

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-02/09
Date: 7 September 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

with ex parte Annex – Prosecutor and Victims and Witnesses Unit only

Second 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. Bahar Idriss Abu Garda*, at the International Criminal Court;¹

NOTING the "Second Decision on issues relating to disclosure" dated 15 July 2009² 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" and to disclose to the Defence as soon as practicable and no later than Thursday 10 September 2009 the statements of the witnesses on which he intends to rely at the confirmation hearing";

NOTING the "First Decision on the Prosecution's Requests for Redactions" of 14 August 2009 (the "First Decision on Redactions");³

NOTING the "Prosecution's Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0466, and DAR-OTP-WWWW-0447, Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence", filed on 25 August 2009⁴ and the "Prosecution's Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0315 and DAR-OTP-WWWW-0419 (2nd Statement), Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence", filed on 28 August 2009;⁵

¹ ICC-02/05-210.

² ICC-02/05-02/09-35.

³ ICC-02/05-02/09-51-Conf.

⁴ ICC-02/05-02/09-66-Conf-Exp.

⁵ ICC-02/05-02/09-73-Conf-Exp.

NOTING the "Prosecution's Application pursuant to Regulation 35(2) of the Regulations of the Court for extension of the time limit within which to submit an application for redactions to the Statement of DAR-OTP-WWWW-0445" (the "Prosecutor's Request for Extension of Time-limit")⁶ and the annexes attached thereto,⁷ filed on 3 September 2009, whereby the Prosecutor requests the Single Judge (i) to grant an extension of the time limit within which to submit applications for redactions; and (ii) in case such extension is granted, to consider the application for redaction attached thereto to have been duly filed;

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 35(2) of the Regulations of the Court;

HEREBY RENDER THIS DECISION.

I. The Prosecutor's Request for Extension of Time-limit

1. The Single Judge notes that pursuant to regulation 35(2) of the Regulations of the Court, "the Chamber may extend or reduce a time-limit if good cause is shown" and "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". The same provision also requires the Single

⁶ ICC-02/05-02/09-82-Conf-Exp.

⁷ The Prosecutor attached to his request the following documents: (i) the "Prosecution's Application for Redactions to the Statement of Witness DAR-OTP-WWWW-0445, Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence" (Annex A) (ii) a table showing the redactions being sought and their justifications (Annex A1); (iii) a copy of the Witness Statement of DAR-OTP-WWWW-0445, reflecting the redactions sought (Annex A2).

Judge, "where appropriate" and before a decision to extend or reduce a time limit is taken, to give "the participants an opportunity to be heard".

2. The Single Judge is of the view that, bearing in mind the date set for the commencement of the confirmation hearing and the deadline established by the Chamber for the disclosure process in the Second Decision on disclosure and with a view to ensuring the expeditiousness of the proceedings in order to carry out a full disclosure without any delay, it is not "appropriate", for the purposes of regulation 35(2), to wait for written observations to be submitted by the Defence before taking a decision on the Prosecutor's Request for Extension of Time-limit. Furthermore, in case such a request is granted, the extension of the time-limit would not result in any prejudice to the Defence since the witness' statement attached thereto can be disclosed, with the redaction authorised by the Single Judge, if any, before the deadline for disclosure established by the Chamber.

3. The Single Judge is of the view that the reasons explained in the Prosecutor's Request for Extension of Time-limit regarding the timing under which (i) the interview of witness DAR-OTP-WWWW-0445 was completed and (ii) the assessment by the Prosecutor was made both as regards the relevance of the statements and the identification of the information which in his view needed to be redacted can be considered as falling outside his control, therefore justifying a request for an extension of time after the lapse of a time-limit pursuant to regulation 35(2).

4. On the basis of the above-mentioned reasoning, the Single Judge determines that the first request made by the Prosecutor in his Request for Extension of Time-limit must be granted and, thus, that the application for redaction attached to such request can be considered to have been duly filed.

5. The Single Judge deems therefore appropriate to address the Prosecutor's request for redactions to the statement of witness DAR-OTP-WWWW-0445 in the present decision along with the other applications pursuant to rule 81(2) and 81(4) previously filed.⁸

II. The Prosecutor's Requests for Redactions

6. Noting the Prosecutor's Requests for Redactions, the witnesses' statements addressed in the present decision are the following:

- (i) Statement by Witness 0446 (ICC-02/05-02/09-66-Conf-Exp-AnxA);
- (ii) Statement by Witness 0447 (ICC-02/05-02/09-66-Conf-Exp-AnxB);
- (iii) Statement by Witness 0315 (ICC-02/05-02/09-73-Conf-Exp-AnxA);
- (iv) Statement by Witness 0419 (ICC-02/05-02/09-73-Conf-Exp-AnxB);
- (v) Statement by Witness 0445 (ICC-02/05-02/09-82-Conf-Exp-AnxA2).

7. For the purposes of his analysis, the Single Judge recalls the First Decision on Redactions and, in particular, the main principles to be complied with in addressing the Prosecution's Requests for Redactions, namely that: (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; 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*.⁹

⁸ All the Prosecutor's requests for redactions pursuant to rule 81(2) and 81(4) will be hereinafter collectively refer to as the "Prosecutor's Requests".

⁹ ICC-02/05-02/09-51-Conf, para. 2.

