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No.: ICC-02/05-01/20
Date: 10 September 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

Public with Confidential, *EX PARTE*, Annex

**Public Redacted Version of “Prosecution’s urgent request for an extension of
time,” 9 September 2020, ICC-02/05-01/20-149-Conf-Exp**

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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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Prosecution urgently requests, under regulation 35 of the Regulations of the Court, that the Single Judge acting on behalf of Pre-Trial Chamber II (“Chamber”) vacate the 11 September 2020 deadline for the submission of any applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence.¹ The reasons set out below establish good cause to vacate the current deadline for the Prosecution’s submission under regulation 35(2).

2. On the basis of the information currently available, the Prosecution is not yet in a position to make definitive determinations regarding the potential risk faced by all relevant witnesses through the disclosure of their identities. Although the Prosecution will likely apply for the authorisation of non-disclosure of the identities of witnesses [REDACTED], it requires additional time to fully assess the implications of recent positive security developments.

3. [REDACTED].

4. In addition, the Prosecution has determined that the identities of witnesses whose family members [REDACTED] cannot be disclosed until further investigative steps can be taken to verify the security risks that they presently face. [REDACTED].

5. As previously indicated, the Prosecution will submit a request for postponement of the date for the confirmation of charges hearing and intends to do so within a week of this filing.² The Prosecution requests that the Chamber set a new deadline once the request for postponement of the confirmation of charges hearing has been filed and the Chamber has made a determination thereon. In the interim, the Prosecution will nevertheless aim to file such applications for the authorisation of non-disclosure of witnesses’ identities and/or entire items of evidence on a rolling basis.

¹ ICC-02/05-01/20-116, para. 12(iii).

² ICC-02/05-01/20-103-Red, para. 60.

6. The Prosecution makes this request urgently given its proximity in time to the 11 September 2020 deadline.

II. CLASSIFICATION

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this request as confidential, *ex parte*, only available to the Prosecution, since it contains highly sensitive information regarding security and risk assessments pertaining to Prosecution witnesses and their family members. The Prosecution will file a confidential redacted version as soon as practicable.

III. PROCEDURAL HISTORY

8. On 15 June 2020, Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”) made his initial appearance before the Single Judge, who scheduled the confirmation of charges hearing for 7 December 2020.³

9. On 2 July 2020, the Single Judge issued an order seeking observations on disclosure and related matters.⁴ On 23 July 2020, the Prosecution submitted its observations pursuant to this order. On 29 July 2020, the Defence submitted its observations.⁵

10. On 17 August 2020, the Single Judge issued the “Order on disclosure and related matters”, ordering that any applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence be submitted no later than 11 September 2020.⁶

IV. SUBMISSIONS

11. The Prosecution requests that the Chamber vacate the current deadline of 11 September 2020 to submit applications for the authorisation of the non-disclosure of

³ ICC-02/05-01/20-T-001-ENG, p. 22, l. 23-25 and p. 23, l. 1-3. The Single Judge noted that “[d]epending on the development of the proceedings, this date may be changed as provided for in Rule 121(7) of the Rules of Procedure and Evidence upon request of either the Prosecution or the Defence, or by the Pre-Trial Chamber on its own motion”, at p. 23, l. 4-6.

⁴ [REDACTED].

⁵ [REDACTED].

⁶ ICC-02/05-01/20-116, para. 12(iii).

witnesses' identities and/or the non-disclosure of entire items of evidence because the Prosecution does not currently possess sufficient information to adequately determine the risk to both witnesses [REDACTED] and those witnesses whose family members [REDACTED]. In addition, recent improvements in security and operational circumstances are expected to have a significant impact on witnesses' risk levels, providing further necessity for additional time in order to make informed assessments on whether it is possible to safely disclose their identities.

12. The Prosecution notes that it is also in the process of liaising with the VWS on the joint assessment of threat and risk to witnesses in accordance with the Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedures for Protection ("Protocol"). [REDACTED].

13. The Prosecution submits the following reasons demonstrating good cause to vacate the current deadline for submissions under regulation 35(2).

a) Risk assessments in relation to the non-disclosure of witnesses' identities are not yet conclusive

Potential non-disclosure of the identities of all witnesses [REDACTED]

14. The Prosecution currently intends to apply for authorisation of the non-disclosure of the identities of witnesses [REDACTED], but it has not yet completed its assessment of all relevant factors. [REDACTED]. However, there have been notable security developments that could improve this assessment in the near future, as set out below.

Potential non-disclosure of the identities of witnesses [REDACTED] but whose family members [REDACTED]

15. [REDACTED].

16. [REDACTED].

b) Changes in security and operational circumstances require additional time to assess

17. In addition to uncertainty [REDACTED], recent positive changes in security and operational circumstances [REDACTED] require a re-evaluation of the risk to individuals [REDACTED]. The signing of a Sudanese peace agreement,⁷ and the potential lifting of travel restrictions that would enable the Court [REDACTED], have changed the overall risk environment and the Prosecution's ability to implement the required risk mitigation measures.

18. The peace agreement that was signed by the transitional government of Sudan and a coalition of armed opposition groups on 31 August 2020 includes stipulations on cooperation with the ICC and other transitional justice and reconciliation mechanisms.⁸ If implemented, this agreement could significantly improve the overall risk environment for witnesses [REDACTED].

19. [REDACTED].

20. The recent lifting of some travel restrictions now enables the Prosecution [REDACTED]. After conducting [REDACTED] security assessments and establishing adequate risk mitigation measures, the Prosecution will be in a better position to determine and possibly lower the risk faced by witnesses and their families [REDACTED].

21. The Prosecution requires additional time to assess the implications of both the Sudanese peace agreement [REDACTED] on witness security. The expected change in overall risk levels as a result of these two developments will impact the initial determinations that the Prosecution has made on the disclosure of witnesses' identities.

⁷ [REDACTED].

⁸ *Id.*

V. RELIEF REQUESTED

22. For the above reasons, the Prosecution respectfully submits this urgent request that the Chamber vacate the 11 September 2020 deadline for the submission of any applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence, with a view to setting a new deadline once the request for postponement of the confirmation of charges hearing has been filed and the Chamber has made a determination thereon.



James Stewart
Deputy Prosecutor

Dated this 10th day of September 2020

At The Hague, The Netherlands