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**International
Criminal
Court**

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Date: **15 October 2009**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF THE PROSECUTOR

V.

BAHAR IDRIS ABU GARDA

Public Document

**Prosecution's Application Seeking Reclassification of Victim Applications of Witnesses
under Regulation 23 *bis***

Source: Office of the Prosecutor

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

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I. Introduction

The Prosecution hereby applies for reclassification of the un-redacted applications of dual status victims a/0434/09, a/0435/09, a/0436/09, a/0569/09 and a/0570/09 under Regulation 23 *bis* of the Regulations of the Court. These applications had been notified to the Prosecution as confidential *ex-parte* annexes.¹ The Prosecution submits that the basis for the *ex parte* classification of the un-redacted applications of victims a/0434/09, a/0435/09, a/0436/09, a/0569/09 and a/0570/09 is no longer justified and therefore seeks their reclassification as confidential.

II. Background

1. On 28 August 2009, the Registry notified 34 victim applications on a confidential *ex – parte* basis to the parties. The Prosecution was notified unredacted copies of the applications, whereas the Defence received redacted copies only.²
2. On 17 September 2009 the parties received notification of 52 victim applications on a confidential *ex parte* basis. The Prosecution was provided unredacted copies of the applications, whereas the Defence received copies in redacted form.³
3. On 25 September 2009, the Single Judge issued her "Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case" (hereinafter "Decision on 34

¹ Application a/0434/09 was notified as ICC-02/05-02/09-69-Conf-Exp-Anx1, Application a/0435/09 was notified as ICC-02/05-02/09-69-Conf-Exp-Anx2, Application a/0436/09 was notified as ICC-02/05-02/09-69-Conf-Exp-Anx3, Application a/0469/09 was notified as ICC-02/05-02/09-108-Conf-Exp-Anx35, Application a/0470/09 was notified as ICC-02/05-02/09-108-Conf-Exp-Anx36.

² Transmission to the Defence of redacted copies of 34 victims' applications for participation ICC-02/05-02/09-71 (the annexes were notified to the Defence on a confidential *ex-parte*); Transmission to the Office of the Prosecutor of non-redacted copies of victims' applications for participation, ICC-02/05-02/09-69 and Conf-Exp-Anxs 1 – 34.

³ Transmission to the Defence of redacted copies of 52 applications for participation in the proceedings a/0535/09 to a/0586/09, ICC-02/05-02/09-109 + Conf-Exp-Anxs1~52; Transmission to the Office of the Prosecutor of non-redacted copies of 52 applications for participation in the proceedings a/0535/09 to a/0586/09 ICC-02/05-02/09-108+Conf-Exp-Anxs1~52.

Applications”),⁴ noting “that three of the Applicants (a/0434/09, a/0435/09 and a/0436/09) are also witnesses on whose testimony the Prosecution intends to rely for the purposes of the confirmation hearing in the present case and whose identities have already been disclosed to the Defence”.⁵ The Single Judge granted participation status to these applicants and ordered “the Registry to provide the Defence with a non-redacted form of the applications a/0434/09, a/0435/009 and a/0436/09”.⁶

4. On 5 October 2009, the Registry transmitted the names of victims a/0434/09 to a/0436/09 to the Defence, indicating that this was in compliance with the Single Judge’s Decision on 34 Applications.⁷
5. On 7 October 2009, upon informal inquiry of the Prosecution, the Research Assistant of the Pre-Trial Division informed the Prosecution that the Registry had complied with the request of the Single Judge and that it was indeed only a disclosure of the names of the victims that the Single Judge had intended to order.
6. On 9 October 2009, the Single Judge rendered her “Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case”⁸, in which she noted “that two of the Applicants (a/0569/09 and a/0570/09) are also witnesses on whose testimony the Prosecution intends to rely for the purposes of the confirmation hearing in the present case and whose identities have already been disclosed to the Defence”.⁹ The Single Judge granted participation status to these applicants and ordered “the Registry to provide the Defence with the names of victims a/0569/09 and a/0570/09”.¹⁰

⁴ ICC-02/05-02/09-121.

⁵ ICC-02/05-02/09-121, at para 102 (emphasis added).

⁶ ICC-02/05-02/09-121, at page 32 (emphasis added)

⁷ Emphasis added; ICC-02/05-02/09-133-Conf-Exp,(Transmission to the Defence of the identity of victims a/0434/09 and a/0435/09) and ICC-02/05-02/09-134-Conf-Exp (Transmission to the Defence of the identity of victim a/0436/09).

⁸ ICC-02/05-02/09-147-Red.

⁹ ICC-02/05-02/09-147-Red, at para 143.

¹⁰ ICC-02/05-02/09-147-Red, at pages 41 and 42 (emphasis added).

