

ANNEX O



Original: **English**

No.: ICC-02/05-02/09
Date: 14 October 2009

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

**SITUATION IN THE DARFUR, SUDAN
*IN THE CASE THE PROSECUTOR v. BAHAR IDRIS ABU GARDA***

Public Redacted Version of

Prosecution's Provision of Alternative Evidence filed on 10 September 2009

Source: Office of the Prosecutor

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

The Office of the Prosecutor	Counsel for the Defence
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. Background

1. The Prosecution submitted three reports¹ in which it informed the Single Judge on the status of the procedures initiated under Article 54(3)(e) in relation to the items identified as potentially exonerating and materials relevant for the preparation of the Defence within the meaning of Rule 77 of the Rules of Procedure and Evidence.

2. In its third report, the Prosecution indicated that the Office of the Prosecutor has requested that the [TEXT REDACTED]².

3. The Prosecution informs the Single Judge that the information provider has not yet lifted the restriction imposed on the eight documents mentioned above. [Text Redacted]

4. The Prosecution is working on finalizing arrangements with the information provider.

5. The Prosecution recalls that this Chamber has held on several occasions in *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* that the specific features and limited scope and purpose of the confirmation hearing allow for the Prosecution to fulfill its article 67(2) and rule 77 disclosure obligations for the purposes of that hearing by disclosing, sufficiently prior to the start of the hearing, the bulk of the

¹ 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 and materials relevant for the Preparation of the Defence, ICC-02/05-02/09-45, 10 August 2009; Prosecution's Second Report on Status of the Procedures initiated under Articles 54(3)(e), 73 and 93 in relation to items identified as Potentially Exonerating and materials relevant for the Preparation of the Defence, ICC-02/05-02/09-63, 28 August 2009; Prosecution's Third Report on Status of the Procedures initiated under Articles 54(3)(e), 73 and 93 in relation to items identified as Potentially Exonerating and materials relevant for the Preparation of the Defence, ICC-02/05-02/09-86-Conf-Exp, 2 September 2009.

² These items consist of 6 items as materials relevant for the preparation of the Defence and 2 items that are incriminatory.

materials identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing.³

6. The Prosecution also notes that, during a Confidential, *ex parte* Status Conference held on 26 August 2009, the Single Judge noted that the Prosecution could file individual items of alternative evidence replacing information that may be material for the preparation of the Defence contained in eight documents for which the confidentiality restriction has not yet been lifted by the information provider.⁴

7. Moreover, in its Decision of 21 October 2008 (ICC-01/04-01/06 OA13), the Appeals Chamber held that it “cannot exclude that the provision of alternative evidence may, in appropriate circumstances, be one way of ensuring fairness in spite of the non-disclosure of material obtained on the condition of confidentiality under article 54 (3) (e) of the Statute”. However the Appeals Chamber notes that “this would require an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor”.

8. Considering that the deadline for disclosure of relevant documents to the Defence expires today, the Prosecution is annexing to the present filing a list of items of alternative evidence as Annex B to cover the information contained in annexes A1 to A8 to the present filing.

9. For ease of reference, the prosecution has attached, as attachment B to the present filing, a chart that identifies:

- (i) In column 1, the ERNs of each of the 8 documents that cannot currently be disclosed;
- (ii) In column 2, a short description of the relevant part of each of the 8 documents that cannot currently be disclosed;

³ See inter alia ICC-01/04-01/06-102, para 124. See also ICC-01/04-01/06-803, para 154.

⁴ Transcript, ICC-02/05-02/09-T-6-ENG ET WT, 26 August 2009 at page 24.

- (iii) In column 3, the specific excerpt from each of the 8 documents that cannot currently be disclosed;
- (iv) In column 4, an excerpt from the proposed alternative evidence.

10. The Prosecution notes that the items identified in Attachment A1-A8 to the present filing as proposed alternative evidence have already been disclosed to the Defence.

Ex Parte Filing

11. The Prosecution submits that the classification of the Attachment A and Annexes 1 to 8 to the Present filing as Confidential-*Ex Parte* – Prosecution Only is necessary. The Prosecution will, however, file a Public Redacted Version of the filing should the Single Judge determine it to be appropriate in the circumstances.



Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of October 2009
At The Hague, The Netherlands