

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original English

No.: ICC-02/05-02/09
Date: 20 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

**Public Redacted Version of the
“First Decision on the Prosecution’s Requests for Redactions” issued on 14 August
2009**

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 Sylvia Steiner, judge at International Criminal Court (the “Court”)

NOTING the “Decision on the Temporary Replacement of the Single Judge for the period of 22 July to 17 August 2009”, whereby Judge Sylvia Steiner was designated Single Judge for the situation in Darfur, Sudan and any case emanating therefrom, including the case of the Prosecutor v Bahar Idriss Abu Garda (the “Case”), for the period of 22 July to 17 August 2009,¹

NOTING the “Second Decision on issues relating to disclosure”,² whereby Pre-Trial Chamber I (the “Chamber”) *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 “Prosecution’s Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0416, DAR-OTP-WWWW-0418, DAR-OTP-WWWW-0419 and DAR-OTP-WWWW-0421 Pursuant to Rules 81(2) and 81(4)” dated 10 July 2009;³ the “Prosecution’s Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0307, and DAR-OTP-WWWW-0314 Pursuant to Rules 81(2) and 81(4)” dated 15 July 2009;⁴ and the “Prosecution’s Application for Redactions to Statements of Witnesses DAR-OTP-WWWW-0326, DAR-OTP-WWWW-0355, DAR-OTP-WWWW-0417 and DAR-OTP-WWWW-0420 Pursuant to Rules 81(2) and 81(4)” dated 17 July 2009⁵ (collectively, the “Prosecution’s Requests for Redactions”), filed *under seal, ex parte only available to the Prosecution and the Victims and Witnesses Unit*,

¹ ICC-02/05-02/09-37

² ICC-02/05-02/09-35

³ ICC-02/05-02/09-33-US-Exp and ICC-02/05-02/09-33-US-Exp-AnxsA, B, C & D

⁴ ICC-02/05-02/09-34-US-Exp and ICC-02/05-02/09-34-US-Exp-AnxsA, B & C

⁵ ICC-02/05-02/09-36-US-Exp and ICC-02/05-02/09-36-US-Exp-AnxsA, B, C, D, A1 & C1

NOTING the “Prosecutor’s Report on Witnesses’ Security Risk Assessment”⁶ filed on 4 August 2009 in compliance with the Single Judge’s Decision dated 30 July 2009⁷;

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 6 August 2009 (the “Hearing”), in which issues relating to the Prosecution’s Requests for Redactions and to protective measures for witnesses were addressed;⁸

NOTING the “Resubmission of Prosecution’s Application for Redactions to statements of Witnesses DAR -OTP-WWWW-0326, DAR-OTP-WWWW-0355, DAR-OTP-WWWW-0416, DAR-OTP-WWWW-0417, DAR-OTP-WWWW-0419, DAR-OTP-WWWW-0420, and DAR-OTP-WWWW-0421, Pursuant to Rules 81(2) and 81(4)” dated 10 August 2009 (the “Prosecution’s Revised Requests for Redactions”), filed in compliance with the Single Judge’s order during the Hearing that the Prosecutor review his requests for redactions in light of her observations and, if need be, upon consultation with the Victims and Witnesses Unit;⁹

NOTING the “Prosecution’s Application for Extension of Time and authorisation to submit summaries in lieu of transcript redactions with respect to witnesses DAR-OTPWWW-0305, DAR-OTP-WWWW-0307 and DAR-OTP-WWWW-0314” filed on an urgent basis 11 August 2009 (the “Prosecutor’s Urgent Application”)¹⁰;

⁶ ICC-02/05-02/09-43 and ICC-02/05-02/09-43-Conf-Exp-AnxA

⁷ ICC-02/05-02/09-41

⁸ ICC-02/05-02/09-T-5-CONF-EXP- ENG ET 06-08-2009 1-35 SZ P1

⁹ ICC-02/05-02/09-44-Conf-Exp

¹⁰ ICC-02/05-02/09-48-Conf-Exp

NOTING the Single Judge's urgent "Decision on the Prosecutor's Application for Extension of Time and authorization to submit summaries in lieu of transcript redactions" dated 11 August 2009, granting the Prosecutor "until Monday 17 August at 4 pm to file requests for authorisation of non-disclosure of information contained in the summaries to be used in lieu of witnesses' transcripts";¹¹

