

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-02/05-02/09
Date: 31 August 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 Document

Decision on the Prosecutor's Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314

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

Mr Essa Faal

Counsel for the Defence

Mr. Karin 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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

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 v. Bahar Idriss Abu Garda*, at the International Criminal Court;

NOTING the “Second Decision on issues relating to disclosure”, whereby Pre-Trial Chamber I, *inter alia*, ordered the Prosecutor “to submit to the Chamber, as soon as practicable and no later than Friday 28 August 2009, any request for redactions under rule 81 of the Rules”;

NOTING the “Prosecutor’s Report on Witnesses’ Security Risk Assessment” dated 4 August 2009 and the “Victims and Witnesses Unit Views and Observations on the Prosecution’s Report on Witnesses’ Security Risk Assessment of 4 August 2009” dated 14 August 2009;

NOTING the “First Decision on the Prosecution’s Requests for Redactions”, issued by the Single Judge on 14 August 2009;

NOTING the “Prosecution’s Notification to the Chamber of the Summaries to be relied upon *in lieu* of the Transcripts of Witnesses DAR-OTP-WWW-0305, DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0314, and Request for Authorization for Non-disclosure in the Summaries of Identities of Witnesses and Members of their Families Contained in the Transcripts, Pursuant to Article 68(5) of the Rome Statute and 81(4) of the Rules of Procedure and Evidence” dated 17 August 2009 and the “Prosecution’s Notification to the Chamber of the Summaries to be relied upon *in lieu* of the Transcripts of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0306 and DAR-OTP-WWWW-0312, and Request for Authorization for Non-disclosure in the Summaries of Identities of Witnesses and Members of their Families Contained in the Transcripts, Pursuant to Article 68(5) of the Rome Statute and

Rule 81(4) of the Rules of Procedure and Evidence” dated 26 August 2009, both filed “confidential *ex parte*, only available to the Prosecution and the Victims and Witnesses Unit”;

NOTING the *ex parte* hearing held in closed session before the Single Judge at the presence of the Prosecutor and the Victims and Witnesses Unit on 26 August 2009, in which issues relating to the Prosecutor’s Requests for Redactions were addressed;

NOTING articles 54, 57(3), 61, 67 and 68 of the Statute of the Court and rules 15, 76, 77, 81 and 121 of the Rules of Procedure and Evidence;

HEREBY RENDER THIS DECISION

1. The Single Judge recalls the “First Decision on the Prosecution’s Requests for Redactions” stating that the main principles which shall be complied with in addressing the Prosecutor’s Requests for Redactions include the following: (i) the Prosecutor has the burden of providing the information which is necessary for the Chamber to conduct the type of analysis required by the Appeals Chamber in its decisions on issues relating to disclosure; and (ii) failure by the Prosecutor to provide a detailed and appropriate justification for each of the redactions requested will result in the unjustified requests being rejected *in limine*.
2. In his Requests, the Prosecutor, *inter alia*, seeks authorisation, pursuant to rule 81(4) of the Rules of procedure and Evidence, for non-disclosure, in the summaries of transcripts of interviews of witnesses annexed to the Prosecutor’s Request for Redactions, of any information contained in the transcripts that could reveal the identity of witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306,

DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314.

3. The Prosecutor submits that “disclosure of the witnesses’ identities and/or personal circumstances and that of members of their family would objectively point put them in jeopardy of being killed, physically harmed or intimidated”.
4. It is worthy pointing out that the overriding principle is that of full disclosure, the authorisation of non-disclosure of information being the exception of this general rule.
5. The Single Judge wishes to clarify that the criteria in respect of non-disclosure of the identity of the witnesses and that of members of their family to the defence are the following:
 - (i) *the existence of a danger caused by disclosure of their identity and, by the same token, the fact that non-disclosure could reduce that danger;*
 - (ii) *the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to protect the witnesses and their family members; and*
 - (iii) *the proportionality of non-disclosure in view of the prejudice caused to the rights of the suspect and a fair and impartial trial.*
6. Consistently with the Appeals Chamber Judgements on issues relating to redactions and the established practice of the Chamber, an explanation of the overall reasons underlying the decisions taken by the Single Judge will be provided in the text of the decision. The analysis of the individual security assessment of each witnesses and a full explanation of the reasons underlying the decisions taken in respect of

each of them will be provided separately in the Annex attached to the present decision, issued *ex parte* and available only to the Prosecutor and the VWU.