8. The Single Judge notes that the redactions either requested by the Prosecutor or to be granted on a *proprio motu* basis fall within three of the four categories identified in the First Decision on Redactions, namely: (i) names and signatures of persons and current staff members of the OTP present when the interview was conducted; (ii) names and identifying information of family members of OTP witnesses and other information of a personal nature pertaining to the OTP witnesses; and (iii) names and identifying information of other persons who might be put at risk on account of the activities of the Court.

9. The Single Judge, recalling the overall reasoning already provided in the First Decision of Redaction in respect of each category of redactions, will conduct his analysis on the basis of the principles already stated therein.

10. The Single Judge has also identified another category in which some redactions sought by the Prosecutor fall: names and identifying information of potential prosecution witnesses. In particular, the Prosecutor requests authorisation to redact the names and identifying information of a "prospective witness for whom arrangements are already in place to interview him" and of a person currently in the process of being interviewed by the Prosecutor.

11. The Single Judge notes that "potential prosecution witnesses" have been defined by the Appeals Chamber as "individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses."¹⁰

¹⁰ICC-01/04-01/07-476, para. 2.

12. The Single Judge further observes that, as the Appeals Chamber held, “the non-disclosure of identities and identifying information of ‘potential prosecution witness’ can, in principle, be sought and, if appropriate, granted pursuant to rule 81(2)”.¹¹

13. The Single Judge is of the view that both the persons whom the Prosecutor refers to fall within the category of ‘potential prosecution witnesses’, whose names and identifying information can be redacted pursuant to rule 81(2) of the Rules.

14. In his request the Prosecutor seeks authorisation to redact such information on the basis either of both rule 81(2) – therefore, to preserve ongoing investigations – and rule 81(4) – to protect persons at risk on account of the activities of the court in accordance with article 54(3)(f) – or just pursuant rule 81(4). The Prosecutor submits for both the persons that “after this ‘prospective witness’ has been interviewed, rule 81(2) would no longer suffice as a reason to maintain the redaction of the name and identifying information of the person.”

15. Although the Single Judge understands the concerns expressed by the Prosecutor, he is, however, of the view that, for the time-being and until a decision as to whether either one or both will become prosecution witnesses is made by the Prosecutor, the two persons still fall within the above-mentioned definition of “potential prosecution witnesses” and, therefore, that the appropriate legal basis for the redactions sought remains rule 81(2) of the Rules, without prejudice to a further decision of the Single Judge should the circumstances change.

¹¹ *Ibid.*, para.46.

16. In accordance with the established practice of the Chamber, the Single Judge will list all requests for redactions made by the Prosecutor and provide analytical explanations of the reasons underlying each decision in their respect in a separate annex to the present decision, issued *ex parte* and available only to the Prosecutor and to VWU.

III. The Prosecutor's Request to lift some redactions authorised *proprio motu* by the Single Judge

17. The Single Judge further notes that the Prosecutor also requests authorisation to lift the redactions, ordered *proprio motu* in the First Decision on Redactions, of the names of two persons mentioned in the Prosecutor's request for redactions dated 25 August 2009.

18. The Single Judge observes that the redactions of the names and other identifying information of the two individuals concerned were authorised *proprio motu* on the basis of the existence of a risk to their safety and/or physical and psychological well-being assessed against the background of their status of "innocent third parties", not being either witnesses or prospective witnesses. Considering, however, that, due to the Prosecutor's intention "to call to testify these two individuals [...] as witnesses and to disclose their names to the Defence",¹² such a basis no longer exists, the Single Judge deems it appropriate to grant the Prosecutor's request.

¹² Prosecutor's request for redactions dated 25 August 2009, para. 12.

FOR THESE REASONS

DECIDE

to grant the extension of the time limit for the submission of applications for redactions requested by the Prosecutor pursuant to regulation 35(2) of the Regulations of the Court;

DECIDE

to consider the application for redaction attached to the Prosecutor's Request for Extension of Time-limit as duly filed;

DECIDE

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

- i. ICC-02/05-02/09-66-Annex A Witness 0446;
- ii. ICC-02/05-02/09-66 Annex B Witness 0447;
- iii. ICC-02/05-02/09-73 Annex A Witness 0315;
- iv. ICC-02/05-02/09-73 Annex B Witness 0419;
- v. ICC-02/05-02/09-82 Annex A2 Witness 0445;

as specified in Annex I to the present decision;

DECIDE

to authorise the Prosecutor to lift the redactions of the name and identifying information of the two individuals mentioned in his request for redaction dated 25 August 2009;

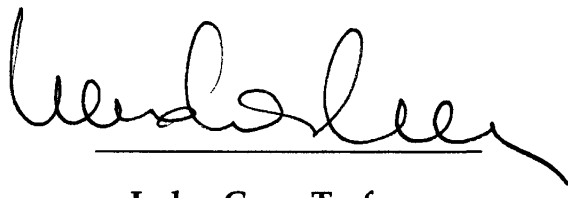
DECIDE

that the Prosecution shall make available to the Defence of Bahar Idriss Abu Garda, the statements concerning the relevant witnesses with the redactions granted or ordered in the present decision as set forth in the confidential, *ex parte* Prosecution Annex I hereto, and 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, 7 September 2009

At The Hague, The Netherlands

A handwritten signature in black ink, consisting of a series of loops and flourishes, positioned above a horizontal line.

Judge Cuno Tarfusser
Single Judge