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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. BAHAR IDRIS ABU GARDA***

Public Document

Defence Response to '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: The Defence

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

The Office of the Prosecutor

Mr Lu s Moreno Ocampo

Mr Essa Faal

Counsel for the Defence

Karim A. A. Khan

Andrew J. Burrow

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Preliminary issue: lateness of Prosecution filing

1. On 2 October 2009, the learned Single Judge issued a “Decision Distributing the Proposed Schedule for the Confirmation Hearing” in which the Single Judge invited the Defence and the Prosecution “to file by Wednesday 7 October 2009 the list of those issues on jurisdiction, admissibility or concerning the proper conduct of the proceedings leading to the confirmation hearing, if any, that the Prosecution and the Defence intend to raise pursuant to rule 111(2) and (3) of the Rules.”¹
2. Regulation 33(2) of the Regulations of the Court provides that “Documents shall be filed with the Registry between 9am and 4pm The Hague time...”
3. As a preliminary matter, the Defence notes that the Prosecution’s Observations² were filed out of time and were accorded a registration date by the Registry of 8 October 2009.
4. The Defence is not aware of any Prosecution application under Regulation 35(1) for an extension of the time limit in relation to the Observations purportedly filed. Certainly, neither the Prosecution Observations nor any registry document accompanying the Prosecution filing provide any evidence that such extension of time was sought by the Prosecution, never mind that such extension was granted. Indeed, the Observations do not even acknowledge the fact that they were filed late. No leave to file out of time accompanied the late filing by the Prosecutor.
5. The Observations provide no explanation for the lateness, let alone demonstrate “good cause” necessary for an extension of time under Regulation 35(2).

¹ ICC-02/05-02/09-129, p. 4

² 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, ICC-02/05-02/09-145 (the “Observations”).

6. Regulation 35(2) additionally provides that once a time limit for filing has lapsed, “an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.” Again, no such reasons have been provided by the Prosecution.
7. Taking into consideration all the resources at the disposal of the Prosecution, it surprises the Defence that the Prosecutor was unable to file its relatively simple observations within the time limits imposed.
8. The Prosecution’s Observations were clearly filed out of time. Given the absence of any “good cause” for this apparent tardiness, given the Prosecution’s failure to even seek leave to file late, given the proximity of the confirmation hearing subject of the Prosecution’s filing, and given the myriad of tasks that a small Defence team composed of only two qualified lawyers are struggling to respond to, the Defence is compelled to request that the out of time submission be disregarded and /or be otherwise struck from the record of the Case.
9. In the event the learned Single Judge decides, notwithstanding the above preliminary objection, to consider the Prosecution Observations, the Defence seeks to respond in accordance with Regulation 24(1) of the Regulations of the Court. The Defence respectfully submits that this response is necessitated because the Prosecution raised issues in its Observations that were not, or not fully, anticipated.

‘Prosecution’s Observations on non-disclosure’

10. Under the guise of providing observations on the “Proper Conduct of the confirmation hearing” (presumably “Proper Conduct of the proceedings prior to the confirmation hearing” is meant), the Prosecution effectively questions the good faith of the Defence by suggesting that it has withheld, or seeks to withhold, material in its possession that is subject to disclosure and Rule 78 inspection.

11. Whilst the Defence had hoped such reassurance would be unnecessary, it emphasises that it has properly disclosed *all* material in its possession which it intends relying on at confirmation, in accordance with its obligations under the Statute and Rules.³ Whilst we are at an early stage of proceedings in this case, the record of this Defence team demonstrates that it has never engaged in “sharp practice”. Nor will it. That this is so is demonstrated, in part, by the fact that it is the *Defence* that gave the *Prosecution* notice of its application for an *ex parte* hearing filed on 22 September 2009.⁴ Conversely, this best practice has not, hitherto been adopted by the Office of the Prosecutor and the Defence has been kept informed of Prosecution applications only by dint of the alertness and independent scrutiny of the Bench.⁵
12. If the Defence was in possession of material that ordinarily would be subject to disclosure, but which it felt it could not for some reason disclose, it would inform the Prosecution and the Pre-Trial Chamber of this. The Defence hopes that this again provides some reassurance to the Prosecutor.
13. The Prosecution states that it “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...”⁶

³ Rules 78, 79 and 121(6) of the Rules of Procedure set out the disclosure obligations of the defence during the Pre-confirmation stage.

