

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05-02/09

Date: 30 May 2009

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR V. BAHAR IDRIS ABU GARDA

Public

Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor

Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Mr Karim A.A. Khan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, Judge Cuno Tarfusser, Single Judge responsible for carrying out the functions of Pre-Trial Chamber I in relation to the proceedings of the situation in Darfur, Sudan and any related cases emanating therefrom, including the case of *The Prosecutor vs. Bahar Idriss Abu Garda* (the “Case”),¹ at the International Criminal Court;

HEREBY RENDER THIS DECISION

1. The Single Judge recalls that at the hearing of first appearance of Bahar Idriss Abu Garda, held on 18 May 2009, the commencement of the confirmation of charges hearing was scheduled for Monday 12 October 2009 and that, in view of the confirmation of the charges hearing, the Prosecutor and the Defence shall disclose to each other a certain number of documents, according to the prescriptions contained in the statutory instruments (Articles 54 (1)(a) and (3)(e), 61(3), 67(2), 68(1) of the Statute of the Court and rules 76 to 83 and 121 of the Rules of Procedure and Evidence).
2. According to rule 121(2)(b) of the Rules, status conferences shall be held in order to ensure that disclosure takes place under satisfactory conditions, that is to say in a manner which is transparent, efficient and expeditious. Accordingly, it is necessary to schedule a hearing (the “Disclosure Hearing”) in order to discuss all matters which might be relevant in connection with the disclosure which has to take place between the parties in view of the confirmation hearing and, in particular, its scope, timing and modalities. The Disclosure Hearing shall be held in closed session and

¹ ICC-02/05-210.

attended by the Prosecutor, the Counsel for the Defence of Bahar Idriss Abu Garda (the "Defence") and the Registrar.

3. In order to facilitate the discussion at the Disclosure Hearing, the Single Judge sets out a number of principles relating to disclosure, in particular as regards (i) its scope; (ii) its modalities and (iii) its time-frame. In so doing, the Single Judge is guided by two paramount principles: (i) to strictly adhere to the relevant statutory framework; and (ii) to ensure that the disclosure be kept as simple as possible in order for it to take place in an efficient and expeditious manner. On all of the principles set forth in this decision, the participants are invited to comment at the Disclosure Hearing.

Scope of the disclosure

4. According to article 61(3) of the Statute and rule 121(3)(c) of the Rules, the Prosecutor has the obligation to disclose to the Defence any material on which he intends to rely at the confirmation hearing. Pursuant to article 67(2) of the Statute, he is equally under an obligation to disclose all exculpatory evidence gathered by him in compliance with article 54(1)(a) of the Statute.
5. The Single Judge notes that rule 77 of the Rules, referring to inspection by the Defence of material in possession or control of the Prosecutor, requires the Prosecutor to provide to the Defence any copies requested during the inspection, as long as the requested material (i) is relevant to the preparation of the defence, (ii) is intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing, or (iii) was obtained from or belonged to the person charged.
6. According to rule 121(6) of the Rules, if the Defence intends to present evidence at the confirmation hearing, pursuant to article 61(6)(c) of the

Statute, it shall provide a list of such evidence to the Pre-Trial Chamber no later than 15 days before the day of the confirmation hearing. Rule 79 of the Rules establishes that, if the defence intends to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, it shall notify the Prosecutor of such intent. Furthermore, pursuant to rule 78 of the Rules, the Prosecutor has the right to inspect any material which the defence intends to use as evidence at the confirmation hearing. The defence has an obligation to provide the Prosecutor with copies of such material, in case the Prosecutor so requests during the inspection.

7. The disclosure process as a whole is aimed at preparing the confirmation hearing and ultimately making it possible for the Pre-Trial Chamber to take an informed decision, following its outcome. Accordingly, it is the view of the Single Judge 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.
8. Therefore the following material shall be subject to disclosure:
 - (i) any incriminating evidence on which the Prosecutor intends to rely at the confirmation hearing;
 - (ii) any exculpatory evidence, i.e. evidence in the Prosecutor's possession or control which he believes to show or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence, pursuant to article 67(2) of the Statute;

- (iii) any evidence in the possession or control of the Prosecutor, which is material to the preparation of the defence or was obtained from or belonged to the person charged and which is subject to inspection under rule 77 of the Rules;
- (iv) any evidence the defence may present pursuant to rule 79 of the Rules, with a view to raising the existence of an alibi or of a ground for excluding criminal responsibility;
- (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.

