

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09

Date: 29 July 2010

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN DARFUR, SUDAN

***IN THE CASE OF THE PROSECUTOR V. ABDALLAH BANDA ABAKAER
NOURAIN AND SALEH MOHAMMED JERBO JAMUS***

Public Document

**with confidential ex parte Annex I – Prosecutor and Victims and Witnesses Unit
only**

First Decision on the Prosecutor's Requests for Redactions

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. 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

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

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. Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus*, at the International Criminal Court;¹

NOTING the “Decision on issues relating to disclosure”, issued by the Chamber on 29 June 2010;²

NOTING the “Prosecution’s Application for Redactions Pursuant to rules 81(2) and 81(4) of the Rules of Procedure and Evidence” and the annexes attached thereto, dated 20 July 2010³ and the “Amendment to ‘Prosecution’s Application for Redactions Pursuant to rules 81(2) and 81(4) of the Rules of Procedure and Evidence’, Filed on 20 July 2010” dated 29 July 2010⁴ (collectively, “Application”), both filed as “Confidential, *Ex Parte*, Available to the Prosecution and the Victims and Witnesses Unit Only” and

NOTING articles 54, 57(3), 61, 67 and 68 of the Statute of the Court, rules 15, 76, 77, 81 and 121 of the Rules of Procedure and Evidence and regulation 42 of the Regulations of the Court;

HEREBY RENDER THIS DECISION.

1. In his Application, the Prosecutor seeks authorisation to redact some information included in the witnesses’ statements attached thereto (including their annexes) on the basis of either rule 81(2) or rule 81(4) of the Rules. The

¹ ICC-02/05-233.

² ICC-02/05-03/09-49.

³ ICC-02/05-03/09-54-Conf-Exp.

⁴ ICC-02/05-03/09-57-Conf-Exp.

former provision entrusts the relevant Chamber, upon request of the Prosecutor, with the authority to authorise the non-disclosure of information when disclosure of such information may prejudice further or ongoing investigations, while the latter empowers the Chamber to authorise redactions for the protection of witnesses, victims and their family members, as well as of other persons at risk on account of activities of the Court⁵.

2. In compliance with the established practice of the Chamber,⁶ within the two broad categories of redactions identified according to the legal basis under which they are sought by the Prosecutor, the Single Judge has identified five sub-categories in which the authorised redactions, whether requested by the Prosecutor or to be granted on a *proprio motu* basis, can be grouped:

- A. Names and other identifying information of OTP and other Court staff members, whether present when the interview was conducted or otherwise mentioned, when applicable, pursuant to rule 81(2);
- B. Specific locations at which interviews with the witnesses were conducted, pursuant to rule 81(2);
- C. Names and other identifying information of witnesses for whom anonymity was granted in the case *The Prosecutor V. Bahar Idriss Abu Garda*;
- D. Names and other identifying information of family members and other information of a personal nature pertaining to the OTP witnesses, pursuant to rule 81(4);
- E. Names and identifying information of other persons who might be put at risk on account of the activities of the Court, pursuant to rule 81(4).

⁵ See *infra*, sub paragraph 8.

⁶ ICC-02/05-02/09-58 ; ICC-02/05-02/09-85.

3. The following paragraphs provide the reasons underlying the decisions taken in respect of each category of redactions, whether granted or rejected. Charts related to each witness' statement will be attached to this decision as part of a separate Annex I, issued *ex parte* and available only to the Prosecutor and to the VWU. The charts will list (i) each redaction requested and (ii) the reasons provided by the Prosecutor for such requests; (iii) the Single Judge's decision as to the request, including the legal basis and the specific sub-category in which the redaction falls. The category into which each redaction falls will be marked with the letters A, B, C, D or E, corresponding to the categories outlined above and illustrated below. As a general principle, whenever feasible, redaction of whole sentences will be avoided and only the specific words containing relevant information will be expunged.

A. Names and other identifying information of OTP and other Court staff members, whether present when the interview was conducted or otherwise mentioned, when applicable, pursuant to rule 81(2) of the Rules

4. The Single Judge agrees with the Prosecutor that, at this stage of the proceedings, with investigations still ongoing in regions that are affected by armed conflicts, it is reasonable to believe that in some instances the presence of OTP investigators and interpreters in the field, should their identities be disclosed to the Defence, could be easily traced, thus possibly putting at risk their safety and security and therefore prejudicing ongoing investigations. A similar reasoning underlies the Prosecutor's request that the names and identifying information relating to the Registry's interpreters and individuals other than OTP or Court staff having facilitated the investigation be redacted. Furthermore, the Single Judge equally agrees that non disclosure of the identities of OTP and other Court staff members, or of individuals having otherwise facilitated the investigation, is the least intrusive protective measure available and it does not collide at this stage of the proceedings with the rights of the suspects to a fair trial. Accordingly, the Single Judge grants authorisation

to redact the names and other identifying information, as appropriate, of OTP and Registry staff members and other individuals having facilitated the investigation, whether present at the interview or otherwise mentioned. The redactions falling within this category will be marked in the charts with the letter A.

B. Specific information on the locations at which interviews with the witnesses were conducted, pursuant to rule 81(2) of the Rules

5. The Single Judge is of the view that disclosing specific information of the locations used by the OTP staff members for conducting their interviews with the witnesses (in particular, where a specific address or description of such locations is provided) might result in making it impossible or riskier for the OTP to use the same locations for future interviews. Considering the limited number of the locations where, according to the Prosecutor, OTP investigators are able to conduct interviews, the Single Judge is of the view that there is no less intrusive alternative protective measure available and that the redaction of such information, at this stage of the proceedings, does not violate the right of the suspects to a fair trial. Accordingly, the Single Judge grants authorisation to redact any and all specific information which would render identifiable the locations where the interviews with the witnesses were conducted. The redactions falling within this category will be marked in the charts with the letter B.