⁴ ICC-02/05-02/09-113-Conf

⁵ See e.g., Decision Ordering the Prosecution to file in the Record of the Case a Public Redacted Version or a Public Note of the Requests for Redactions and of future *ex parte* filings, ICC-02/05-02/09-39 (30 July 2009), in which the Single Judge identified the following *ex parte* filings by the Prosecution: ICC-02/05-02/09-33-US-Exp, ICC-02/05-02/09-34-US-Exp, ICC-02/05-02/09-36-US-Exp; Decision reclassifying the “Prosecution’s First Report on Status of the Procedures initiated under Articles 54(3) (e), 73 and 93 in relation to items identified as Potentially Exonerating”, ICC-02/05-02/09-47 (11 August 2009), in which the Single Judge reclassified the Prosecution’s report as public and noted that “the order to the Prosecutor to file a public redacted version or a public notice of *ex parte* filings is only applicable whenever substantive reasons make it necessary to deviate from the paramount principle of the publicity of the proceedings”; Decision on the Prosecutor’s requests for extension of time-limit, ICC-02/05-02/09-98 (11 September 2009), in which the Single Judge held that the Prosecution’s request “does not contain any information in respect of which there is a need for confidentiality vis-à-vis the Defence and that, accordingly, such request shall be reclassified as “confidential” pursuant to regulation 23bis(3) of the Regulations.”

⁶ Prosecution Observations, para. 15. The Defence has nowhere publicly identified the intended subject of the *voir dire* and specifically filed its recent “Observations on Reclassification” as confidential to preserve the subject’s identity. The Defence notes the Prosecution has chosen not to do so.

14. Unfortunately, the Prosecution is labouring under a serious misapprehension.

The Defence has never stated that Annexure A contained, consisted of or constituted, "documentary evidence". The Prosecution does not define what it means by "documentary evidence subject of the *voir dire*", and relies only on supposition and conjecture for the assertion it makes. The assumption made by the Prosecution is without merit. For the sake of clarity, there is no document or material upon which the Defence will seek to rely at confirmation that is not in the possession of the Prosecution.

15. The nature of Annexure A is clearly defined in the Urgent Defence

Application for an *Ex Parte* Hearing with notice dated 22 September 2009.⁷ By no stretch of the imagination, can it be considered subject to disclosure or inspection under Rule 78. The Defence is cognisant that the Pre-Trial Chamber will be the ultimate arbiter of whether that ex parte annexure retains its confidential ex parte status. On that issue, the Defence respectfully recalls its submissions on this issue.⁸

16. For the avoidance of doubt, as the OTP Team Leader of Investigations in the Abu Garda case is "a witness identified with an adverse party,"⁹ the Defence is entitled to examine the witness with the use of leading questions.

‘Defence’s failure to give notice of alibi’

17. The Prosecution notes that the Defence has not notified the Prosecution of its intent to raise the existence of an alibi. That observation is correct. The Prosecution additionally notes that "the statements of Defence witnesses seem to establish some form of alibi."¹⁰

18. At this stage of proceedings, the Defence is not asserting the existence of an alibi. It is just too early, and the Defence has had insufficient time to investigate and prepare its case, to formally raise alibi at this juncture. Had

⁷ ICC-02/05-02/09-113-Conf

⁸ Observations on reclassification, ICC-02/05-02/09-135-Conf

⁹ Rule 611(c), Federal Rules of Evidence

¹⁰ Prosecution Observations, para. 19.

the Prosecution supplied its disclosure in a more timely fashion it may be that the position would have been different.¹¹ Be that as it may, no alibi notice was filed as no alibi is raised at the confirmation stage.