The modalities of disclosure

9. The Single Judge highlights that his role is to ensure that disclosure of evidence between the parties takes place "*under satisfactory conditions*". Accordingly, the Single Judge shall be informed by way of communication of all the evidence disclosed between the parties, as provided for by rule 121(2)(c) of the Rules.
10. Furthermore, the Single Judge observes that, in order for the Pre-Trial Chamber to conduct the assessment of the case before it under article 61(7) of the Statute, it should have access to all the evidence exchanged between the Prosecutor and the Defence, regardless of whether the parties intend to rely on it for the purposes of the confirmation hearing. As a consequence, it is necessary that the Pre-Trial Chamber have access to all the exculpatory material gathered by the Prosecutor.
11. The Single Judge also observes that, with a view to ensuring the proper conduct of the disclosure between the parties, both the disclosure of

evidence and the communication of that evidence to the Chamber shall be conducted through the Registrar.

12. In particular, the material disclosed between the parties, according to the system that the Single Judge will establish, shall be filed with the Registrar. Mindful that the Registrar might need a reasonable time for the registration in the record of the case of all the evidence disclosed, the Single Judge invites the Registrar to indicate at the Disclosure Hearing the technical modalities which would be most suitable for ensuring the efficiency and expeditiousness of the disclosure proceeding.

The time-frame for the disclosure

13. As regards the time-frame for the disclosure, the relevant provision is rule 121(3) of the Rules, stipulating that *“the Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of confirmation hearing a detailed description of the charges, together with a list of the evidence which he or she intends to present at the hearing”*. This provision clarifies that the disclosure process shall be completed 30 days before the date of the hearing at the latest. Accordingly, Saturday 12 September 2009 must be considered as the final date for disclosure in the Case.
14. The deadline established under rule 121(3) of the Rules must however be read in a manner which is compatible with the right of Bahar Idriss Abu Garda to have adequate time for a meaningful preparation of his defence pursuant to article 67(1)(b) of the Statute. Accordingly, if, on the one hand, the final date for disclosure is the one established in rule 121(3) of the Rules – i.e. Saturday 12 September 2009 – on the other hand, the Single Judge shall set an articulate calendar for disclosure, taking due consideration of the right of the Defence to have adequate time for the preparation in view of the

confirmation hearing. This may entail that disclosure of certain materials shall happen in advance of such date.

15. In order for the Single Judge to establish an adequate calendar, at the Disclosure Hearing the Prosecutor is requested to provide information on the following:
 - i. an estimate of the overall amount of documents he intends to use as evidence at the confirmation hearing;
 - ii. the number of witnesses, if any, that he intends to call to testify at the confirmation hearing and the number of witness statements he intends to use at the confirmation hearing pursuant to rule 76 of the Rules;
 - iii. an indication as to whether he intends to request that certain documents be disclosed to the defence in redacted form and, in the affirmative, an estimate of the amount of such documents;
 - iv. an indication as to whether he intends to request that protective measures be put in place in order to protect witnesses, victims or other persons at risk, prior to disclosure of the names of witnesses or of certain documents or otherwise, including any relevant information on the steps he is taking and/or he intends to take in this respect which might be available at this stage;
 - v. an indication as to whether he intends to rely on documents or information obtained on the condition of confidentiality under article 54(3)(e) of the Statute.
16. As regards the inspection to be conducted by the parties of the material in possess or in control of the other party pursuant to rules 77 and 78 of the Rules, both the Prosecutor and the Defense are invited to submit their views in respect of its envisaged scope and timing.

FOR THESE REASONS**DECIDE**

to convene a hearing to be held in closed session and to be attended by the Prosecutor, the Defence and the Registrar on Tuesday 9 June 2009, at 14 hours;


DECIDE

that, at the said hearing, all matters which might be relevant in connection with the disclosure between the Prosecutor and the Defence for the purposes of the confirmation hearing as highlighted in the present decision shall be discussed.

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

Dated this Saturday, 30 May 2009

At The Hague, The Netherlands



Judge Cuno Tarfusser

Single Judge