NOTING the Registrar's filing of "Victims and Witnesses Unit Views and Observations on the Prosecution's Report on Witnesses' Security Risk Assessment of 4 August 2009" ("the VWU Observations")¹², filed by the Registry as confidential, *ex parte Prosecution and Victims and Witnesses Unit only* on 14 August 2009;

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.

General remarks

1 The Single Judge wishes to point out at the outset that she will address the Prosecution's Requests for Redactions and the Revised Requests for Redactions bearing in mind (i) the principles established by the Chamber in the previous cases of the Prosecutor vs Thomas Lubanga Dyilo and the Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui¹³ as well as (ii) the guidance provided by the Appeals Chamber in its Judgments on issues relating to

¹¹ ICC-02/05-02/09-49-Conf-Fxp

¹² ICC-02/05-02/09-50-Conf-Exp

¹³ ICC-01/04-01/07-5b1

redactions¹⁴ Also the information provided to the Chamber by the Prosecution and by VWU in relation to witnesses' security assessment will be taken into due consideration

2. In particular, principles which shall be complied with include the following: (i) the Prosecution has the burden of providing the information which is necessary for the Chamber to conduct the type of analysis required by the Appeals Chamber; and (ii) failure by the Prosecution to provide a detailed and appropriate justification for each of the redactions requested may result in the unjustified requests being rejected.

3. The present decision is classified as confidential because it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential or under seal, ex parte, Prosecution only. The making of such references in the present decision is required by the principle of fairness of proceedings for the Defence and is not inconsistent with the nature of the documents referred to

4. The ultimate goal of the Prosecution's Requests for Redactions and Revised Requests for Redactions is to make available to the Defence documents which are relevant for the purposes of the confirmation hearing, albeit in a form and manner that is not prejudicial to other interests which are also protected under the Statute, in particular the need to safeguard the safety of victims and witnesses and to avoid prejudice to further or ongoing investigations by the Prosecution.

¹⁴ Judgment of 13 May 2008, ICC-01/04-01/07-475, Judgment of 27 May 2008, ICC-01/04-01/07-521,

5 The Prosecution's Requests for Redactions and Revised Requests for Redactions comprise the following type of documents: (i) witnesses' statements, (ii) documents and other materials attached to witnesses' statements; (iii) transcripts of witnesses' interviews; (iv) video material and transcripts of video material

6 Mindful that it is crucial for the Defence to be provided as early as feasible with the material the Prosecution is going to rely on for the purposes of the confirmation hearing, in the present decision the Single Judge will only address the witnesses' statements, and documents and other materials attached to such statements, in respect of which, also following the Hearing and the Revised Requests for Redactions, there is no need to request and obtain additional clarification from the Prosecution.

7. Before listing such requests, however, the Single Judge points out that the Prosecution incurs into a mistake in identifying one of the witnesses' statements on which it wishes to rely, which mistake requires clarification at the outset. The Prosecution's Urgent Application states that requests for authorization of redactions for the statement of Witness DAR-OTP-WWWW-0420 are not resubmitted since the witness [REDACTED]¹⁵. The Single Judge notes that, contrary to the Prosecution's submission, the statement of Witness DAR-OTP-WWWW-0420 (a male), originally attached to the Prosecution's Requests for Redactions¹⁶, is also attached to the Prosecution's Revised Requests for Redactions¹⁷. The only witness statement which seems to miss from the Prosecution's Revised Requests for Redactions is the one issued by