- (i) *The existence of a danger caused by disclosure of their identity and, by the same token, the fact that non-disclosure could reduce that danger*

7. As regards the first criterion, the Single Judge wishes to clarify that the danger caused by disclosure of the identity of the witness and that of members of their family must involve an objectively justifiable risk to the safety of the person concerned. The Single Judge will consider whether such an alleged risk of danger arises from disclosing the identity of the witnesses to the Defence of Bahar Idriss Abu Garda, as opposed to disclosing it to the public in general.
8. The Prosecutor submits that “disclosure of the witnesses’ identities and/or personal circumstances and that of members of their family would objectively point put them in jeopardy of being killed, physically harmed or intimidated”. In the view of the Prosecutor, Abu Garda’s supporters or other sympathizers in Darfur “even without any instruction from Abu Garda in this regard, may directly or indirectly carry out retaliatory attacks against these witnesses or members of their families if their identities were revealed”.
9. The Single Judge notes that all the witnesses for whom the Prosecutor is seeking anonymity are *insider witnesses*, as such, “viewed as traitors by members of the group to which they were a part”.
10. The Single Judge is of the view that Abu Garda has no intent to harm witnesses and is not even fully convinced that communicating the names of these witnesses to the Defence of Abu Garda would be

tantamount to disclosing them to the public. However, due, *inter alia*, to the fact that Abu Garda is not currently detained, disclosure of the names of the witnesses to the Defence inevitably raises the possibility that information disclosed even on a limited basis might be revealed more broadly. Therefore, it cannot be ruled out with certainty that a certain leakage of information might actually occur and that such information might get to people close to Abu Garda who could believe that it is in his interest to carry out retaliatory attacks against the witnesses and/or their families, even without any instruction from him.

11. The Single Judge is therefore of the view, considering also the reasons explained in the Annex attached to the present decision, that disclosing the names of the witnesses to the Defence would pose an unjustifiable risk to their safety and/or physical and psychological well-being.

(ii) *The necessity of the non-disclosure, including whether it is the least intrusive measure necessary to protect the witnesses and their family members*

12. Being satisfied of the existence of an actual risk of danger caused by disclosure of the identity of witness to the Defence, the Single Judge shall consider whether the protective measures sought by the Prosecutor are *necessary* and, in particular, whether no protective measure other than anonymity would protect the witnesses' safety, considering, *inter alia*, that, as submitted by the VWU, "a clear distinction should be drawn between those that reside in Sudan/Chad compared to those that now reside 'internationally'" since "the Court's ability to operate effective protective measures in Chad or Sudan is at best extremely limited".

13. The Single Judge notes the submissions made by the Prosecutor and the VWU regarding each witness concerned at the *ex parte* hearing held

before him on 26 August 2009, scheduled, *inter alia*, in order to verify whether alternative measures short of anonymity were available and feasible in the present circumstances. Due to the personal circumstances of the witnesses and/or their current location, as also stated by the VWU, the Single Judge is of the view that the non-disclosing of the witnesses' identity is currently the least intrusive measure necessary to protect the witnesses and their family members.

(iii) *The proportionality of non-disclosure in view of the prejudice caused to the rights of the suspect and a fair and impartial trial*

14. Finally, the Single Judge shall assess the *proportionality* of the measures sought by the Prosecutor in view of the prejudice caused to the rights of the accused and a fair and impartial trial.
15. As regards this last criterion, the Single Judge takes due consideration of the pre-trial nature of proceedings in which the non-disclosure is sought, considering, as held by the Appeals Chamber, that "[a]s such it may be permissible to withhold the disclosure of certain information from the defence prior to confirm the charges that could not be withheld prior to trial."
16. Taking into consideration the safety situation of the witnesses and the overall information provided by the Prosecutor and the VWU at this stage of the proceedings – as assessed in the Annex to the present decision – the Single Judge grants, pursuant to rule 81(4) of the Rules authorization for non-disclosure of the witnesses' identity.
17. The Single Judge notes that the Prosecutor also requested authorisation to redact the signature of Witness DAR-OTP-WWWW-0312, pursuant to rule 81(4), wherever it appears on some photographs included in the

relevant summary of this witness' transcript, as well as of the signature of the OTP investigator, pursuant to rule 81(2).

18. The Single Judge authorises (i) the redaction of the witness' signature on the basis of the anonymity granted to the witness by the present decision and (ii) the redaction of the OTP investigator's signature on the basis of the legal and factual reasoning contained in paragraphs 12-15 of the First Decision on Redactions.

FOR THESE REASONS

DECIDE

to authorise the non-disclosure in the summaries of information in the transcripts relating to the identities of witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314 as well as that of members of their families.

DECIDE

to authorise the redactions of the signatures of witness DAR-OTP-WWWW-0312 and of the OTP investigator contained in the photographs included in the summary of interview transcript of witness DAR-OTP-WWWW-0312.

DECIDE

to authorise the use the use of the numbers DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314, respectively, in reference to the relevant witness for all subsequent proceedings, including during the Confirmation Hearing.

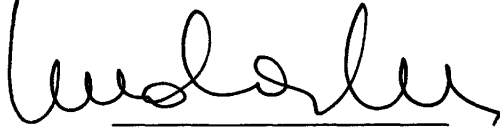
DECIDE

that the Prosecutor shall, by no later than Wednesday, 2 September 2009, make available to the Defence of Bahar Idriss Abu Garda the summaries of transcripts of interview of witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314 in compliance with the prescriptions contained in the Second Decision on Issues relating to Disclosure and in the revised E-court protocol.

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

Dated this Monday, 31 August 2009

At The Hague, The Netherlands

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser

Single Judge