C. Names and other identifying information of witnesses for whom anonymity was granted in the case *The Prosecutor v. Bahar Idriss Abu Garda*

6. This category appears self-explanatory. In some instances, the Prosecutor's witnesses mention individuals who acted as witnesses in the Abu Garda case and for whom anonymity *vis-à-vis* the Defence was granted in that case. In light of the absence of specific information warranting review of that decision, the same protective measures shall continue to have full force and effect, pursuant to regulation 42.1 of the Regulations of the Court. The

redactions falling within this category will be marked in the charts with the letter C.

D. Names and other identifying information of family members and other information of a personal nature pertaining to the OTP witnesses, pursuant to rule 81(4) of the Rules

7. The Single Judge notes that the family members of the witnesses are not involved in any way in the activities of the Court. Accordingly, disclosing their names and other identifying information would pose an unjustifiable risk to their safety and/or physical and psychological well-being. The requested redactions are adequate to minimise that risk and, at this stage, no less intrusive alternative measure can be taken to achieve that goal. Furthermore, none of these family members is a witness (or otherwise a source for the Prosecutor), nor is referred to as having any further information or knowledge of events relevant to the case. Accordingly, redaction of information relating to these persons would not result in the confirmation hearing, viewed as a whole, being unfair to the suspects. Information relating to the current place of residence or whereabouts of both the witnesses' and of their family members shall equally be redacted in order to preserve their privacy from unnecessary intrusion. Redacting such information would not violate the right of the suspects to a fair trial, notably since the identity of the witnesses is disclosed to the Defence. For these reasons, the Single Judge grants, pursuant to rule 81(4) of the Rules, authorisation to redact names and other identifying information of the family members of the Prosecutor's witnesses, as well as the current place of residence or whereabouts of both the witnesses and their family members. The redactions falling within this category will be marked in the charts with the letter D.

E. Names and identifying information of other persons who might be put at risk on account of the activities of the Court

8. The Single Judge is of the view that individuals not connected to the case (so-called “innocent third parties”) shall be prevented from unnecessarily being exposed to an unjustified risk as a result of the activities of the Court. Although rule 81(4) only refers to witnesses, victims and their family members, as stated by the Appeals Chamber, there are “other provisions of the Statute and the Rules that are aimed at ensuring that persons are not put at risk through the activities of the Court”⁷ and, therefore, rule 81(4) of the Rules should be read so as “to include the words ‘persons at risk on account of the activities of the Court’, so as to reflect the intention [...] to protect that category of persons”.⁸ Moreover, such redactions, when strictly limited to those individuals’ names and identifying information, would not result in the confirmation hearing, viewed as a whole, to be unfair to the suspects. Accordingly, the Single Judge grants authorisation to redact names and identifying information relating to innocent third parties who, without being witnesses or otherwise related to the Case, might be wrongly perceived as cooperating with the Prosecutor and/or the Court. By the same token, however, the Single Judge points out that no issue of being exposed to an “unjustified risk” on account of the activities of the Court may arise when organisations are mentioned whose mission typically consists and requires being present and operating in zones of armed conflict, which presence is known to the public. The names of such organisations shall therefore not be redacted, whereas redactions appear necessary and justified whenever specific individuals acting on behalf of those organisations are mentioned. The redactions falling within this category will be marked in the charts with the letter E.

⁷ Judgment of 13 May 2008, ICC-01/04-01/07-475, para. 43; see also 27 May 2008, ICC-01/04-01/07-521, para. 33.

⁸ Judgment of 13 May 2008, ICC-01/04-01/07-475, para. 56.

FOR THESE REASONS

DECIDE

to partially grant the Prosecutor's requests for and to order redactions to the following Witnesses' Statements and attached documents

- (i) Statement by Witness 0315 (ICC-02/05-03/09-54-Conf-Exp-AnxA);
 - (ii) Statement by Witness 0355 (ICC-02/05-03/09-54-Conf-Exp-AnxB);
 - (iii) Statement by Witness 0446 (ICC-02/05-03/09-54-Conf-Exp-AnxC);
 - (iv) Statement by Witness 0439 (ICC-02/05-03/09-54-Conf-Exp-AnxD);
 - (v) Transcript of Interview of Witness 0442 (ICC-02/05-03/09-54-Conf-Exp-AnxE);
- as specified in Annex I to the present decision;

DECIDE

that the Prosecutor shall make available to the Defence, no later than Friday 6 August 2010, the statements and transcript concerning the relevant witnesses with the redactions granted or ordered in the present decision as set forth in the confidential, *ex parte* Prosecutor and VWU Annex I hereto, and in compliance with the prescriptions contained in the Decision on Issues relating to Disclosure (ICC-02/05-03/09-49);

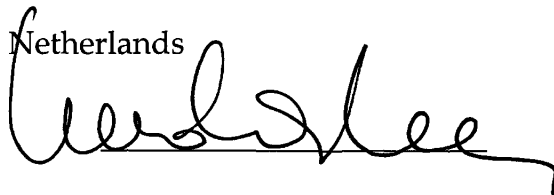
ORDER

that the Prosecutor shall make available to the Defence the statements and transcript in such a way as to clearly identify the legal basis and the reasons supporting each redaction, including by reference to the categories identified in this decision.

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

Dated this Thursday, 29 July 2010

At The Hague, The Netherlands



Judge Cuno Tarfusser
Single Judge