19. The Prosecution has referred to no rule or authority that requires the Defence to summarize, classify, interpret or limit in any way the content or meaning of the statements submitted by it. The Defence declines to do so. It is apparent from the face of the statements, however, that they perhaps place in some doubt aspects of the Prosecution narrative. The purpose for which these statements are tendered may, more productively, be subject to comment by the Prosecution at the end of the confirmation hearing, rather than speculation before it.

20. The Defence denies that there has been a “failure to give formal notice of alibi as required by Rule 79” as suggested in paragraph 20 of the Prosecution’s Observations. The issue of the admissibility of any evidence the Prosecution may obtain at this stage does therefore not arise, and the Prosecution ought not to be allowed to submit further evidence for the purposes of confirmation.

‘Prosecution’s Observations on calling of an ICC staff member as a Defence witness’

21. The Prosecution begins its Observations under this head by asserting that 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.”¹² The Prosecution offers no authority in support of this remarkably broad proposition.

22. With respect, the Defence must respectfully recall, that it is not a matter for the Prosecution to decide whether it will allow a staff member to testify. The

¹¹ See ICC-02/05-02/09-T-8-ENG, pg. 6-8

¹² Prosecution Observations, para. 22.

Prosecutor, notwithstanding his elevated office, is subject to all orders of the Court.

23. Secondly, the Prosecution attempts to obfuscate the issue by using deliberately vague or misleading terms such as “member of staff”, “its lawyers or agents”, or “agent or prosecutor”.
24. The Defence is not seeking to call opposing counsel as a witness. The Defence recognises that courts, for good reason, are loath to call counsel in proceedings before it as witnesses in the same proceedings. Neither is the Defence seeking to call a neutral member of staff, such as an interpreter, or a member of the Registry. Such persons may well be protected by their neutral status and the party seeking to call them may have a greater persuasive burden to show relevance.
25. The Defence submits, however, that there is a distinct and fundamental difference between such cases and the present. The Defence wish to call and question the officer in charge of the case. This should be uncontroversial and is common in many systems. As the team leader for investigations he is an obviously relevant witness.¹³ He took his job knowing that he may well have to testify in court proceedings as to his official functions as investigator. Being called to testify is part of the job of a policeman or investigator. Any submission by the Prosecutor that some kind of heightened protection or testimonial privilege attaches to such a person would be utterly bereft of merit. In national systems, this would be the investigating officer or policeman, the cross-examination of whom in criminal trials by the defence is unexceptional.

¹³ The Defence notes that the duties listed in the vacancy announcement for the position of “Senior Investigator (P4)” at the Investigation Division, Office of the Prosecutor, ICC, requires the Senior Investigator to: “Lead sensitive and complex interviews which require specialist skills and considerable experience such as interview of suspects, insiders, important overview witnesses and other sensitive witnesses” as well as “lead and manage sub-teams comprising of a number of investigators and ensure effective and proper management of projects that may be assigned to the sub-teams.” (<http://www.icc-cpi.int/NR/exeres/F47ADE39-F863-492C-89AB-A82485B9871F.htm>). The Senior Investigator is responsible to and must carry out the tasks and instructions of the *Team Leader*.

26. In the United States, for instance, the classic exposition under Federal law of the right of an accused to cross-examine a government agent as an adverse party, is *United States of America v. Freeman*.¹⁴ The Court of Appeals for the Second Circuit accepted with no great difficulty and without comment, the accused's right to call three government narcotics agents to support his defence that he had been framed.¹⁵
27. In the United Kingdom, there is no doubt as to the compellability of police officers. Their cross-examination in criminal trials on particular matters, however, is an issue regulated by statute.¹⁶
28. In the *Ad Hoc* and Special International Criminal Tribunals and Courts, furthermore, prosecution investigators are competent and compellable.
29. In the *Sesay* case, the Special Court for Sierra Leone, for instance, allowed for a *voir dire* of a prosecution investigator to discern how certain pieces of evidence were obtained in the course of determining their admissibility.¹⁷ The ICTR, in the *Zigiranyirazo* case, similarly granted the defence the opportunity to cross-examine prosecution investigators to establish how certain pieces of evidence were obtained.¹⁸
30. The Prosecution has provided no reason why the intended witness is not competent and compellable, and the Defence submits that no such reason exists. Police officers are not cloaked in any protection which renders them impervious to examination in criminal trials upon entering the portals of the OTP. The Prosecution, furthermore, suggests no grounds for believing that such protection accrues by the mere fact of employment by the OTP.

