

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 August 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN DARFUR
IN THE CASE THE PROSECUTOR V. BAHAR IDRIS ABU GARDA**

URGENT

**Confidential *Ex parte* available only to the Prosecutor and the Victims and
Witnesses Unit**

**Decision on the Prosecutor's Application for Extension of Time and authorisation
to submit summaries in lieu of transcript redactions**

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the 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
Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, Judge Sylvia Steiner, judge at the International Criminal Court (the “Court”);

NOTING the “Decision on the Temporary Replacement of the Single Judge for the period of 22 July to 17 August 2009”, whereby Judge Sylvia Steiner was designated Single Judge for the situation in Darfur, Sudan and any case emanating therefrom, including the case of the Prosecutor v. Bahar Idriss Abu Garda (the “Case”), for the period of 22 July to 17 August 2009;¹

NOTING the “Prosecutions Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0416, DAR-OTP-WWWW-0418, DAR-OTP-WWWW-0419 and DAR-OTP-WWWW-0421 Pursuant to Rules 81(2) and 81(4)” dated 10 July 2009;² the “Prosecutions Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0307, and DAR-OTP-WWWW-0314 Pursuant to Rules 81(2) and 81(4)” dated 15 July 2009;³ and the “Prosecutions Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0326, DAR-OTP-WWWW-0355, DAR-OTP-WWWW-0417 and DAR-OTP-WWWW-0420 Pursuant to Rules 81(2) and 81(4)” dated 17 July 2009⁴ (collectively, the “Prosecutor’s Requests for Redactions”), filed *under seal, ex parte only available to the Prosecution and the Victims and Witnesses Unit*;

NOTING the hearing held in closed session *ex parte* Prosecutor and the Victims and Witnesses Unit on 6 August 2009, in which the Single Judge addressed a number of issues concerning the Prosecutor’s Requests for Redactions and ordered the Prosecutor to resubmit, by 4pm on 11 August 2009, amended proposals for redactions, bearing in mind the observations made by the Single Judge during the Hearing;

¹ ICC-02/05-02/09-37.

² ICC-02/05-02/09-33-US-Exp and ICC-02/05-02/09-33-US-Exp-AnxsA, B, C & D.

³ ICC-02/05-02/09-34-US-Exp and ICC-02/05-02/09-34-US-Exp-AnxsA, B & C.

⁴ ICC-02/05-02/09-36-US-Exp and ICC-02/05-02/09-36-US-Exp-AnxsA, B, C, D, A1 & C1.

NOTING the "Prosecution's Application for Extension of Time and authorisation to submit summaries in lieu of transcript redactions with respect to witnesses DAR-OTPWWWW-0305, DAR-OTP-WWWWW-0307 and DAR-OTP-WWWWW-0314" (the "Prosecutor's Application"), requesting for authorization to rely on summaries *in lieu* of transcripts as well as for an extension of time to Monday 17 August 2009 to submit the summaries for witnesses DAR-OTP-WWWWW-0305, DAR-OTP-WWWWW-0307 and DAR-OTP-WWWWW-0314;⁵

NOTING regulation 35(2) of the Regulations of the Court (the "Regulations"), providing that "after the lapse of a time limit, 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";

CONSIDERING that, at the time of the filing of Prosecutor's Application, the deadline granted by the Single Judge during the Hearing was six minutes short of expiring, this making it impossible for the Single Judge to decide and for the Prosecutor to comply with the time limit originally granted, if the Single Judge were to decide against the extension of the deadline;

CONSIDERING that the Prosecutor's fails to demonstrate how his failure to comply with the prescribed time limit was due to reasons outside his control;

CONSIDERING that, accordingly, that the Prosecutor's Application could be considered as inadmissible and as such rejected in limine;

CONSIDERING, however, that rejecting the Prosecutor's Application on the basis of its inadmissibility might ultimately result in prejudicing the Defence, by possibly preventing it from accessing material of a potentially exculpatory nature;

⁵ ICC-02/05-02/09-48-Conf-Exp.

CONSIDERING that, accordingly, the Single Judge will entertain the Prosecution's Application and decide upon it as if it had been timely filed;

NOTING article 61(5), second sentence, of the Statute of the Court (the "Statute"), providing that at the confirmation hearing the Prosecutor "may rely on documentary or summary evidence";

NOTING that the use of summary evidence for the purpose of the confirmation hearing pursuant to article 61(5) has been already addressed by the Appeals Chamber, in particular by stating that "the use of summaries by the Prosecutor at the confirmation hearing ... is not subject to any explicit condition" and that, more specifically, "neither the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre-Trial Chamber prior to their presentation at the confirmation hearing";⁶

CONSIDERING that, accordingly, there was no need for the Prosecutor to seek the authorisation of the Chamber for the purpose of using summaries of the relevant witnesses' transcripts;

CONSIDERING that the only reason why the Prosecutor may need an intervention of the Chamber for the purpose of using summaries would be his desire not to disclose to the Defence the identity of those witnesses to whom the summaries refer;

CONSIDERING that, accordingly, the Chamber assumes that the extension of time limit sought by the Prosecutor has the purpose to allow him to request authorisation to expunge information from the summaries prior to disclosing them to the Defence, although the Prosecutor's Application actually fails to state so;

⁶ ICC-01/04-01/06-773, paragraph 43.

CONSIDERING that, in light of the above, the subject matter of the Prosecutor's Application consists of the (i) notification to the Chamber of his decision no longer to rely on the transcripts for witnesses DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0314, and (ii) the request for an extension of the time limit for submitting requests for authorisation of non-disclosure of information contained in the summaries to be used *in lieu* of the said transcripts;

NOTING, finally, regulation 23(1)(d) of the Regulations, providing that any document filed with the Court shall state, inter alia, "all relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon";

NOTING that the Prosecutor's Application fails to state the legal basis for his requests, including article 61(5) of the Statute, regulation 35 of the Regulations and the relevant precedents of the Chambers of the Court;

CONSIDERING that, at this critical stage of the proceedings, the Chamber is seriously concerned by the Prosecutor's failure to comply with the relevant provisions, due to such compliance being of essence for the purpose of ensuring the fairness and expeditious conduct of the proceedings;

CONSIDERING that, accordingly, the Single Judge cautions the Prosecutor that the Chamber is expecting from him to ensure such compliance for the remaining part of the proceedings;

FOR THESE REASONS

DECIDE to grant the Prosecutor until Monday 17 August at 4 pm to file requests for authorisation of non-disclosure of information contained in the summaries to be used *in lieu* of witnesses' transcripts.

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



Judge Sylvia Steiner
Single Judge

Dated this Tuesday, 11 August 2009

At The Hague, the Netherlands