

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 August 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN DARFUR
IN THE CASE THE PROSECUTOR V. BAHAR IDRIS ABU GARDA**

Public document

Decision reclassifying the "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"

Decision 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, Senior Trial Lawyer

Counsel for the Defence
Mr. Karim A.A. Khan

Legal Representatives of the Victims

Legal Representatives of the 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
Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, Judge Sylvia Steiner, judge at the 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 “ (i) to file by 10 August 2009 the first report on the status of the procedures initiated under articles 54(3)(e), 73 and 93 of the Statute in relation to those items identified as of potentially exculpatory nature under article 67(2) of the Statute or which are material to the preparation of the defence pursuant to rule 77 of the Rules; and (ii) to subsequently file a report on this matter every two weeks”;

NOTING the “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” filed on 10 August 2009 as confidential, *ex parte* Prosecutor only (the “Prosecutor’s First Report”);³

NOTING the Single Judge’s “Decision Ordering the Prosecution to file in the Record of the Case a Public Redacted Version or a Public Note of the Requests for Redactions and of future *ex parte* filings” dated 30 July 2009;⁴

¹ ICC-02/05-02/09-37.

² ICC-02/05-02/09-35.

³ ICC-02/05-02/09-45-Conf-Exp.

⁴ ICC-02/05-02/09-39.

NOTING the principle of publicity enshrined in article 67(1) of the Statute of the Court ("the Statute"), rule 15 of the Rules of Procedure and Evidence (the "Rules") and regulations 8 and 31 (1) of the Regulations of the Court ("the Regulations");

NOTING regulation 23 *bis*(1) of the Regulations, providing that any document filed by the Registrar or a participant and marked "ex parte", "under seal" or "confidential" shall state the factual and legal basis for the chosen classification;

NOTING that the Prosecutor requests that his First Report be received *ex parte* "on the basis of the order contained in the 15 July Decision", while recalling in a footnote also the Single Judge's "Decision Ordering the Prosecution to file in the Record of the Case a Public Redacted Version or a Public Note of the Requests for Redactions and of future ex parte filings" dated 30 July 2009;

CONSIDERING that the mere reference to the two decisions mentioned above fails to amount to a statement "of the factual and legal basis for the chosen classification" required under regulation 23*bis*(1) of the Regulations;

CONSIDERING that, on the one hand, the Second Decision on Issues relating to Disclosure did not provide for the reports on the status of the procedures initiated under articles 54(3)(e), 73 and 93 of the Statute to be filed on a confidential *ex parte* basis;

CONSIDERING, on the other hand, that the order to the Prosecutor to file a public redacted version or a public notice of *ex parte* filings is only applicable whenever substantive reasons make it necessary to deviate from the paramount principle of the publicity of the proceedings;

CONSIDERING, accordingly, that the aforementioned order, far from justifying or encouraging *ex parte* filings, provides a way in which the principle of publicity of

proceedings can be preserved even in those instances where other interests equally protected under the Statute make *ex parte* filings necessary;

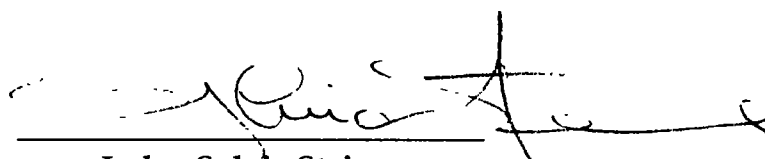
CONSIDERING that the information contained in the Prosecutor's First Report, while of immediate interest and relevance to the Defence, are of a general and neutral nature, focused as they are on the number of documents identified so far by the Prosecutor as of relevance for the purposes of articles 54(3)(e), 73 and 93 of the Statute;

CONSIDERING that, accordingly, the principle of publicity of proceedings must prevail;

FOR THESE REASONS

DECIDE to reclassify the "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" (ICC-02/05-02/09-45-Conf-Exp) as public.

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



Judge Sylvia Steiner
Single Judge

Dated this Tuesday, 11 August 2009

At The Hague, the Netherlands