¹⁴ 302 F.2d 347.

¹⁵ At 350.

¹⁶ *Archbold : Criminal Pleading, Evidence and Practice*, 2006, at 8-140, p. 1246. Most competent witnesses are also compellable, the only notable exception being spouses and civil partners.

¹⁷ *Prosecutor v. Issa Hassan Sesay*, SCSL, Judgment 2 March 2009, p. 777.

¹⁸ *Prosecutor v. Zigiranyirazo*, No. ICTR-2001-73-T, Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae 29 November 2006.

31. The Prosecution claims, again without citing any authority, that the Defence “must first seek the leave of the Chamber to call a member of staff as a witness.” There is no provision in the Statute or the Rules of Procedure and Evidence requiring such a step. The Defence is not aware that the leave of the Pre-Trial Chamber, or of any other Chamber of the Court, has been sought for the calling of any other witness. The Defence resist any attempt by the Prosecution that would seek to attach a special status to its investigators or create a hurdle in their being called.
32. The Defence does not doubt the Pre-Trial Chamber’s power in this regard, however. Article 57(3)(b) of the Rome Statute makes it clear that the Pre-Trial Chamber may “issue such orders...as may be necessary to assist the person [who has appeared on a summons] in the preparation of his or her defence”. In the event the relevant person refused to appear as a witness, or in the event the Prosecution purports to refuse to allow the required investigator to appear as a witness, the Defence will seek the assistance of the Pre-trial Chamber under this Rule.
33. To date, however, there has been no such refusal, and the Defence cannot imagine why there would be such a refusal. The Defence notes, in this regard, that the grievances detailed by the Prosecution relate mainly to the *manner in which* the person concerned is called, rather than to the *fact* of him being called.
34. The Prosecution complains that it has been deprived of the opportunity to respond to submissions on the relevance of any evidence the prospective witness is likely to provide. With respect, the time for submissions about, and assessment of, the relevance of evidence is at confirmation. Rule 64(1) is clear: “An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber...” Indeed, it cannot be otherwise, for that would imply the need to assess all evidence *before* it has been submitted to the Court, clearly not something anticipated in the Statute.

35. The Prosecution complains, furthermore, that proceedings may have to be disrupted to accommodate the witness in accessing his notes and other documents. The Defence notes (a) that the Prosecution seems to have been able to divine exactly what the witness will be examined on and (b) has no objection, and indeed was going to suggest that, the witness concerned have full access to his case file and the Court system.
36. Furthermore, the Judges of the Pre-Trial Chamber have been appraised of the relevance of the information to be elicited from the proposed witness *ex parte*.¹⁹
37. The relevance and probity of any questions that are put to the intended witness will be scrutinised by the Pre-Trial Chamber and, no doubt, by the Prosecution. The Prosecution may object to, and the Pre-Trial Chamber will disallow, any line of questioning that is irrelevant, unduly repetitious or without probative value. There can, therefore, be no complaint concerning prejudice to the Prosecution or unfairness to the witness.
38. For the reasons detailed above, the Defence respectfully requests the learned Single Judge, to the extent the Single Judge considers them at all, to treat the Prosecution Observations with the necessary circumspection and, if necessary, to deny any Prosecution applications formulated under these Observations.

¹⁹ The Defence has noted, while finalising this Response, the “Decision requesting the Defence to provide information on prospective witness”, rendered by Single Judge Tarfusser on 8 October 2009. The Defence has not had sufficient opportunity to consider this Decision in the preparation of this Response, and will respond to it by the time limit indicated.

Respectfully submitted,



Mr. Karim A. A. Khan

Counsel for Bahar Idriss Abu Garda

Dated this 9th Day of October 2009

At The Hague, The Netherlands