of alibi as required by Rule 79 may impact on the admissibility of any evidence obtained by the Prosecution after the deadline imposed by the Chamber for the disclosure of its evidence. As the statements of the witnesses which seem to establish some form of alibi have been received only on 6th October 2009, the Prosecution can only commence relevant investigations now.
21. In any event, during the hearing on the observations of the parties on the matters concerning the proper conduct of the case the Prosecution will raise the issue whether the Defence intends to raise an alibi defence, and also will argue that if the Defence does so that the Prosecution should be allowed to submit evidence on that defence, even though such evidence will be submitted out of time.

Prosecution's Observations on calling an ICC staff member as a Defence witness

22. It is a rare situation when any Prosecution office allows its lawyers or agents to testify. If a defendant seeks to call an agent or a prosecutor, the reason and scope has to be clear from the outset.
23. The Defence must first seek the leave of the Chamber to call a member of staff as a witness. In so doing, the Defence must demonstrate a reasonable basis for its belief that the prospective witness is likely to give information that will be relevant to identified issues in the forthcoming confirmation hearing. The Prosecution notes that the Defence did not make an application for leave or provide justification or

explanation as to the substance or relevance of the person's *viva voce* testimony. In the absence of the Defence taking such critical prior steps, the Prosecution will be deprived of the possibility to respond to such submissions in order to enable the Chamber to evaluate and make an informed conclusion on the relevance of the testimony of the prospective witness and the list of issues the Defence intends to address during the examination-in-chief.

24. Furthermore, a refusal of the Defence to inform the prospective witness prior to the confirmation hearing of the issues it intends to address would raise difficulty. If the Defence intends to question him regarding his actions, he should be able to consult his notes or retrieve and review numerous documents and other material from the Court system. If not given advance notice, he may have to interrupt the proceedings to review the materials, which would adversely affect the efficiency and proper conduct of the hearing.



Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of October 2009
At The Hague, The Netherlands