¹⁵ ICC-02/05-02/09-48-Conf-Exp, page 4, footnote 4

¹⁶ ICC-02/05-02/09-36-US-Exp-AnxD

¹⁷ ICC-02/05-02/09-44-Conf-Exp-Anx I

Witness 0418 (a female), originally submitted to the Prosecution's Requests for Redactions¹⁸

8 The Single Judge also notes, with regret and concern, the lack of accuracy affecting the submissions by the Prosecution in the Case. This extent of lack of accuracy is highly unusual and results in imposing on the Chamber the inordinate burden of reviewing the Prosecution's work in its material aspects. Failure by the Prosecution to ensure that minimal diligence is exercised prior to submitting applications or other kind of documents to the Chamber runs contrary to the basic duties which are to be complied with by all participants in the proceedings and has a significantly adverse impact on their fairness and expeditiousness. Consequences of an even more serious nature may ensue as a result of witnesses being erroneously referred to, or third innocent parties being put at an unnecessary risk, such as in the many instances referred to in the Annex of the present decision.

9 The statements addressed in the present decision are the following:

- i. Statement by Witness 0326, including the transcript of the video attached as Annex A1,¹⁹
- ii. Statement by Witness 0355,²⁰
- iii. Statement by Witness 0416;²¹
- iv. Statement by Witness 0417,²²
- v. Statement by Witness 0419,²³
- vi. Statement by Witness 0420,²⁴
- vii. Statement by Witness 0421.²⁵

¹⁸ ICC-02/05-02/09-33-US-Exp-AnxB

¹⁹ ICC-02/05-02/09-44 –Conf-Exp-AnxA

²⁰ ICC-02/05-02/09-44 –Conf-Exp-AnxB

²¹ ICC-02/05-02/09-44 –Conf-Exp-AnxC

²² ICC-02/05-02/09-44 –Conf-Exp-AnxD

²³ ICC-02/05-02/09-44 –Conf-Exp-AnxE

²⁴ ICC-02/05-02/09-44 –Conf-Exp-AnxF

²⁵ ICC-02/05-02/09-44 –Conf-Exp-AnxG

For the sake of expediency, these documents will be hereinafter collectively referred to as the “Witnesses’ Statements”

10 In compliance with the established practice of the Chamber, the Single Judge has identified four categories in which the redactions either requested by the Prosecution or to be granted on a *proprio motu* basis as regards the Witnesses’ Statements can be grouped

- A. names and signatures of persons and current staff members of the OTP present when the interview was conducted, and other OTP staff members,
- B names and identifying information concerning other individuals currently under investigation by the Prosecutor;
- C. names and identifying information of family members and other information of a personal nature pertaining to the OTP witnesses;
- D. names and identifying information of other persons who might be put at risk on account of the activities of the Court;

11. Also consistently with the Appeals Chamber Judgements and the established practice of the Chamber, a full explanation of the overall reasons underlying the decisions taken in respect of each category of redactions will be provided in the text of the decision. A separate Annex to this decision, issued *ex parte* and available only to the Prosecutor and to VWU, will list all requests for redactions made by the Prosecution and provide analytical explanations of the reasons underlying each of the Single Judge’s decisions in their respect

Categories of redactions

A. Names and signatures of persons and current staff members of the OTP present when the interview was conducted, and other OTP staff members

12. The Prosecution requests authorisation to redact the names, initials and signatures of the persons present when the interviews were conducted, pursuant to rule 81(2) of the Rules. In particular, these redactions are sought for information relating to the identities of investigators and [REDACTED] The Prosecution submits that ongoing investigation may require staff members involved in the interviews to go back to the field to meet with witnesses and collect further evidence. It is submitted that this would, at the same time, prejudice investigations and pose objectively identifiable risks to the safety and security of these staff members. Furthermore, the Prosecution mentions that it is only able to conduct interviews in a limited number of locations, some of which characterised by a significant [REDACTED].

