

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

URGENT

Public Document

Decision on the Prosecutor's Request for Authorisation for Non-disclosure of Identity
of Witnesses DAR-OTP-WWWW-0433

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 Court¹;

NOTING the “Second Decision on issues relating to disclosure”,² 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”³ 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”⁴ 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 “Decision on the Prosecutor’s Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAROTP-WWWW-0306, DAR-OTP-WVWW-0307, DAR-OTP-VVWW-0312 and DAR-OTP-WVWW-0314”, (the “First Decision on Anonymity”) issued by the Single Judge on 31 August 2009;

NOTING the “Prosecution’s Notification to the Chamber of the Summary to be relied upon *in lieu* of the Transcripts of Witness DAR-OTP-WWWW-0433 and

¹ ICC-02/05-210.

² ICC-02/05-02/09-35

³ ICC-02/05-02/09-43 and ICC-02/05-02/09-43-Conf-Exp-AnxA.

⁴ ICC-02/05-02/09-50-Conf-Exp.

Request for Authorisation for Non-disclosure in the Summary of the Identity of the Witness and Members of his Family 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 31 August 2009, whereby the Prosecutor, *inter alia*, requested the authorisation, pursuant to rule 81(4) of the Rules of procedure and Evidence, for non-disclosure, in the summaries of transcripts of interviews of witness DAR-OTP-WWWW0433, of any information contained in the transcripts that could reveal the witness' identity;

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

HEREBY RENDER THIS DECISION.

1. The Single Judge recalls the First Decision on Anonymity, stating that in order for him to authorize the non-disclosure of the witnesses' identities and that of their family members, he must be satisfied of (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.

2. The Prosecutor submits that "disclosure of the witness' identities and/or personal circumstances and that of members of his family would objectively point put him in jeopardy of being killed, physically harmed or intimidated".

3. Consistently with the established practice of the Chamber, the analysis of the individual security assessment of the witness and a full explanation of the reasons underlying the decisions taken in respect of him will be provided separately in the Annex attached to the present decision, issued *ex parte* and available only to the Prosecutor and the VWU.

4. As regards the first criterion, the Single Judge recalls the First Decision, wherein he stated that “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”.

5. Considering the reasons explained in the Annex to the present decision, the Single Judge is of the view that disclosing the name of the witness to the Defence would pose an unjustifiable risk to his safety and/or physical and psychological well-being.

6. Moreover, the Single Judge, taking due consideration of both the personal circumstances of the witness and his current location as assessed in the Annex to the present decision, considers that no alternative measures short of anonymity for the witness are available and feasible in the present circumstances and, therefore, that the authorization of non-disclosing the witness’ identity is currently necessary.

7. Finally, as regards the criterion of proportionality, the Single Judge recalls 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

permissible to withhold the disclosure of certain information from the defence prior to confirm the charges that could not be withheld prior to trial.”⁵

8. Taking into consideration the safety situation of the witness 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 witness’ identity.

FOR THESE REASONS

DECIDE

to authorise the non-disclosure in the summaries of information in the transcripts relating to the identities of witness DAR-OTP-WWWW-0433, as well as that of members of his families.

DECIDE

to authorise the use the use of the number DAR-OTP-WWWW-0433 in reference to the witness for all subsequent proceedings, including during the Confirmation Hearing.

⁵ ICC-01/04-01/07-475, para. 68.

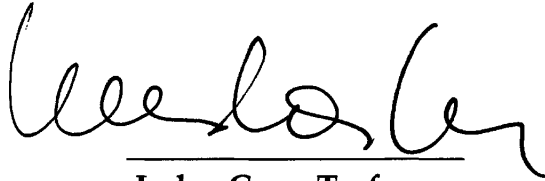
DECIDE

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-0433, 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