



Original: **English**

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

Date: **19 October 2009**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF THE PROSECUTOR

V.

BAHAR IDRIS ABU GARDA

Public Document

Prosecution's Response to the Victims' Legal Representatives Requests For Access to Confidential Documents

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Mr Karim A.A. Khan

Legal Representatives of Victims

Mr Brahim Koné

Ms Hélène Cissé

Mr Akin Akinbote

Colonel Frank Adaka

Unrepresented Victims

Legal Representatives of Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

I Background

1. On 16 October 2009, the Legal Representative for victims a/0535/09, a/0537/09, a/0538/09, a/0539/09, a/0540/09, a/0541/09, a/0542/09, a/0544/09, a/0545/09, a/0546/09, a/0547/09, a/0548/09, a/0549/09, a/0550/09, a/0551/09, a/0552/09, a/0553/09, a/0554/09, a/0555/09, a/0556/09, a/0557/09, a/0558/09, a/0559/09, a/0560/09, a/0561/09, and a/0562/09, ("First Legal Representative") applied to the Single Judge for an order (i) for lifting of the anonymity of Victims; and (ii) for Access to Documents Relating to Witnesses (the "first Legal Representative's Request").¹
2. On 16 October 2009, the Legal Representative for victims a/0434/09 and a/0435/09 ("Second Legal Representative") filed her "Requête aux fins d'être autorisée à accéder aux documents classés confidentiels relatifs aux témoins cités par le Procureur et la Défense pour l'audience de confirmation des charges"², in which she requested access to the statements and confidential documents related to the witnesses intended to be relied upon at the confirmation hearing (the "second Legal Representative's Request").
3. On 16 October 2009, the Single Judge rendered the "Decision lifting anonymity of victims"³, in which she granted the request of the First Legal Representative insofar as it related to lifting the anonymity of victims.
4. On 16 October 2009, the Single Judge also rendered her "Decision setting a deadline for the parties' responses to the victims' legal representatives' request for access to confidential documents", and requested the Defence and the

¹ ICC-02/05-02/09-176

² ICC-02/05-02/09-177

³ ICC-02/05-02/09-180

Prosecution to respond to the requests of both Legal Representatives by 16:00 hours on Monday 19 October 2009.

5. Since the Single Judge has already granted the First Legal Representative's request for lifting of the anonymity of Victims, that aspect of his filing will not be addressed herein.

II Access to the "Confidential Documents in the Proceedings"

6. In the First Legal Representative's Request, the Legal Representative requested an order "*for access to confidential documents in the proceedings*". He makes this request on the basis that such access would enable him to be fully seized of the facts of this case and prepare questions for cross examination as the situation demands.
7. The Prosecution observes that the First Legal Representative's request appears to seek access to the *entirety* of the confidential documents in the proceedings. To the extent that this is in fact the request sought, the Prosecution respectfully opposes it. In the Prosecution's view, access to confidential portions of the record by Legal Representatives should only be granted in highly exceptional situations when an applicant has established a compelling case that the material in question directly affects his or her interests.⁴ The current level of access to documents granted to legal representatives for the victims in the case is sufficient to enable a full appreciation of the facts of this case. Moreover, in accordance with the jurisprudence of the Court, an applicant seeking access to confidential material

⁴ *Situation in Democratic Republic of the Congo*, "Prosecution's response to the "Request of the OPCV to access documents in the situation record related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06", ICC-01/04-413, 8 November 2007, para. 3.

must first demonstrate, on a case-by-case basis, that the relevant document directly affects his or her personal interests before access can be granted to it. No such showing has been made by the First Legal Representative in the instant case.

8. Consequently, the Prosecution opposes any request for *carte blanche* access to *confidential documents in the proceedings* in the manner sought by the First Legal Representative.

III Access to Confidential Material For the Purpose of Examining Witnesses

9. The First Legal Representative has also requested access to the confidential material in the proceedings to “enable him prepare questions for cross examination as the situation demands”⁵. The Second Legal Representative makes a similar request for access to the statements and confidential documents related to the witnesses intended to be relied upon at the confirmation hearing.⁶

10. It is true that the Prosecution proposes to call 3 witnesses to testify at the Confirmation Hearing. However, even where identities of victims’ have been disclosed to the parties as has been in this case and they are no longer anonymous the Legal Representatives would first have to make a successful application to the Chamber pursuant to Rule 91(3)(a) of the Rules of Procedure and Evidence before being entitled to examine any witnesses the Prosecution calls to testify. Indeed, it is at that time that the Chamber will determine the procedure to be followed, taking into account, among other factors, the stage of

⁵ ICC-02/05-02/09-176 at Para. 4.

⁶ ICC-02/05-02/09-177 at last paragraph, Page 5. The Prosecution notes that the 2 victims represented by the Second Legal Representative – a/0434/09 and a/435/09 – are also Prosecution witnesses whose identities have been already been disclosed to the Defence (Witnesses DAR-OTP-WWWW-0421 and DAR-OTP-WWWW-0420, respectively), and are therefore not anonymous witnesses.

the proceedings, the rights of the suspect, the interests of the witnesses, the need for a fair, impartial and expeditious trial and any other requirements under article 68(3) of the Statute⁷.

11. As such, the Prosecution considers that even a request for access to material relating to those witnesses the Prosecution intends to call to testify would be premature at this stage, as there is no indication that the legal representatives will succeed in any application to examine the Prosecution's witnesses.⁸ Additionally, in the Prosecution's view, access to confidential portions of the record by Legal Representatives should only be granted in highly exceptional situations when an applicant has established a compelling case that the material in question directly affects his or her interests.



Luis Moreno-Ocampo
Prosecutor

Dated this 19th day of October 2009
At The Hague, The Netherlands

⁷ Rule 91(3)b of the Rules of Procedure and Evidence; See also ICC-02/05-02/09-136: "Decision on victims' modalities of participation at the Pre-Trial Stage of the Case" at Paras 23-24.

⁸ In this regard the Prosecution reminds that one of these witnesses (Witness DAR-OTP-WWWW-0446) is the subject of Protective Measures pursuant to an Order of the Chamber made on 24 September 2009 (See ICC-02/05-02/09-117-Conf.). As such, the Prosecution draws attention to the specific concerns raised in its filing of 22 September 2009 as to the consequences of disclosing publicly information that could lead to the identification of this witness.