13 The Single Judge notes that the Prosecution does not point out to any objectively identifiable risk that could be posed to the staff of the office of the Prosecutor. Mere reference to the “significant [REDACTED]” in places where interviews are conducted does not satisfy the requirements set forth by the Appeals Chamber. The Single Judge recalls that the Appeals Chamber excluded that “dangers that cannot be overcome by redactions because they are inherent in the situation itself cannot, as such, provide a justification for redactions”²⁶ and that the Pre-Trial Chamber would have to assess whether the danger sought to be protected could be overcome by redactions or “arises

²⁶ *The Prosecutor v Germain Katanga*, Appeals Chambers Judgment, 13 May 2008, ICC-01/04-01/06-773, para 98

simply from the fact that personnel of the OTP and of the VWU generally may be easily identifiable in the field”²⁷

14 However, the Single Judge agrees with the Prosecution that, at this stage of the proceedings, with investigation still ongoing in regions that are facing ongoing armed conflicts, it is reasonable to believe that the presence of OTP investigators in the field, if their identities are disclosed to the Defence, can be easily traced and, therefore, bring risk to the OTP staff and to ongoing investigations. The Single Judge also agrees that, at this stage of the proceedings, the non disclosure of the names of OTP investigators is the less intrusive protective measure available, and that it does not collide with the rights of the suspect to a fair trial

15 Accordingly, the Single Judge grants authorisation to redact the names and signatures of the OTP investigators and [REDACTED] present when the interview was conducted, and other OTP staff members otherwise mentioned in such statements

B. Names and identifying information concerning other individuals currently under investigation by the Prosecutor

16. The Prosecution requests authorisation pursuant to rule 81(2) of the Rules to redact information that may potentially identify the other individuals against whom the Chamber is yet to issue its decision pursuant to the Prosecution’s Application under article 58 of the Statute²⁸. He submits that disclosure of information which potentially identifies such individuals would

²⁷ Ibidem,

²⁸ ICC-02/05-163-Conf Exp

contravene the current level of classification of documents pertaining to such individuals

17 The Single Judge notes that the confidentiality of the information relating to individuals for whom a decision by the Chamber, under article 58 of the Statute, is still pending, is not necessarily related to the issue of whether the redaction of information relating to other individuals should be authorised. As a matter of fact, the reasons underlying the order by the Chamber to ensure confidentiality of information in relation to other individuals also addressed by the Prosecution's Application under article 58 were other than those which are to be considered when deciding on an application under rule 81(2) of the Rules, centred as they were on the specific situation and whereabouts of such individuals at the time of the issuance of the decision.

18 Accordingly, the Single Judge rejects the Prosecution's contention that the decision as to whether a redaction requested under the authority of rule 81(2) of the Statute is to be granted. Requests under this heading will be determined on the specific merits of the latter rule: they shall be granted whenever failure to do so might result in highlighting the investigative interest of the Prosecutor in a particular individual and thus possibly prejudicing the outcome of the investigations pertaining to such individual.

C. Names and Identifying Information of Family Members of Prosecutor's witnesses and other information of a personal nature pertaining to the OTP witnesses

19. The Prosecution requests, in some instances, authorisation pursuant to rule 81(4) of the Rules to redact names and identifying information of family members of the Prosecution's witnesses. In many other instances, no redactions

are requested. The Prosecution does not point out to any reason for such discrepancy.

20 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 Prosecution, nor it 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, to be unfair to the suspect.

21 For these reasons, the Single Judge grants, pursuant to rule 81(4) of the Rules, authorisation that names and other identifying information of the family members of the Prosecutor's witnesses be redacted. For those family members for whom redactions are not requested, the Single Judge determines, *proprio motu*, that the Prosecution redact such information before disclosing the statements to the Defence.

