

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-02/09
Date: 19 October 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner – Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR V. BAHAR IDRIS ABU GARDA

Public Document

Decision on witness to be called by the Defence at the confirmation hearing

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

Counsel for the Defence

Mr. Karim A.A. Khan
Mr Andrew J. Burrow

Legal Representatives of Victims

Mr Brahima Koné
Ms Hélène Cissé
Mr Akin Akinbote
Mr Frank Adaka

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively),

NOTING the “Prosecutor’s request for an order directing the Defence to remove its proposed viva voce witness from its list of witnesses” dated 14 October 2009 (the “Prosecutor’s Request”), requesting the Chamber “to strike out” from the Defence List of witnesses the name of the one witness the Defence indicated it would call at the Confirmation Hearing (the “Defence’s Proposed Witness”);¹

NOTING the “Response to ‘Prosecutor’s request for an order directing the Defence to remove its proposed viva voce witness from its list of witnesses’” filed by the Defence on 16 October 2009² in compliance with the “Decision setting a deadline for the Defence’s Response to the Prosecution’s Request of 14 October 2009” dated 15 October 2009;³

NOTING articles 61(7), 67(1) and 69 of the Statute of the Court (the “Statute”) and rules 63, 64 and 81 of the Rules of Procedure and Evidence (the “Rules”) and regulation 20 of the Regulations of the Court;

CONSIDERING it necessary and appropriate at this stage of the proceedings, with a view to ensuring the principle of publicity, that the fact that the Defence’s Proposed Witness is a member of the investigative team of the Office of the Prosecutor (“OTP”) be made known to the public;

¹ ICC-02/05-02/09-170-Conf.

² ICC-02/05-02/09-178-Conf.

³ ICC-02/05-02/09-171.

CONSIDERING that the arguments set forth in the Prosecutor's Request revolve around the fact that the Defence's Proposed Witness is a member of the investigative team of the OTP;

CONSIDERING that, from a procedural viewpoint, nothing in the statutory instruments prohibits a member of the OTP from being called as a witness, in particular if the party calling such a witness has presented reasonable grounds to justify the need for the witness' testimony to be presented viva voce during a hearing;

CONSIDERING that, apart from the ruling envisaged in article 69(4) of the Statute relating to the admissibility or relevance of any piece of evidence, the statutory instruments provide no basis either for the preliminary authorisation of a proposed witness by the Chamber or for a party's right to be notified in advance of the other party's intended line of questioning of a given witness;

CONSIDERING that subjecting a particular witness to a regime consisting of such authorisation and/or notification on the sole grounds of his or her being a member of the OTP would be tantamount to establishing a special regime which is not provided for in the statutory instruments of the Court;

CONSIDERING further that, in the current case, the questioning of the member of the OTP as a witness, provided it is appropriately conducted, might prove instrumental in the Chamber meaningfully exercising its powers in accordance with article 61(7) of the Statute;

CONSIDERING that, accordingly, it is in principle admissible that a member of the OTP be called as a witness, without prejudice to the Chamber's power to assess the admissibility of any given question and the relevance of evidence introduced or elicited in answering such question, pursuant inter alia to article 69(4) of the Statute and rule 63(2) of the Rules;

CONSIDERING, however, that the questioning of the Defence's Proposed Witness must be done in compliance with the relevant statutory framework and subject to the conditions and restrictions set forth hereunder;

CONSIDERING, in particular, that rule 81 applies;

CONSIDERING that only questions bearing on objective facts will be considered as admissible;

CONSIDERING, in particular, that questions aimed at eliciting from the Defence's Proposed Witness judgements or evaluations of a discretionary nature (including without limitation matters of prosecutorial discretion) will be considered as not admissible;

CONSIDERING that, from a substantial viewpoint, the subject matter of the questioning must be defined in light of the scope of the confirmation hearing, which is to determine whether the case brought by the Prosecutor meets the evidentiary threshold allowing the Chamber to hold that there are substantial grounds to believe that the person has committed the crimes as charged;

CONSIDERING that, accordingly, questions posed to the Defence's Proposed Witness will be considered as admissible only insofar as they may be considered instrumental in making the above mentioned determination;

CONSIDERING that, accordingly, questions merely aimed at challenging the investigative methods followed by the OTP will be deemed as not admissible by the Chamber, either *proprio motu* or upon a request by the Prosecutor;

CONSIDERING further that the Chamber reserves its right to question the Defence's Proposed Witness;

CONSIDERING that, in the precedents of the Pre-trial Chamber⁴ in accordance with the principles established by the Appeals Chamber,⁵ the identity of any OTP staff members in charge of investigations has been protected under rule 81(2) by way of redacting their names and signatures from witnesses' statements and transcripts in order not to prejudice further or ongoing investigation;

CONSIDERING, by the same token, that the name of the Defence's Proposed Witness as well as other information which could lead to his identification shall not be revealed publicly;

CONSIDERING, moreover, taking into account the status of the Defence's Proposed Witness as a member of the investigative team of the OTP, that

⁴ ICC-01/04-01/07-90, paras. 57-64; ICC-02/05-02/09-51, para. 14; ICC-01/05-01/08-135-Red, paras. 83-89.

⁵ ICC-01/04-01/06-773, para. 98.

questions posed to him could seek information that cannot be disclosed in a public hearing;

CONSIDERING, therefore, that the examination of such a witness shall be conducted in closed session;

CONSIDERING that, in accordance with the "Decision on victims' modalities of participation at the pre-trial stage of the Case", the Legal Representatives of Victims are not entitled to attend such a hearing held in closed session, unless, upon request, the Chamber decides otherwise;⁶

FOR THESE REASONS,

REJECTS the Prosecutor's Application;

⁶CC-02/05-02/09-136, paras 16-20.

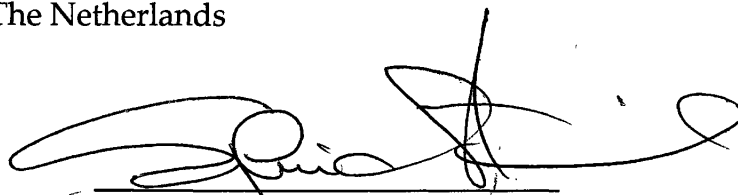
ORDERS the Defence to conduct the questioning of the Defence's Proposed Witness in compliance with the principles and directions established in this decision;

DECIDE that the examination of the Defence's Proposed Witness scheduled for Tuesday 27 October 2009 shall be conducted in closed session.


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

Dated this Monday, 19 October 2009

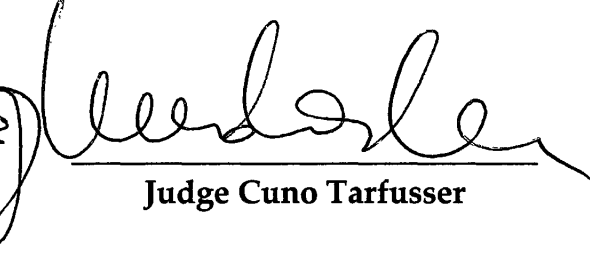
At The Hague, The Netherlands



Judge Sylvia Steiner
Presiding Judge



Judge Sanji Mmasenono Monageng



Judge Cuno Tarfusser