7. On 9 October 2009, the Registry transmitted the names of victims a/0569/09 and a/0570/09 to the Defence.¹¹

III. The Prosecution's Submission

8. According to Regulation 23 *bis* (3) "where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to re-classify the document. A Chamber may also re-classify a document upon request by any participant or on its own motion."

9. The Prosecution submits that the basis for the ex-parte classification of the un-redacted applications of victims a/0434/09, a/0435/09, a/0436/09, a/0569/09 and a/0570/09 is no longer justified.

10. The Defence is in possession of the full statements of these dual status witnesses that reveal not only the victims'/witnesses' identity but also the full account of their stories.¹² The only information not available to the Defence is information subject to discrete redactions authorized by the Pre-Trial Chamber,¹³ as for instance the name of family members, the place or residence of the witness and the name and signature of the investigators. The remaining information is accessible to the Defence.

¹¹ Transmission to the Defence of the identities of victims a/0569/09 and a/0570/09, ICC-02/05-02/09-151-Conf-Exp;

¹² Victim a/0434/09 is witness DAR-OTP-WWWW-0421, whose statement was disclosed as DAR-OTP-0165-0544; Victim a/0435/09 is witness DAR-OTP-WWWW-0420, whose statement was disclosed as DAR-OTP-0165-0521; Victim a/0436/09 is witness DAR-OTP-WWWW-0419, whose statements were disclosed as DAR-OTP-0165-0489 and DAR-OTP-0168-0168; Victim a/0569/09 is witness DAR-OTP-WWWW-0446, whose statement was disclosed as DAR-OTP-0169-0808; Victim a/0570/09 is witness DAR-OTP-WWWW-0447, whose statement was disclosed as DAR-OTP-0169-1160.

¹³ ICC-02/05-02/09-51-Conf and ICC-02/05-02/09-85.

11. The Prosecution therefore submits that the basis for classifying the unredacted applications as confidential *ex parte* no longer exists. Since the defence is already in possession of the facts relating to the witnesses' identities and testimony, withholding the factual statements contained in the applications or attached thereto that relate to the victims' suffering harm during the attack on MGS Haskanita on 29 September 2009 is no longer necessary. In addition, the Defence is already in possession of their identifying information; therefore, supplementary documents attached to the applications, such as ID cards and health reports, should also be provided to the Defence.
12. Furthermore, the Prosecution submits that the Defence should be notified unredacted versions of these dual status victim applications, as they could be considered to be prior statements under Rule 76(1), to contain potentially exonerating information under Article 67(2), or could be material to the preparation of the Defence under Rule 77. Of the five applications of dual status victims received, one relates to a witness that the Prosecution intends to call at the confirmation hearing (witness DAR-OTP-WWWW-0446, who is victim a/0569/09). Another application, that of witness DAR-OTP-WWWW-0447 (who is victim a/0570/09), contains information that differs slightly from information provided to the Prosecution and is therefore disclosable.¹⁴ In addition, the victim applications in most cases contain additional supporting documents, such as a separate statement of facts, list of personal belongings lost, in one case a typed sketch of the MGS Haskanita (victim a/0570/09), correspondence with the victims' employer (a national army), as well as identity documents. The Prosecution provides this information to underline the importance attached to reclassifying these documents.

¹⁴ Reference is made to paragraphs 81 to 86 of the witness DAR-OTP-WWWW-0447's statement at DAR-OTP-0169-1160.

13. The Prosecution submits that reclassification of these documents provides a procedural avenue to grant the Defence access to this information without violating confidentiality levels imposed by the Chamber. Although the Trial Chamber in Lubanga took a different approach and ordered the Prosecution to treat victim applications as evidence and to disclose them,¹⁵ the unfortunate result of this approach is that the confidentiality level of court records is rendered meaningless and that the Registry's Victims Participation and Reparations Section, the custodian of the victim applications and all correspondence with victims, loses control over the victim applications notified to the Prosecution and the manner in which they are disclosed to the Defence.¹⁶

14. Finally, in accordance with the Court's obligations to protect the safety and privacy of victims and witnesses and members of their families as foreseen by Article 68(2) of the Statute and Rule 81(4) of the Rules of Procedure and Evidence, the Prosecution proposes its assistance to VPRS for applying the necessary limited set of redactions.

IV. Relief Sought

15. For the reasons outlined above, the Prosecution respectfully requests the Chamber in accordance with Regulation 23*bis*(3) to order the Registry (i) to reclassify the unredacted versions of applications a/0434/09, a/0435/09, a/0436/09, a/0569/09 and

¹⁵ ICC-01/04-01/06-1637, at para13.

¹⁶ See Regulations 97 and 99 of the Regulations of the Registry.

a/0570/09 as confidential and (ii) to notify these applications to the Defence, after applying discrete redactions as authorized.¹⁷



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of October 2009
At The Hague, The Netherlands

¹⁷ ICC-02/05-02/09-51-Conf and ICC-02/05-02/09-85.
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