22. The Single Judge further observes that some of the statements contain information which might give away a witness's current place of residence or whereabouts and that no authorisation for redacting such information is sought by the Prosecution. In the view of the Single Judge, any and all information relating to the witness's current place of residence or whereabouts and/or of their families should be redacted, irrespective of the fact that the identity of the witness will be disclosed and therefore known to the Defence. Such redaction,

which the Single Judge orders on a *proprio motu* basis, appears necessary with a view to preserving the witness's and witnesses families privacy from unnecessary intrusion, a task which is also entrusted to the Chamber alongside the task of ensuring the witness's protection pursuant to articles 57(3)(c) and 68(1) of the Statute

23. For these reasons, the Single Judge orders the Prosecution to redact information concerning places of current residence or whereabouts of the witnesses and/or their families with a view to ensuring the protection of the witnesses' and witnesses' families privacy pursuant to article 57(3)(c) and 68(1) of the Statute.

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

24 The Prosecution seeks authorisation to redact names and other information which may identify other persons who are not witnesses or prospective witnesses, and are not directly or indirectly relevant to the issues before the Court (so-called "innocent third parties"), such as [REDACTED], or [REDACTED], or [REDACTED], [REDACTED], and third persons merely mentioned in the witnesses statements but who neither are witnesses or prospective witnesses, nor otherwise involved in the Prosecution investigations, with a view to avoiding unnecessarily opening them to unjustifiable risks

25 The Prosecution's Requests for Redactions in this respect, also in their revised version, appear irremediably flawed. While in the main submission the request is listed among those redactions sought under the authority of rule

81(2) of the Rules²⁹, the tables accompanying and introducing each of the Witnesses' Statements annexed to the submissions list those same redactions, in many instances, among those requested under the heading of rule 81(4), i.e. as a means of ensuring the safety of third parties

26. Again, the Single Judge takes note with regret and concern of the blatant inconsistencies affecting the Prosecution's submissions. By the same token, she notes that preventing individuals not connected to the case from unnecessarily being exposed to an unjustified risk as a result of the activities of the Court has been a guiding principle for the Chamber's decisions on redactions from the early days. As stated by the Appeals Chamber, "whilst rule 81(4) makes no express provision for the protection 'any person', other provisions of the Statute and the Rules are aimed at ensuring that persons are not put at risk through the activities of the Court and those provisions are not limited to the protection of witnesses and victims and members of their families only"³⁰. 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"³¹.

27. Accordingly, the Single Judge grants authorisation to redact names and identifying information relating to innocent third parties who are not witnesses and are otherwise unrelated to the Case, notwithstanding the flaws and inconsistencies affecting the Prosecution's Requests for Redactions and Revised Requests for Redactions in this respect. In many instances, the Single Judge is ordering, *proprio motu*, the Prosecution to redact such information before disclosure of the statement to the Defence.

²⁹ ICC-02/05-02/09-44-Conf-Exp, para. 8

³⁰ Judgment of 27 May 2008, ICC-01/04-01/07-521, para. 33

³¹ Judgment of 13 May 2008, ICC-01/04-01/07-475, para. 43

FOR THESE REASONS

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

- i ICC-02/05-02/09-44-Annex A Witness 0326; and Annex A1
- ii ICC-02/05-02/09-44 Annex B Witness 0355;
- iii ICC-02/05-02/09-44 Annex C Witness 0416;
- iv. ICC-02/05-02/09-44 Annex D Witness 0417; and Annex D1
- v ICC-02/05-02/09-44 Annex A Witness 0419,
- vi ICC-02/05-02/09-44 Annex B Witness 0420,
- vii. ICC-02/05-02/09-44 Annex C Witness 0421,

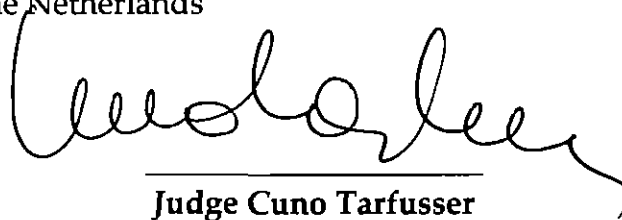
as specified in Annex I to the present decision;

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 E-court Protocol.

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

Dated this Thursday, 20 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